

**FINAL PRIVATE LETTER RULING**

---

**REQUEST LETTER**

15-001

NAME 1<EMAIL 1> Tue, Dec 30, 2014 at 1:48 PM

To: taxplr@utah.gov

To: Commissioners

From:

NAME 1 (COMPANY 1) - home business

ADDRESS 1

CITY ZIP AND STATE

PHONE NUMBER 1

We are requesting a private ruling in regards to tax percents on events.

We have begun a small business of a home-based bakery. In so doing, I did some research to help determine what kind of percent we should be collecting for taxes. Following the information at this link <http://tax.utah.gov/sales/food-rate> we came to the determination that we should be charging the lower rate (3%) while at events. I also called the tax commission and spoke with a representative who also came to this same determination, and that is how and why we proceeded to collect at the lower rate.

As you will see under bakery items at the link listed above, bakery items are taxed at the lower rate if there is no utensil provided. There is no distinguishable tax amount from "events" and items sold from "home."

But when I called to inquire about paying tax amounts from "events" we had attended, I was transferred over to -- I think her name was NAME 2, a supervisor -- who proceeded to tell us that because we were at an "event," we were required to pay the higher rate. To this point, no one nor any information provided had given us such information.

I then spoke with NAME 3 who did some research of her own. I believe she is part of the Technical Research Unit. After some phone calls back and forth, NAME 3 came to the same determination that we had come to. She did not find any information that supported the idea that "events" were somehow taxed at a higher rate but that it should be at the lower rate. She then suggested that we send this letter.

What [it] sounds like is this: for quite some time the department that handles events have been collecting at the higher rate when people ask or when they happen upon telling others this, just with no apparent law/rulings to back it up. It's just what they have been accustomed to doing.

If we could get any clarification on this, it would be appreciated.

Thanks

NAME 1

**RESPONSE LETTER**

**PRIVATE LETTER RULING 15-001**

April 21, 2015

NAME 1  
COMPANY 1  
ADDRESS 1  
CITY ZIP AND STATE  
EMAIL 1

RE: Private Letter Ruling Request on the Utah Sales and Use Tax Rate for Your Bakery Items Sold at Special Events

Dear NAME 1,

This letter is in response to your request for information about the correct sales tax rate for bakery items, such as cookies and brownies, sold at special events, such as farmers markets, when the bakery items are provided to customers in sleeves or boxes without other items such as napkins or plates. The correct sales tax rate for the sales you presented is the lower sales tax rate found in § 59-12-103(2)(c) for sales of food and food ingredients. The logic supporting this conclusion is found below, in “Section III. Analysis.”

I. Facts

In your request letter, you explained you have a home-based bakery that sells baked goods at special events. You also explained you have received conflicting information from the Utah State Tax Commission about whether the lower or higher sales tax rate is correct for your sales at special events.

Through a later telephone conversation, you explained that the special events you are contemplating are in the nature of outdoor farmers markets. Your wife sets up a table and a pop-up canopy and sells baked goods, typically cookies and brownies. Your wife gives the goods to the customers in a sleeve or box. You stated your wife does not provide plates or napkins.

Through a later email, you explained, that you are unsure what the bakery’s NAICS code would be. You said the most applicable code made reference to “commercial bakery,” which you thought would not apply to your home bakery. The code you refer to seems to be NAICS Code 311812 is titled, “Bakery Products, Fresh (i.e., Bread, Cakes, Doughnuts, Pastries), Made in Commercial Bakeries.” You said your next best guess would be NAICS Code 311821, which is titled “Cookie and Cracker Manufacturing.” Also, you explained that you make sales from your home as well as at the events, and you bake the goods yourselves. Furthermore, you again explained you sell single or multiples of cookies and brownies, which you typically put in a sleeve, a box, or other container.

## II. Applicable Law

### **A. Law Found in Utah Sales & Use Tax, Part 1: Tax Collection**

Utah Code § 59-12-103(1) imposes Utah sales tax as follows:

- (1) A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions:
  - (a) retail sales of tangible personal property made within the state . . .  
....
  - (e) sales of prepared food . . .  
....

Utah Code § 59-12-103(2)(a)-(c) addresses the correct sales tax rate for prepared food and for food and food ingredients. The rate for prepared food is found in subsection (a); the rate for food and food ingredients is found in subsection (c). § 59-12-103(2)(a)-(c) states the following, in pertinent part:

- (2) (a) Except as provided in Subsections (2)(b) through (e), a state tax and a local tax is imposed on a transaction described in Subsection (1) equal to the sum of:
  - (i) a state tax imposed on the transaction at a tax rate equal to the sum of:
    - (A) 4.70%; and
    - (B) (I) the tax rate the state imposes in accordance with Part 18, Additional State Sales and Use Tax Act, if the location of the transaction as determined under Sections 59-12-211 through 59-12-215 is in a county in which the state imposes the tax under Part 18, Additional State Sales and Use Tax Act; and
    - (II) the tax rate the state imposes in accordance with Part 20, Supplemental State Sales and Use Tax Act, if the location of the transaction as determined under Sections 59-12-211 through 59-12-215 is in a city, town, or the unincorporated

- area of a county in which the state imposes the tax under Part 20, Supplemental State Sales and Use Tax Act; and
- (ii) a local tax equal to the sum of the tax rates a county, city, or town imposes on the transaction under this chapter other than this part.

