

## Department of Revenue

### Revenue Notice # 10-01: Sales and Use Tax - Prepared Food; Revocation of Revenue Notices # 01-12, 02-01, 02-02, 02-04, and 03-01

#### Introduction

This revenue notice repeals Revenue Notices # 02-01 (Sales and Use Tax – Alcoholic Beverages, Dietary Supplements and Tobacco), # 02-02 (Sales and Use Tax – Soft Drinks), and # 02-04 (Sales and Use Tax – Candy), as obsolete or unnecessary. This revenue notice also repeals and replaces Revenue Notices # 01-12 (Sales and Use Tax – Prepared Food) and # 03-01 (Amendment to Revenue Notice # 01-12).

This revenue notice also explains certain terms and phrases used within the definition of “prepared food” in *Minnesota Statutes*, section 297A.61, subdivision 31. These terms and phrases must be read in conjunction with the statute, as well as *Minnesota Rules*, parts 8130.4700 [Prepared Food, Candy, and Soft Drinks] and 8130.4705 [Food Sold with Eating Utensils], to determine the final taxability of specific food items. Food that is exempt under one of the provisions of the prepared food definition may still be subject to tax if it is covered under another part of the definition.

#### Background

*Minnesota Statutes*, section 297A.67, subdivision 2, provides that “food and food ingredients” are exempt from the Minnesota sales tax. Subdivision 2 defines “food and food ingredients” to mean substances 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. However, alcoholic beverages and tobacco are not included in the definition of “food and food ingredients.”

*Minnesota Statutes*, section 297A.61, subdivision 3, defines “sale and purchase” to include the preparation of food for consideration. Under *Minnesota Statutes*, section 297A.61, subdivision 3 (d), the following subcategories of food or food ingredients are taxable: prepared food sold by a retailer, soft drinks, candy, dietary supplements and all food sold through vending machines.

*Minnesota Statutes*, section 297A.61, subdivision 38, in defining “bundled transaction,” provides in part in paragraph (d) that a “transaction that otherwise meets the definition of a bundled transaction is not a bundled transaction” if it is “the retail sale of exempt tangible personal property and taxable tangible personal property” and “the transaction includes food and food ingredients,” and “the seller's purchase price or sales price of the taxable tangible personal property is 50 percent or less of the total purchase price or sales price of the bundled tangible personal property. Sellers must not use a combination of the purchase price and sales price of the tangible personal property when making the 50 percent determination for a transaction.”

*Minnesota Statutes*, section 297A.61, subdivision 31, defines “prepared food” as food that meets one of the following conditions: (1) food sold with eating utensils that are provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws; (2) food that is sold in a heated state or food that is heated by the seller; or (3) food where two or more ingredients were mixed or combined by the seller for sale as a single item. It also provides that the following items are

not included in the definition of “prepared food,” unless they are sold with eating utensils provided by the seller:

1. Bakery items such as bread, rolls, pastries, cookies, and tortillas.
2. Ready-to-eat meat and seafood in an unheated state sold by weight.
3. Eggs, fish, meat, and poultry when they are raw, and other foods containing these raw animal foods requiring cooking by the consumer so as to prevent food borne illnesses.
4. Food that is only sliced, repackaged, or pasteurized by the seller.

### **Department Position**

**Bakery items.** Bakery items are not “prepared food” unless sold with eating utensils provided by the seller under *Minnesota Rules*, part 8130.4705. Ice cream cakes or ice cream pies are not bakery items.

**Eating utensils.** Food sold with eating utensils that are provided by the seller is “prepared food.” Refer to *Minnesota Rules*, part 8130.4705 [Food Sold with Eating Utensils], for details on eating utensils provided by the seller.

