

This rule draft is being proposed under an expedited rule-making process that does not require the agency to hold public hearings. Under no circumstances is this proposed rule to be used as a basis for determining tax liability or eligibility for a tax deduction, exemption, or credit.

AMENDATORY SECTION (Amending WSR 07-11-066, filed 5/14/07, effective 6/14/07)

WAC 458-20-244 Food and food ingredients. (1)

Introduction.

(a) **What is the purpose of this section?** This section, WAC 458-20-244, provides guidelines for determining if food or food ingredients qualify for the retail sales tax and use tax exemptions under RCW 82.08.0293 and 82.12.0293 (collectively referred to in this section as the "exemptions").

There is no corresponding business and occupation (B&O) tax exemption. Even if a sale of food or food ingredients is exempt from retail sales tax or use tax under the exemptions, gross proceeds from sales of food or food ingredients remain subject to the retailing B&O tax.

(b) **How has the law changed since the prior version of this section was published?** In 2003 and 2004, the legislature amended RCW 82.08.0293 and 82.12.0293 to comply with the national Streamlined Sales and Use Tax Agreement. These amendments alter the definitions used to determine whether a particular food or food ingredient qualifies for the exemptions.

(c) **What other sections might apply?** The following sections may contain additional relevant information:

WAC 458-20-119 (Sales of meals);

WAC 458-20-124 (Restaurants, cocktail bars, taverns and similar businesses);

WAC 458-20-12401 (Special stadium sales and use tax);

WAC 458-20-166 (Hotels, motels, boarding houses, rooming houses, resorts, summer camps, trailer camps, etc.);

WAC 458-20-167 (Education institutions, school districts, student organizations, and private schools);

WAC 458-20-168 (Hospitals, medical care facilities, and adult family homes); and

WAC 458-20-169 (Nonprofit organizations).

(2) What qualifies for the exemptions?

(a) **In general.** The exemptions apply to food and food ingredients. "Food and food ingredients" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.

(b) **Items not used solely for ingestion or chewing.** Items that are commonly ingested or chewed by humans for their taste or nutritional value but which may also be used for other purposes are generally treated as food or food ingredients. For example, pumpkins are presumed to be a food or food ingredient unless the pumpkin is sold painted or is otherwise clearly for decorative purposes rather than consumption. This is true even though the purchaser may use an undecorated pumpkin for carving and display rather than for eating.

(3) What does not qualify for the exemptions? The

exemptions do not apply to the following items, which are not considered "food or food ingredients" or which are otherwise specifically excluded from the exemptions:

(a) **Items sold for medical or hygiene purposes.** Items commonly used for medical or hygiene purposes, such as cough drops, breath sprays, toothpaste, etc., are not ingested for taste or nutrition and are not considered a food or food ingredient. In contrast, breath mints are commonly ingested for taste and are considered a food or food ingredient.

(b) **Bulk sales of ice.** Ice sold in bags, containers, or units of greater than ten pounds and blocks of ice of any weight are not considered a food or food ingredient. Ice sold in cubed, shaved, or crushed form in packages or quantities of ten pounds or less is considered a food or food ingredient. Refer to WAC 458-20-120 (Sales of ice) for additional guidance on the sale of ice.

(c) **Alcoholic beverages.** Alcoholic beverages are excluded from the definition of food and food ingredients. "Alcoholic beverages" means beverages that are suitable for human consumption and contain one-half of one percent or more of alcohol by volume.

(d) **Tobacco.** Tobacco is excluded from the definition of food and food ingredients. "Tobacco" includes cigarettes, cigars, chewing or pipe tobacco, or any other items that contain tobacco.

(e) **Soft drinks.** Soft drinks are excluded from the exemptions. "Soft drinks" means any nonalcoholic beverage that

contains natural or artificial sweeteners, except beverages that contain:

Milk or milk products;

Soy, rice, or similar milk substitutes; or

More than fifty percent by volume of vegetable or fruit juice.

