

**SUBSTITUTE FOR  
HOUSE BILL NO. 4377**

A bill to amend 1937 PA 94, entitled  
"Use tax act,"  
by amending section 4d (MCL 205.94d), as amended by 2015 PA 172.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1           Sec. 4d. (1) The following are exempt from the tax under this  
2 act:

3           (a) Sales of drugs for human use that can only be legally  
4 dispensed by prescription, over-the-counter drugs for human use  
5 that are legally dispensed by prescription, or food or food  
6 ingredients, except prepared food intended for immediate human  
7 consumption. As used in this subdivision, "over-the-counter drug"  
8 means a drug that is labeled in accordance with the format and  
9 content requirements ~~required for labeling over-the-counter drugs~~

1 **drug product labeling** under 21 CFR 201.66.

2 (b) The deposit on a returnable container for a beverage or  
3 the deposit on a carton or case that is used for returnable  
4 containers.

5 (c) Food or tangible personal property purchased under the  
6 federal food stamp program or meals sold by a person exempt from  
7 the tax under this act **that are** eligible to be purchased under the  
8 federal food stamp program.

9 (d) Fruit or vegetable seeds and fruit or vegetable plants if  
10 purchased at a place of business authorized to accept food stamps  
11 by the Food and Nutrition Service of the United States Department  
12 of Agriculture or a place of business that has made a complete and  
13 proper application for authorization to accept food stamps but has  
14 been denied authorization and provides proof of denial to the  
15 department. ~~of treasury.~~

16 (e) Live animals purchased with the intent to be slaughtered  
17 for human consumption.

18 (2) Food or drink heated or cooled mechanically, electrically,  
19 or by other artificial means to an average temperature above 75  
20 degrees Fahrenheit or below 65 degrees Fahrenheit before sale and  
21 sold from a vending machine, except milk, nonalcoholic beverages in  
22 a sealed container, and fresh fruit, is subject to the tax under  
23 this act. The tax due under this act on the sale of food or drink  
24 from a vending machine selling both taxable items and items exempt  
25 under this subsection shall be calculated under this act after  
26 December 31, 1994 based on 1 of the following as determined by the  
27 taxpayer:

28 (a) Actual gross proceeds from sales at retail.

29 (b) Forty-five percent of proceeds from the sale of items

1 subject to tax under this act or exempt from the tax levied under  
2 this act, other than from the sale of carbonated beverages.

3 (3) **As used in this section:**

4 (a) "Bottled water" means water that is placed in a safety  
5 sealed container or package for human consumption, including water  
6 that is delivered to the buyer in a reusable container that is not  
7 sold with the water. Bottled water is calorie-free and does not  
8 contain sweeteners or other additives except that it may contain  
9 antimicrobial agents, fluoride, carbonation, vitamins, minerals,  
10 and electrolytes, oxygen, preservatives, and only those flavors,  
11 extracts, or essences derived from a spice or fruit.

12 (b) "Candy" means a preparation of sugar, honey, or other  
13 natural or artificial sweeteners in combination with chocolate,  
14 fruits, nuts, or other ingredients or flavorings in the form of  
15 bars, drops, or pieces. Candy shall not include any preparation  
16 containing flour and shall require no refrigeration.

17 (c) "Food and food ingredients" means substances, whether in  
18 liquid, concentrated, solid, frozen, dried, or dehydrated form,  
19 that are sold for ingestion or chewing by humans and are consumed  
20 for their taste or nutritional value. Food and food ingredients do  
21 not include alcoholic beverages and tobacco.

22 (d) "Food sold in an unheated state by weight or volume as a  
23 single item" means food sold in an unheated state and the sales  
24 price of which is determined by multiplying its per unit price by  
25 its weight or volume and the sales price of which varies based on  
26 its weight or volume.

27 (e) "Food sold with eating utensils provided by the seller"  
28 means food sold by a seller who meets the requirements of  
29 subparagraph (i) or (ii), but does not include food described in

1 subparagraph (iii) :

2 (i) For a seller with a prepared food sales percentage of  
3 greater than 75%, the seller makes eating utensils available to  
4 purchasers or, if a food item is bottled water, candy, or soft  
5 drinks, the seller gives or hands the eating utensils to purchasers  
6 or makes plates, bowls, glasses, or cups that are necessary for the  
7 purchaser to receive the food available to purchasers. If a food  
8 item has 4 or more servings packaged as 1 food item sold for a  
9 single price, the seller must give or hand the eating utensil to  
10 the purchaser. Serving sizes must be determined based on a label on  
11 an item sold, or if no label is available, then a seller shall  
12 determine the reasonable number of servings in an item.

