



MEMORANDUM

TO: Members of the House Tax Committee

FROM: Leah Robinson, Director of Legislative Affairs and Leadership Programming

SUBJECT: MI Chamber Opposes Legislation to Reinstate Taxes on Certain Non-Prepared Food Items

DATE: May 10, 2023

This memorandum is to voice the Michigan Chamber of Commerce's opposition to House Bills 4377 and 4378 which creates confusion for business owners and reinstates taxes on certain non-prepared food items under specific circumstances.

In Michigan's tax code, prepared foods, known as heated items or two or more ingredients combined by the seller and sold with eating utensils, have typically been taxed. Per the Michigan Department of Treasury, "eating utensils provided by the seller" was not defined in the General Sales and Use Tax Acts, subsequently leading the Department through Rule 86(5)(b) to define the term consistent with that of the Streamlined Sales Use and Tax Agreement (SSUTA). That definition is outlined as follows and would be codified should HBs 4377-4378 be signed into law:

If a seller's percentage of prepared food sales over the prior tax year was greater than 75%, the eating utensils are considered provided by the seller if they are merely made available to purchasers. If the seller's percentage of prepared food sales was 75% or less, eating utensils are considered provided by the seller only if it is the seller's practice to physically give or hand eating utensils to purchasers.¹

In November of 2020, the Court of Appeals determined, through *Emagine Entertainment, Inc. et. al., v. Department of Treasury*, that Treasury's Rule 86 was considered invalid as there was not another example of such a standard in statute and further stated that prepared foods are those with utensils that must specifically accompany the food or be added to it.² Additionally, the Emagine decision clarified that "bottled water" and "prepackaged candy" were items that are considered "unprepared foods," which would also be codified and exempt from the collection of taxes if HBs 4377-4378 passes the Michigan Legislature.

Specifically for businesses that reach the 75 percent threshold created in the package, our concerns lie directly with certain definitions outlined in HBs 4377-4378 as we feel these definitions do not fully encompass what should be considered exempt or a "non-prepared food" and create confusion.

¹ [Sales and Use Tax Notice: Emagine Entertainment, Inc., et. al. v Dep't of Treasury \(michigan.gov\)](#)

² [COA 350376 EMAGINE ENTERTAINMENT INC V DEPARTMENT OF TREASURY Opinion - Per Curiam - Published 11/19/2020 \(michbar.org\)](#)



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Under the legislation, items such as unsweet tea would be taxed, but sweet tea would not be subject to that same tax. Similarly, prepackaged candy would remain untaxed, but prepackaged chips and nuts would be taxed. These are just a few examples as to the confusion this legislation creates for business owners and customers. Our desire is to work with the Department to further clarify opportunities for improvements to this legislation.

Although the Michigan Chamber supports a simplistic, easy-to-follow tax code, SSUTA's definitions are currently hindering Michigan's own tax code. The Michigan Chamber plans to work directly with SSUTA to address our concerns and hopefully, create more transparency regarding what items should and should not be considered "prepared."

We thank you for your time and consideration of the feedback we have shared on behalf of our members, and I am happy to answer any questions you may have. Please do not hesitate to reach out with questions at LRobinson@michamber.com.