For example, sweetened sports beverages are considered "soft drinks," but a sweetened soy beverage is a food or food ingredient.

Beverage mixes that are not sold in liquid form are not soft drinks even though they are intended to be made into a beverage by the customer. Examples include powdered fruit drinks, powdered tea or coffee drinks, and frozen concentrates. These items are a food or food ingredient and are not subject to retail sales tax.

(f) **Dietary supplements.** Dietary supplements are excluded from the exemptions. "Dietary supplement" means any product intended to supplement the diet, other than tobacco, which meets all of the following requirements:

Contains a vitamin; mineral; herb or other botanical; amino acid; a substance for use by humans to increase total dietary intake; or a concentrate, metabolite, constituent, extract; or combination of any of them;

Is intended for ingestion in tablet, capsule, powder, soft gel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and

Is required to be labeled with a Food and Drug Administration "supplement facts" box. If a product is otherwise considered a food or food ingredient and labeled with both a "supplement facts" box and "nutrition facts" box, the product is treated as a food or food ingredient.

Nutrition products formulated to provide balanced nutrition as a sole source of a meal or of the diet are considered a food or food ingredient and not a dietary supplement. Refer to RCW 82.08.925 for information on the sales tax exemption applicable to dietary supplements dispensed under a prescription.

(g) **Prepared food.** Prepared food is excluded from the exemptions. Prepared food generally means heated foods, combined foods, or foods sold with utensils provided by the seller, as described in more detail in subsection (4) of this section. "Prepared food" does not include food sold by a seller whose proper primary North American industry classification system (NAICS) classification is manufacturing in sector 311, except subsector 3118 (bakeries), unless the food is sold with utensils provided by the seller (see subsection (4)(c) of this section).

(4) **What is "prepared food"?** Food or food ingredients are "prepared foods" if any one of the following are true:

(a) **Heated foods.** Food or food ingredients are "prepared foods" if sold in a heated state or are heated by the seller, except bakery items. "Bakery items" include bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.

Food is sold in a heated state or is heated by the seller when the seller provides the food to the customer at a temperature that is higher than the air temperature of the seller's establishment. Food is not sold in a heated state or heated by the seller if the customer, rather than the seller, heats the food in a microwave provided by the seller.

(b) **Combined foods.** Food or food ingredients are "prepared foods" if the item sold consists of two or more foods or food ingredients mixed or combined by the seller for sale as a single item, unless the food or food ingredients are any of the following:

Bakery items (defined in (a) of this subsection);

Items that the seller only cuts, repackages, or pasteurizes;

Items that contain eggs, fish, meat, or poultry, in a raw or undercooked state requiring cooking as recommended by the federal Food and Drug Administration in chapter 3, part 401.11 of *The Food Code*, published by the Food and Drug Administration, as amended or renumbered as of January 1, 2003, so as to prevent foodborne illness; or

Items sold in an unheated state as a single item at a price that varies based on weight or volume.

(c) **Food sold with utensils provided by the seller.** Food or food ingredients are "prepared foods" if sold with utensils provided by the seller. Utensils include plates, knives, forks, spoons, glasses, cups, napkins, and straws. A plate does not include a container or packaging used to transport the food.

(i) **Utensils are customarily provided by the seller.** A food or food ingredient is "sold with utensils provided by the seller" if the seller's customary practice for that item is to physically deliver or hand a utensil to the customer with the food or food ingredient as part of the sales transaction. If the food or food ingredient is prepackaged with a utensil, the seller is considered to have physically delivered a utensil to the customer unless the food and utensil are prepackaged together by a food manufacturer classified under sector 311 of the NAICS. Examples of utensils provided by such manufacturers include juice boxes that are packaged with drinking straws, and yogurt or ice cream cups that are packaged with wooden or plastic spoons.

(ii) **Utensils are necessary to receive the food.** Individual food or food ingredient items are "sold with utensils provided by the seller" if a plate, glass, cup, or bowl is necessary to receive the food or food ingredient and the seller makes those utensils available to its customers. For example, items obtained from a self-serve salad bar are sold with utensils provided by the seller, because the customer must use a bowl or plate provided by the seller in order to receive the items.