....

- (c) Except as provided in Subsection (2)(d) or (e), a state tax and a local tax is imposed on amounts paid or charged for food and food ingredients equal to the sum of:
  - (i) a state tax imposed on the amounts paid or charged for food and food ingredients at a tax rate of 1.75%; and
  - (ii) a local tax equal to the sum of the tax rates a county, city, or town imposes on the amounts paid or charged for food and food ingredients under this chapter other than this part.

Utah Code § 59-12-102(49) defines “food and food ingredients” as follows in pertinent part:

- (a) "Food and food ingredients" means substances:

....

- (ii) that are:
  - (A) sold for:
    - (I) ingestion by humans;
    - .... and
  - (B) consumed for the substance's:
    - (I) taste; or
    - (II) nutritional value.

- (b) "Food and food ingredients" includes an item described in Subsection (90)(b)(iii).

- (c) "Food and food ingredients" does not include:

....

- (iii) prepared food.

Utah Code § 59-12-102(90) defines “prepared food” as follows in pertinent part:

- (a) "Prepared food" means:

....

- (iii) except as provided in Subsection (90)(c), food sold with an eating utensil provided by the seller, including a:
  - (A) plate;
  - (B) knife;
  - (C) fork;
  - (D) spoon;
  - (E) glass;
  - (F) cup;
  - (G) napkin; or
  - (H) straw.

(b) "Prepared food" does not include:

....

(iii) the following if sold without eating utensils provided by the seller:

....

(C) a bakery item, including:

- (I) a bagel;
- (II) a bar;
- (III) a biscuit;
- (IV) bread;
- (V) a bun;
- (VI) a cake;
- (VII) a cookie;
- (VIII) a croissant;
- (IX) a danish;
- (X) a donut;
- (XI) a muffin;
- (XII) a pastry;
- (XIII) a pie;
- (XIV) a roll;
- (XV) a tart;
- (XVI) a torte; or
- (XVII) a tortilla.

(c) An eating utensil provided by the seller does not include the following used to transport the food:

- (i) a container; or
- (ii) packaging.

## **B. Law Found in Utah Sales & Use Tax, Part 6: Tourism, Recreation, Cultural, Convention, and Airport Facilities Tax ("Tourism Tax") Act**

Utah Code § 59-12-603(1)(a) imposes an additional sales tax as follows:

In addition to any other taxes, a county legislative body may, as provided in this part, impose a tax as follows:

....

(ii) a county legislative body of any county may impose a tax of not to exceed 1% of all sales of the following that are sold by a restaurant:

....

- (B) food and food ingredients; or
- (C) prepared food; . . .

....

For purposes of § 59-12-603(1)(a)(ii), Utah Code § 59-12-602(5) defines restaurant as follows:

- (a) "Restaurant" includes any coffee shop, cafeteria, luncheonette, soda fountain, or fast-food service where food is prepared for immediate consumption.
- (b) "Restaurant" does not include:
  - (i) any retail establishment whose primary business or function is the sale of fuel or food items for off-premise, but not immediate, consumption; and
  - (ii) a theater that sells food items, but not a dinner theater.

### III. Analysis

This section explains the following: first, the lower sales tax rate for food and food ingredients applies to your sales of bakery items, and second, your bakery currently does not include a restaurant and thus is not presently subject to the tourism tax imposed by § 59-12-603(1)(a)(ii).

#### **A. The Lower Sales Tax Rate for Food and Food Ingredients Applies to Your Sales of Bakery Items at the Events You Have Described.**

Under § 59-12-103(1)(a), Utah sales tax is imposed on retail sales of tangible personal property; and under § 59-12-103(1)(e), Utah sales tax is imposed on sales of prepared food. Normally, bakery items such as brownies and cookies are subject to Utah sales tax.

Under § 59-12-103(2)(a), the sales tax rate generally is 4.7% plus any additional tax imposed through the Additional State Sales and Use Tax Act and the Supplemental State Sales and Use Tax Act plus any local sales tax. This sales tax rate applies to prepared food. Under § 59-12-103(2)(c), sales of food and food ingredients are taxed at a lower rate, which is 1.75% plus any local sales tax on food and food ingredients. You have asked about which of these two rates is correct for your sales of bakery items at special events.

