

RULE 2007-3. SPECIAL RULES FOR SALES OF FOOD AND FOOD INGREDIENTS AND PREPARED FOOD.

A. **GENERAL INFORMATION.** Effective July 1, 2007, the gross receipts or gross proceeds derived from the sale of food and food ingredients is taxed at a reduced state sales and use tax rate of three percent (3%). The gross receipts or gross proceeds derived from the sale of prepared food, alcoholic beverages, dietary supplements, and tobacco are subject to the full state sales and use tax rate of six percent (6%). The sale of food and food ingredients continues to be subject to the full local sales and use tax rate.

B. DEFINITIONS.

1. "Alcoholic beverage" means a beverage that is suitable for human consumption and contains one-half of one percent (0.5%) or more of alcohol by volume.
2. "Dietary supplement" means any product, other than tobacco, intended to supplement the diet that contains one (1) or more of the following dietary ingredients: a vitamin; a mineral; an herb or other botanical; an amino acid; a dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or a concentrate, metabolite, constituent, extract, or combination of any ingredient described herein and is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet. A dietary supplement is required to be labeled as a dietary supplement, identifiable by the "Supplemental Facts" box found on the label.
3. "Food and food ingredients" 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. Such substances are food and food ingredients and taxed at the reduced state sales and use tax rate unless otherwise excluded. Food and food ingredients does not include an alcoholic beverage, tobacco, a dietary supplement, or prepared food.
4. "Prepared food" means food sold in a heated state or heated by the seller (see Subdivision (C)(1)); food consisting of two (2) or more food ingredients mixed or combined by the seller for sale as a single item (see Subdivision(C)(2)); or food sold with an eating utensil provided by the seller (see Subdivision (C)(3)). Prepared food does not include food that is only cut, repackaged, or pasteurized by the seller, or eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer to prevent food-borne illnesses as recommended by the Food and Drug Administration.
5. "Seller" means every person making a sale. For the purposes of this rule, seller means the entity that sells the product to the end consumer.

6. "Tobacco" means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

7. "Utensil" means an implement used to serve or consume food or drink including a plate, knife, fork, spoon, glass, cup, napkin, or straw. "Plate" does not include a container or packaging used to transport the food, such as a paper bag or foam used by a grocery store to shrink-wrap meat or cheese. A utensil does not include an item provided only for sanitary purposes, such as wax tissue, and not for the purposes of consumption.

C. PREPARED FOOD. Prepared food is meant to encompass items intended for, and which are generally ready for, immediate consumption at the time of sale either on or off the premises of the seller. An item will be considered prepared food and taxed at the full state sales and use tax rate if it meets any of the criteria discussed below in Subdivisions (C)(1), (C)(2), (C)(3), or (F)(1), even if the item is not for immediate consumption.

1. Prepared food is food sold in a heated state or heated by the seller. Food is sold in a heated state if it is sold at a temperature higher than the air of the room or place where the item is sold. Food that is heated by the seller at any time prior to sale, even if the item is not warm at the time of sale, is prepared food. Heating includes, but is not limited to, baking, boiling, smoking, microwaving, and cooking, as well as the use of such items as heat lamps or chaffing dishes. The heating may occur at premises other than the location at which the sale is made.

a. Prepared food includes food that is served hot even if the food was not otherwise prepared by the seller, as well as food that was heated by the seller at any time before the sale and is ready to eat at the time of sale. Prepared food also includes heated food regardless of form, condition, quantities, and packaging.

EXAMPLES: Rotisserie chicken, ready-to-eat pizza, fried potatoes, and ready-to-eat soup are foods that are sold in a heated state or heated by the seller and are taxed at the full state sales and use tax rate as prepared food.

b. Food heated by the customer on the seller's premises is not prepared food.

EXAMPLE: A convenience store sells frozen burritos. The convenience store also provides a self-service microwave for use by its customers. The customer selects a frozen burrito and heats it in the microwave. In this scenario, the burrito is not prepared food sold in a heated state because the food item is not heated by the seller. The burrito is food and taxed at the reduced state sales and use tax rate.

