

THIS PROPOSED RULE IS SUBMITTED FOR PUBLIC COMMENTS AFTER INPUT FROM INTERESTED PARTIES AND IS TO BE USED SOLELY FOR DISCUSSION PURPOSES AT THE PUBLIC HEARING ON THE PROPOSED RULE. UNDER NO CIRCUMSTANCES IS THIS PROPOSED RULE TO BE USED TO DETERMINE TAX LIABILITY AND OR EXEMPTIONS.

AMENDATORY SECTION (Amending WSR 03-24-031, filed 11/25/03, effective 1/1/04)

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

Introduction. (~~RCW 82.08.0293 and 82.12.0293 provide retail sales tax and use tax exemptions for certain foods sold for human consumption. In 2003, the legislature adopted the food definitions set forth in the national Streamlined Sales and Use Tax Agreement. The 2003 amendments to these statutes significantly change how sales of food and food ingredients are taxed on and after January 1, 2004. This rule provides guidelines for determining if the sale of a food or food ingredient is subject to retail sales tax.~~)

~~There is no general business and occupation (B&O) tax exemption for sales of food and food ingredients. Therefore, even if a sale of food is exempt from retail sales tax, the income from that sale is included in gross proceeds when calculating the business's retailing B&O tax.~~

~~(2) **Related rules.** The department has adopted other rules that provide important tax reporting information to persons who sell food and prepared meals:~~

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

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

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

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

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

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

~~(g) WAC 458-20-169 (Nonprofit organizations).~~

~~(3) **"Food and food ingredients" defined.** "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.~~

~~"Food and food ingredients" does not include:~~

~~(a) "Alcoholic beverages," which means beverages that are suitable for human consumption and contain one half of one percent or more of alcohol by volume; and~~

~~(b) "Tobacco," which means cigarettes, cigars, chewing or pipe tobacco, or any other items that contain tobacco.~~

~~(4) **Taxability of prepared food.** The exemption for "food and food ingredients" provided in RCW 82.08.0293 does not apply to prepared food. The sale of prepared food is subject to retail sales tax, unless otherwise exempt by law. See subsection (5) of this section for information about the taxability of soft drinks and subsection (6) of this section for information about the taxability of dietary supplements.~~

~~(a) **Prepared food.** "Prepared food" means:~~

~~(i) 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;~~

~~(ii) Food sold in a heated state or heated by the seller;
or~~

~~(iii) Two or more food ingredients mixed or combined by the seller for sale as a single item, except:~~

~~(A) Food that is only cut, repackaged, or pasteurized by the seller;~~

~~(B) Raw eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer 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~~

~~(C) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.~~

~~(b) **Food sold with eating utensils.** Food sold with eating utensils provided by the seller is prepared food and thus subject to tax, even if the seller does not otherwise prepare the food.~~

~~(i) **Eating establishments that sell food with eating utensils.** Generally food sold by an eating establishment is subject to sales tax. An eating establishment may be mobile or in a fixed location and may or may not provide seating accommodations for its customers. Eating establishments include restaurants, caterers, pizzerias, bars, taverns, night clubs, yogurt or ice cream stores/stands, coffee or donut shops, diners, refreshment stands, drive ins, fast food restaurants, bagel shops, lunch counters, cafeterias, private and social clubs, sandwich shops, snack bars, hot dog carts, espresso stands, concession stands at a fair or a mall, sidewalk vendors or like places of business where food is served to individuals and is customarily sold for consumption shortly after it is sold.~~

~~(A) All food served at eating establishments is subject to tax unless the seller maintains adequate records for sale of~~

~~food items that are generally not sold with eating utensils and do not otherwise qualify as prepared food, such as gallons of milk, loaves of bread, whole pies, a dozen donuts, wedding or birthday cakes, and packages of rolls or muffins. The information shown on invoices, cash register receipts, or sales tickets must provide an adequate description of the food items sold to show that the sale was not of food items that are generally served with eating utensils or do not otherwise qualify as prepared food.~~

