

# PROPOSED RULEMAKING

## DEPARTMENT OF REVENUE

### [61 PA. CODE CHS. 55 AND 60] Sales and Use Tax; Lawn Care Services

The Department of Revenue (Department), under authority contained in section 270 of the Tax Reform Code of 1971 (TRC) (72 P. S. § 7270), proposes to add § 55.6 (relating to lawn care services) and delete § 60.2 (relating to lawn care services) to read as set forth in Annex A.

#### *Purpose*

Currently, the Department's interpretation of section 201(k)(17), (o)(15) and (j) act of August 4, 1991 (P. L. 97, No. 22) (72 P. S. §§ 7201(k)(17), (o)(15) and (j)) relating to lawn care services is set forth as a pronouncement and codified in § 60.2. The Department has concluded that the issues relating to lawn care services have evolved to a point where a regulation can be proposed. With the adoption of the proposal in § 55.6, the Department will be deleting the pronouncement in § 60.2.

In 1996, the Department prepared a similar proposal. The Department received numerous comments on this prior proposal concerning the definition of "lawn" and the application of the tax to trimming shrubbery. In addition, there were indications that the authorizing statute might be amended by the Legislature. Consequently, the Department decided in 1997 to withdraw the final-form regulation to provide further time to study the revision of the regulation. In this present proposal, the Department has addressed the issues raised in the prior proposed rulemaking process.

#### *Explanation of Regulatory Requirements*

Section 55.6(a) defines the terms "lawn" and "lawn care service" for use in § 55.6. Subsection (b) provides that the sale at retail or use of lawn care services performed in this Commonwealth is subject to tax. Lawn care services became taxable October 1, 1991.

Subsection (c) provides examples of taxable lawn care services. Subsection (d) provides examples of services that are not taxable lawn care services. Subsection (e) provides that tax shall be imposed on the total charge for lawn care services. The failure to state charges for lawn care services separately from other nontaxable charges on the invoice requires the charging of tax on the total invoice amount.

Subsection (f) sets forth exclusions. Paragraph (1) provides an exemption if the lawn care services are purchased by qualified institutions of purely public charity, charitable organizations, volunteer fire companies, religious organizations and nonprofit educational institutions, except if used in an unrelated trade or business. The services are also excluded if purchased by the Federal government or its instrumentalities; or the Commonwealth or its instrumentalities or subdivisions, including public school districts. Paragraph (2) provides that the vendor of lawn care services may claim the resale exemption upon its purchase of tangible personal property that is transferred to the purchaser or a third party in the performance of the lawn care services. This subsection also provides examples of property that may be purchased exempt for resale when transferred to the

purchaser in the performance of lawn care services and examples of property that is taxable when used in the performance of lawn care services.

#### *Affected Parties*

Providers of lawn care services will be affected by the proposed rulemaking.

#### *Fiscal Impact*

The Department has determined that the change in policy from the Department's statement of policy (§ 60.2) relating to the exclusion of shrubbery trimming from tax when not performed in conjunction with a taxable lawn care service and the exclusion of leaf raking from the definition of a lawn care service as set forth in this proposed rulemaking will result in an estimated revenue loss of approximately \$1.1 million for Fiscal Year 1998-99.

#### *Paperwork*

The proposed rulemaking will require no additional paperwork for the public or the Commonwealth.

#### *Effectiveness/Sunset Date*

The proposed rulemaking will become effective upon final publication in the *Pennsylvania Bulletin*. The proposed rulemaking is scheduled for review within 5 years of final publication. No sunset date has been assigned.

#### *Contact Person*

Interested persons are invited to submit in writing comments, suggestions or objections regarding the proposed rulemaking to Anita M. Doucette, Office of Chief Counsel, Department of Revenue, Dept. 281061, Harrisburg, PA 17128-1061, within 30 days after the date of the publication of this notice in the *Pennsylvania Bulletin*.

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on June 30, 1999, the Department submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Finance and the Senate Committee on Finance. In addition to submitting the proposed rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed rulemaking, it will notify the Department within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review of objections raised, prior to final publication of the amendments, by the Department, the General Assembly and the Governor.