2. Prepared food is two (2) or more food ingredients mixed or combined by the seller for sale as a single item. Prepared food is anything made or combined by the seller and is taxable at the full state sales and use tax rate. The item does not have to be prepared and sold at the same location. (But see Subdivision (D)(2).)

EXAMPLES: Salads, birthday cakes, meat and cheese trays, popcorn seasoned with salt and butter, take and bake pizza, candy, and mixed fruit are prepared food and taxable at the full state sales and use tax rate if the item is made by the seller.

3. Prepared food is food sold with an eating utensil provided by the seller. Food is considered to be sold with an eating utensil provided by the seller when the food is intended for consumption with the utensil provided.

a. Food is sold with an eating utensil provided by the seller in the following scenarios:

(1) The seller physically gives the utensil to the customer.

EXAMPLE 1: The seller serves fried chicken and potato salad on a plate. The seller provided a utensil, a plate, and the sale is taxable at the full state sales and use tax rate as prepared food.

EXAMPLE 2: The seller includes napkins or plastic forks in a to-go bag. The transaction is taxable at the full state sales and use tax rate as prepared food because the food is sold with an eating utensil provided by the seller.

EXAMPLE 3: A food manufacturer sells a product containing crackers, tuna, a mayonnaise packet, and a spreader to supermarkets. The seller, the supermarket, did not provide the utensil to the customer and the product is taxable at the reduced state sales and use tax rate as food. If a manufacturer, and not the seller, provides a utensil in a package, then the food is not sold with eating utensils provided by the seller.

(2) The seller provides a utensil that is generally necessary for the customer to receive or consume the item. A customer's choice not to use a provided utensil does not affect whether an item is prepared food.

EXAMPLE 1: A cup for a dispensed beverage is a utensil generally necessary for the customer to receive the beverage. The dispensed beverage is prepared food and taxable at the full state sales and use tax rate.

EXAMPLE 2: Plastic forks, spoons, and knives available at a salad bar are utensils that are generally necessary for the customer to consume the salad. A salad purchased from a salad bar is prepared food and taxable at the full state sales and use tax rate.

EXAMPLE 3: A customer purchases a fountain drink at a convenience store. Instead of using the cups provided by the seller, the customer uses their own plastic cup. The fountain drink is still a dispensed beverage,

which is prepared food and taxable at the full state sales and use tax rate even though the customer did not use the cups provided by the seller.

b. If a seller makes utensils available to its customers by way of a self-service station or other central location, then all of the food items sold by the seller may be considered prepared food and taxable at the full state sales and use tax rate. Providing utensils to customers by way of a self-service station or other central location will result in all food sales being considered prepared food, if the seller's prepared-food sales percentage exceeds seventy-five percent (75%) as outlined in Subsection F.

D. EXCLUSIONS FROM PREPARED FOOD. Prepared food does not include food that meets the criteria discussed below in Subdivisions (D)(1) and (D)(2).

1. Prepared food does not include food that contains raw eggs, fish, meat, or poultry products that require cooking after the sale to prevent food-borne illnesses and food the customer generally cooks or heats after the sale.

EXAMPLE: A grocery store seasons raw meat, which is required to be cooked by the customer. The seasoned meat is food and taxed at the reduced state sales and use tax rate.

2. Prepared food does not include food that is only cut, repackaged, or pasteurized by the seller and such items are taxable at the reduced state sales and use tax rate.

EXAMPLE 1: Meat from a deli counter that is sliced and wrapped for a customer; deli salad that is purchased in large quantities by a supermarket and repackaged into smaller containers (without further preparation) for sale; or cantaloupe sliced by the seller and packaged into containers for sale.

EXAMPLE 2: A deli tray, cheese platter, mixed fruit, or similar item where the seller has mixed or combined two (2) or more food ingredients for sale as a single item is prepared food and is taxable at the full state sales and use tax rate. (See Subdivision (C)(2).)

