

Outline for R056-18

- I. **Regulation:** NRS 372.284 exempts certain food for human consumption from sales and use tax but this does not include prepared food for immediate consumption. NAC 372.605 defines what is and is not “prepared food intended for immediate consumption.” Section 1(a) of the regulation indicates that prepared food intended for immediate consumption is defined in NRS 360B.460. NRS 360B.460 provides three situations when food is considered prepared food and thus taxable: 1) food is sold in a heated state; 2) two or more ingredients are mixed or combined as a single item; or 3) **the item is sold with utensils provided by the seller.** And NAC 372.605 section 1(b) indicates that certain prepared food is not taxable if sold without eating utensils provided by the seller.
- II. **Issue:** What is considered utensils “provided” by the seller?
 - (a) **Two interpretations of the language:** One definition of “provided” by the seller is utensils are physically present in the establishment and available to the buyer. Another definition of “provided” by the seller is utensils are physically handed to customers when they purchase their food.
 - (b) **How other Member states interpret the language:** Several states have encountered this same issue and brought it to the attention of the Streamlined Sales Governing Board. Some states interpreted the language to require that utensils actually be handed to the purchaser by the seller and other states took the position that utensil need only be made available by the seller.
 - (c) **Solution:** Streamlined Sales Governing Board came up with a standard definition for all Member states to apply so that the law would be administered in a consistent manner among the member states. The Governing Board came up with a 75% Threshold Test to make determinations of taxability of prepared food.
- III. **Test:** Sellers will need to keep records of their food sales and separate them by prepared food items that fall under subsection 1 and 2 of NAC 372.605. This will be the numerator. The Denominator includes all food and food ingredients including prepared food. Alcoholic beverages are not included in the calculation. Calculating the numerator and denominator, we will arrive at a percentage. For example, a sandwich shop has sales of \$60,000 a year in prepared food and has total food sales of \$80,000. The percentage of prepared food to total sales is .75 or 75%.
 - (a) If a seller has a sales percentage greater than 75%, then utensils merely made available to purchasers in a common area are treated as utensils “provided by the seller.”
 - (b) If a seller has a sales percentage of 75% or less, then utensils have to be physically handed to the purchaser to be considered “provided by the seller.”
- IV. **Exceptions:** 4 or more servings packaged as one item sold for a single price
- V. **Procedure:** The prepared food sales percentage is calculated by the seller annually based on prior tax year data. New businesses make a good faith estimate for their first year and should adjust after the first 3 months if actual prepared food sales percentages materially affect the 75% test.

VI. Examples:

- (a) XYZ Bakery is under the 75% threshold. XYZ Bakery sells an unheated, unprepared bagel to a customer. The exclusion for bakery items applies and tax is not due as long as XYZ Bakery did not hand the customer an eating utensil to use to consume the bagel.
- (b) Donut World is over the 75% threshold and has a kiosk where utensils are made available for its customers. Donut World sells two donuts to a customer. Donuts are a bakery item, however, because Donut World is over the 75% threshold and makes eating utensils available for its customers, Donut World is required to charge tax on the sale of the two donuts.
- (c) ABC Café is over the 75% threshold and has a kiosk where it makes eating utensils available for its customers. ABC Café sells a loaf of bread to a customer. The sale of the loaf of bread is not taxable because it contains four or more servings and the employee did not hand the customer a utensil to use to consume the bread.
- (d) Donut World is over the 75% threshold and has a kiosk where it makes eating utensils available for its customers. Donut World sells a bag of ground or whole bean coffee to a customer. The sale of the bag of ground or whole bean coffee is not taxable because it contains four or more servings and the employee did not hand the customer a utensil to use to consume the coffee.
- (e) Convenience Store A is under the 75% threshold and sells prepackaged sandwiches which were made by a third party. Because Convenience Store A is under the 75% threshold and the employees do not actually hand the customers an eating utensil to use to consume the sandwiches, the sales of the prepackaged sandwiches are not subject to tax.
- (f) Convenience Store B is over the 75% threshold and sells prepackaged sandwiches which were made by a third party. Convenience Store B provides eating utensils at a kiosk near the cash register. Because Convenience Store B is over the 75% threshold and makes eating utensils available for its customers, the sales of the prepackaged sandwiches are subject to tax.