1. Eating utensils include, but are not limited to, plates, knives, forks, spoons, glasses, cups, bowls, dishes, napkins, chopsticks, straws, platters, a wooden skewer inserted into food and handed to the customer, platters and trays that are designed for serving and displaying the food (for example, party trays on which slices and pieces of ready-to-eat meats, cheeses, raw vegetables, fruit, etc., are displayed and served).
2. Material that is used solely for packaging and transporting the food is not an eating utensil. The fact that food is packaged on top of or in material (for example, a cardboard round, or a plastic or polystyrene foam tray that is designed for packaging or transporting the food and not for displaying or serving the food), does not make the material a utensil.

**Heated food.** Food that is sold “in a heated state” or that is “heated by the seller” is prepared food. The term “seller” means the legal entity that sells the product at retail.

1. Heating includes baking, braising, boiling, broiling, dehydrating, frying, microwaving, roasting, simmering, smoking, steaming, and any other form of cooking food.
2. Food is “in a heated state” if it is either hot or warm.
3. The heating may occur at premises other than the location at which the sale is made, as long as the food either is in a heated state when sold or was heated by the seller.
4. Food that is either sold in a heated state or heated by the seller is taxable as “prepared food” even if the food was not otherwise prepared by the seller. For example, sandwiches prepared by someone other than the seller are prepared food when heated by the seller.

5. As long as the food is sold in a heated state or heated by the seller, it is “prepared food,” regardless of the form, condition, or quantity of the food, and regardless of the packaging.
6. Food that was heated by the seller at any time before the sale is taxable as “prepared food,” even if it is in an unheated state when sold, except the food must be ready-to-eat at the time of sale. (See “Ready-to-eat food” section below.)

**Two or more ingredients mixed or combined.** Food where two or more ingredients were mixed or combined by the seller for sale as a single item is “prepared food.” The term “seller” means the legal entity that sells the product at retail.

1. Food sold as a single item by the seller where the seller mixed or combined two or more ingredients is taxable as “prepared food,” as long as the food is ready-to-eat at the time of sale. (See “Ready-to-eat food” section below.)
2. To be “prepared food,” the combining and mixing may occur at premises other than the location at which the sale is made, as long as the same legal entity that mixes or combines two or more food ingredients for sale as a single item also sells the food item.
3. If the seller contracts with another legal entity to mix or combine two or more food ingredients for sale as a single item, the sale is not taxable as “prepared food,” even if sold under the seller’s label, unless the food is heated by the seller or sold in a heated state, or is sold with an eating utensil provided by the seller.
4. Examples of food where two or more ingredients were mixed or combined by the seller for sale as a single item:
  - a. Cheese made by dairies that sell it directly to the public is “prepared food” since making cheese involves a combination of two or more food ingredients.
  - b. A mixed green salad, a mixed fruit salad, a mixture of cut raw vegetables or cubed fruit, are each “prepared food,” because the seller combines or mixes two or more food ingredients.
  - c. Hand-prepared or dispensed ice cream cones, sundaes, and ice cream cakes and ice cream pies are “prepared food” because the ice cream is combined with the cones by the seller and the sundaes, ice cream cakes and ice cream pies involve a combination of two or more ingredients.
  - d. Sushi is “prepared food” because two or more ingredients are combined. For example, the seller may make its sushi with rice and raw fish with a sea vegetable wrap. While food that contains raw fish may be excluded from the definition of prepared food if the food requires cooking to prevent food borne illnesses (see provision below), sushi when properly prepared does not require additional cooking.
  - e. Jams or salsa are “prepared food” because the seller has combined more than one food ingredient for each.

- f. Sandwiches prepared by the seller are “prepared food” since they always include more than one food ingredient.

**Ready-to-eat food.** As used in this revenue notice, the term “ready-to-eat” means that the food is customarily eaten by the customer at the temperature in which it is sold. Food that a customer customarily heats before eating is not taxable as “prepared food” unless sold with eating utensils that are provided by the seller, even though the seller may have heated the food at some time or may have mixed or combined two or more food ingredients to make the food. However, “ready-to-eat meat and seafood,” sold by weight in an unheated state, is statutorily excluded from the definition of “prepared food.”

