

1 Department of Revenue
2 Adopted Permanent Rules Governing the Sales and Use Tax on Food
3 Sold with Eating Utensils

4 8130.4705 FOOD SOLD WITH EATING UTENSILS.

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

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

27 A. it is the seller's practice to hand the utensil to

1 the customer along with the food;

2 B. it is the seller's practice to place the utensil
3 in a package containing the customer's food, including
4 prepackaged food when the seller places the utensil in the
5 package;

6 C. it is the seller's practice to sell food with a
7 utensil that has been prepackaged by a person other than the
8 seller, except when the person who originally placed the
9 utensils in the package has a North American Industry
10 Classification System (NAICS) classification code of a
11 manufacturer, sector 311, the utensil is not provided by the
12 seller; or

13 D. it is the seller's practice to place the utensil
14 on a table, counter, or similar surface for the customer to
15 use. A utensil previously placed by the seller, for example, as
16 part of a place setting, is considered physically given to the
17 customer. For purposes of this item, "table, counter, or
18 similar surface" means furniture or surfaces where a customer
19 sits or stands to eat.

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

24 A. if a plate, glass, cup, or bowl is necessary to
25 receive the food from the seller; for example, milk dispensed
26 from a milk dispenser is sold with an eating utensil provided by
27 the seller because the customer must use a glass in order to

1 receive the milk; or

2 B. if the seller's prepared food sales percentage, as
3 determined in subpart 5, is greater than 75 percent; except that

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

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

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

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

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

1 Subp. 5. Determination of prepared food sales percentage.

2 The seller shall determine the prepared food sales percentage as
3 provided in this subpart.

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

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

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

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

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

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

1 for the annual calculation.

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

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

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

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

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

24 Subp. 6. **Examples.**

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

27 (1) A caterer sells a boxed lunch with utensils

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

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

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

22 (1) A restaurant, with a convenience food area
23 near the cash register, sells a package of cinnamon rolls,
24 labeled at 12 servings, for \$5.98, an apple for 75 cents, and a
25 single-serving container of milk for 49 cents. There is a
26 napkin dispenser and a drinking straw dispenser on a counter
27 nearby. The restaurant is owned by a seller whose

1 establishments in this state have a combined prepared food sales
2 percentage of 85 percent, meaning that for most of the
3 restaurant's sales of food, the seller only has to make utensils
4 available to the customer. Since the package of cinnamon rolls
5 has four or more servings and it is sold for a single price, the
6 seller is not providing a utensil in its sale of the cinnamon
7 rolls simply because a utensil is available for the customer,
8 and therefore the cinnamon rolls are not prepared food. The
9 utensils are provided by the seller for the apple and the
10 single-serving container of milk, since the utensils are
11 available.

12 (2) A bakery, owned by a seller whose
13 establishments in this state combined have a sales percentage of
14 80 percent, sells fruit pies it baked at \$2 a slice. Each slice
15 equals one serving. Five slices are packaged and sold for
16 \$9.40. The sales receipt simply provides that the price of the
17 apple pie is \$9.40. This package is sold for a single price.
18 Since the item of four or more servings is sold for a single
19 price, the item is not considered prepared food unless the
20 utensils are physically given or handed to the customer, even if
21 the seller has utensils available to the customer.

22 (3) As described in subitem (2), the customer
23 purchases five slices of apple pie and the slices are packaged
24 in one container. The sales receipt, however, indicates that
25 the slices are sold five at \$2 each, for a total price of \$10.
26 This package is not sold for a single price, since the seller
27 charged \$2 for each slice in the package, as shown by the sales

1 receipt. Therefore, if the seller has utensils available to the
2 customer, the utensils are considered to be provided by the
3 seller, meaning that the pie slices are considered prepared food
4 and are subject to tax. However, if the bakery neither has
5 utensils available, nor hands or gives utensils to the customer,
6 then the bakery items are not considered prepared food.

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

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

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

27 (3) Corporation X owns three cafeterias and one

1 sandwich shop. Corporation Y owns a convenience store.
2 Corporation Z owns 100 percent of the shares of both
3 Corporations X and Y. While Corporation Z owns the two
4 corporations, it is not the person that owns the business
5 operations, and therefore does not combine the sales of
6 Corporations X and Y. Rather, Corporation X calculates the
7 prepared food sales percentage based on the sales from its
8 cafeterias and sandwich shop, and Corporation Y calculates the
9 prepared food sales percentage based on the sales from its
10 convenience store.

11 Subp. 7. **Other prepared food.** Notwithstanding the
12 application of subparts 1 through 6, if a food is considered
13 "prepared food" under Minnesota Statutes, section 297A.61,
14 subdivision 31, clause (2), because it is sold in a heated state
15 or heated by the seller, or because the seller mixed or combined
16 two or more food ingredients as a single item, excepting the
17 foods listed in Minnesota Statutes, section 297A.61, subdivision
18 31, clause (2), items (i) through (iv), the food is still taxed
19 as prepared food.

20 Example: a pizzeria prepares, heats, and sells pizzas
21 by the slice solely for pick-up, and does not have any
22 utensils available or given to the customer. The
23 business has a prepared food sales percentage greater
24 than 75 percent, so that it only need have utensils
25 available for any food sold at the establishment for
26 the utensils to be considered "provided by the
27 seller." However, the fact that no utensils are

07/10/07

[REVISOR] JMR/RC AR3699

1 provided by the seller does not mean that the pizza is
2 not prepared food. Rather, it is prepared food
3 because it is heated by the seller and also because
4 the seller combines food ingredients and sells it as a
5 single item.