

**NEW JERSEY DIVISION OF TAXATION
REGULATORY SERVICES BRANCH
TECHNICAL BULLETIN**

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TAX: SALES AND USE TAX

TOPIC: SALES OF PREPARED FOOD BY FOOD SERVICE PROVIDERS

Prepared Food

In general, sales of food and food ingredients purchased for human consumption are exempt from sales tax. However, sales of prepared food are taxable. Prepared food includes:

- Food sold in a heated state or heated by the seller; or
- Food items that are a result of the seller combining two or more food ingredients; or
- Food sold with eating utensils provided by the seller (plates, cutlery items, glasses, cups, napkins, or straws). Eating utensils do not include containers for transport).

Prepared food does not include the following:

- 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 as recommended by the Food and Drug Administration.

Prepared food includes the following *only* when the seller provides eating utensils (*See* explanation below):

- Food sold directly by a food manufacturer, except bakeries; or
- Food sold in an unheated state by weight or volume as a single item; or
- Bakery items sold as such, including, but not limited to, bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.

Food Sold in a Heated State or Heated by the Seller

Food sold in a heated state or heated by the seller is subject to tax as prepared food. “Heated” means any temperature higher than the air temperature of the room or place where the item is sold. To be sold heated, the items must be offered for sale by the seller in a heated state. An item is not considered sold in a heated state if it is sold from a refrigerated display case and the purchaser heats it in a seller-provided microwave either before or after paying the seller.

Example

A consumer purchases a prepackaged breakfast burrito at a convenience store. The consumer heats the burrito in a microwave provided by the convenience store. The burrito is not considered to be sold in a heated state.

Food Items that are a Result of the Seller Combining Two or More Food Ingredients to Make a Single Item

Sales of food that are the result of the seller combining two or more ingredients to create a single item are taxed as prepared food.

Example

XYZ Convenience Store makes and sells sandwiches. The sales of the sandwiches are taxable because the seller is combining two or more ingredients to produce a single item.

Food Sold with Eating Utensils “Provided by the Seller”

Food sold with eating utensils “provided by the seller” is taxed as prepared food.

Threshold test for determining whether utensils are “provided by the seller”

Whether eating utensils are deemed to be “provided by the seller” depends on whether the seller’s annual sales of certain types of prepared food make up more than 75% of its total food sales (excluding alcoholic beverages).

Calculation of the threshold

The percentage of prepared food sales is calculated as follows:

- Determine the numerator, which is made up of the total dollar value of sales of prepared food that is either sold in a heated state or heated by the seller; plus sales of prepared food made up of two or more food ingredients mixed or combined by the seller for sale as a single item; plus sales of food that cannot be transferred to the purchaser without plates, bowls, glasses, cups or other utensils (e.g., fountain beverages, salad bar); then:
- Divide the numerator determined above by the total dollar value of all sales of food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks, but not including alcoholic beverages.

The threshold test

If the seller’s percentage of prepared food sales is 75% or less:

For sellers with a prepared food sales percentage of **75% or less**, utensils are considered to be “provided by the seller” if the seller’s practice (as represented by the seller) is to actually give or hand the utensil(s) to the purchaser to use to consume the prepared food item being sold, except that plates, bowls, glasses, or cups necessary for the purchaser to receive the food (e.g., dispensed beverage, salad bar) need only be made available for the purchaser.

If the seller’s percentage of prepared food sales is greater than 75%:

For sellers with a prepared food sales percentage **greater than 75%**, utensils are considered to be “provided by the seller” if the seller merely makes the utensils available for purchasers. Thus, utensils at a kiosk or common area are considered to be utensils “provided by the seller.”

The seller must calculate the percentage of prepared food sales annually to determine whether it is above or below the 75% threshold. This calculation must be performed by the seller for each tax year or business fiscal year, using 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 new business will calculate a percentage based on a good faith estimate for the first year. A new business should adjust its good faith estimate prospectively after the first three months of operation if its actual sales materially affect the calculation.

If a seller has multiple locations in New Jersey, the seller must use the average of the percentage of prepared food sales for all their similar establishments.

Examples

Bakery A is under the 75% threshold. Bakery A sells a single unheated, unprepared bagel to a customer. The exclusion for bakery items applies and tax is not due as long as the employee did not hand the customer an eating utensil to use to consume the bagel.

Bakery B is over the 75% threshold and provides eating utensils at a kiosk near the cash register. Bakery B sells a single unheated, unprepared bagel to a customer. Because Bakery B is over the 75% threshold and makes eating utensils available for its customers, the sale of a single unheated, unprepared bagel is subject to tax.