~~(B) Food sold by grocery stores, convenience stores, and department stores is generally not considered to be sold with eating utensils provided by the seller, even though eating utensils may be available to customers (e.g., napkins on the counter). For example, the sale of yogurt is not subject to retail sales tax even if napkins are available for the customer's use at the checkout stand. The food may be taxable if it is generally served with eating utensils (see part (ii) below). A grocery store is a business primarily engaged in the retail sale of a wide variety of food products. They generally contain the following departments: Dairy, baked goods, canned and dry goods, frozen foods, meats, fresh fruits and vegetables and household supplies.~~

~~Grocery stores, department stores, and convenience stores that have a separately identifiable eating establishment, such as a salad bar, sushi bar, or deli, are required to collect the tax on food items sold at that establishment unless the store maintains adequate records for sale of food items that are generally not sold with eating utensils or do not otherwise qualify as prepared food.~~

~~(ii) **Food that is generally sold with eating utensils.** Food that is generally sold with eating utensils, including plates, knives, forks, spoons, glasses, cups, napkins, or straws, is subject to tax, even if the seller does not in all cases actually provide the utensils. For example, sales from salad bars or "make your own sandwich" bars at a grocery store are taxable since salads and sandwiches are generally eaten with eating utensils (a fork for the salad and a napkin for the sandwich). "Make your own ice cream sundae" bars are taxable for the same reason. These items are taxable regardless of where they are sold. Cold cut platters, cheese platters, vegetable and fruit platters are taxable since the platter is an eating utensil.~~

~~(A) Box lunches are taxable since they are generally sold with eating utensils provided by the seller.~~

~~(B) If the eating utensil is provided by the manufacturer rather than by the seller, the sale of the food is not subject to retail sales tax. For example, a box of crackers and cheese that includes a spreader, is not subject to tax since the seller does not provide the spreader.~~

~~(c) "Prepared food" examples.~~ The examples in this subsection identify a number of facts and then state a conclusion. These examples should only be used as a general guide. Similar determinations for other situations can be made only after a review of all facts and circumstances.

~~(i) If a carton of milk is purchased from a grocery store, the sale is exempt from retail sales tax because the milk, in this case, is an exempt food item. If an individual purchases a glass of milk from a restaurant, however, it is subject to retail sales tax because the seller provided an eating utensil, a glass.~~

~~(ii) A grocery store deli sells pasta salad that it prepares itself and potato salad that it purchases in bulk. The deli packages the pasta salad for sale, and repackages the potato salad the deli purchased in bulk into smaller containers. Sales of the potato salad are exempt from retail sales tax because "prepared food" does not include food that is merely repackaged. Sales of the pasta salad are subject to retail sales tax because the deli mixed or combined two or more food ingredients, doing something more than cutting or repackaging the food ingredients.~~

~~(iii) A grocery store meat department prepares ready to bake stuffed pork chops. The stuffed pork chops are not "prepared foods" and are not subject to tax even though the seller combined two or more ingredients because "prepared foods" does not include raw meat, or foods containing raw animal foods that require cooking by the consumer, to prevent foodborne illness.~~

~~(iv) **Pizza.** The taxability of pizza depends on who prepares it and in what form it is sold. The following examples explain the taxability of pizza in its various forms:~~

~~(A) Pizza prepared by the seller and sold in a heated state. Pizza sold by the slice and whole hot pizzas ready to eat, including delivered pizzas, are taxable because they are sold in a heated state. Additionally, the sale of the pizza is a taxable sale of a "prepared food" because the seller mixed or combined two or more food ingredients.~~

~~(B) Ready to bake pizzas prepared by the seller. Fresh or frozen ready to bake pizza prepared by the seller is taxable as a "prepared food" because the seller mixed or combined two or more food ingredients.~~

~~(C) Ready to bake pizzas prepared by a third party. Fresh or frozen ready to bake pizza procured by the seller from a third party or wholesaler is exempt from sales tax because it does not fall under the definition of "prepared food" as the seller did not mix or combine two or more food ingredients.~~

~~(d) **Exemption from taxation for certain meals (prepared food).** Notwithstanding subsection (4)(a) and (b), above, 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 are exempt from retail sales and use tax. There is a sales tax exemption for meal sales for certain fund raising by nonprofit organizations. See WAC 458-20-169.