1. Examples of food where the seller heated or mixed or combined two or more ingredients, sold in an unheated state, that are taxable as “prepared food” because they are ready-to-eat:
  - a. The seller hard-boils eggs and sells them cold from its cooler. Since the hard-boiled eggs are ready-to-eat when sold, they are “prepared food.”
  - b. A seller roasts peanuts, and sells them when they are in an unheated state. Since the peanuts were heated by the seller and are ready-to-eat when sold, they are “prepared food.”
  - c. A seller cooks onions, leeks, potatoes, and other ingredients to make a soup which is meant to be eaten cold, and then refrigerates the soup. Since the soup was heated by the seller and is ready-to-eat when sold, it is “prepared food.”
  - d. However, for examples a, b, or c, if someone other than the seller had both prepared and heated the food, and the seller then sold the food in an unheated state, it would not be taxable as “prepared food,” even though the food is ready-to-eat, as long as the food is sold without eating utensils provided by the seller under *Minnesota Rules*, part 8130.4705.
2. The following are examples of foods that are not ready-to-eat:
  - a. The seller cooks a vegetable soup, packages and freezes it, and then sells it from the seller’s freezer. The soup is meant to be eaten hot. Since the soup is frozen, it is not ready-to-eat at the time of sale, even though the seller at one time heated it and combined ingredients.
  - b. The seller makes a spaghetti sauce by combining and heating several ingredients together, and sells it in jars on its shelves. Even though the seller at one time heated and did other preparations to the sauce, it is not ready-to-eat when sold because it is not intended to be eaten by the customer in the unheated state in which it is sold; rather, the customer is expected to reheat it.
  - c. The seller combines cheese, sauce, and pizza dough and then partially-bakes cheese pizzas. Some customers purchase the partially baked pizzas while they are still hot, and others purchase them later from the seller’s cooler. All customers finish baking the pizzas at home. Even though the seller combined or mixed food ingredients to sell the food as a single item and heated the pizzas, they are not ready-to-eat at the time of sale. Food that is only partially cooked, if it needs to be fully cooked to be eaten, is not ready-to-eat.

**Ready-to-eat meat and seafood.** Ready-to-eat meat and seafood that are sold in an unheated state by weight are not “prepared food,” even though the seller may have heated it at some time or may have combined two or more food ingredients to make the ready-to-eat meat and seafood, and are not subject to sales tax unless sold with eating utensils provided by the seller. Meat and seafood include any part of an animal used for food, such as beef, pork, lamb, buffalo, venison, ostrich, game birds, turkey, chicken and other poultry, fish and shellfish from the sea (such as caviar, clams, lobsters, oysters, shark, and shrimp), and any freshwater fish.

1. Examples of ready-to-eat meat and seafood: cooked sliced turkey, honey-baked or honey-glazed cooked ham, smoked fish, or cooked shrimp that is in an unheated state when sold.
2. Raw fish that does not require cooking to prevent food borne illnesses, since it is ready-to-eat (for example, caviar and salmon sashimi), is exempt if it is sold by weight.
3. When meat provided by the customer to a meat processor is combined with other meats or ingredients that are provided by the meat processor, the resulting meat is exempt if it is sold to the customer by weight, in an unheated state, and ready-to-eat (for example, beef sticks, venison sausage, buffalo jerky, and turkey jerky).
4. A ready-to-eat meat or seafood may have other food ingredients, such as spices, cooked into the meat or seafood. Adding a sauce or glaze that is in an unheated state to the ready-to-eat meat or seafood before the ready-to-eat meat or seafood is weighed does not make it “prepared food.”
  - a. For example, a cold shrimp sauce is added to ready-to-eat cold shrimp and they are weighed together — the resulting item is “ready-to-eat seafood” and is exempt.
  - b. However, if ingredients that are not part of the ready-to-eat meat and seafood are added to the ready-to-eat shrimp — for example, celery or pasta to make a cold salad — the resulting item is “prepared food” because ingredients are combined with the ready-to-eat seafood, and the fact that it is sold in an unheated state and weighed is irrelevant.

