

This letter sets out the applicable tax rates for sales of different type of foods. See 86 Ill. Adm. Code 130.310. (This is a PLR.)

May 25, 2011

Dear Xxxxx:

This letter is in response to your letter dated May 26, 2010 and the additional information which you provided on March 23, 2011. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at [www.tax.illinois.gov](http://www.tax.illinois.gov) to review regulations, letter rulings and other types of information relevant to your inquiry.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to BUSINESS for the issue of issues presented in this ruling, and is subject to the provisions of subsection (3) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither BUSINESS, nor a related taxpayer, is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In addition to your original PLR request, you submitted additional information, including several photographs of the inside of a BUSINESS store and a blueprint showing the store layout (indicating that each was representative of stores in Illinois); and provided additional information regarding the manner in which food is bar coded at the store and the specific locations in the store where seating is provided. In your letter you have stated and made inquiry as follows:

I am writing on behalf of the above referenced entity to request a taxability ruling pertaining to the appropriate use of the high rate of tax versus the low rate of tax for prepared food items such as sales of individual servings of rolls and cookies.

**Facts:**

BUSINESS sells groceries, prepared foods, and general merchandise at retail through several physical store fronts throughout Illinois. Their stores sell grocery items for off premise consumption as well as prepared foods and bakery items that are ready for immediate consumption. All of their stores have open eating areas that are un-partitioned from the rest of the store. Due to the layout and the free flow of customers

through the stores, a separate means of collections for the eating areas is not possible. All food sold in the grocery stores is paid for at the regular grocery store check-out counters.

Each store has several different sections which can include a bakery section, a juice bar, a pizza bar, a sandwich bar, a stir fry bar, a self serve salad bar, a self serve hot soup bar and an area where hot food such as baked chicken can be purchased. The juice bar, pizza bar, sandwich bar, stir fry bar and hot food section usually have store personnel available who assist customers with their purchases. There are no separate cash registers in these sections.

Within their bakery departments, they sell fresh baked rolls and cookies that are sold by the piece as individual servings. The rolls and cookies are baked in the store daily. They do not maintain the temperature of the rolls and cookies after they are baked. The rolls and cookies are placed out in self service bins for the customers. Customers are free to purchase as many, or as few, of these items as they wish. Although the bakery products are ready for immediate consumption, most of the bakery products are not typically eaten on the premises of the retailer.

### **Current Treatment:**

BUSINESS currently charges the high rate of tax on all prepared foods (including individual servings of baked goods) sold in our grocery stores in Illinois. BUSINESS has been audited by the Illinois Department of Revenue in the past and the auditor agreed that the high rate of tax should be charged on all prepared foods (including individual servings of baked goods) sold by the store. BUSINESS also requested a letter ruling on this issue in 2002 and was told they were handling these transactions correctly due to the fact that the store had open eating areas within our stores.

However, BUSINESS has recently received complaints from a customer because the customer disagreed with being charged the high rate of tax on individual servings of rolls and cookies. An investigator from the Illinois Department of Revenue contacted one of the stores and store personnel gave him all of the relevant facts including the products involved, the layout of the store, the register systems, etc. and explained why the high rate of tax was charged on the questioned items. The investigator did some research and called back the store and verbally instructed the store to start charging the low rate of tax on these items because he claimed that in these situations the Illinois Department of Revenue looked at whether the item was 'made to order' to determine the taxability.

### **Applicable Regulations and Letter Rulings:**

BUSINESS charges the high rate of tax on all prepared foods they sell because of guidance contained in 86 Ill. Adm. Code 130.310 and numerous letter rulings including General Information Letter No. ST 02-0187-GIL.

