

**TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING 04-16**

WARNING

Revenue rulings are not binding on the Department. This presentation of the ruling in a redacted form is information only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Departmental policy.

SUBJECT

The reduced rate of sales and use tax on food and food ingredients.

SCOPE

Revenue rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue rulings are advisory in nature and are not binding on the Department.

FACTS

The taxpayer is a multi-member limited liability company that operates retail stores located within Tennessee. The taxpayer's principal business is the retail sale of food, food ingredients, and other consumer end-user products at the stores.

"ABC Company" owns a membership interest in the taxpayer. ABC Company's business activities include, but are not limited to, manufacturing what the ruling request describes as prepared food¹ for sale at its retail locations and selling its manufactured goods at wholesale to related entities.

¹ The ruling request uses the term "prepared food" but it is not clear as to whether the term has the same meaning as that term is found in Tenn. Code Ann. § 67-6-228, or whether a less specific meaning is intended. In its letter to the Department dated December 12, 2003, in response to the Department's

The taxpayer purchases food and food ingredients (hereinafter referred to as “food”) from ABC Company as well as from other vendors. The food is resold at the taxpayer’s retail outlets. As a part of the taxpayer’s purchase of food from ABC Company, title is transferred from ABC Company to the taxpayer. The food sold by ABC Company to the taxpayer is ready to eat. However, the taxpayer performs additional heating or combining of the food it sells. The taxpayer purchases utensils separate from the purchase of the food.

The taxpayer controls the day-to-day function of its retail stores. However, it leases employees from ABC Company.

QUESTION

What sales and use tax rate is applicable to the taxpayer’s retail sales of the food it purchases from ABC Company?

RULING

Since the taxpayer performs additional heating or combining of the food prior to sale, the food is taxable at the state rate of 7%, plus the applicable local option tax rate. If the taxpayer did not: (1) perform additional heating or combining of the food, (2) sell the food in a heated state, or (3) sell the food with utensils, a state tax rate of 6%, plus the applicable local option tax rate, would apply.

ANALYSIS

Statute Regarding Food and Food Ingredients

Effective July 15, 2002, Ch. 856, Public Acts of 2002, enacted Tenn. Code Ann. § 67-6-228, which states in pertinent part:

(a) (1) Notwithstanding any provision of this part to the contrary, except as otherwise provided in subdivision (2), the retail sale of food and food ingredients for human consumption shall be taxed at the rate of six percent (6%) of the sales price of each single article of food or food ingredient.

(2) The retail sale of the following food and food ingredients shall be taxed at the rate of tax levied on the sale of tangible personal property at retail by the provisions of § 67-6-202.²

* * * *

question, the person requesting the ruling did not specify how ABC Company prepares the food, only stating that the food was “ready to eat”.

² Presently seven percent (7%).

(C) Prepared food.

* * * *

(3) For purposes of this section:

(C) "Prepared food" means:

- (i) Food sold in a heated state or heated by the seller; or
- (ii) Two (2) or more food ingredients mixed or combined by the seller for sale as a single item; or
- (iii) Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. "Prepared food" does not include food that is only sliced, repackaged, or pasteurized.³

The ruling request correctly points out that the term "seller" is not defined in the sales tax statute. However, since words in a statute are to be construed using an ordinary and natural meaning unless the context in which they are used requires otherwise, *Nashville Golf & Athletic Club v. Huddleston*, 837 S.W.2d 49, 53 (Tenn. 1992), there can be little doubt that "seller" means the party selling the food in the transaction to which the tax may apply. Here, the seller is the taxpayer when it sells to the consumer.

ABC Company and the Taxpayer Are Regarded as Separate Entities

The Tennessee law for limited liability companies provides that, for purpose of state and local Tennessee taxes, limited liability companies are classified the same as they are classified for federal tax purposes. Tenn. Code Ann. § 48-211-101.⁴ The taxpayer is not a single-member limited liability company. Therefore, it cannot be a disregarded entity for federal tax purposes, pursuant to Treas. Reg. § 301.7701-3, often referred to as the "check-the-box" provision. For Tennessee sales tax purposes, ABC Company and the taxpayer are considered separate entities.

Preparation of Food by ABC Company Would Not Cause Food Sales by the Taxpayer to Be Subject to the Higher Sales Tax Rate

The ruling request states that ABC Company prepares the food. It is important that, subsequent to the preparation, title to the food passes from ABC Company to the taxpayer. There is no evidence that ABC Company, in its preparation of the food, is

³ Ch. 357, Public Acts of 2003, has been enacted to enable Tennessee's participation in the Streamlined Sales and Use Tax Agreement. The effective date of Ch. 357 is dependent on the date the Streamlined Sales and Use Tax Agreement becomes effective. It presently appears that the earliest possible effective date for Ch. 357 is July 1, 2005. The amendments made by Ch. 357 change the definition of "prepared food"; however, those amendments (which exclude from "prepared food" certain items that must be cooked in order to prevent food-borne illnesses) do not change the result of this ruling.

⁴ Certain provisions of Tennessee tax law, not applicable to the sales and use tax, supercede this provision. See Tenn. Code Ann. § 67-4-2006(a)(5)-(6).

acting on behalf of the taxpayer. Therefore, assuming a bona fide sale between ABC Company and the taxpayer, the preparation by ABC Company would not subject the taxpayer's sales of the food to the higher tax rate.

Preparation of Food by the Taxpayer Would Subject Food Sales by
the Taxpayer to the Higher Sales Tax Rate

However, the taxpayer performs additional heating or combining of the food it sells. It is this additional heating or combining of ingredients that causes the taxpayer's sale of the food thus prepared to be subject to the higher tax rate.

Owen Wheeler
Tax Counsel

APPROVED: Loren L. Chumley
Commissioner

DATE: 6/5/04