ROBERT A. JUDGE, Sr.,  
*Secretary*

**Fiscal Note:** 15-407. (1) General Fund; (2) Implementing Year 1998-99 is \$1.1 million; (3) 1st Succeeding Year 1999-00 is \$1.1 million; 2nd Succeeding Year 2000-01 is \$1.1 million; 3rd Succeeding Year 2001-02 is \$1.1 million; 4th Succeeding Year 2002-03 is \$1.1 million; 5th Succeed-

ing Year 2003-04 is \$1.1 million; (4) 1997-98 \$1.1 million; 1996-97 \$1.1 million; 1995-96 \$1.1 million; (8) recommends adoption.

### Annex A

## TITLE 61. REVENUE

### PART I. DEPARTMENT OF REVENUE

#### Subchapter B. GENERAL FUND REVENUES

#### ARTICLE II. SALES AND USE TAX

#### CHAPTER 55. SERVICES

##### § 55.6. Lawn care services.

(a) *Definitions.* The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

*Lawn*—An area maintained with grass adjacent to a building. The term does not include athletic fields, cemeteries, golf courses, fields, parks and public utility or highway right-of-ways.

*Lawn care service*—Providing services for lawn upkeep including fertilizing, mowing or performing other lawn treatment services.

(b) *Scope.* The sale at retail or use of lawn care services performed in this Commonwealth is subject to tax. Lawn care services became taxable October 1, 1991.

(c) *Examples of taxable services.* The following are examples of taxable lawn care services:

- (1) Fertilizing lawns.
- (2) Mowing, trimming, cutting or edging lawns.
- (3) Dethatching lawns.
- (4) Applying herbicides, insecticides or fungicides to lawns.
- (5) Raking grass on lawns.
- (6) Applying treatments for weed, pest, insect or disease control to lawns.
- (7) Watering lawns.
- (8) Applying lime to lawns.
- (9) Aerating lawns.
- (10) Providing lawn evaluation, consultation or soil testing services on lawns, if purchased in conjunction with other lawn care services, regardless of whether the costs of the lawn evaluation, consultation or soil testing services are separately stated on the invoice.

(11) Overseeding, sodding or grass plugging of lawns.

(12) Trimming or pruning shrubbery when performed in conjunction with other lawn care services.

(d) *Examples of nontaxable services.* The following are examples of services which are not taxable lawn care services:

- (1) Seeding, sodding or grass plugging to establish a new lawn.
- (2) Trimming, pruning or fertilizing trees.
- (3) Planting or removing shrubbery or trees.
- (4) Providing lawn evaluation, consultation or soil testing services, if not purchased in conjunction with other lawn care services.
- (5) Designing lawns or landscapes.
- (6) Applying herbicides or fungicides to shrubbery, trees, flowers or vegetables.

(7) Maintaining shrubbery, flower or vegetable beds, such as by mulching, tilling, weeding or fertilizing.

(e) *Purchase price.* Tax shall be imposed on the total charge for lawn care services. The failure to separately state charges for lawn care services from other nontaxable charges on the invoice requires the charging of tax on the total invoice amount.

(f) *Exclusions.*

(1) Lawn care services are exempt if purchased by qualified institutions of purely public charity, charitable organizations, volunteer fire companies, religious organizations and nonprofit educational institutions, except if used in an unrelated trade or business; the Federal government or its instrumentalities; or the Commonwealth, its instrumentalities or subdivisions, including public school districts. The manufacturing, mining, processing, public utility, farming, dairying, agriculture, horticulture or floriculture exclusions do not apply.

(2) The vendor of lawn care services may claim the resale exemption upon its purchase of tangible personal property that is transferred to the purchaser or a third party in the performance of the lawn care services. The vendor may also purchase lawn care services from another provider and subsequently resell the services to its customer. The vendor may not claim the resale exemption upon its purchase of administrative supplies or the purchase of other taxable services that it may use in the performance of its lawn care services.

(i) The following are examples of property that may be purchased exempt for resale when transferred to the purchaser in the performance of lawn care services:

(A) Herbicides, insecticides, fungicides or other chemicals that are applied to lawns.

(B) Grass seed, sod, grass plugs, straw, fertilizers or lime applied to lawns.

(ii) The following are examples of property that are taxable when used in the performance of lawn care services:

(A) Mowers; edgers; or pruning, dethatching, aerating or mulching equipment, including motor oil and gasoline used in these equipment.

(B) Rakes, shovels or hoes.

(C) Spray applicators.

(D) Testing kits.

(E) Lawn sweepers.

(F) Other tangible personal property and services used in connection with the performance of lawn care services such as invoices, sales receipts, contracts, estimate sheets, confirmations and other similar items.

