

The Pumpkin Tax

by John A. Swain

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“Don't tax you, don't tax me, tax that fellow behind the tree.” --
Russell Long



Things must be slow in Iowa. Or perhaps sales tax revenue is down. Whatever the reason, the Iowa Department of Revenue has rethought its long-standing position on pumpkins. In the past, “pumpkins have been exempt from sales tax as food (edible squash).”¹ It has come to the DOR's attention, however, perhaps through an anonymous tipster, that Iowans are not eating the vast majority of pumpkins they buy. Instead, get this, they are carving scary faces on them. This year, the visages of Hillary, Barack, and Rudy are in vogue. A candle is then inserted through a hole cut in the top of the pumpkin, and the so-called “jack-o'-lantern” is displayed on Halloween night. Later, Iowans discard their pumpkins without even taking a nibble.

The DOR is going to put a stop to this widespread abuse. Beginning this Halloween, pumpkins will be eligible for exemption only if either (a) they “are specifically of a variety to be used *to make pumpkin pies* [I kid you not] and are advertised in that way,” (b) they are “purchased with *food stamps*,” or (c) “the purchaser evidences their intent to use them as food by completing a *sales tax exemption certificate* stating they are being purchased for human consumption.”² (Emphasis added.) Mercifully, Iowa tax officials are not going after back taxes or penalties. Nor are they seeking criminal sanctions, though they would be well within their rights. Iowa pumpkin sellers knew darn well their customers were not eating the pumpkins they purchased.

Aunt Dorothy Goes Shopping

Although it is my job to know these things, this sea change in Iowa tax policy may have escaped my attention had it not been for my Aunt Dorothy in Keokuk. I just got off the phone with her, and it took the better part of an *American Idol* episode to calm her down. This morning she strolled the quarter mile down to her mailbox and was delighted (she thought) to find the latest edition of *Iowa Tax News* waiting for her. As she walked back to the house, however, thumbing through the *Tax News* with two dogs and a cat in tow, she was startled to learn of the DOR's abrupt shift in pumpkin tax policy. She cooks a mean pumpkin pie, mind you, but since Doc Peterson told her to back off the sweets, her specialties have been pumpkin bread and pumpkin soup. For these dishes she prefers the “winter luxury” variety of pumpkin to the “small sugar” variety that is everyone's favorite for pies.

¹ *Iowa Tax News* (Iowa DOR Dec. 1, 2006).

² *Id.*

She relaxed a bit as she approached the house. After all, she thought, "Iowa is a streamlined sales tax state, and with the good-faith acceptance requirement a part of the past, Ol' Man McDermott should take my resale certificate no questions asked. And when, after all, was the last time an individual consumer like me was audited for sales tax?"³ So as she breezed through the kitchen, she tore a resale certificate off the magnetic pad on her fridge and headed off to McDermott's Market.

It was not her lucky day. Ol' Man (George) McDermott had also been to the mailbox, and he was busily reprogramming his cash register. After doing a bit of shopping and steeling her nerves, Aunt Dorothy plucked a carving pumpkin out of the bin and placed it in her cart next to a six-pack of Coca-Cola. She then approached the cash register, exemption certificate in hand. Aunt Dorothy, bless her heart, feels guilty just for playing cards, and Ol' Man McDermott read her body language like Tiger Woods reads a green. And she had another problem. Last year she and her Osama-Bin-Lantern appeared on the front page of the *Gate City Daily*, having won the pumpkin carving contest at the Lee County Fair.

Aunt Dorothy tried her best to distract Ol' Man McDermott by asking for a fifth of Jack Daniels, a carton of cigarettes, one of them girly magazines, and some contraceptives, but Ol' Man McDermott stayed on task.

"Dorothy, you know I can't accept this certificate in good faith."

"But you don't have to, George, not after streamlining."

For a moment, George was stumped, but he soon regained his footing. "I've still got my business ethics. And besides, you've got no sales tax license number to put on this form. I'd say it's invalid. I don't know what the DOR was thinking by asking folks like you to issue exemption certificates, but the law is the law."

"Phooey on you, George. I'll just cross the river and buy my pumpkins in Illinois. Ever heard of Illinois letter ruling ST 2005-0081?"⁴

"Ever heard of the use tax?" he retorted.

Dorothy paid for the goods, sans pumpkin, and stormed angrily out of the store.

George paused for a moment, and then followed in hot pursuit. "And another thing, missy. You better not use that Coca-Cola to clean your battery terminals!"



"The small pumpkin is tax exempt, but the large pumpkin is taxable."

The Cost of Pumpkin Tax Equity

³ See Streamlined Sales and Use Tax Agreement section 317(C) (eliminating good faith requirement).

⁴ Private Letter Ruling ST2005-0081-GIL (Ill. DOR Sept. 26, 2005).

