

8130.4705 FOOD SOLD WITH EATING UTENSILS.

Subpart 1. **Eating utensils provided by seller.** The sale of food sold with eating utensils provided by the seller is one of the conditions that meets the definition of prepared food in Minnesota Statutes, section 297A.61, subdivision 31. Examples of "eating utensils" include plates, bowls, knives, forks, chopsticks, spoons, glasses, cups, napkins, or straws. A "plate" does not include a container or packaging used to transport food. Some foods, such as foods containing certain raw animal foods requiring cooking by the consumer, and bakery items, which otherwise are excepted from the definition of prepared food, are prepared food if they meet the condition of Minnesota Statutes, section 297A.61, subdivision 31, clause (1), "food sold with eating utensils provided by the seller." This part explains when eating utensils are considered to be provided by the seller.

Subp. 2. **Seller's practice to physically give or hand utensil to the customer.** Food is sold with eating utensils provided by the seller if the seller's practice for the item, as represented by the seller, is to physically give or hand a utensil to the customer with the food as part of the sales transaction. For purposes of this part, the seller's practice to "physically give or hand" a utensil to the customer means:

- A. it is the seller's practice to hand the utensil to the customer along with the food;
- B. it is the seller's practice to place the utensil in a package containing the customer's food, including prepackaged food when the seller places the utensil in the package;
- C. it is the seller's practice to sell food with a utensil that has been prepackaged by a person other than the seller, except when the person who originally placed the utensils in the package has a North American Industry Classification System (NAICS) classification code of a manufacturer, sector 311, the utensil is not provided by the seller; or
- D. it is the seller's practice to place the utensil on a table, counter, or similar surface for the customer to use. A utensil previously placed by the seller, for example, as part of a place setting, is considered physically given to the customer. For purposes of this item, "table, counter, or similar surface" means furniture or surfaces where a customer sits or stands to eat.

Subp. 3. **Seller makes utensils available to the customer.** Food is sold with eating utensils provided by the seller when the seller makes the utensils available to the customer under the following circumstances:

- A. if a plate, glass, cup, or bowl is necessary to receive the food from the seller; for example, milk dispensed from a milk dispenser is sold with an eating utensil provided by the seller because the customer must use a glass in order to receive the milk; or
- B. if the seller's prepared food sales percentage, as determined in subpart 5, is greater than 75 percent; except that

C. in the case of a food item that contains four or more servings packaged as one item sold for a single price, as provided for in subpart 4, even if the sales percentage of prepared food is greater than 75 percent, a utensil is not provided by the seller merely because the seller makes the utensil available.

Subp. 4. **Four or more servings packaged as one item.** When a food item that contains four or more servings packaged as one item is sold for a single price, eating utensils are considered provided by the seller if it is the seller's practice to physically give or hand the utensils to the customer as described in subpart 2, and the following items apply.

A. The number of servings in an item is as shown on the label on the item sold. In the absence of a label, a seller shall make a reasonable determination of the number of servings in the item.

B. For purposes of this subpart, "packaged" means that the food item is placed in a package by the seller or the customer either prior to or following the selection of the food.

C. For purposes of this subpart, "single price" means one price for the entire contents of the packaged food. If the food item consists of more than one serving and the seller charges for each individual serving in the package, then the sale is not "one item sold for a single price."

Subp. 5. **Determination of prepared food sales percentage.** The seller shall determine the prepared food sales percentage as provided in this subpart.

A. Annually, the seller shall determine a single prepared food sales percentage for all of the seller's establishments in this state combined.

B. The seller shall calculate the prepared food sales percentage as follows:

(1) add together the total sales of food where plates, bowls, glasses, or cups are necessary to receive the food from the seller, but not including alcoholic beverages, and the total sales of prepared food that meets the condition provided in Minnesota Statutes, section 297A.61, subdivision 31, clause (2), for all of the seller's establishments in this state combined; and

(2) divide the result of subitem (1) by the seller's total sales of all food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks, but not including alcoholic beverages, for all of the seller's establishments in this state combined.

C. The seller shall calculate the percentage either each tax year or each business fiscal year, based on the seller's data from the prior tax year or business fiscal year.

D. The seller shall calculate and apply the percentage as soon as possible after accounting records are available to the seller, but not later than 90 days after the beginning of the tax or business fiscal year, whichever is used for the annual calculation.

E. Notwithstanding item C, if the seller has a new establishment in this state, the following subitems apply.

(1) The seller shall make a good faith estimate of the seller's prepared food sales percentage for the seller's first year.

(2) If the seller has both new and established businesses in this state, the seller shall combine the good faith estimate for the new establishment and the data from the prior tax year or business fiscal year for the established businesses.

(3) After the first three months of operation of the new establishment, if actual sales of the new establishment are such that the prepared food sales percentage for all of the seller's establishments in this state combined, either decreases from greater than 75 percent to 75 percent or less, or increases from 75 percent or less to greater than 75 percent, the seller shall adjust the seller's good faith estimate and apply it prospectively.

F. "Seller's establishments" means business operations in Minnesota owned by the same person, as defined in Minnesota Statutes, section 297A.61, subdivision 2, paragraphs (a) and (b).