**Raw eggs, raw fish, raw meat, and raw poultry.** Eggs, fish, meat, and poultry when they are raw, and other foods containing these raw animal foods requiring cooking by the consumer so as to prevent food borne illnesses, are not “prepared food” unless sold with eating utensils provided by the seller. Fish includes fish and shellfish from the sea (for example, clams, lobsters, oysters, shark, and shrimp), and any freshwater fish.

1. Examples of food that contains raw eggs, raw fish, raw meat, or raw poultry and requires cooking: uncooked meatloaf, marinated raw chicken, uncooked crab cakes, or cookie dough.
2. When meat provided by the customer and processed by a meat processor is combined with other meats or food ingredients that are provided by the meat processor, the resulting meat sold to the customer as raw meat that requires cooking is exempt. For example, raw venison sausage links.

**Sliced, repackaged, or pasteurized food.** Sliced, repackaged, or pasteurized food is not subject to tax if the seller did not prepare it other than to slice, repackage, or pasteurize it, unless the food is sold with eating utensils provided by the seller.

The following are examples of foods that are only sliced, repackaged or pasteurized:

1. The seller slices celery. The sliced celery is not “prepared food.” However, if the seller fills the cut celery with cream cheese, or combines it with cut carrot sticks, it becomes a “prepared food” item.
2. Cheese that is removed by the seller from the storage or display area, sliced as requested by the customer, weighed, wrapped, labeled, and handed to the customer to be taken to the checkout area, is not “prepared food” since repackaging in itself does not result in the item being “prepared food.”
3. Variety packages that include different kinds of food such as different types of ready-to-eat meat, different flavors of muffins, or different varieties of whole fruits, are not “prepared food” when the seller only repackages these foods.
4. Potato salad purchased in large quantities by the seller and repackaged into smaller containers without further preparation, is not “prepared food.”
5. Food that the seller has pasteurized (for example, eggs, milk, fruit juice, soy sauce, or cheese) is not “prepared food.”

**Combination packages.** If a retailer sells a combination package, consisting of “prepared food” (e.g., fully-baked chicken sold heated, or mixed fruit salad prepared by the seller) in combination with food that is not “prepared food” (e.g., potato salad not prepared by the seller, or cold mashed potatoes that need to be reheated by the customer), and the combined items are sold for a single price, then whether the transaction is subject to sales tax will depend on the application of *Minnesota Rules*, part 8130.4705 [Food Sold with Eating Utensils], in conjunction with the “bundled transaction” statutory provisions in *Minnesota Statutes*, section 297A.61, subdivision 38.

The total sales price of a combination package is subject to sales tax if it meets one or more of the following:

1. It is the seller’s practice to physically give or hand a utensil to the customer with the food as part of the sales transaction, as described in *Minnesota Rules*, part 8130.4705, subpart 2.
2. The seller makes the eating utensils available to the purchaser of the combination package, and the seller’s prepared food percentage is greater than 75 percent, as provided in *Minnesota Rules*, part 8130.4705, subpart 3.
  - a. However, even if the seller’s prepared food percentage is greater than 75 percent, if the combination package includes four or more servings of food and the combination package is sold for a single price, having the eating utensils available will not subject the sale to sales tax. Rather, it must be the seller’s practice to physically give or hand a utensil to the customer with the food. See *Minnesota Rules*, part 8130.4705, subparts 3 and 4.

- b. Conversely, if the seller's prepared food percentage is greater than 75 percent, but the combination package does not include four or more servings, the combination package is subject to sales tax because eating utensils are made available.
3. The seller neither physically gives, hands, nor makes available any eating utensils when selling the combination packages, but as provided under the "bundled transaction" statutory provisions, either the sales price of the "prepared food" item is more than 50 percent of the total sales price of the combination package or the purchase price of the "prepared food" item is more than 50 percent of the total purchase price of the combination package.



ELIZABETH KADOUN, Assistant Commissioner  
for Tax Policy and External Relations

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