E. CATERERS. Individuals or businesses that provide catered foods or beverages are deemed to be selling prepared food, which is subject to the full state sales and use tax rate plus all applicable local taxes.

F. PREPARED-FOOD SALES PERCENTAGE. The prepared-food sales percentage is used to determine when making utensils available to customers at a self-service station or otherwise constitutes selling food with a utensil provided by the seller, and is taxable at the full state sales and use tax rate as a sale of prepared food. The prepared-food sales percentage is important to sellers that primarily sell prepared food, but also sell items that would generally be considered food and food ingredients. A seller must calculate its prepared-food sales percentage to determine when it is providing a utensil to its customers by making utensils available.

1. If a seller has a prepared-food sales percentage greater than seventy-five percent (75%) (sales of prepared food are greater than 75% of total sales of food items), and utensils are made available by way of a self-service station or otherwise, then all food items sold by the seller are considered prepared food and taxable at the full state sales and use tax rate, unless the item meets the serving-size exception discussed in Subdivision (F)(3). Establishments that are likely to have a prepared-food sales percentage that is greater than seventy-five percent (75%) include, but are not limited to, sandwich shops, cafes, cafeterias, coffee shops, diners, fast food restaurants, mobile food vendors, food courts, hot dog stands, ice cream shops, pizzerias, restaurants, and concession stands.

2. If a seller has a prepared-food sales percentage that is seventy-five percent (75%) or less (sales of prepared food is less than 75% of total sales of food items), then food is sold with an eating utensil provided by the seller and taxable at the full state sales and use tax rate as prepared food, only if the seller physically gives the utensil to the customer or the utensil is generally necessary for the customer to receive or consume the item (see Subdivision (C)(3)).

3. Items that contain four (4) or more servings packaged as one item sold for a single price are not considered to be sold with utensils unless the seller provides a utensil as detailed in Subdivision (C)(3). Whenever available, serving sizes will be determined based on the label on the item sold. If no label is available, then a seller will reasonably determine the number of servings in an item.

EXAMPLE: A coffee shop sells various bakery items that are made by an unrelated third party. The coffee shop has napkins and straws available on the premises for its customers. The sale of a whole cheesecake (not made by the seller) will not constitute a sale of prepared food unless the coffee shop physically gives a utensil to the customer with the purchase of the cheesecake.

4. The prepared-food sales percentage will be calculated by the seller for each tax year or business fiscal year, based on the seller's data from the prior tax year or business fiscal year, as soon as possible after accounting records are available, but not later than ninety (90) days after the beginning of a tax or business fiscal year. A seller must be able to provide documentation to support the determination of its prepared-food sales percentage. (This calculation is not to be mailed to the Sales Tax Department. The calculation should be kept on file at your business.) A single prepared-food sales percentage will be determined annually, for all of a seller's establishments in the state.

a. Calculation of the prepared-food sales percentage. The prepared-food sales percentage is calculated by dividing sales of prepared food by the sum of all sales of prepared food, food and food ingredients, and dietary supplements in the following manner:

(1) Add the dollar amount of all sales of food sold in a heated state or heated by the seller; food that was mixed or combined by the seller; and

food sold where plates, bowls, glasses, or cups are necessary to receive the item. Do not include alcoholic beverages in this total.

(2) Add the dollar amount of all sales of food and food ingredients, prepared food, and dietary supplements. Do not include alcoholic beverages in this total.

(3) Divide the total prepared food sales (amount calculated in Subdivision (F)(4)(a)(1)) by the total sales of prepared food, food and food ingredients and dietary supplements (amount calculated in Subdivision (F)(4)(a)(2)) by the seller. The resulting percentage is the prepared-food sales percentage.

b. A new business will make a good faith estimate of their prepared food sales percentage for their first year. A new business should adjust its good faith estimate prospectively after the first three (3) months of operation if the actual prepared food sales percentages materially affect the estimate.

For further guidance, see Appendix A: “Food and Food Ingredients” – State Sales & Use Tax Guide.

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