~~(5) **Taxability of soft drinks.** The exemption for "food and food ingredients" provided in RCW 82.08.0293 does not apply to "soft drinks."~~

~~(a) **"Soft drinks" defined.** "Soft drinks" are nonalcoholic beverages that contain natural or artificial sweeteners. Soft drinks do not include:~~

~~(i) Beverages that contain milk or milk products, soy, rice, or similar milk substitutes; or~~

~~(ii) Beverages that contain greater than fifty percent vegetable or fruit juice by volume.~~

~~(b) **"Soft drink" examples.** The examples in this subsection identify a number of facts and then state a conclusion. These examples should only be used as a general guide. Similar determinations for other situations can be made only after a review of all facts and circumstances.~~

~~(i) The sale of bottled water, carbonated water, and flavored water, without natural or artificial sweeteners, is exempt from tax because they are defined as food in RCW 82.08.0293 and do not fall within the definition of "soft drinks." If these products are sold in a cup or glass, however, the sale is a sale of a "prepared food" and is subject to sales tax. See subsection (4)(a)(i) above. Bottled water, carbonated water, and flavored water that contain natural or artificial sweeteners are subject to sales tax because they are "soft drinks."~~

~~(ii) Sports drinks that contain natural or artificial sweeteners are subject to sales tax because they fall within the definition of "soft drinks."~~

~~(iii) Fruit or vegetable juice that contains natural or artificial sweeteners and contains fifty percent or less by volume of fruit or vegetable juice is subject to sales tax because it falls within the definition of "soft drinks."~~

~~(iv) Bottled coffee or tea drinks with natural or artificial sweeteners, but without milk or milk products, are "soft drinks" and are subject to retail sales tax. Bottled coffee or tea drinks, with or without sweeteners that contain milk or milk products are not subject to sales tax because they do not fall within the definition of "soft drinks."~~

~~(6) **Taxability of dietary supplements.** The exemption for "food and food ingredients" provided in RCW 82.08.0293 does not apply to "dietary supplements."~~

~~(a) **"Dietary supplements" defined.** "Dietary supplement"~~

~~means any product, other than tobacco, intended to supplement the diet and that:~~

~~(i) Contains one or more of the following dietary ingredients:~~

~~(A) A vitamin;~~

~~(B) A mineral;~~

~~(C) An herb or other botanical;~~

~~(D) An amino acid;~~

~~(E) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or~~

~~(F) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in this subsection;~~

~~(ii) Is intended for ingestion in tablet, capsule, powder, soft gel, geleaf, 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~~

~~(iii) Is required to be labeled as a dietary supplement, identifiable by the "Supplement Facts" box found on the label and as required under 21 Code of Federal Regulations (CFR) § 101.36, as amended or renumbered as of January 1, 2003.~~

~~(b) "Dietary supplements" examples. The examples in this subsection identify a number of facts and then state a conclusion. These examples should only be used as a general guide. Similar determinations for other situations can be made only after a review of all facts and circumstances.~~

~~(i) Nutrition products in bar or liquid form formulated to provide balanced nutrition as a sole source of nourishment are considered a food and not a dietary supplement and are therefore exempt from taxation.~~

~~(ii) A product sold for human consumption may have one or more of the following federal Food and Drug Administration labels, a "Nutrition Facts," a "Dietary Supplements Facts," or a "Drug Facts" label. If a product label contains a "Supplement Facts" and "Nutrition Facts" box, the product is a food and not subject to tax if it does not otherwise qualify as prepared food.~~

~~(7) Is ice sold for human consumption taxed? Ice sold for human consumption is considered a food or food ingredient and is therefore exempt from retail sales tax. "Ice sold for human consumption" means ice sold in cube, 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 therefore taxable. See WAC 458-20-120 (Sales of ice) for additional guidance on the sale of ice.~~

~~(8) Combination businesses. The sale of "food and food ingredients" or "prepared food" sold in the same manner should receive the same tax treatment regardless of the establishment~~

