



Important Notice Regarding Prepared Food For Human Consumption

This publication addresses criteria regarding prepared food for human consumption in compliance with the Streamlined Sales Tax Agreement. It is not a substitute for tax laws or regulation.

Items subject to tax, for the most part, will be treated the same. There are however, changes in single serving items sold by convenience stores and grocery stores. There are also changes for bakery items sold by bakeries whose business is generally a bakery and not a coffee shop. There are also other small changes.

Prepared food is defined in any one of the following ways:

- A. Food sold in a heated state or heated by the seller.
- B. Food items that are combined by the seller for sale as a single item except:
 - 1. Food that is only cut, repackaged or pasteurized by the seller.
 - 2. Eggs, fish, meat, poultry and foods containing these raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration.
 - 3. Foods sold in an unheated state by weight or volume as a single item unless sold by the seller with utensils.
 - 4. Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, bars, cookies and tortillas unless sold by the seller with utensils.
 - 5. Food sold by a seller that is primarily a manufacturer (NAICS section 311), except Bakeries (section 3118) unless sold by the seller with utensils.
- C. Food sold with eating utensils (plates, cutlery items, glasses, cups, napkins or straws. Plates do not include containers or packaging used for transport)

The following rules have been adopted by the Streamlined Sales Tax Governing Board to determine how utensils are treated and their impact on the sale of various food items. Under the approved interpretation, a 75% Threshold Test was created to add consistency to the meaning of the term "provided by seller". The Department is required to use this test in making determinations of the taxability of prepared food and beverage sales. The calculation is as follows:

The numerator would include sales of (a) prepared food if under A and B of the definition of prepared food; and (b) food sales where plates, bowls, glasses or cups are necessary to receive the food (e.g., dispensed milk, salad bar). Alcoholic beverages are not included in the numerator.

The denominator would include sales of all food and food ingredients, including prepared food, candy, dietary supplements and soft drinks. Alcoholic beverages are not included in the denominator.

The following is the application of the Threshold Test:

For sellers with a sales percentage of 75% or less, utensils are provided by the seller if the sellers practice for the item (as represented by the seller) is to physically give or hand the utensil to the purchaser, except that plates, bowls, glasses or cups necessary for the purchaser to receive the food (e.g. dispensed milk, salad bar) need only be made available.

For sellers with a sales percentage greater than 75%, utensils are provided by the seller if they are made available to purchasers.

For sellers with a sales percentage greater than 75% and who sell items that contain four (4) or more servings packaged as one item sold for a single price, an item does not become prepared food due to the seller having utensils available. However, if the seller provides utensils for the items as in 4 above, then the item is considered prepared food. Whenever available, serving sizes will be determined based on a label on an item sold. If no label is available, a seller will reasonably determine the number of servings in an item.

When a seller sells food items that have a utensil placed in a package by a person other than the seller and that person's NAICS classification code is that of manufacturers (sector 311), the seller shall not be considered to have provided the utensil except as provided in 4 – 6 above. For any other packager with any other NAICS classification code (e.g. sector 722 for caterers), the seller shall be considered to have provided the utensil.

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 90 days after the beginning of the tax or business fiscal year.

A single prepared food sales percentage will be determined annually for all of the seller's establishments in a state.

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 months of operation if actual prepared food sales percentages materially affect the 75% threshold test.

See Publication TSD-419 for additional information regarding West Virginia sales tax on food.

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