(iii) **More than seventy-five percent prepared food sales with utensils available.** All food and food ingredients sold at an establishment, including foods prepackaged with a utensil by a manufacturer classified under sector 311 of the NAICS, are "sold with utensils provided by the seller" if the seller makes

utensils available to its customers and the seller's gross sales of prepared food under (a), (b), and (c)(ii) of this subsection equal more than seventy-five percent of the seller's gross sales of all food and food ingredients, including prepared food, soft drinks, and dietary supplements.

(A) **Exception for four or more servings.** Even if a seller has more than seventy-five percent prepared food sales, four servings or more of food or food ingredients packaged for sale as a single item and sold for a single price are not "sold with utensils provided by the seller" unless the seller's customary practice for the package is to physically hand or otherwise deliver a utensil to the customer as part of the sales transaction. Whenever available, the number of servings included in a package of food or food ingredients is to be determined based on the manufacturer's product label. If no label is available, the seller must reasonably determine the number of servings.

(B) **Determining total sales of prepared foods.** The seller must determine a single prepared food sales percentage annually for all the seller's establishments in the state based on the prior year of sales. The seller may elect to determine its prepared food sales percentage based either on the prior calendar year or on the prior fiscal year. A seller may not change its elected method for determining its prepared food percentage without the written consent of the department of revenue. The seller must determine its annual prepared food sales percentage as soon as possible after accounting records

are available, but in no event later than ninety days after the beginning of the seller's calendar or fiscal year. A seller may make a good faith estimate of its first annual prepared food sales percentage if the seller's records for the prior year are not sufficient to allow the seller to calculate the prepared food sales percentage. The seller must adjust its good faith estimate prospectively if its relative sales of prepared foods in the first ninety days of operation materially depart from the seller's estimate.

(d) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(i) **Example 1.** Fast Cafe sells hot and cold coffee and mixed coffee and mixed milk beverages, cold soft drinks, bottled water, milk and juice in single-serving containers, sandwiches, whole fruits, cold pasta salad, cookies and other pastries. Fast Cafe prepares the pasta salad on-site. It orders the pastries from a local bakery, including specialty cakes which it sells both as whole cakes and by the slice. It purchases its sandwiches from a local caterer. The sandwiches are delivered by the caterer prewrapped in plastic with condiments and a plastic knife. Fast Cafe makes straws, napkins and cup lids available for all customers by placing them on a self-service stand. In its first full year of operation, Fast Cafe's annual gross sales of all food and food ingredients, including prepared

food, soft drinks, and dietary supplements is \$100,000. Of this gross sales total, \$80,000 is from the sale of hot coffee and hot and cold mixed coffee and milk beverages, all sold in disposable paper or plastic cups with the Fast Cafe logo.

Because more than seventy-five percent of Fast Cafe's total sales of food and food ingredients, including prepared food, soft drinks, and dietary supplements are sales of food or food ingredients that are heated or combined by the seller or sold with a utensil (cups) necessary to receive the food, Fast Cafe has more than seventy-five percent prepared food sales. Because Fast Cafe makes utensils available for its customers, all food and food ingredients sold by Fast Cafe are considered "prepared food," including the cold milk beverages, cookies and pastries, pasta salad, sandwiches and whole fruits. The only exception is the sale of whole specialty cakes. Because a whole cake contains four or more servings, it is not subject to retail sales tax unless Fast Cafe customarily hands a utensil to the customer as part of the sale transaction.

(ii) **Example 2.** Assume the same facts as in Example 1, but that only \$60,000 of Fast Cafe's Year 1 gross sales were sales of hot coffee and hot and cold mixed coffee and milk beverages. The remainder of its sales were sales of sandwiches, whole fruits, cookies and other pastries. Under these facts, Fast Cafe does not have more than seventy-five percent prepared food sales. Thus, the items sold by Fast Cafe are taxed as follows:

Hot coffee and milk beverages are heated by the seller and are also sold by Fast Cafe with a utensil (a paper cup)

necessary to receive the food. The hot coffee and milk beverages are "prepared food" for either reason and are subject to retail sales tax.