~~in which the item is sold. Persons operating a combination of two kinds of food sales businesses at one location must keep their accounting records and sales receipts segregated between taxable and tax exempt sales. Examples of combination businesses are a grocery store with a lunch counter or salad deli bar, a bakery that sells tax exempt baked goods and also sells baked goods with eating utensils or as part of a meal, and a gas station/convenience store.~~

~~(a) **Tax collecting responsibility.** Combination businesses must collect and report retail sales tax upon their charges for prepared foods. It is sufficient segregation for accounting purposes if cash registers or electronic checking machines are programmed to identify and separately tax food that is not tax exempt. If the combined food business' sales are commingled in their accounting records, all sales of food and food ingredients are subject to retail sales tax.~~

~~(b) **Combination business examples.** The examples in this subsection identify a number of facts and then state a conclusion. These examples should only be used as a general guide. Similar determinations for other situations can be made only after a review of all facts and circumstances.~~

~~(i) A consumer purchases his wedding cake, a donut, and a cup of coffee from Bakery. The sale of the wedding cake is not taxable if Bakery maintains adequate records for sale of food items that are generally not sold with eating utensils and do not otherwise qualify as prepared food. The sale of the donut is taxable because it is a food that is generally sold with eating utensils, a napkin. The sale of the coffee is taxable because it is served with an eating utensil, the cup, and because it is sold in a heated state by the seller.~~

~~(ii) Grocery Store has a deli section that prepares and sells deli foods and provides a salad bar where the customer can make a salad. A customer purchases a salad that he made from the salad bar and a bottle of apple juice that is one hundred percent fruit juice. The sale of a salad from the salad bar is taxable because it is generally sold with eating utensils (e.g., a plate, fork, knife, spoon, or napkin). The sale of the apple juice is exempt because it is food and not a "soft drink" because it is more than fifty percent fruit juice.~~

~~(iii) Gas Station has a convenience store that sells "food and food ingredients," "prepared food," and nonfood products. The sale of "food and food ingredients" is not taxable if Gas Station maintains adequate records for sale of food items that are generally not sold with eating utensils and do not otherwise qualify as prepared food.~~

~~(9) **How are packages of food items that contain taxable and nontaxable items taxed?** When a package consists of both food and nonfood products, such as a holiday or picnic basket containing beer and pretzels, cups or glasses containing food~~

~~items, or soft drinks along with cheese and crackers, the food portion may be tax exempt if its price is stated separately. If the price is a lump sum, the sales tax applies to the entire price.~~

~~Nonfood items given to buyers to promote food or food ingredient sales such as coffee sold in a decorative apothecary container or cheese sold in a serving dish are not taxable and are not deemed combination packages where it is clear that the nonfood item is simply a gift furnished as a sales inducement for the food. In the same way, promotional give aways of food items as an inducement for sales of nonfood items are not exempt (e.g., the sale of crystal ware containing candy or nuts is fully subject to sales tax).~~

~~(10) **Purchases made under the Food Stamp Act of 1977.** RCW 82.08.0297 provides a retail sales tax exemption for the sale of eligible foods that are purchased with coupons issued only under the federal Food Stamp Act of 1977. The term "food coupon" does not include manufacturers' coupons, grocers' coupons, or other coupons issued by private parties. "Eligible foods" has the same meaning as established under federal law for the purposes of the Food Stamp Act of 1977. The term includes any food or food ingredient intended for human consumption except alcoholic beverages, tobacco, and hot foods or hot food ingredients prepared for immediate consumption. 7 U.S.C. § 2012(g), as amended or renumbered as of January 1, 2003. The term "coupon," 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. 7 CFR § 271.2, as amended or renumbered as of January 1, 2003.~~

~~(a) **Purchasing nonfood products with food coupons.** Some nonfood products may be exempt if purchased with food coupons. For example, seeds and growing plants are considered "nonfood products," even though they may be sold at grocery stores and can be ingested by humans. However, seeds and plants to grow foods for the personal consumption of eligible households are "eligible foods" under the Food Stamp Act of 1977. 7 CFR § 271.2, as amended or renumbered as of January 1, 2003. Therefore, in this limited circumstance, the sale of seeds and plants is tax exempt.~~

