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## Opinion of the Tax Commissioner

Date Issued: August 19, 2005

Opinion No: 05-0006

Tax: Sales

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XXXX

Subject: Soft Drink/Food Stamps

TAXPAYER has requested an Opinion of the Tax Commissioner (“Opinion”) pursuant to Ohio Revised Code (“R.C.”) section 5703.53.

### FACTS

In support of its request for an Opinion, TAXPAYER has provided the following facts:

TAXPAYER, a retail drug store chain, requests a written opinion regarding the sales taxability to our customers of soda fountain drinks. According to the USDA Food Stamp program, these drinks would be eligible for purchase with food stamps. They are sold in 24oz. and 32 oz. containers. We supply cups, lids, straws and napkins with these purchases but do not have any seating available on the premises, therefore, these drinks are sold on a take-out basis.

### DISCUSSION AND OPINION

R.C. 5739.01(EEE)(2) provides the following definition of “food”:

\* \* \*

(2) On and after July 1, 2004, "food" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. "Food" does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco.

\* \* \* \*

Pursuant to this definition, soft drinks are excluded from the definition of “food.” Accordingly, it is irrelevant whether the soft drink is consumed on the premises where sold or whether it is “to go.” The exemption from sale tax for “[s]ales of food for human consumption off the premises where sold” found in R.C. 5739.02(B)(2) does not apply. Soft drinks are generally subject to tax and TAXPAYER should charge and collect the tax due from its customers. However, the sale of

soft drinks to persons who pay for the drinks with food stamps is an exception to the general rule of taxability. R.C. 5739.02(B)(16) provides that “[s]ales of “food” to persons using food stamp benefits to purchase the food” is exempt from tax. The definition for “food” for purposes of R.C. 5739.02(B)(16) is different from that found in R.C. 5739.01(EEE)(2) as it is based on the meaning of “food” found in the federal “Food Stamp Act of 1977.”

In summary it is the Opinion of the Tax Commissioner that the sale of soft drinks is a taxable sale and TAXPAYER should charge and collect sales tax on such sales unless the customer is paying for the soft drinks with food stamps benefits.

This Opinion is limited to the legal issue addressed in this Opinion. This Opinion only applies to the taxpayer and it may not be transferred or assigned. In addition, the tax consequences stated in this Opinion may be subject to change for any of the reasons stated in R.C. 5703.53(C). It is the duty of the taxpayer to be aware of such changes. See R.C. 5703.53(E).

Sincerely,

William W. Wilkins  
Tax Commissioner