86 Ill. Adm. Code 130.310(b) states 'The manner in which food is taxed depends upon 2 distinct factors that must both be considered in determining if food is taxed at the high rate as 'food prepared for immediate consumption' or the low rate as 'food prepared for consumption off the premises where sold:

- 1) The first factor is whether the retailer selling the food provides premises for consumption of food. If so, a rebuttable presumption is created that all sales of food by that retailer are considered to be prepared for immediate consumption and subject to tax at the high rate. As a result of this presumption, even bulk food could potentially be taxable at the high rate. However, this presumption is rebutted if a retailer demonstrates that: A) the area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and B) the retailer has a separate means of recording and accounting for collection of receipts from sales of both high and low rate foods. For purposes of this subsection (b)(1)(B), the phrase 'separate means of recording and accounting for collection of receipts' includes cash registers that separately identify high rate and low rate sales, separate cash registers, and any other methods by which the tax on high and low rate sales are recorded at the time of collection; and
- 2) The second factor is the nature of the food item being sold. As provided in subsection (c), some foods, such as hot foods, are always considered to be 'food prepared for immediate consumption', and thus subject to the high rate of tax.

86 Ill. Adm. Code 130.310(c)(2) states '...Food prepared for immediate consumption means food that is prepared or made ready by a retailer to be eaten without substantial delay after the final state of preparation by the retailer. Food prepared for immediate consumption includes, but is not limited to, the following...(A)(v) all food sold for consumption on the premises where sold. (B) 'Food prepared for immediate consumption' does not include: (i) doughnuts, cookies, bagels or other bakery items prepared by a retailer and sold either individually or in another quantity selected by the customer, provided they are for consumption off the premises where sold...' However, 86 Ill. Adm. Code 130.310(c)(2)(C) states '...the items listed in subsection (c)(2)(B) are taxable at the low rate only if the retailer had a separate means of recording and accounting for high and low rate sales, and the retailer provides no on-premises facilities for consumption of the food or, if the retailer does provide such facilities, they are physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold.'

86 Ill. Adm. Code 130.310(d)(1) states 'If retailers provide seating or facilities for on-premises consumption of food, all food sales are presumed to be taxable at the high rate as 'food prepared for immediate consumption'. However, this presumption can be rebutted by evidence that : A) the area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and B) the retailer utilizes a means of recording and accounting for collection of receipts from the sales of food prepared for immediate consumption (high rate) and the sales of food that are not prepared for immediate consumption (low rate).

86 Ill. Adm. Code 130.310(d)(4)(A) gives the following example '...Provided that the requirements of subsection (d)(1) are met ... Low rate items would include, but are not limited to, doughnuts (regardless of quantity), bagels, rolls and whole breads or bakery items prepared by the retailer ...' Unfortunately, the current arrangement in the stores does not allow BUSINESS to meet the requirements of subsection (d)(1).

General Information Letter No. ST 02-0187-GIL states 'The manner in which food is taxed depends upon the nature of the establishment that is selling the food. Retailers who provide seating or facilities for on-premises consumption of food generally incur tax at the high rate on all food sales (including bulk or grocery type items). However, if establishments sell both food that has been prepared for immediate consumption and bulk or grocery type items and also provide facilities for on-premises consumption, the lower rate of tax may be charged on the bulk or grocery type items **only if the dining facilities are physically partitioned from the area where food not for immediate consumption is sold and these facilities utilize a separate means of collection of receipts (emphasis added).**

Since BUSINESS does not utilize separate cash registers for the sale of prepared foods nor do they physically partition their seating areas from their general grocery areas, they do not meet the exception outlined in 86 Ill. Adm. Code 130.310(d)(1) and General Information Letter No. ST 02-0187-GIL. I could find no rulings outlining the department's position that the taxability of specific food items depended on whether the item was 'made to order'.

### **Ruling Request**

BUSINESS is not currently under audit by the Illinois Department of Revenue.

Please confirm that the high rate of tax should be charged on all prepared foods (including sales of individual servings of rolls or cookies) sold by BUSINESS in its Illinois grocery stores due to the fact that BUSINESS does not utilize separate cash registers for the sale of prepared foods nor do they physically partition their seating areas from their general grocery areas.

Thank you for your assistance in this matter. If you need additional information, please feel free to contact me.