Cold mixed milk beverages are a combination of two or more foods or food ingredients and are also sold by Fast Cafe with a utensil (a paper or plastic cup) necessary to receive the food. The cold milk beverages are "prepared food" for either reason and are subject to retail sales tax.

Cold soft drinks are not exempt and are subject to retail sales tax.

Sandwiches prepared by the caterer are subject to retail sales tax. Even though the caterer, rather than the seller, combines the ingredients and includes a utensil, Fast Cafe is considered to have provided the utensil because the caterer is not a food manufacturer classified under sector 311 of the NAICS.

Pasta salad is combined by the seller and is subject to retail sales tax. Note that if the pasta salad was sold by the pound, rather than by servings, it would not be subject to retail sales tax.

Bottled water, milk and juice in single serving containers, whole fruit, cookies, pastries, slices of cake, and whole cakes are not subject to retail sales tax unless the seller's customary practice is to hand a utensil to the customer as part of the sales transaction. None of these items are heated by the seller, combined by the seller, or require a plate, glass, cup, or bowl in order to receive the item. Even

if Fast Cafe heats the pastries for its customers, the pastries are not subject to retail sales tax.

(iii) **Example 3.** A pizza restaurant sells whole hot pizzas, hot pizza by the slice, and unheated ready-to-bake pizzas. The whole hot pizzas and hot pizza sold by the slice, including delivered pizzas, are "prepared food" because these items are sold in a heated state. If the unheated ready-to-bake pizzas are prepared by the seller, they are "prepared food" because the seller has mixed or combined two or more food ingredients. This is true even though some ingredients in the unheated pizzas are raw or uncooked, because those ingredients do not require cooking to prevent foodborne illness. If the unheated ready-to-bake pizzas are prepared by a manufacturer other than the seller, they will be taxable as "prepared food" only if sold with utensils provided by the seller.

(5) **How are combined sales of taxable and exempt items taxed?**

(a) **Combined sales.** Where two or more distinct and identifiable items of tangible personal property, at least one of which is a food or food ingredient, are sold for one nonitemized price that does not vary based on the selection by the purchaser of items included in the transaction:

The entire transaction is taxable if the seller's purchase price or sales price of the taxable items is greater than fifty percent of the combined purchase price or sales price; and

The entire transaction is exempt from retail sales tax if the seller's purchase price or sales price of the taxable items

is fifty percent or less of the combined purchase price or sales price.

The seller may make the determination based on either purchase price or sales price, but may not use a combination of the purchase price and sales price.

(b) **Examples.**

(i) A combination wine and cheese picnic basket contains four items packaged together: A bottle of wine, a wine opener, single-serving cheeses, and the picnic basket holding these items. The seller's purchase price for the wine, wine-opener, and picnic basket totals ten dollars. The seller's purchase price for the cheeses is two dollars. The seller must collect retail sales taxes on the entire package, because the seller's purchase price for the taxable items (ten dollars) is greater than fifty percent of the combined purchase price (twelve dollars).

(ii) A retailer sells a decorative jar containing individually wrapped candies for the selling price of twelve dollars. The retailer sells the decorative jar by itself for the price of five dollars. The retailer's selling price for the candy alone is seven dollars. The retailer is not required to collect retail sales taxes on the decorative jar filled with candies, because the retailer's selling price for the tax exempt candies is greater than its selling price for the taxable jar.

(c) **Incidental packaging.** "Distinct and identifiable items" does not include packaging which is immaterial or incidental to the sale of another item or items. For example, a

decorative bag sold filled with candy is not the sale of "distinct and identifiable" items where the bag is merely ornamental packaging immaterial in the sale of the candy.

