

ADMINISTRATIVE RULE REVIEW

New Rule	Rule No. 150-317-1150	Last Revised Date January 23, 2020
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Temporary Rule - DRAFT	NOTICE OF INTENDED ACTION	
	Bulletin Dated	Hearing Scheduled

PURPOSE: Provide guidance to assist taxpayers in determining whether receipts from retail sales of food items may be excluded from the taxpayer’s commercial activity under Oregon Laws 2019, chapter 122, section 58(1)(b)(EE), as amended by Oregon Laws 2019, chapter 579, section 50.

1 **150-317-1150**

2 **Retail Sale of Groceries Exclusion**

3 (1) *Definition.* For purposes of this rule, “store” means the location from which a taxpayer sells goods at
4 retail to the final consumer for home consumption. “Store” includes both physical locations and online
5 storefronts.

6 (2) *Excludable receipts from retail sales.* Receipts from retail sales of groceries are excludable from a
7 taxpayer’s commercial activity under Oregon Laws 2019, chapter 122, section 58(1)(b)(EE), as amended
8 by Oregon Laws 2019, chapter 579, section 50. The exclusion applies only to receipts from the sale of
9 groceries as that term is defined in Oregon Laws 2019, chapter 122, section 58(8), as amended by
10 Oregon Laws 2019, chapter 579, section 50, which are sold at retail to the final consumer for home
11 consumption. The determination as to whether an item is sold to a consumer for home consumption is
12 based on the type of item sold and the circumstances of the sale. The determination is based on whether
13 the seller typically expects that the sale of food from a specific store is purchased for home consumption.

14 (3) *Factors indicating home consumption.* The determination as to whether a store typically sells
15 groceries at retail rests on specific facts and circumstances. When determining whether a store typically
16 makes grocery retail sales, the department will consider factors such as (but not limited to):

17 (a) Whether the store’s average gross receipts from the sale of hot food is greater than the average gross
18 receipts from the sale of groceries.

19 (b) Whether the store offers on-site dining facilities, and if so, whether the percentage of total floor space
20 allotted to dining facilities for customers is greater than the percentage of floor space dedicated to shelves
21 displaying groceries available to customers for retail sale.

22 (c) Whether the store advertises itself as being engaged in the sale of hot food or ready-to-eat food.

23 (4) The list of factors in section (3) is nonexclusive, and the factors will be considered only to the extent
24 that they are relevant. The department may consider any other relevant facts and circumstances.

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1 (5) *Examples.*

2 **Example 1:** McPherson’s Convenient Coffee Shop is located on the first floor of a large office building
3 and is open from 6:00 a.m. to 3:00 p.m. Monday through Friday. McPherson’s sells hot coffee and an
4 assortment of baked goods, which are warmed or toasted before being served to the customer. In
5 addition, McPherson’s sells a variety of packaged snacks, candy, bottled water and juice. The store has
6 little on-site seating; most customers consume the purchased food off-site. McPherson’s markets itself as
7 a convenient place for office workers to buy a cup of coffee or purchase a quick mid-day snack. Seventy-
8 five percent of McPherson’s sales are from hot foods. Based on the business’s advertising and the fact
9 that the majority of gross receipts are from hot prepared food, McPherson’s does not typically intend or
10 expect the food items sold from their store to be consumed at the purchaser’s home. Therefore,
11 McPherson’s may not exclude any receipts under Oregon Laws 2019, chapter 122, section 58(1)(b)(EE),
12 as amended by Oregon Laws 2019, chapter 579, section 50.

13 **Example 2:** Clarendon’s Cupboard is a small neighborhood convenience store open seven days a week
14 from 5:00 a.m. to 11:00 p.m. Clarendon’s sells a wide variety of items, including cigarettes, tobacco,
15 bottled soda, candy, and some grocery staples, such as bread, eggs, milk, and cheese. From noon to 3:00
16 p.m., Clarendon’s also sells hot prepared food for immediate consumption, such as hot dogs, fried
17 chicken, and hot pizza by the slice. Clarendon’s does not offer any on-site seating. Clarendon’s
18 advertises itself as a convenient place to buy cigarettes, purchase a hot lunch or a quick snack, and pick
19 up a few groceries on the way home from work. Sales of cigarettes, tobacco, and other nonfood items
20 constitute sixty percent of Clarendon’s gross receipts. Receipts from the sale of cold food (i.e., grocery
21 staples and various snacks and candy items) constitute thirty percent of Clarendon’s gross receipts, while
22 receipts from the sale of hot prepared food (i.e., hot dogs, and hot prepared pizza) constitute less than ten
23 percent of Clarendon’s gross receipts. Based on the business’s advertising, and the fact that Clarendon’s
24 gross receipts from the sale of cold food outweigh the gross receipts from the sale of hot food, the food

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1 items sold by the store are typically intended for the purchaser’s consumption at home. Clarendon’s may
 2 exclude receipts from the sale of grocery staples and snacks, as these items are “groceries” as defined in
 3 Oregon Laws 2019, chapter 122, section 58(8), as amended by Oregon Laws 2019, chapter 579, section
 4 50. Clarendon’s may not exclude receipts from the sale of hot prepared food such as hot dogs and hot
 5 pizza, as these items are not groceries.

6 (6) *Safe Harbor for Stores Authorized as Retail Food Stores or Qualifying as Retail Food Stores for*
 7 *Purposes of the Supplemental Nutrition Assistance Program (SNAP).* The sale of a grocery item, as
 8 defined in Oregon Laws 2019, chapter 122, section 58(8), as amended by Oregon Laws 2019, chapter
 9 579, section 50, by a store authorized as a retail food store under 7 U.S.C. 2012(o), with a valid permit as
 10 a SNAP qualified retail food store from the U.S. Department of Agriculture, is considered the retail sale
 11 of groceries for home consumption, and excluded from the taxpayer’s commercial activity. Receipts from
 12 the sale of groceries realized by a store that meets the requirements to qualify as a retail food store under
 13 7 U.S.C. 2012(o), regardless of whether the store holds a permit as a SNAP qualified retail food store
 14 from the U.S. Department of Agriculture, are also considered the retail sales of groceries for home
 15 consumption and are excluded from the taxpayer’s commercial activity, provided that the taxpayer can
 16 demonstrate that the store meets the requirements to qualify as a retail food store under 7 U.S.C. 2012(o).

17 (7) A store may not exclude receipts under Oregon Laws 2019, chapter 122, section 58(1)(b)(EE), as
 18 amended by Oregon Laws 2019, chapter 579, section 50, if the store’s receipts from the sale of hot food
 19 or hot prepared food constitutes 80 percent or more of the total receipts that the store realized from the
 20 sale of all food items. The fact that the store’s receipts are at least 80 percent from sales of hot food or
 21 hot prepared food is evidence that the store does not intend to sell, or typically sell, groceries to the final
 22 consumer for home consumption; therefore, sales from the store are not excludable as retail sales of
 23 groceries.

24 **Publications:** Contact the Oregon Department of Revenue for information about how to obtain a copy of

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- 1 the publication referred to or incorporated by reference in this rule pursuant to ORS 183.360(2) and ORS
- 2 183.355(1)(b).
- 3 **Stat. Auth.:** ORS 305.100, Oregon Laws 2019, chapter 122, section 72
- 4 **Stats. Implemented:** Oregon Laws 2019, chapter 122, section 58(1)(b)(EE) and 58(8), as amended by
- 5 Oregon Laws 2019, chapter 579, section 50

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