### **DEPARTMENT'S RULING:**

We disagree with the taxation methodology that BUSINESS has proposed for taxing sales of food in the store described in your request. It is our opinion, after reviewing the information in your letter and the additional materials you submitted, that the store should charge the high rate of tax only on food prepared for immediate consumption (as explained in the regulation), candy, alcohol and general merchandise. In the case of baked goods, such as rolls or cookies that can be bought in any quantity, including a single item, the store should only charge high rate on these items if they are sold for consumption on the premises. As a practical matter, the store will need to make this determination at the time of sale by asking the customer if he or she plans on eating these items in the dining area. If the store determines that these items will not be consumed in the on-premise facilities, the low rate of tax would apply.

The Department's regulation governing food is found at Section 130.310 ("Food, Soft Drinks and Candy"). This regulation has been significantly modified since the audit you mention in your letter, as well as the 2002 General Information Letter you also reference in your letter. Food can be taxed at either the State general merchandise, or "high" rate (6.25%) or a preferential low rate of 1% (plus any applicable local taxes). As Section 130.310 explains, the applicable tax rate depends upon several factors. However, certain items are always taxable at the high rate, such as candy, soft drinks and "food prepared for immediate consumption." The latter term is explained in greater detail

at subsection (c)(2)(A)(i) through (iv) of the regulation. Many of the items sold by BUSINESS clearly constitute “food prepared for immediate consumption.” Examples include, but are not limited to, all hot foods, sandwiches prepared to the individual order of a customer, and salad bars where a customer can prepare his or her own salad (both hot and cold).

For other food items in the store, the tax rate depends upon several factors. These factors are explained in subsection (d) of the regulation. As that subsection indicates, if retailers provide facilities for the on-premise consumption of food, a presumption is created that all sales of food are taxable at the higher rate. However, this presumption can be rebutted if the following two criteria are demonstrated:

1. The area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and
2. The retailer utilizes a means of recording and accounting for collection of receipts from the sales of food prepared for immediate consumption (high rate) and the sales of food that are not prepared for immediate consumption (low rate).

The area designated for on-premise consumption of food is sufficiently distinguishable from the rest of the store to meet the requirements of the first factor. It occupies the left front corner of the store as you enter. No food is stocked for sale in, or near, this front area. Several long, high curving bar tables form a divider that separates the dining area from the rest of the store. These high bar tables also serve as an enclosure that surrounds a number of smaller tables and chairs within the dining area. As one moves past the dining area into the rest of the store, he first passes a series of checkout lanes situated across the middle of the store. These checkout lanes further separate the dining area from the area where food is stocked for sale.

The information you have submitted also indicates that the requirements of the second factor are met, as well. Section 130.310 does not require, as your letter states, that the dining facilities utilize a separate means of collection of receipts. Instead, Section 130.310 (d)(1)(B) requires only that a retailer utilize a means of recording and accounting for both high rate and low rate sales. Your letter indicates that the registers at the store can account for both low and high rate items, and so meet the requirements of the second factor.

Additional information you have provided indicates that each item sold in the store is “tax flagged” with a specific tax rate. This has led the store to charge the high rate of tax on all baked goods, regardless of whether they are for consumption on or off the premises. It is our opinion that this practice may often result in an overcollection of tax. If the baked good is for consumption on the premises, it should be taxed at the high rate; otherwise, it should be taxed at the lower rate. This will require the store to make inquiry of the customer at the time of sale.

The regulation governing food has recently undergone significant changes. These changes, in part, were designed to promote tax consistency between restaurants and modern grocery stores that also sell a variety of foods prepared for immediate consumption (e.g., sales of hot foods, customer-made salads; sandwiches made to customer orders). The manner in which food is now sold and marketed has necessitated these changes, which we hope “level the playing field” between all types of food vendors.

I hope this information is helpful. If you have questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax

laws, please visit our website at [www.tax.illinois.gov](http://www.tax.illinois.gov) or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Terry D. Charlton  
Chairman, Private Letter Ruling Committee

TDC/JGT:msk