



Senate Fiscal Agency
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BILL ANALYSIS

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House Bill 4377 (Substitute H-1 as passed by the House)
House Bill 4378 (Substitute H-1 as passed by the House)
Sponsor: Representative Brenda Carter (H.B. 4377)
Representative Cynthia Neely (H.B. 4378)
House Committee: Insurance and Financial Services (H.B. 4377)
Tax Policy (H.B. 4377 & H.B. 4378)
Senate Committee: Finance, Insurance, and Consumer Protection

Date Completed: 9-13-23

INTRODUCTION

Taken together, the bills would specify use and sales tax exemptions for certain prepared foods, such as food sold with eating utensils provided by the seller and food sold in an unheated state, among other things. Additionally, the bills would define food sales percentage and would specify how to calculate the percentage for sellers to calculate the percentage annually.

PREVIOUS LEGISLATION

(Please note: This section does not provide a comprehensive account of all previous legislative efforts on the relevant subject matter.)

House Bill 4377 and House Bill 4378 are reintroductions of House Bill 4635 and House 4636, respectively, from the 2021-2022 Legislative Session.

FISCAL IMPACT

Based on estimates from the Michigan Department of Treasury, the bills would reduce State and local unit revenue by approximately \$0.5 million per year.

Approximately 73% of sales tax revenue is constitutionally earmarked to the School Aid Fund, 10% is constitutionally earmarked to local revenue sharing, and the remainder is deposited into the General Fund. Of the State's share of use tax revenue (after the local use tax enacted as personal property tax reform), revenue at a rate of 2% is constitutionally directed to the School Aid Fund, while the General Fund receives any remaining State use tax revenue. The bills' affect on each fund (and local unit revenue) would depend on the relative impact of the exemption between the sales tax and the use tax. The overwhelming majority of the impact is expected to reflect the sales tax exemption. If 100% of the affected sales were under the sales tax, the bill would reduce School Aid Fund revenue by approximately \$0.4 million per year, and both constitutional revenue sharing and General Fund revenue by approximately \$0.1 million per year.

MCL 205.94d (H.B. 4377)
205.54g (H.B. 4378)

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CONTENT

House Bill 4377 (H-1) would amend the Use Tax Act to do the following:

- **Exempt bottled water, candy, food sold in an unheated state, and food sold with eating utensils provided by the seller from the Use Tax.**
- **Specify the calculation for determining prepared food sales percentage and require a seller to calculate the prepared food sales percentage annually.**

House Bill 4378 (H-1) would amend the General Sales Tax Act to do the following:

- **Exempt bottled water, candy, food sold in an unheated state, and food sold with eating utensils provided by the seller from the Sales Tax.**
- **Specify the calculation for determining prepared food sales percentage and require a seller to calculate the prepared food sales percentage annually.**

House Bill 4377 (H-1) & House Bill 4378 (H-1)

The General Sales Tax Act levies a 6.0% tax on the gross proceeds (i.e., "sales price") of a business that makes sales at retail. The Use Tax Act levies a 6.0% tax on the price (i.e., "purchase price") of tangible personal property used, stored, or consumed in the State.

Certain items are exempt from the use and sales taxes including prepared food. "Prepared food" means the following:

- Food sold in a heated state or that is heated by the seller.
- Two or more food ingredients mixed or combined by the seller for the sale as a single item.
- Food sold with eating utensils provided by the seller, including cutlery, glasses, napkins, plates, but not including a container or packaging used to transport food.

The term does not include the following:

- Food that is only cut, repackaged, or pasteurized by the seller.
- Raw eggs, fish, meat, poultry, and foods containing those raw items requiring cooking by the consumer to prevent foodborne illness.
- Food sold in an unheated state by weight or volume as a single item, without eating utensils.
- Bakery items sold without eating utensils.

The bill also would exempt the terms described below from the use and sales taxes.