Under subsection (b) of § 59-12-102(49) food and food ingredients are defined to include an item described in § 59-12-102(90)(b)(iii), and under subsection (c) of § 59-12-102(49) food and food ingredients are defined to exclude prepared food, which is defined in § 59-12-102(90). Thus, § 59-12-102(49) and § 59-12-102(90) must be considered together when determining whether your sales are of food and food ingredients, which are taxed at the lower rate found in § 59-12-103(2)(c), or are of prepared food, which is taxed at the higher rate found in § 59-12-103(2)(a).

Under § 59-12-102(90)(a)(iii), prepared food is defined to include “food sold with an eating utensil provided by the seller, including a: (A) plate; . . . [or] napkin . . .” Furthermore, under § 59-12-102(90)(b)(iii)(C), prepared food is defined to exclude “a bakery item” that is “sold without eating utensils provided by the seller.” Also under § 59-12-102(90)(b)(iii)(C), a bakery item is defined to include “a cookie” and many other breads and sweet baked foods. Under § 59-12-102(90)(c), “an eating utensil provided by the seller does not include the

following used to transport the food: (i) a container, or (ii) packaging.” Your cookies and brownies are bakery items. You have explained that you sell them in a sleeve or in a box but not with a plate or napkin. The sleeve or box is a container or packaging and not a utensil. Thus, you sell bakery items without eating utensils. Therefore, you do not sell “prepared food” and you do sell “food and food ingredients.” Hence, the correct Utah sales tax rate for your sales of brownies and cookies at special events is the lower sales tax rate found in § 59-12-103(2)(c).

**B. Your Home-Based Bakery is Not a Restaurant for Purposes of the Tourism Tax Found Imposed by § 59-12-603(1)(a)(ii).**

Under § 59-12-603(1)(a)(ii), “a county legislative body of any county may impose a tax of not to exceed 1% of all sales of the following that are sold by a **restaurant**: . . . food and food ingredients; or . . . prepared food . . .” (emphasis added). Under § 59-12-602(5), a “‘Restaurant’ includes any coffee shop, cafeteria, luncheonette, soda fountain, or fast-food service where food is prepared for immediate consumption [but] does not include . . . any retail establishment whose primary business or function is the sale of . . . food items for off-premise, but not immediate, consumption . . .”

Your home-based bakery is not a restaurant for either the event or home locations. For the event locations, the bakery is not a restaurant because the event locations are not “where food is prepared.” For the home location, the bakery is not “where food is prepared for immediate consumption”; instead from the home location, the bakery sells “food items for off-premise, but not immediate, consumption.” Therefore, your bakery is not currently subject to the tourism tax imposed under § 59-12-603(1)(a). If the nature of your bakery changes in the future, it could potentially include a restaurant and be subject to tax under § 59-12-603(1)(a)(ii) at that time.

IV. Conclusion

As explained above, the lower sales tax rate found in § 59-12-103(2)(c) is correct for your sales of bakery items, such as cookies and brownies, regardless of whether they are sold at special events, such as farmers markets, or at your home, as long as you provide the bakery items in sleeves or boxes without other items such as napkins or plates. Furthermore, your bakery currently does not include a restaurant and thus is not presently subject to the tourism tax imposed by § 59-12-603(1)(a)(ii).

The Tax Commission’s conclusions are based on the facts as you described them and the Utah law currently in effect. Should the facts be different or if the law were to change, a different conclusion may be warranted. If you feel we have misunderstood the facts as you have presented them, you have additional facts that may be relevant, or you have any other questions, please feel free to contact the Commission.

Additionally, you may also appeal the private letter ruling in the following two ways.

First, you may file a petition for declaratory order, which would serve to challenge the Commission's interpretation of statutory language or authority under a statute. This petition must be in written form, and submitted within thirty (30) days after the date of this private letter ruling. You may submit your petition by any of the means given below. Failure to submit your petition within the 30-day time frame could forfeit your appeal rights. Declaratory orders are discussed in Utah Administrative Code R861-1A-34 C.2., available online at <http://tax.utah.gov/commission/effective/r861-01a-034.pdf>, and in Utah Administrative Code R861-1A-31, available online at <http://tax.utah.gov/commission/effective/r861-01a-031.pdf>.

Second, you may file a petition for redetermination of agency action if your private letter ruling leads to an audit assessment, a denial of a claim, or some other agency action at a division level. This petition must be written and may use form TC-738, available online at <http://tax.utah.gov/forms/current/tc-738.pdf>. Your petition must be submitted by any of the means given below, within thirty (30) days, generally, of the date of the notice of agency action that describes the agency action you are challenging.

You may access general information about Tax Commission Appeals online at <http://tax.utah.gov/commission-office/appeals>. You may file an appeal through any of the means provided below:

- **Best way**—by email: [taxappeals@utah.gov](mailto:taxappeals@utah.gov)
- By mail: Tax Appeals  
USTC  
210 North 1950 West  
Salt Lake City, UT 84134
- By fax: 801-297-3919

For the Commission,

D'Arcy Dixon Pignanelli  
Commissioner

DDP/aln  
15-001