#### CHAPTER 60. SALES AND USE TAX PRONOUNCEMENTS—STATEMENTS OF POLICY

*(Editor's Note: As part of this regulatory package, the Department is proposing to delete the text of the statement of policy that appears in § 60.2, 61 Pa. Code pages 60-7—60-9, serial pages (200067)—(200069).)*

##### § 60.2. (Reserved).

[Pa.B. Doc. No. 99-1125. Filed for public inspection July 16, 1999, 9:00 a.m.]

**[61 PA. CODE CH. 31]****Sales and Use Tax; Vending Machines**

The Department of Revenue (Department), under authority contained in section 270 of the Tax Reform Code of 1971 (TRC) (72 P.S. § 7270), proposes to amend § 31.28 (relating to vending machines and automatic sales devices) to read as set forth in Annex A.

*Purpose*

- Prior to October 1, 1991, § 31.28 provided that the sale of food and beverages and taxable tangible personal property from a vending machine was taxable; however, the sale of candy and gum from a vending machine was exempt.

- With the enactment of the act of August 4, 1991 (P.L. 97, No. 22) (Act 22), effective October 1, 1991, vending machines were considered to be eating establishments and the sale of food and beverages and taxable tangible personal property from a vending machine was taxable; however, the sale of candy and gum from a vending machine was exempt.

- With the act of December 13, 1991 (P.L. 373, No. 40) (Act 40), effective January 1, 1992, the term "vending machine" was removed from the definition of "eating establishment"; however, the law provided that sales from vending machines continued to be taxed as they were prior to October 1, 1991, therefore the provisions of § 31.28 continued in effect.

- With this proposal, the regulation in effect prior to October 1, 1991, is withdrawn and replaced with a new regulation. With the act of April 23, 1998 (P.L. 239, No. 45) (Act 45), imposition of tax will only be on items that are considered taxable when sold from other noneating establishments. Vending machines are added to the list of establishments which are not considered to be establishments from which food or beverages ready to eat are sold. Since a vending machine does not qualify as an eating establishment, only the sale of selected food and beverage items in section 204(29) of the TRC (72 P.S. § 7204(29)) are taxable when sold from a vending machine. Taxable tangible personal property, other than food and beverages, is also subject to tax when sold from a vending machine. The sale of candy and gum from a vending machine continues to be exempt.

*Explanation of Regulatory Requirements*

This amendment proposes to delete the current provisions of subsections (a)–(e) of § 31.28. Proposed subsection (a) defines "juice beverage," "meal," "operator," "selected food and beverage items," "soft drink" and "vending machine" for purposes of this section. Proposed subsection (b) relating to registration provides that an operator who sells taxable tangible personal property or selected food and beverage items through a vending machine is required to obtain a sales, use and hotel occupancy tax license for the purposes of collecting and remitting tax to the Department.

Proposed subsection (c) requires that a sign or sticker stating the name and address of the operator be conspicuously displayed on the vending machine. Proposed subsection (d) explains the scope of taxation for the sale of tangible personal property and food or beverages from a vending machine.

Proposed subsection (e) provides that the sale of selected food and beverage items dispensed by means of a vending machine located on the premises of a school or

church are exempt from tax provided the sales are made in the ordinary course of the activities of the school or church. The sale of tangible personal property other than food or beverages, dispensed by means of a vending machine located on the premises of a school or church, is subject to tax.

Proposed subsection (f) provides that sales tax collected by the operator upon taxable property, including selected food and beverage items, shall be reported and remitted to the Department. The current subsection (f) is relettered as subsection (g) and is amended to clarify the taxability of the purchase or lease of vending equipment and supplies.

*Affected Parties*

The proposed amendment may affect vending machine operators.

*Fiscal Impact*

The Department has determined that the proposed amendment will have no fiscal impact on the Commonwealth. Rather, it clarifies the Department's policy on the taxation of items dispensed from a vending machine.

However, the change in policy required by the Commonwealth Court decision in *CRH Catering Co., Inc., v. Commonwealth*, 539 A.2d 38 (Pa. Cmwlth. 1988) has had a negative impact on revenue. The policy has been in effect since the 1988-89 fiscal year. The fiscal impact of the change in policy was estimated to be about \$0.4 million for fiscal year 1998-99.

