

**STREAMLINED SALES AND USE TAX AGREEMENT
COMPLIANCE REVIEW AND INTERPRETATIONS
COMMITTEE**

Interpretive Opinion 2013-3

This Interpretive Opinion recommendation is made to the Governing Board by the Compliance Review and Interpretations Committee this 17th day of October 2013 in accordance with Article IX, Rule 902 of the Rules and Procedures adopted by the Streamlined Sales Tax Governing Board, Inc.

Mr. David Steines of the Wisconsin Department of Revenue and Mr. Mike Herold of Clifton, Larson, Allen Company submitted the interpretation request on August 15, 2013.

Issue:

Do take and bake pizzas meet the definition of "prepared food" based on the following facts?

Facts:

- The seller of take and bake pizzas makes the pizzas on-site. They are not pre-made by someone other than the seller.
- Pizzas are not heated by the seller or sold in a heated state.
- No food is sold on the premises in a heated state.
- The seller creates the pizzas by adding sauces, cheeses, and toppings to a selected crust.
- Only the pizza dough is made on site. The meats, cheese and sauce are food products prepared and packaged by another business. The meats come pre-sliced and the cheese is shredded in the store.
- All meats used by the seller are pre-cooked by someone other than the seller.
- The crust used by the seller does not contain egg or raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration.
- It is not the seller's practice to provide utensils with the pizza. Utensils are not made available.
- No customer seating is available.
- Take and bake pizzas are not ready for immediate consumption as they require additional preparation as instructed by the seller.
- The pizzas are sold by size and not sold by weight or volume.
- The smallest pizza contains 8 servings.
- For food safety, it is recommended the pizzas be heated to over 140 degrees.
- The seller's NAICS classification is not manufacturing in sector 311.
- The requestor asserts that payments under the federal Supplemental Nutrition Assistance Program (previously known as "food stamps") can be used to purchase the unbaked pizzas whereas other prepared food found in a deli or fast food restaurant or pizzerias are considered "food sold hot at point of sale" and not covered.

Mr. Steines requests a ruling that take and bake pizzas meet the definition of "prepared food." There is no exclusion from the definition of prepared food for additional preparation required by the purchaser. The take and bake pizza does not require cooking per the food code since it contains no egg or raw meat or seafood.

Mr. Herold requests a ruling that take and bake pizzas do not meet the definition of "prepared food." Mr. Herold states meat, cheese, fruit and vegetable trays are currently exempt from the definition of prepared food and require a number of similar tasks found in making unbaked pizzas. The food trays require slicing, shredding, peeling, assembly and packaging. Cheese and meats, fruits and vegetables might be combined on a platter along with sauces or dips– possibly prepared by the store or not – and sold as a single product. This process is similar to making a take and bake pizza. However, the platters are ready for immediate consumption, but the consumer must still bake the pizza.

The Committee's discussion did not address whether fruit and vegetable trays are prepared food. However, it was indicated that regardless such fruit and vegetable trays are not comparable because the components of these trays remain physically distinct within the tray at the time of sale whereas the components of the take and bake pizzas are combined to form a physically integrated product.

Public Comment:

Numerous public comments were received from sellers and consumers of take and bake pizzas in support of Mr. Herold's position that these pizzas are not "prepared food." Most of the public comments pointed out that the take and bake pizzas could be purchased with EBT cards/food stamps and also had dough that needed to be cooked by the consumer before eating.

The Minnesota Department of Revenue responded that take and bake pizzas would meet the definition of prepared food; however, Minnesota's position goes beyond the plain language of the definition and does not impose tax on food that otherwise meets the definition of "prepared food" if it is not ready to eat at the time of sale. Even though the seller may have heated the food at some time or may have mixed or combined two or more food ingredients to make the food, a take and bake pizza is only partially cooked and needs to be fully cooked to be eaten and is therefore not ready-to-eat at the time of sale.

The Kentucky Department of Revenue provided written testimony supporting Mr. Steines' position. The testimony stated take and bake pizzas do meet the definition of prepared food because the seller combines two or more ingredients together as one product, the pizzas do not require additional cooking under the Food and Drug Administration code, and use of food stamps have no impact on the definition of prepared food.

Recommendation:

By a vote of six to one, the Compliance Review and Interpretations Committee submits to the Governing Board a recommendation that the take and bake pizzas as specifically described in this request meet the definition of "prepared food." The take and bake pizzas

are two or more ingredients mixed or combined by the seller for sale as a single item and there is no exclusion in the definition of “prepared food” that would remove these take and bake pizzas from that definition.

Rationale:

The SSUTA, Appendix C, Library of Definitions, defines “prepared food” as:

- 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.

Based on the above definition and the facts provided, the take and bake pizzas clearly fall within the definition of “prepared food.” These pizzas are the product of two or more ingredients mixed or combined by the seller for sale as a single item. The take and bake pizzas do not contain eggs, fish, meat, poultry, or foods containing these raw animal foods requiring cooking under the Food and Drug Administration’s Food Code. The fact that the pizzas are taken home for baking before consumption does not alter the classification as “prepared food” since there is no exclusion from the definition of “prepared food” for items requiring additional preparation by the purchaser. The fact that take and bake pizza may qualify for purchase with federal food stamps is not a factor in determining whether the pizzas meet the definition of “prepared food.” The take and bake pizzas meet the definition of “prepared food” and do not meet the criteria for any of the exclusions provided.

Participating Committee Members:

Myles Vosberg, Tom Atchley, Richard Cram, Larry Paxton, Harry Fox, and Tim Jennrich supported this recommendation. Dan Noble did not support this recommendation.