

SPECIAL NOTICE

November 19, 2003

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Food and Food Ingredients — Sales Tax Changes SB 5783 (Chapter 168, Laws of 2003)

Effective January 1, 2004, Washington State will adopt food definitions based on the national Streamlined Sales and Use Tax Agreement. The changes significantly affect the application of **retail sales tax** to food products, including food ingredients, beverages, and prepared food items. (Food sellers are subject to retailing business and occupation (B&O) tax even if the food sale is exempt from retail sales tax.) Please note that all food purchases made with food stamps remain tax-free. This notice provides an outline of the new definitions and the major tax changes they create.

“Food and Food Ingredients” (except prepared foods, dietary supplements and soft drinks) are exempt from sales tax. Food and food ingredients mean substances, whether in liquid, frozen, concentrated, dried, etc. form sold for ingestion or chewing by humans for taste and nutritional value other than alcoholic beverages and tobacco products.

However, **“Prepared Foods,” “Dietary Supplements,”** and **“Soft Drinks”** are **taxable**. The definitions of these three terms are provided below.

Prepared Foods

“Prepared Foods” are products that meet **any one** of the following three criteria:

- 1) Food sold in a heated state or heated *by the seller*,
- 2) Food sold with eating utensils provided *by the seller*,
(Utensils include plates, knives, forks, spoons, glasses, cups, napkins, or straws, but do not include containers or packaging used to carry the food.)
- 3) Two or more food ingredients mixed or combined *by the seller* for sale as a single item **unless the product is:**
 - ✓ Only cut, repackaged, or pasteurized *by the seller*;
 - ✓ A bakery item;
 - ✓ Contains raw eggs, fish, meat, poultry, and foods containing these raw foods that require cooking by the consumer as recommended by the Food and Drug Administration (FDA) under chapter 3, part 401.11 of the Food Code to prevent food borne illness.

Products meeting any of these criteria are not “prepared foods” and are sales tax exempt unless they are sold in a heated state or heated by the seller, or sold with eating utensils provided by the seller.

“Prepared foods” include unsealed beverages, such as hot and iced coffee, tea, fountain drinks and milkshakes. These products are subject to sales tax. “Prepared foods” do not include sealed beverages, canned goods, and other food products boxed, bottled, or otherwise packaged and sealed by someone other than the retailer.



Examples of taxable prepared foods:

- ❖ Beverages prepared by the seller (hot and iced coffee, tea, milkshake, fountain drinks);
- ❖ Meals sold with a plate, napkin or fork, etc. provided by the seller;
- ❖ Unsealed beverages sold in a cup or with a cup, straw or napkin provided by the seller;
- ❖ Bakery products heated by the seller for the consumer; and
- ❖ Pizza prepared by the seller and sold uncooked, cooked or by the slice.

Whether or not the seller is required to have a food handler's permit is no longer a factor in determining taxability.

The following is a discussion of various types of businesses that sell food products and how retail sales tax applies.

Grocery Stores — Grocery stores, convenience stores, and department stores are businesses that primarily sell prepackaged food products. **Generally, food products sold by grocery stores, convenience stores, and department stores are tax exempt**, unless the products sold are prepared foods, dietary supplements or soft drinks.

However, hot or iced coffee, fountain beverages, and hot food items are “prepared foods” and grocery stores, convenience stores, and department stores must collect retail sales tax on the sale of these and similar prepared food products.

In addition, the food products sold by *delicatessen and eating establishment sections in grocery stores must be taxed separately* from products sold from the rest of the store. (See “Eating Establishments” below.)

Bakeries — Bakeries are businesses that produce bakery items which are primarily sold in bulk and includes the bakery section of grocery stores. **Generally, bakery items sold by bakeries are tax exempt** because bakery items are excluded from the “combining of two or more ingredients” criterion of prepared foods and there is a presumption that the items are not heated nor are utensils provided by the seller. For example, merely placing a stack of small plates by bins of baked goods does not constitute “utensils provided by the seller.”

However, doughnut and cookie shops are not considered bakeries. They are eating establishments. (See below.)

Eating Establishments — Eating establishments include restaurants and all other places of business where food is served and/or customarily sold for consumption shortly after it is sold. **Generally, eating establishments must collect retail sales tax on all sales** because there is a presumption that at least one of the “prepared food” criteria (sold heated, sold with utensils, or the seller combines two or more ingredients) is met. This includes sales by doughnut and cookie shops.

