

STREAMLINED SALES AND USE TAX INTERPRETATION: PREPARED FOOD DEFINITION OF “FOOD SOLD WITH EATING UTENSILS PROVIDED BY THE SELLER”

Through the enactment of Public Law 2005, chapter 126, New Jersey joined a national coalition of states in conforming the New Jersey Sales and Use Tax Act to the provisions of the Streamlined Sales and Use Tax Agreement (SSUTA). The SSUTA was developed over the course of several years through the joint effort of over forty states participating in the Streamlined Sales and Use Tax Project. The underlying purpose of the Agreement is to simplify and modernize the administration of the sales and use tax laws of the member states in order to facilitate multi-state tax administration and compliance. The provisions of New Jersey’s law were effective on October 1, 2005.

Some of the defined terms in the law have required further interpretation in order for the law to be administered in a consistent manner among the member states. Specifically, the third definition of “prepared food,” which deals with “food sold with eating utensils provided by the seller” has been interpreted differently among the member states. Some states interpreted this language to require that the utensils actually be handed to the purchaser by the seller, and other states took the position that utensils need only be made available by the seller.

In response to this conflict among the member states, a Request for Interpretation was sought by the Food Marketing Institute and other interested parties. The Streamlined Sales and Use Tax Governing Board approved the following interpretation, which basically creates two meanings for “food sold with eating utensils...,” based on the annual sales of a business. The definition is as follows:

“Prepared Food” which means:

- (i) A. food sold in a heated state or heated by the seller; or
 - B. two or more food ingredients mixed or combined by the seller for sale as a single item, but not including food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration in Chapter 3, part 401.11 of its Food Code so as to prevent food borne illnesses; or
 - * C. food sold with eating utensils “provided by the seller,” including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food; provided however, that:**
- (ii) "Prepared food" does not include the following sold without eating utensils:

1. food sold by a seller whose proper primary NAICS classification is manufacturing in section 311, except subsector 3118 (bakeries);
2. food sold in an unheated state by weight or volume as a single item; or
3. bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.

Under the approved interpretation, a 75% Threshold Test was created to add consistency to the meaning of the term “provided by the seller.” The Division 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 includes sales of (a) prepared food under A and B of the definition of prepared food; and (b) food where plates, bowls, glasses or cups are necessary to receive the food (e.g., dispensed milk, fountain beverages, salad bar). Alcoholic beverages are not included in the numerator.

The denominator includes 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:

1. For sellers with a sales percentage of 75% or less, utensils are provided by the seller if the seller’s 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.
2. For sellers with a sales percentage greater than 75%, utensils are provided by the seller if they are merely made available to purchasers. Thus, utensils at a kiosk or common area are treated as utensils “provided by the seller.”
3. For sellers with a sales percentage greater than 75% 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 (e.g. ground coffee, whole cakes, loaves of bread). However, if the seller physically gives or hands a utensil to the purchaser, OR plates, bowls, glasses or cups are necessary for the purchaser to receive the food, then the item is considered prepared food. For example, a pizzeria sells 2-liter bottles of soda which customers may purchase for on-premises consumption. The pizzeria makes cups available for such use. In this transaction, the 2-liter bottle of soda for on-premise consumption is taxable as 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.

4. 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 a manufacturer (sector 311), the seller shall not be considered to have provided the utensil except as provided in 1-3 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.

5. 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.

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

7. 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.