The proposed amendment also sets forth the Department's interpretation of Act 45 which amended section 204(29) of the TRC relating to sales tax on sales from vending machines. This proposed amendment is estimated to reduce the fiscal year 1999-00 (the first full year of revenue loss) General Fund by \$15.4 million.

*Paperwork*

The proposed amendment will not require additional paperwork for the public or the Commonwealth.

*Effectiveness/Sunset Date*

The proposed amendment will become effective upon final publication in the *Pennsylvania Bulletin*. The proposed amendment is scheduled for review within 5 years of final publication. No sunset date has been assigned.

*Contact Person*

Interested persons are invited to submit in writing comments, suggestions or objections regarding the proposed amendment to Anita M. Doucette, Office of Chief Counsel, Department of Revenue, Dept. 281061, Harrisburg, PA 17128-1061, within 30 days after the date of the publication of this notice in the *Pennsylvania Bulletin*.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. 745.5(a)), on June 30, 1999, the Department submitted a copy of this proposed amendment to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Finance and the Senate Committee on Finance. In addition to submitting the proposal, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed amendment, it will notify the Department within 10 days of the close of the Committees review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review of objections raised, prior to final publication of the regulation, by the Department, the General Assembly and the Governor.

ROBERT A. JUDGE, Sr.,  
Secretary

**Fiscal Note:** 15-408. No fiscal impact; (8) recommends adoption.

**Annex A**

**TITLE 61. REVENUE**

**PART I. DEPARTMENT OF REVENUE**

**Subpart B. GENERAL FUND REVENUES**

**ARTICLE II. SALES AND USE TAX**

**CHAPTER 31. IMPOSITION**

§ 31.28. Vending machines [and automatic sales devices].

(a) *Vending or automatic sales.* Tangible personal property otherwise taxable under the Sales and Use Tax Act (72 P. S. §§ 3403-1—3403-605) is taxable when dispensed by means of a vending machine or other automatic sale device.

(b) *Identification requirement.* Every machine used for the purpose of vending tangible personal property shall bear conspicuously thereon a sign or sticker setting forth the following information:

(1) The name and address of the owner of the merchandise contained within the machine and sold thereby.

(2) The charge made for the merchandise contained therein and sold thereby, indicating as separate items the charge made for the merchandise, the amount of tax imposed on the sale and the total amount of the sale including the tax.

(3) The Sales Tax License Number of the person liable for collection of the tax.

(c) The sign or sticker required by this section may be reproduced by any method, but shall be clearly legible and prominently displayed.

(d) Where articles of more than one price are sold by the same machine, the sales price, tax and total amount charged shall be clearly shown for each article or group of articles having a different price.

**Example:** THE NAME AND ADDRESS OF THE OWNER OF THE MERCHANDISE CONTAINED IN AND SOLD BY THIS MACHINE IS:

Joseph J. Jones  
387 Parkside Drive  
Philadelphia 7, Pa.

SALES PRICE OF ARTICLE SOLD .....	23 CENTS
SALES TAX PAYABLE.....	2 CENTS
TOTAL AMOUNT CHARGED.....	25 CENTS
SALES TAX LICENSE NUMBER.....	

(e) Sales tax shall be paid by the vendor on the sale or use of food and beverages dispensed by means of a vending machine or other automatic

sales device at the rate of 6% of the gross receipts collected from the machine under section 202(d) of the TRC (72 P. S. § 7202(d)). Thus, if the receipts from a machine total \$100, the amount of tax that is remitted to the Commonwealth by the vendor is \$6. ]

(a) *Definitions.* The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

*Juice beverage*—A liquid beverage containing at least 25% by volume natural fruit or vegetable juice.

*Meal*—A variety of foods prepared for immediate consumption and sold as a single item.

*Operator*—A person who makes sales of tangible personal property, including food or beverages, primarily through a vending machine.

*Selected food and beverage items*—Soft drinks; meals; hot or cold sandwiches, including cold meat sandwiches, cheese sandwiches, hoagies, hot dogs, hamburgers and similar sandwiches; brewed coffee; hot beverages such as hot chocolate, hot tea and similar items; food from salad bars; pizza, soup and other food items dispensed from the vending machine in a heated form or which are served in cold form and normally heated in an oven or microwave provided by the operator.

*Soft drink*—

(i) A nonalcoholic beverage, in either powder or liquid form, whether or not carbonated, such as soda water, ginger ale, colas, root beer, flavored water, artificially carbonated water, orangeade, lemonade, juice drinks containing less than 25% by volume of natural fruit or vegetable juices, and similar drinks.

