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State and Local Advisory Council  
Prepared Food Re-Visited  
March 7-8, 2006

SSTP approved several interpretations of the food definitions at its meeting on January 6, 2005. The approved interpretations are included in an Issue Paper titled “Food Definition Issues” on the Streamlined web site at [www.streamlinedsalestax.org](http://www.streamlinedsalestax.org). SSTP interpreted “provided by the seller” with respect to utensils as:

1. Utensils need only be made available to purchasers if a seller’s sales of prepared food in A and B of the definition (except items 1 through 3 that a state chooses to exclude), soft drinks, and alcohol beverages at an establishment are more than 75% of the seller’s total sales at the establishment.
2. For sellers other than in 1., the seller’s customary practice is to give the utensil to the purchaser, except that plates, glasses, or cups necessary for the purchaser to receive the food or food ingredients need only be made available.

Also, SSTP addressed utensils provided by persons other than the seller and resold by a seller as follows:

Although a person other than the seller may have originally placed the utensil in the package, the seller provides it to the purchaser when it transfers the package to the purchaser. Therefore, in the examples provided (caterer sells a boxed lunch with utensils to a concessionaire who sells the boxed lunch; food manufacturer packages ready-to-eat lunch with utensils and sells to a grocer who sells the lunch), utensils are provided by the seller.

The Food Marketing Institute and a number of interested parties submitted a request for interpretation to the Compliance Review and Interpretations Committee (CRIP) on January 6, 2006. CRIP has requested SLAC to further address the prepared food interpretation issue.

Several representatives from the food industry, Business Advisory Council and State and Local Advisory Council (SLAC) are offering the following compromise for discussion at the SLAC meeting on March 7-8, 2006.

1. We will maintain the 75% test for sellers but modify how the numerator and denominator are calculated so that like businesses (single purpose coffee shop v. coffee shop in a bookstore) are treated the same.
2. The numerator would include sales of (a) prepared food if under A and B of the definition of prepared food; (b) food where the seller's customary practice (as reasonably determined by the seller) is to give the utensil to the purchaser; and (c) food where plates, glasses or cups are available to the purchaser and necessary to receive the food (e.g., dispensed milk, salad bar).
3. The denominator would include sales of all food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks, and all alcohol beverages.
4. For sellers with a sales percentage of 75% or less, utensils are provided by the seller if the seller's customary practice (as reasonably determined by the seller) is to give the utensil to the purchaser, except that plates, glasses, or cups necessary for the purchaser to receive the food (e.g., dispensed milk, salad bar) need only be made available.
5. For sellers with a sales percentage greater than 75%, utensils are provided by the seller if they are made available to purchasers.
6. For sellers with a sales percentage greater than 75% and who sell items that contain four (4) or more servings packaged as one item sold for a single price, an item does not become prepared food due to the seller having utensils available. Whenever available, serving sizes will be determined based on a label on an item sold. If no label is available, a seller will reasonably determine the number of servings in an item.
7. When a seller sells food items that have a utensil placed in a package by a person other than the seller, and that person's NAICS classification code is that of manufacturers (sector 311) only, the seller shall not be considered to have provided the utensil. For any other packager with any other NAICS classification code (e.g., sector 722 for caterers), the seller shall be considered to have provided the utensil.
8. The prepared food sales percentage will be calculated by the seller each calendar year for the seller's establishment.
9. The annual prepared food sales percentage will be determined for all of the seller's establishments in a state.
10. A new business will make a good faith estimate of their prepared food sales percentage for their first year.

If states concur that an interpretation of "food sold with eating utensils provided by the seller" requires an amendment to the Agreement or time to implement the interpretation, then a temporary interpretation must be offered now so that sellers of prepared food can determine tax treatments under laws enacted by states that are in compliance with the Streamlined Sales and Use Tax Agreement. We have two options:

1. "Food sold with eating utensils provided by the seller" means the seller's customary practice is to *give* the utensil to the purchaser.
2. "Food sold with eating utensils provided by the seller" means the seller need only make the utensils *available*.

Note: Black's Law Dictionary defines "*provide*" as to make, procure, or furnish for future use, prepare. To supply; to afford; to contribute.

## **FOOD AND FOOD PRODUCTS**

**“Food and food ingredients”** means substances, whether in liquid, concentrated, solid frozen, dried, or dehydrated form, that sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. “Food and food ingredients” does not include “alcoholic beverages” or “tobacco.” A member state may exclude “candy,” “dietary supplements” and “soft drinks” from this definition, which items are mutually exclusive of each other. Notwithstanding the foregoing requirements of this definition or any other provision of the Agreement, a member state may maintain its tax treatment of food in a manner that differs from the definitions provided herein, provided its taxation or exemption of food is based on a prohibition or requirement of that state’s Constitution that exists on the effective date of the Agreement.

**“Food sold through vending machines”** means food dispensed from a machine or other mechanical device that accepts payment.

**“Prepared food”** means:

- A. Food sold in a heated state or heated by the seller;
- B. Two or more food ingredients mixed or combined by the seller for sale as a single item;  
or
- C. 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.

“Prepared food” in B does not include food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration in chapter 3, part 401.11 of its Food Code so as to prevent food borne illnesses.

The following items may be taxed differently than “prepared food” and each other, if sold without eating utensils provided by the seller, but may not be taxed differently than the same item when classified un “food and food ingredients.”

1. Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries).
2. Food sold in unheated state by weight or volume as a single item.
3. Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes tortes, pies, tarts, muffins, bars, cookies, tortillas.

Substances within “food and food ingredients” may be taxed differently if sold as “prepared food.” A state shall tax or exempt from taxation “candy,” dietary supplements,” and “soft drinks” that are sold as “prepared food” in the same manner as it treats other substances that are sold as “prepared food.”

**“Soft drinks”** means non-alcoholic beverages that contain natural or artificial sweeteners.

“Soft drinks” do not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of vegetable or fruit juice by volume.

**“Tobacco”** means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.