However, some eating establishments, such as **delicatessens**, typically sell foods that do not meet the “prepared food” criteria. Examples include sliced meats and cheeses, and unheated food, such as potato salad, prepared by a third party and sold in bulk without utensils by the deli. Similarly, doughnut and cookie shops often sell their products in bulk (one dozen or more) in the manner of a bakery. These establishments can make bulk sales tax-exempt *provided* the sales are adequately segregated. Otherwise retail sales tax must be collected on all sales.

Dietary Supplements

“**Dietary Supplements**” are any products that meet *all three* of the following criteria:

- ◆ They are required to be labeled as a dietary supplement with a “Supplement Facts” box as required under 21 Code of Federal Regulation (CFR) Sec. 101.36, **and**

- ◆ They contain a vitamin, mineral, herb or other botanical ingredient; amino acid; dietary substance taken to increase dietary intake; or a concentrate, metabolite, constituent, extract, or combination of the ingredients listed above, **and**
- ◆ They are intended for ingestion in tablet, capsule, powder, soft gel cap, liquid form, or are otherwise not represented as conventional food or for use as the sole component of a meal or diet.

Products labeled with both a “Supplement Facts” box and a “Nutrition Facts” box are a “food” or “food ingredient.” These are tax-exempt unless they are a “soft drink” or a “prepared food.”

Soft Drinks

“**Soft Drinks**” are nonalcoholic beverages sold in sealed containers that contain natural or artificial sweeteners. However, beverages that contain any milk, milk products, or milk substitutes or that contain more than 50% vegetable or fruit juice by volume are not defined as “soft drinks” and are tax-exempt even if they contain sweeteners. “Soft drinks” do not include frozen, powdered, or concentrated beverages. Nor do they include beverages prepared by the seller, or served with a utensil provided by the seller such as coffee or soda pop sold from a fountain. Carbonation is no longer a factor in determining taxability.

Taxability of Sealed Beverages	
Taxable	Tax-exempt
<p>Soft Drinks (sweetened, 50% or less fruit/vegetable juice, no milk or milk substitutes):</p> <ul style="list-style-type: none"> ◆ Sports drinks ◆ Bottled tea/coffee, sweetened, no milk ◆ Lemonade ◆ Soda pop ◆ Tonic water ◆ Flavored water with sweeteners ◆ “Juices” with 50% or less fruit juice ◆ “Energy” drinks <p>* Sales of fountain drinks are taxable because they are “prepared foods” (sold with eating utensils — cups, straws, lids).</p>	<ul style="list-style-type: none"> ◆ Bottled water ◆ Sparkling water ◆ Mineral water ◆ Club soda ◆ Seltzer ◆ Beverages with over 50% fruit juice ◆ Beverages with over 50 % vegetable juice ◆ Beverages with milk or milk product ◆ Canned or bottled coffee drinks with cream or milk ◆ Beverages with soy, rice or similar milk substitutes

Miscellaneous Food Sales

Changes:

Sales of Ice — Ice sold for human consumption is considered a food or food ingredient and is tax-exempt. “Ice sold for human consumption” means ice sold in cubes, shaved or crushed form and in quantities of ten pounds or less in weight per bag or container. Blocks of ice of any weight are not considered a food or food ingredient and are taxable.

Food Sold at Locations with an Admission Charge — Sales of otherwise tax-exempt foods, such as boxes of candy at movie theaters and fairs are no longer taxable.

Unchanged:

Nutrition Programs — Meals sold under a state administered nutrition program for the aged and meals sold to senior citizens, disabled persons, and low-income persons by a nonprofit organization remain **tax-exempt**.

Food Stamp Sales — Eligible foods under the Food Stamp Act of 1977 purchased with food coupons remain exempt from retail sales tax.

The Department of Revenue is in the process of amending WAC 458-20-244. Persons selling food products should refer to this administrative rule.

To inquire about the availability of this document in an alternate format for the visually impaired, please call (360) 486-2342. Teletype (TTY) users please call 1-800-451-7985.

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**Important Information on
Sales Tax Changes on Food & Food Ingredients
Effective January 1, 2004**