~~When both coupons and cash (or check) are used to make purchases, the coupons must be applied first to "eligible foods" which are not otherwise tax exempt "food or food ingredients." For example, soft drinks and garden seeds are "eligible foods" under the food stamp program but are not tax exempt under RCW 82.08.0293. The intent is always to apply the coupons and cash in such a way as to provide the greatest possible amount of retail sales tax exemption under the law.~~

~~(b) **Food coupon examples.** The examples in this subsection identify a number of facts and then state a conclusion. These examples should only be used as a general guide. Similar determinations for other situations can be made only after a review of all facts and circumstances. The following examples demonstrate how the tax exemption applies in cases where a purchase of ten dollars each is made for meat (a food ingredient), soda pop (an eligible food), and soap (a nonfood item) using both coupons and cash.~~

~~(i) The customer pays with fifteen dollars in coupons and fifteen dollars in cash. The coupons are applied first to the soda pop (ten dollars worth) and then to the meat (five dollars worth). The cash applies to the rest of the meat and the soap. Retail sales tax is due on the ten dollar purchase of soap because soap is not an "eligible food" under the food stamp program.~~

~~(ii) A customer pays the thirty dollar selling price with ten dollars worth of coupons and twenty dollars cash. The coupons are applied to the soda pop, making the soda pop exempt. The cash is applied towards the purchase of the meat and soap. The result is that retail sales tax is due only on the ten-dollar purchase of soap.~~

~~(iii) The customer pays with five dollars worth of coupons and twenty-five dollars in cash. Again, the coupons are first applied towards the soda pop, leaving five dollars of the value to be purchased with cash. Retail sales tax is due on fifteen dollars, the ten-dollar purchase of soap and five dollars worth of soda pop.~~

~~(11) **How are food vending van sales taxed?** Food and food ingredient sales from vehicular vending vans are taxable or exempt of retail sales tax in the same manner as food sales at grocery stores. Thus, sales of candy bars, gum, or any prewrapped food and food ingredients which are prepackaged by a manufacturer or preparer other than the person operating the van are exempt from retail sales tax. Sales of any prepared food items or soft drinks, including, but not limited to, hotdogs, sandwiches, soups, and hot or cold beverages are subject to retail sales tax. See definition of "prepared food" in subsection (4)(a), above.)~~

(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 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 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 to prevent food-borne 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.** Food or food ingredients are "sold with utensils provided by the seller" if the seller's customary practice 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 ingredients are 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) Seller of predominantly prepared food makes utensils available. All food and food ingredients sold at an establishment are "sold with utensils provided by the seller" if the seller makes utensils available to its customers and the seller is in the business of selling predominantly prepared food. A seller is in the business of selling predominantly prepared food if 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 food, food ingredients, soft drinks and dietary supplements.

(A) Exception for four or more servings. Even if a seller is in the business of selling predominantly prepared food, 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 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 tax 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 tax 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 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 gross sales of food and food ingredients, 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 75% of Fast Cafe's total sales of food, food ingredients, 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 is in the business of selling predominantly prepared food. 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 is not considered to be in the business of selling predominantly prepared food. 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 milk beverages or a combination of two or more foods or food ingredients 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.

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

(a) Combined sales. Where two or more distinct and identifiable items, at least one of which is a food or food ingredient, are sold for one nonitemized price:

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 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 fifteen 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:

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

(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, soft drinks, 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, soft drinks, & 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:

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

$$\$2,500 - (\$2,500 / 1.088) = \$202.21 \text{ (Seattle coffee machine)}$$

$$\$3,000 - (\$3,000 / 1.086) = \$237.57 \text{ (Spokane coffee machine)}$$

$$\underline{\$439.78}$$

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:

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

$$\$10,000 \times .57 \times .088 = \$294.12 \text{ (Seattle candy machine)}$$

$$\$6,000 \times .57 \times .086 = \$501.60 \text{ (Spokane candy machine)}$$

$$\underline{\$795.72}$$

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.

(43% x gross machine proceeds) - tax in gross = exempt
food deduction

(.43 x \$16,000) - \$795.72 = \$6,084.28

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.