"Food sold in an unheated state by weight or volume as a single item" would mean a food sold in an unheated state and the sales price of which is determined by multiplying its per unit price by its weight or volume and the sales price of which varies based on its weight or volume. "Volume" would mean a three-dimensional measure, expressed in units such as pints, quarts, cubic centimeters, or liters. "Weight" would mean a measure of heaviness, expressed in units such as pounds or grams.

"Food sold with eating utensils provided by the seller" would mean food sold by a seller who meets the following requirements:

- For a seller with a prepared food sales percentage of greater than 75%, the seller makes eating utensils available to purchasers or, if the food item is bottled water, candy, or soft

drinks, the seller gives or hand the eating utensils to purchasers or makes plates, bowls, glasses, or cups that are necessary for the purchaser to receive the food available to purchasers.

- For a seller with a prepared food sales of 75% or less, the seller's business practice is to give or hand eating utensils to the purchasers.

Under the term, for a seller with a prepared food sales of greater than 75%, if a food item had four or more servings packaged as one food item sold for a single price, the seller would have to give or hand the eating utensil to the purchaser. Serving sizes would have to be determined based on the label on an item sold, or if no label was available, then a seller would have to determine the reasonable number of servings in an item.

For a seller with a prepared food sales percentage of 75% or less, eating utensils necessary for the purchaser to receive the food, such as bowls and cups, would only need to be made available to the purchaser.

The term would not include food not sold with eating utensils provided by the seller if the food items had a utensil placed in the package with the food items by a person other than the seller, and that other person's North American Industry Classification System (NAICS) code was that of a manufacturer, subsector 311. If the packagers had any other NAICS classification code the seller would be considered to have provided the eating utensil.

(The NAICS is the standard used for Federal statistical agencies in classifying business establishments for collecting, analyzing, and publishing statistical data related to the U.S. business economy. A manufacturer subsector 311 are industries in the food manufacturing subsector that transform agricultural products for intermediate or final consumption.)

"Prepared food sales percentage" would mean a percentage determined by dividing the numerator by the denominator. The numerator would have to consist of the seller's annual sales of prepared food described below:

- Food sold in a heated state or that is heated by the seller.
- Two or more food ingredients mixed or combined by the seller for sale as a single item.
- Food sold when plates, bowls, glasses, or cups are necessary to receive the food.

The numerator could not include the following:

- Food that is only cut, repackaged, or pasteurized by the seller.
- Raw eggs, fish, meat, poultry, and foods containing those raw items requiring cooking by the consumer to prevent foodborne illness.
- Food sold in an unheated state by weight or volume as a single item, without eating utensils.
- Bakery items sold without eating utensils.
- Alcoholic beverages.

The denominator would have to consist of the seller's total annual sales of all food and food ingredients and prepared foods, excluding alcoholic beverages. The seller would calculate the prepared food sales percentage for each tax year or business fiscal year, respectively, as soon as possible after accounting records were available, but no later than 90 days after the beginning of the seller's tax year or business fiscal year. A single prepared food sales percentage would have to be determined annually for all the seller's establishments in the State. A seller would have to make a good faith estimate of its prepared food sales percentage for its first year in business and would have to adjust its estimate prospectively after the first

three months of its business operation if actual prepared food sales percentages materially affected the 75% threshold.

"Bottled water" would mean water that is placed in a safety sealed container or package for human consumption, including water that is delivered to the buyer in a reusable container that is not sold with the water. The term would specify bottled water would have to be calorie-free and could not contain sweeteners or other additives except that it may contain antimicrobial agents, fluoride, carbonation, vitamins, minerals, and electrolytes, oxygen, preservatives, and only use those flavors, extracts, or essences derived from a spice or fruit.

"Candy" would mean a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces. The term would not include any preparation containing flour and could not require refrigeration.

"Soft drinks" would mean nonalcoholic beverages that contain natural or artificial sweeteners. The term would not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or more than 50% of vegetable or fruit juice by volume.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.