

# Minnesota Department of Revenue

## Revenue Notice # 21-02: Sales and Use Tax - Prepared Food - Revocation of Revenue Notice # 10-01

### Introduction

This Revenue Notice revokes and replaces 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”) to omit examples which are now provided in department fact sheets or industry guides on the department’s website; to provide more explanations of certain terms and phrases; and to provide the department’s position that food that is not fully cooked and requires cooking prior to consumption is not “prepared food,” as opposed to food that is fully cooked but is customarily reheated by the customer before eating.

This Revenue Notice 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 Minnesota sales tax if it is covered in another part of the definition.

### Background

*Minnesota Statutes*, section 297A.67, subdivision 2, defines “food and food ingredients” and provides that "food and food ingredients"—except candy, soft drinks, dietary supplements, and prepared food—are exempt from the sales tax. The statute also provides that alcoholic beverages and tobacco are not included in the definition of "food and food ingredients."

*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 are 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 to prevent food borne illnesses; and
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, and platters and trays designed for serving and displaying the food.
2. Material used solely for packaging and transporting the food is not an eating utensil. The fact that food is packaged on top of or in the material, does not make the material a utensil.

**Heated food.** Food sold "in a heated state" or "heated by the seller" is prepared food. "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.
2. Food is "in a heated state" if it is hot or warm.
3. Heating may occur at premises other than the location of the sale, as long as the food either is in a heated state when sold or was heated by the seller.
4. Food 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.
5. Food sold in a heated state or heated by the seller is taxable as "prepared food," regardless of the form, condition, or quantity of the food, and regardless of packaging.
6. Food 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, if, at the time of sale, the food has been fully cooked even though it may be customary or necessary to reheat the food prior to consumption. (See "Food sold requiring cooking prior to consumption" section below.)

As explained in the Background above, certain food items (*e.g.*, bakery items), are not included in the definition of "prepared food" even though they are sold "in a heated state" or "heated by the seller," unless they are sold with eating utensils provided by the seller.

**Two or more ingredients mixed or combined.** Food where two or more ingredients are 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," if, at the time of sale, the food does not require

cooking prior to consumption, even though reheating may be customary. (See “Food sold requiring cooking prior to consumption” section below.)

2. To be "prepared food," the combining and mixing may occur at premises other than the location of the sale, 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.

As explained in the Background above, certain food items (*e.g.*, bakery items), are not included in the definition of "prepared food" even though two or more ingredients are mixed or combined by the seller for sale as a single item," unless they are sold with eating utensils provided by the seller.

**Food sold requiring additional cooking prior to consumption.** Food a customer ordinarily must fully cook prior to consumption is not taxable as "prepared food" unless sold with eating utensils 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, except for "ready-to-eat meat and seafood" sold by weight in an unheated state (which is statutorily excluded from the definition of "prepared food"), if the seller fully cooked the food, it is taxable as “prepared food,” even though it may be customary or necessary for the customer to reheat the food before eating (*e.g.*, soup fully cooked by seller, meant to be eaten hot, packaged and sold frozen; spaghetti sauce fully cooked by the seller, meant to be eaten hot, sold in jars on its shelf; but not partially baked pizzas, whether sold hot or from a cooler).

**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 (*e.g.*, beef, pork, lamb, buffalo, venison, ostrich, game birds, turkey, chicken and other poultry, fish and shellfish from the sea, and freshwater fish).

1. Raw fish that does not require cooking to prevent food borne illnesses, since it is ready-to-eat, is exempt if sold by weight.
2. When meat provided by the customer to a meat processor is combined with other meats or ingredients 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.
3. A ready-to-eat meat or seafood may have other food ingredients (*e.g.*, spices), cooked into the meat or seafood, or a sauce or glaze that is in an unheated state may be added to the meat or seafood before the meat or seafood is weighed. Incorporating other ingredients into the meat or seafood does not make it "prepared food"—it is still read-to-eat meat or seafood.
4. However, if ingredients that are not part of the ready-to-eat meat or seafood are added to the ready-to-eat meat or seafood (*e.g.*, to create a salad or sandwich), the resulting

item is "prepared food" because ingredients are combined with the ready-to-eat meat or 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.** Raw eggs, raw fish, raw meat, and raw poultry, and other foods containing these raw animal foods that require the consumer to cook them 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, and any freshwater fish. 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 is exempt because it is sold to the customer as raw meat that requires cooking.

**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.

**Combination packages.** If a seller sells for a single price a combination package of food that consists of both "prepared food" that meets the condition described in *Minnesota Statutes*, section 297A.61, subdivision 31, clause (2), and food that does not meet this condition, 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 one or more of the following conditions are met:

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 both makes the eating utensils available to the customer of the combination package and also has a "prepared food percentage," as determined in *Minnesota Rules*, part 8130.4705, subpart 5, that is greater than 75 percent, as provided in *Minnesota Rules*, part 8130.4705, subpart 3.
  - a. The seller "makes the [eating] utensils available" to the customer if the utensils are in the eating establishment for the customer's use but are not physically given or handed to the customer, and
  - b. The seller's "prepared food percentage" is greater than 75 percent if more than 75 percent of all the food sold by the seller (food and food ingredients, candy, diet supplements, and soft drinks, but not alcoholic beverages) at all the seller's establishments in Minnesota combined (businesses owned by the same person) is food where a plate, glass, cup, or bowl is necessary to receive the food from the seller or is prepared food that meets the condition of *Minnesota Statutes*, section 297A.61, subdivision 31, clause (2).
    - 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 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, as provided in *Minnesota Rules*, part 8130.4705, subparts 3 and 4.

- 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 the seller makes eating utensils 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 seller’s purchase price of the "prepared food" item is more than 50 percent of the seller’s total purchase price of the combination package, where “purchase price” means the measure subject to use tax on purchases made by the seller.

Revenue Notice # 10-01, as originally published April 12, 2010, revoked 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; as well as revoking and replacing Revenue Notices # 01-12 (Sales and Use Tax - Prepared Food) and # 03-01 (Amendment to Revenue Notice # 01-12). These Revenue Notices remain revoked.

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Lee Ho, Deputy Commissioner