Before we start accusing the Iowa taxing authorities of being headless horsemen, we might first look to our lawmakers. Taxing authorities are often asked to enforce “nutty” distinctions.⁵ The sales tax, from a normative perspective, is best viewed as a consumption tax, but lawmakers seem intent on exempting most all consumption from the tax, for example, food, medicine, services, and housing. That is often done in the name of helping the poor. But as Prof. Emerita Holly Ulbrich of Clemson University recently reminded an audience of state and local tax officials, “If you want to do something for the poor, help people with low-incomes.” The point, of course, is that rich people eat, too. Nevertheless, the Iowa General Assembly, and most other legislatures as well, have put their taxing authorities in the position of determining what is food and what is not.⁶ That may seem an easy task, but anyone who has represented a nutritional supplement company, or a pumpkin retailer, knows better.

Fine distinctions are not always silly. Often those distinctions are made in the name of equity. Take the Internal Revenue Code (please). Congress wants to treat people with like incomes alike. That may sound simple, but a person with a \$100,000 income and no children is in a different position from a person with the same income but raising six children. So we make an adjustment via the personal exemption. But what if the children are in college? Or one is disabled? Or what if one family lives in Keokuk and the other in Manhattan, where the cost of pumpkins (and almost everything else) is surely higher?⁷ Do we keep fine-tuning? When do we stop?

There is a trade-off between tax equity and tax administration, and there comes a point at which the costs of compliance and enforcement exceed the equity benefits. Returning to the pumpkin tax -- and setting aside for a moment my suggestion that the food/nonfood distinction is a silly one -- the Iowa taxing authorities are simply trying to get it right. In essence, they are saying that pumpkin varieties that generally are used only for cooking will be treated as food and that carving pumpkins will be treated as taxable. Standing alone, that is a sensible rule.

Also, however, they allow that *any* pumpkin purchased with food stamps is also exempt. And carving pumpkins are indeed eligible for food stamp purchases.⁸ Complexity is now creeping into the equation. Carving pumpkins are food under federal law, but not under Iowa law. Except when purchased with food stamps. Poor Mr. McDermott.

⁵ See generally Charles E. McLure Jr., “The Nuttiness of State and Local Taxes -- and the Nuttiness of Responses Thereto,” *State Tax Notes*, Sept. 16, 2002, p. 841, Doc 2002-20966, or 2002 STT 179-2.

⁶ Iowa also distinguishes between candy (taxable) and other food.

⁷ Believe it or not, making a regional adjustment for cost of living was seriously proposed in a recent *Harvard Law Review* article. See Michael S. Knoll and Thomas D. Griffith, *Taxing Sunny Days: Adjusting Taxes for Regional Living Costs and Amenities*, 116 *Harv. L. Rev.* 987 (2003).

⁸ Confirming e-mail from the U.S. Department of Agriculture on file with author.

Finally, some people *really do* cook with carving pumpkins, although they are too stringy and bland for most tastes. Thus, in an effort to be fair, the new rule allows for the bizarre possibility that a consumer who wants to cook a carving pumpkin will issue an exemption certificate. Will retailers have a tear-off pad right next to the pumpkins, or will Aunt Dorothy's neighbors be asking to borrow an exemption certificate as well as a cup of sugar? And what about someone who wants to display her pumpkin and eat it too? We'll have to wait for Aunt Dorothy's audit to find out.

The Pumpkin Tax Score Card

Some of you may not live in Iowa. Still, you might be wondering how your state treats pumpkins. Unfortunately, there is little published formal guidance addressing the sales taxation of pumpkins. Nevertheless, after electronically searching using the terms "pumpkin" or "jack-o'-lantern," and gaining inspiration from the Council On State Taxation,⁹ I have developed a Pumpkin Tax Score Card. "A" means carving pumpkins are treated as food; "F" means they are not treated as food. Intermediate grades are explained in the comments. One must use this score card with caution. It considers only states that have directly addressed pumpkin taxation, and even then the pumpkin guidance is sometimes ambiguous. Those wishing to research other states might consider whether those states rely on federal food stamp definitions or have issued analogous guidance on decorative gourds or Christmas trees. If you are doing something more serious than writing a column for *State Tax Notes*, I would recommend that you contact the appropriate taxing agency as well.

Pumpkin Tax Score Card

State	Grade	Comments
Arkansas	A	Only "decorated" pumpkins are taxable at full rate
Connecticut	A	Pre-carved or decorated pumpkins taxable
Illinois	A	Pre-carved or decorated pumpkins taxable at full rate
Iowa	D-	Generally taxable, but exemption certificate may be issued
Minnesota	A	
Nebraska	A	
New Jersey	C	Published authority is ambiguous. "Used for food," exempt; "used for decoration," taxable
Pennsylvania	C	Published authority is ambiguous. "For food," exempt; "for decoration," taxable
Tennessee	A	
Texas	A-	Exempt (private letter ruling)
Virginia	A	
Washington	A	Pre-carved or decorated pumpkins taxable
West Virginia	A	Pre-carved or decorated pumpkins taxable at full rate

A Streamlined Sales Tax Pumpkin Gap?