13 (ii) For a seller with a prepared food sales percentage of 75%  
14 or less, the seller's business practice is to give or hand eating  
15 utensils to purchasers. Eating utensils necessary for the purchaser  
16 to receive the food, such as bowls and cups, need only be made  
17 available to purchasers.

18 (iii) Food is not sold with eating utensils provided by the  
19 seller if the food items have a utensil placed in a package with  
20 the food items by a person other than the seller, and that other  
21 person's NAICS classification code is that of a manufacturer,  
22 subsector 311. If the packager has any other NAICS classification  
23 code, the seller is considered to have provided the eating utensil.

24 (f) ~~(4)~~—"Prepared food", subject to subdivision (g), means the  
25 following:

26 (i) ~~(a)~~—Food sold in a heated state or that is heated by the  
27 seller.

28 (ii) ~~(b)~~—Two or more food ingredients mixed or combined by the  
29 seller for sale as a single item.

1           **(iii)** ~~(e)~~—Food sold with eating utensils provided by the seller,  
 2 including, **but not limited to**, knives, forks, spoons, glasses,  
 3 cups, napkins, straws, or plates, but not including a container or  
 4 packaging used to transport the food.

5           **(g)** ~~(5)~~—Prepared food does not include the following:

6           **(i)** ~~(a)~~—Food that is only cut, repackaged, or pasteurized by  
 7 the seller.

8           **(ii)** ~~(b)~~—Raw eggs, fish, meat, poultry, and foods containing  
 9 those raw items requiring cooking by the consumer in  
 10 recommendations contained in section 3-401.11 of part 3-4 of  
 11 chapter 3 of the 2001 food code published by the Food and Drug  
 12 Administration of the Public Health Service of the Department of  
 13 Health and Human Services, to prevent foodborne illness.

14           **(iii)** ~~(c)~~—Food sold in an unheated state by weight or volume as  
 15 a single item, without eating utensils.

16           **(iv)** ~~(d)~~—Bakery items, including bread, rolls, buns, biscuits,  
 17 bagels, croissants, pastries, doughnuts, danish, cakes, tortes,  
 18 pies, tarts, muffins, bars, cookies, and tortillas, sold without  
 19 eating utensils.

20           **(h)** ~~(6)~~—"Prepared food intended for immediate consumption"  
 21 means prepared food.

22           **(i)** "Prepared food sales percentage" means the percentage  
 23 described in subparagraph *(i)* and calculated pursuant to  
 24 subparagraph *(ii)* :

25           **(i)** A percentage determined by dividing the numerator described  
 26 in sub-subparagraph (A) by the denominator described in sub-  
 27 subparagraph (B) :

28           **(A)** The numerator must consist of the seller's annual sales of  
 29 prepared food described in subdivision (f) *(i)* and *(ii)* and food sold

1 when plates, bowls, glasses, or cups are necessary to receive the  
2 food. The numerator must not include food described in subdivision  
3 (g) or alcoholic beverages.

4 (B) The denominator must consist of the seller's total annual  
5 sales of all food and food ingredients and prepared food, excluding  
6 alcoholic beverages.

7 (ii) A seller shall calculate the prepared food sales  
8 percentage for each tax year or business fiscal year, based on the  
9 seller's sales data from the prior tax year or business fiscal  
10 year, respectively, as soon as possible after accounting records  
11 are available, but not later than 90 days after the beginning of  
12 the seller's tax year or business fiscal year. A single prepared  
13 food sales percentage must be determined annually for all of the  
14 seller's establishments in this state. A seller shall make a good-  
15 faith estimate of its prepared food sales percentage for its first  
16 year in business. A seller shall adjust its good-faith estimate  
17 prospectively after the first 3 months of its business operation if  
18 actual prepared food sales percentages materially affect the 75%  
19 threshold described in subdivision (e).

20 (j) "Soft drinks" means nonalcoholic beverages that contain  
21 natural or artificial sweeteners. Soft drinks does not include  
22 beverages that contain milk or milk products, soy, rice, or similar  
23 milk substitutes, or greater than 50% of vegetable or fruit juice  
24 by volume.

25 (k) "Volume" means a 3-dimensional measure, expressed in units  
26 such as pints, quarts, cubic centimeters, or liters.

27 (l) "Weight" means a measure of heaviness, expressed in units  
28 such as pounds or grams.