Subp. 6. Examples.

A. The following subitems are examples of utensils originally placed in a package by a person other than the seller.

(1) A caterer sells a boxed lunch with utensils packaged inside to a concessionaire who sells the boxed lunch. The caterer has a North American Industry Classification System (NAICS) classification code of sector 722. The concessionaire provides the eating utensils when selling the boxed lunch to a customer, and the boxed lunch is prepared food.

(2) A food manufacturer packages ready-to-eat lunches with eating utensils and sells to a grocer. Since the person that sold the packages to the grocer has a North American Industry Classification System (NAICS) classification code of a manufacturer, sector 311, the grocer is not providing the eating utensils with the food when selling the ready-to-eat lunch. Other examples of utensils provided by a manufacturer include snack package combinations of cheese and crackers that contain a spreader, ice cream cups that are packaged with wooden or plastic spoons, and juice boxes that are packaged with drinking straws. However, when the grocer physically gives or hands a utensil to the customer along with the item, the utensil given by the grocer is "provided by the seller."

B. The following subitems are examples explaining whether a food item that contains four or more servings packaged as one item is sold for a "single price."

(1) A restaurant, with a convenience food area near the cash register, sells a package of cinnamon rolls, labeled at 12 servings, for \$5.98, an apple for 75 cents,

and a single-serving container of milk for 49 cents. There is a napkin dispenser and a drinking straw dispenser on a counter nearby. The restaurant is owned by a seller whose establishments in this state have a combined prepared food sales percentage of 85 percent, meaning that for most of the restaurant's sales of food, the seller only has to make utensils available to the customer. Since the package of cinnamon rolls has four or more servings and it is sold for a single price, the seller is not providing a utensil in its sale of the cinnamon rolls simply because a utensil is available for the customer, and therefore the cinnamon rolls are not prepared food. The utensils are provided by the seller for the apple and the single-serving container of milk, since the utensils are available.

(2) A bakery, owned by a seller whose establishments in this state combined have a sales percentage of 80 percent, sells fruit pies it baked at \$2 a slice. Each slice equals one serving. Five slices are packaged and sold for \$9.40. The sales receipt simply provides that the price of the apple pie is \$9.40. This package is sold for a single price. Since the item of four or more servings is sold for a single price, the item is not considered prepared food unless the utensils are physically given or handed to the customer, even if the seller has utensils available to the customer.

(3) As described in subitem (2), the customer purchases five slices of apple pie and the slices are packaged in one container. The sales receipt, however, indicates that the slices are sold five at \$2 each, for a total price of \$10. This package is not sold for a single price, since the seller charged \$2 for each slice in the package, as shown by the sales receipt. Therefore, if the seller has utensils available to the customer, the utensils are considered to be provided by the seller, meaning that the pie slices are considered prepared food and are subject to tax. However, if the bakery neither has utensils available, nor hands or gives utensils to the customer, then the bakery items are not considered prepared food.

C. The following subitems are examples of combined sales from a seller's establishments for purposes of the prepared food sales percentage under subpart 5.

(1) A partnership owns two business operations in Minnesota, both restaurants. The partnership is a person, under Minnesota Statutes, section 297A.61, subdivision 2, and therefore the sales from both restaurants are combined by the partnership for purposes of calculating the prepared food sales percentage under subpart 5.

(2) A sole proprietor of a small grocery store is one of the partners in the example in subitem (1). The partnership does not combine the sales from the grocery store with the sales from the restaurants because the partnership does not own the grocery store. Similarly, the sole proprietor does not combine the sales from the restaurants with the sales from its grocery store, as the partnership owns the restaurants, not the sole proprietor. The sole proprietor calculates the prepared food sales percentage based on the sales from the grocery store and any other establishments owned by the sole proprietor.

(3) Corporation X owns three cafeterias and one sandwich shop. Corporation Y owns a convenience store. Corporation Z owns 100 percent of the shares of both Corporations X and Y. While Corporation Z owns the two corporations, it is not the person that owns the business operations, and therefore does not combine the sales of Corporations X and Y. Rather, Corporation X calculates the prepared food sales percentage based on the sales from its cafeterias and sandwich shop, and Corporation Y calculates the prepared food sales percentage based on the sales from its convenience store.

Subp. 7. **Other prepared food.** Notwithstanding the application of subparts 1 through 6, if a food is considered "prepared food" under Minnesota Statutes, section 297A.61, subdivision 31, clause (2), because it is sold in a heated state or heated by the seller, or because the seller mixed or combined two or more food ingredients as a single item, excepting the foods listed in Minnesota Statutes, section 297A.61, subdivision 31, clause (2), items (i) through (iv), the food is still taxed as prepared food.

Example: a pizzeria prepares, heats, and sells pizzas by the slice solely for pick-up, and does not have any utensils available or given to the customer. The business has a prepared food sales percentage greater than 75 percent, so that it only need have utensils available for any food sold at the establishment for the utensils to be considered "provided by the seller." However, the fact that no utensils are provided by the seller does not mean that the pizza is not prepared food. Rather, it is prepared food because it is heated by the seller and also because the seller combines food ingredients and sells it as a single item.

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