⁹ That taxpayer organization frequently publishes A-F score cards of various state tax institutions and policy proposals.

Streamlined sales tax member states have adopted a uniform definition of food. To paraphrase, food is something we eat or drink, except beverages that make us dangerous behind the wheel of a car or at a class reunion.¹⁰ Though pumpkins are not addressed specifically, the general idea is that states will interpret uniform definitions . . . well . . . uniformly. In that regard, the Streamlined Sales Tax Project -- the predecessor entity to the State and Local Advisory Board -- made several recommendations regarding some pesky food issues, including pumpkins:

Pumpkins will be presumed to be food or food ingredients unless decorated at the time of sale. This is true even though the purchaser may use the pumpkin to carve and decorate or the fact that certain varieties of pumpkins are better for eating than others.¹¹

The Halloween lobby clearly had been hard at work.

The Streamlined Sales Tax Governing Board, however, has yet to adopt those recommendations.¹² The clear inference from the Pumpkin Tax Score Card is that the controversial pumpkin clause has been the deal breaker. Although member states Minnesota, Nebraska, Washington, and West Virginia are pumpkin-friendly venues, the rule in member states New Jersey and Pennsylvania appears to be more stringent, and Iowa has unquestionably drawn a line in the sand. Fortunately, the Streamlined Sales and Use Tax Agreement has a ready mechanism for resolving such disputes, and one would hope that the PGA (not *that* PGA) will submit a formal request for interpretation well before next Halloween.¹³



Pumpkin Politics

It is easy to understand why the governing board has been ducking the pumpkin tax issue. The board is largely peopled with veteran tax administrators who are keenly aware that although in the minority, Iowa has the normative high ground. Carving pumpkins are not “sold for ingestion or chewing.”¹⁴ The board also fears the inevitable slippery slope. Today pumpkins, tomorrow Christmas trees (“you know, many parts of

¹⁰ Streamlined Sales and Use Tax Agreement App. C, Part II (“food and food ingredients”).

¹¹ Streamlined Sales Tax Project, “Food Definition,” (Jan. 10, 2005) (issue paper approved by the SSTP and recommended for approval by the Streamlined Sales Tax Implementing States (SSTIS), the predecessor to the governing board).

¹² It has, however, addressed a few of the issues contained in those recommendations unrelated to pumpkin taxation.

¹³ See SSUTA section 902 (requests for interpretation).

¹⁴ SSUTA App. C, Part II (“food and food ingredients”).

a pine tree are edible”¹⁵). The board, however, has a political problem. The top five pumpkin-producing states, ranked in descending order, are Ohio, Pennsylvania, New York, Illinois, and California.¹⁶ The governing board is hungrily eyeing those populous states in hopes that they will join the streamlining movement. Although Ohio, the nation's number one pumpkin-producing state, is already an associate member, it has done considerable backsliding of late. The wages of pumpkin tax virtue may well be streamlined sales tax poverty.

In the past, disgruntled streamlined states have relied on substitute taxes when trying to avoid the consequences of a SSUTA definition. Both Minnesota and New Jersey, for example, adopted taxes on fur clothing to do an end run around the inclusion of fur clothing within the SSUTA definition of clothing. Those tactics were quickly viewed, however, as a threat to the credibility of the streamlining movement, and a crisis was averted by the simple expedient of including a separate definition of fur clothing.¹⁷ States could then treat fur clothing differently from other clothing while remaining in compliance with the agreement.

Thus, dare I say it, the obvious solution is to carve out a pumpkin exception.

Trick or Treat?

You may be wondering about the revenue impact of the pumpkin tax. In 2006 the total value (to growers) of all pumpkin production was about \$100 million.¹⁸ As best I can tell, retail prices are about four times the commodity price, so let's say pumpkins gross about \$400 million in retail sales annually.¹⁹ If we generously assume that all of those sales are of carving pumpkins (which of course they are not), we arrive at a nationwide sales tax revenue potential of about \$24 million, assuming an average sales tax rate of 6 percent. That translates to close to \$500,000 for the average state. Not a budget balancer, but not bad for one night of trick or treating.

Happy Halloween, everyone!

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¹⁵ Euell Gibbons, authority on wild edible plants and author of *Stalking the Wild Asparagus*.

¹⁶ National Agriculture Statistics Services, USDA, data available at <http://www.nass.usda.gov>.

¹⁷ SSUTA App. D, Part II (“fur clothing”).

¹⁸ National Agriculture Statistics Services, USDA, data available at <http://www.nass.usda.gov>.

¹⁹ In years past, the commodity price has been about 9 cents to 10 cents per pound, while the retail price this year is about 44 cents a pound, at least in Texas. See National Agriculture Statistics Services, USDA, data available at <http://www.nass.usda.gov>; “Heat, Drought Spook Pumpkin Prices,” FoxNews.com, Oct. 9, 2007.

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