(ii) The term does not include a juice beverage.

*Vending machine*—A device which mechanically dispenses tangible personal property, including food and beverages, for a purchase price.

(b) *Registration.* An operator who sells taxable tangible personal property or selected food and beverage items through a vending machine is required to obtain a Sales, Use and Hotel Occupancy Tax License for the purpose of collecting and remitting tax to the Department. One license is sufficient for any number of machines operated by the same operator.

(c) *Identification requirement.* A sign or a sticker setting forth the name and address of the operator shall be conspicuously displayed on the vending machine.

(d) *Scope.*

(1) *General.* The sale of food or beverages may be taxable or exempt depending upon the type of food or beverage or upon the basis of the location from which the food or beverage is sold. Since a vending machine does not qualify as an eating establishment, only the sale of selected food and beverage items as defined in subsection (a), is taxable when sold from a vending machine. Taxable tangible personal property, other than food and beverages, is also subject to tax when sold from a vending machine.

(2) *Sales of taxable property, other than food and beverages.* An operator is required to collect and remit Sales Tax upon the purchase price of each individual sale of taxable property, such as cigarettes, combs, toys and similar items. The amount required to be inserted in the machine is presumed to be the purchase price of each taxable item of property unless the operator displays a sign or sticker indicating the purchase price and the amount of tax for each taxable item.

(3) *Sales of selected food and beverage items.*

(i) *Imposition.* The sale of selected food and beverage items, as defined in subsection (a), from a vending machine is subject to tax.

(ii) *Collection of tax.* An operator of a vending machine from which selected food and beverage items are sold is required to collect and remit Sales Tax at the rate of 6% upon the sale of the selected food and beverage items. Sales Tax shall be computed by the following formula: (Total receipts from the sale of selected food and beverage items ÷ 1.06) × .06 = Sales Tax due.

*Example:*

"A" operates a vending machine from which milk, coffee and crackers are sold. "A" removes \$100 from the machine representing the following sales: milk-\$50, coffee-\$25 and crackers-\$25. Coffee is a selected food and beverage item. Milk and crackers are not. "A" remits tax in the amount of \$1.42 calculated as follows: ( $\$25 \div 1.06$ ) × .06 = \$1.42.

(4) *Sales of food and beverages other than selected food and beverage items.*

(i) The sale of food and beverages of the type described in this paragraph are not subject to sales tax when sold from a vending machine.

(ii) Examples of exempt food and beverages include.

- (A) Baked goods, such as cakes, pies, cookies.
- (B) Potato chips.
- (C) Corn chips.
- (D) Cheese balls.
- (E) Pretzels.
- (F) Crackers.
- (G) Milk products, such as plain milk, chocolate milk, malted milk.

(H) Ice tea and iced coffee.

(I) Juice drinks.

(J) Unflavored water.

(K) Prepackaged ice cream products, such as ice cream cakes and pies, popsicles, sundaes and novelties.

(L) Prepackaged frozen water-based products.

(M) Candy and gum.

(N) Other food and beverages not defined as a selected food and beverage item.

(e) *Vending machine sales on school or church property.*

(1) Sales of selected food and beverage items dispensed by means of a vending machine located on the premises of a school or church are exempt from tax, if the sales are made in the ordinary course of the activities of the school or church.

(2) Sales of tangible personal property, other than food or beverages, which are dispensed by means of a vending machine located on the premises of a school or church, are subject to tax.

(f) *Remitting tax to the Department.* Sales tax collected by the operator upon taxable property, including selected food and beverage items, shall be reported and remitted to the Department.

[ (f) ] (g) *Purchase or lease of vending equipment and supplies.*

[ Vending ] (1) The purchase or lease of vending equipment, including parts [ and ], accessories, [ purchased for or used in connection therewith, shall be included within the scope of the definition of tangible personal property and the purchase thereof shall be ] such as tables, chairs, microwaves, straw and napkin dispensers and other similar items, and supplies, such as straws, napkins, stirrers, eating utensils and similar items, is subject to tax.

(2) Wrapping supplies, such as plastic, paper and styrofoam cups, bowls or similar containers used to wrap property which is sold, are exempt from tax.

[Pa.B. Doc. No. 99-1126. Filed for public inspection July 16, 1999, 9:00 a.m.]