(d) **Free items.** "Distinct and identifiable items" does not include items provided free of charge. An item is only provided free of charge if the seller's sales price does not vary depending on whether the item is included in the sale.

(6) **What are the seller's accounting requirements?** All sales of food and food ingredients at an establishment will be treated as taxable unless the seller separately accounts for sales of exempt and nonexempt food and food ingredients. It is sufficient separation for accounting purposes if cash registers or the like are programmed to identify items that are not tax exempt and to calculate and assess the proper sales tax accordingly.

(7) **Are there any other retail sales tax exemptions that apply?**

(a) **Meals served by not-for-profit organizations.** The exemptions apply to meals sold under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040, and meals sold to or for senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW. The exemptions apply even if the meals would otherwise be considered prepared food.

(b) **Foods exempt under the Federal Food Stamp Act.** Under RCW 82.08.0297, eligible foods under the Food Stamp Act of 1977

purchased with food coupons are exempt from the retail sales tax. This is a separate and broader exemption than the retail sales exemption for food and food ingredients under RCW 82.08.0293. For example, soft drinks and garden seeds are "eligible foods" but are not a "food or food ingredients." If such items are purchased with food coupons, they are exempt from the retail sales tax under RCW 82.08.0297, even though the items do not qualify for the exemption under RCW 82.08.0293.

(i) **Definition of food coupons.** The term "food coupons," as used in this subsection means any coupon, stamp, type of certificate, authorization card, cash or check issued in lieu of a coupon, or access device, including an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food Stamp Act of 1977. See 7 CFR § 271.2, as amended or renumbered as of January 1, 2003.

(ii) **Use of food coupons combined with other means of payment.** When both food coupons and other means of payment are used in the same sales transaction, for purposes of collecting retail sales taxes, the other means of payment shall be applied first to items which are food and food ingredients exempt under RCW 82.08.0293. The intent is to apply the coupons and other means of payment in such a way as to provide the greatest possible exemption from retail sales tax.

(iii) **Example.** A customer purchases the following at a grocery store: Meat for three dollars, cereal for three dollars, canned soft drinks for five dollars, and soap for two dollars for a total of thirteen dollars. The customer pays with

seven dollars in coupons and six dollars in cash. The cash is applied first to the soap because the soap is neither exempt under RCW 82.08.0293 nor an eligible food under the Food Stamp Act. The remaining cash (four dollars) is applied first to the meat and the cereal. The food stamps are applied to the balance of the meat and cereal (two dollars) and to the soft drinks (five dollars). Retail sales tax is due only on the soap.

(8) **Vending machine sales.** The exemptions do not apply to sales of food and food ingredients dispensed from vending machines. There are special requirements for reporting sales tax collected on vending machine sales, discussed in (a) of this subsection. "Honor box" sales (sales of snacks or other items from open display trays) are not considered vending machine sales.

(a) **Calculating and reporting retail sales tax collected on vending machine sales.** Vending machine owners do not need to state the retail sales tax amount separately from the selling price. See RCW 82.08.050(5) and 82.08.0293. Instead, vending machine owners must determine the amount of retail sales tax collected on the sale of food or food ingredients by using one of the following methods:

(i) **Food or food ingredients dispensed in a heated state.** For food or food ingredients dispensed from vending machines in a heated state (e.g., hot coffee, soups, tea, and hot chocolate), a vending machine owner must calculate the amount of retail sales tax that has been collected ("tax in gross") based on the gross vending machine proceeds. The "tax in gross" is a

deduction against the gross amount of both retailing B&O and retail sales. The formula is:

$$\text{gross machine proceeds} - \frac{(\text{gross machine proceeds})}{(1 + \text{sales tax rate})} = \text{tax in gross}$$

(ii) **All other food or food ingredients.** For all other food and food ingredients dispensed from vending machines, a vending machine owner must calculate the amount of retail sales tax that has been collected ("tax in gross") based on fifty-seven percent of the gross vending machine proceeds. The "tax in gross" is a deduction against the gross amount of both retailing B&O and retail sales. The formula is:

$$(\text{gross machine proceeds} \times .57) \times \text{sales tax rate} = \text{tax in gross}$$