Convenience Store A is under the 75% threshold and sells prepackaged sandwiches which were made by a third party. Because Convenience Store A is under the 75% threshold and the employees do not actually hand the customers an eating utensil to use to consume the sandwiches, the sales of the prepackaged sandwiches are not subject to tax.

Convenience Store B is over the 75% threshold and sells prepackaged sandwiches which were made by a third party. Convenience Store B provides eating utensils at a kiosk near the cash register. Because Convenience Store B is over the 75% threshold and makes eating utensils available for its customers, the sales of the prepackaged sandwiches are subject to tax.

75% threshold presumed to be met

The following types of establishments engaged in the sale of prepared food are presumed to be over the 75% threshold. The burden is on the seller to prove that their percentage of prepared food sales is under 75%.

- Cafés
- Cafeterias
- Caterers
- Coffee shops
- Convenience stores with deli
- Delicatessens
- Diners
- Donut shop
- Fast food restaurants

- Food courts
- Hot dog stands
- Ice cream shops
- Mobile food sellers
- Pizzerias
- Restaurants
- Sandwich shops
- Snack bars
- Juice bars
- Sports/entertainment arena food sellers
- Sushi bars
- Taverns, grills, and bars

Bulk items exception

Bulk items are items that contain four or more servings packaged as one item and sold for a single price (e.g., ground coffee, whole cakes, loaves of bread). These bulk items are not considered to be prepared food as a result of the seller having eating utensils available for its customers. However, the sale of a bulk item is taxable if the seller actually hands the customer an eating utensil to use to consume the item. Whenever available, serving sizes will be determined based on the label on an item sold. If a label is not available, a seller will reasonably determine the number of servings in an item.

Examples

ABC Café is over the 75% threshold and has a kiosk where it makes eating utensils available for its customers. ABC Café sells a loaf of bread to a customer. The sale of the loaf of bread is not taxable because it contains four or more servings and the employee did not hand the customer a utensil to use to consume the bread.

Donut World is over the 75% threshold and has a kiosk where it makes eating utensils available for its customers. Donut World sells a bag of ground or whole bean coffee to a customer. The sale of the bag of ground or whole bean coffee is not taxable because it contains four or more servings and the employee did not hand the customer a utensil to use to consume the coffee.

Food That is Only Cut, Repackaged, or Pasteurized by the Seller

Tax is not imposed on sales of food that is only cut, repackaged, or pasteurized by the seller.

Examples

ABC Deli sells trays/platters of fruits, vegetables, meats and cheeses which are arranged by its employees. Because ABC Deli employees are arranging the food on the tray/platter they are doing more than simply cutting and repackaging the food, and the exclusion for sales of food that is only cut, repackaged, or pasteurized by the seller does not apply.

Supermarket X sells containers of cut honeydew. The honeydew is cut and packaged by Supermarket X employees. The honeydew is considered cut and repackaged and the exclusion for sales of food that is only cut, repackaged, or pasteurized by the seller applies.

Foods Containing Raw Animal Foods Requiring Cooking by the Consumer

Tax is not imposed on sales of eggs, fish, meat, poultry, and foods containing these raw animal foods that require cooking by the consumer as recommended by the Food and Drug Administration.

Food Sold by a Seller Whose Primary NAICS Classification is Manufacturing

Food sold by a seller whose primary NAICS classification is manufacturing in section 311, except subsector 3118 (bakeries), is not taxable unless the seller provides eating utensils with the food (*See above*).

Food Sold by Weight or Volume

Food sold in an unheated state by weight or volume as a single item is not taxable unless the seller provides eating utensils with the food (*See above*). Food sold by weight or volume means that the price is based on the weight or volume of the product a purchaser selects (e.g., it is sold by the pound and the price is determined by multiplying the weight selected by the price per pound).

Example

Potato salad, roast beef, and cheese by the pound is sold at a deli counter located in a supermarket. The sale of the potato salad, roast beef, and cheese is not subject to sales tax because it is sold by weight or volume.

Bakery Items

Bakery items sold as such, including, but not limited to, bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas are not taxable unless the seller “provides eating utensils” (*See above*).

Examples

XYZ Bakery is under the 75% threshold. XYZ Bakery sells an unheated, unprepared bagel to a customer. The exclusion for bakery items applies and tax is not due as long as XYZ Bakery did not hand the customer an eating utensil to use to consume the bagel.

Donut World is over the 75% threshold and has a kiosk where utensils are made available for its customers. Donut World sells two donuts to a customer. Donuts are a bakery item, however, because Donut World is over the 75% threshold and makes eating utensils available for its customers, Donut World is required to charge tax on the sale of the two donuts.

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