The remaining 43% of the gross vending machine proceeds, less the "tax in gross" amount, is reported as an exempt food sales deduction against retail sales proceeds only calculated as follows:

$$(\text{gross machine proceeds} \times .43) - \text{tax in gross} = \text{exempt food deduction}$$

(b) **Example.** Jane owns a vending machine business with machines in Spokane and Seattle. In each location, she has a vending machine selling candy and water and a second vending machine selling hot cocoa and coffee drinks. Her annual sales for the vending machines and the combined retail sales tax rates for Seattle and Spokane are as follows:

	Coffee Machine (cocoa & coffee)	Candy Machine (candy & water)	Combined Retail Sales Tax Rate
Seattle	\$2,500	\$10,000	.088
Spokane	\$3,000	\$6,000	.086

To determine the amount of retail sales tax she collected on the sale of cocoa and coffee (food dispensed in a heated state), Jane calculates the "tax in gross" amount as follows:

$$\begin{aligned} & \text{gross machine proceeds} - \frac{(\text{gross machine proceeds})}{(1 + \text{sales tax rate})} = \text{tax in gross} \\ & \$2,500 - (\$2,500/1.088) = \$202.21 \quad (\text{Seattle coffee machine}) \\ & \$3,000 - (\$3,000/1.086) = \underline{\$237.57} \quad (\text{Spokane coffee machine}) \\ & \qquad \qquad \qquad \$439.78 \end{aligned}$$

Thus, for both retailing B&O and retail sales, Jane must report her total gross coffee machine proceeds of \$5,500 with a "tax in gross" deduction of \$439.78.

To determine the amount of retail sales tax she collected on the sale of candy(~~(, soft drinks)~~) and water, Jane calculates the "tax in gross" amount as follows:

$$\begin{aligned} & (\text{gross machine proceeds} \times .57) \times \text{sales tax rate} = \text{tax in gross} \\ & \$10,000 \times .57 \times .088 = \$501.60 \quad (\text{Seattle candy machine}) \\ & \$6,000 \times .57 \times .086 = \underline{\$294.12} \quad (\text{Spokane candy machine}) \\ & \qquad \qquad \qquad \$795.72 \end{aligned}$$

Thus, for both retailing B&O and retail sales, Jane must report her total gross candy machine proceeds of \$16,000 with a "tax in gross" deduction of \$795.72.

Jane must also report an exempt food sales deduction representing the remaining 43% of the gross candy machine proceeds.

$$\begin{aligned} & (43\% \times \text{gross machine proceeds}) - \text{tax in gross} = \text{exempt food deduction} \\ & \qquad \qquad \qquad (.43 \times \$16,000) - \$795.72 = \$6,084.28 \end{aligned}$$

Jane reports the exempt food sales deduction only against the gross amount of her retail sales. The deduction does not

apply to retailing B&O.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). 07-11-066, § 458-20-244, filed 5/14/07, effective 6/14/07; 03-24-031, § 458-20-244, filed 11/25/03, effective 1/1/04. Statutory Authority: RCW 82.32.300. 88-15-066 (Order 88-4), § 458-20-244, filed 7/19/88; 87-19-139 (Order 87-6), § 458-20-244, filed 9/22/87; 86-21-085 (Order ET 86-18), § 458-20-244, filed 10/17/86; 86-02-039 (Order ET 85-8), § 458-20-244, filed 12/31/85; 83-17-099 (Order ET 83-6), § 458-20-244, filed 8/23/83; 82-16-061 (Order ET 82-7), § 458-20-244, filed 7/30/82. Statutory Authority: RCW 82.01.060(2) and 82.32.300. 78-05-041 (Order ET 78-1), § 458-20-244 (Rule 244), filed 4/21/78, effective 7/1/78.]