

REG-1-083, Prepared Food and Beverage Service

083.01 Retail sales of prepared food, including sales by caterers and concessionaires, and all sales of prepared food, food, and food ingredients through vending machines are taxable. Retail sales of alcoholic beverages are taxable, whether sold packaged or sold by the drink. (Reg-1-031, Coin-Operated Machines; Reg-1-040, Alcoholic Liquors Consumed on the Premises; and Reg-1-087, Food for Human Consumption.)

083.02 Prepared food is food generally intended for immediate consumption, and is prepared to a point generally accepted as ready to be eaten without further preparation. Prepared food means:

083.02A Food sold in a heated state or heated by the retailer, including, but not limited to hamburgers, hot dogs, pizza, egg rolls, baked beans, and nachos with heated cheese sauce;

083.02B Two or more foods or food ingredients mixed or combined by the retailer for sale as a single item and not sold by weight or volume, including, but not limited to, fountain drinks, ice cream cones, sandwiches, and salad bars; or

083.02C Food sold with eating utensils provided by the retailer. Eating utensils include, but are not limited to, plates, knives, forks, spoons, glasses, cups, napkins, or straws. Plates do not include a container or packaging used to transport the food.

083.02C(1) If 75% or less of the sales of food by the retailer are sales of prepared food described by 083.02A and 083.02B, eating utensils are considered provided by the retailer only if they are given to the purchaser by the retailer.

083.02C(2) If more than 75% of the sales of food by the retailer are sales of prepared food described by 083.02A and 083.02B, eating utensils are considered provided by the retailer if they are available on the premises where the food is sold, regardless of whether or not the purchasers are given the utensils or take them.

083.02C(3) The 75% test is determined in the following manner:

083.02C(3)(a) The numerator is the total sales of prepared food described by 083.02A and 083.02B.

083.02C(3)(b) The denominator is the total sales of food, food ingredients, prepared food, candy, dietary supplements, and soft drinks.

083.02C(3)(c) Exclude sales of alcoholic beverages, tobacco, motor vehicle fuels, and all other non-food sales from both the numerator and the denominator.

083.02C(3)(d) The percentage is calculated using the retailer's most recently completed tax year, or if the retailer has been in operation less than a year, the retailer must make a good faith estimate of the percentage for the first year. The good faith estimate must be reviewed after three months of operation and adjusted, if appropriate. A single percentage should be calculated for all of the retailer's locations in the state.

083.02C(4) Even if more than 75% of the sales of food by the retailer are sales of prepared food, sales of food or food ingredients are not taxable if the transaction is for four or more servings as described in the "Nutrition Facts" box on the labels as required by 21 C.F.R. § 101.9, and the retailer maintains adequate records of each sale. If the transaction is for

less than four servings, or the retailer does not maintain adequate records of these sales, sales tax must be collected on these food sales.

083.02C(5) Examples of food sold with eating utensils include, but are not limited to, pieces of cake or pie served with a fork, bagels served with a knife, and cookies or donuts served on a napkin.

083.03 Prepared food does not include:

083.03A Food sold by a manufacturer whose primary NAICS classification is a food manufacturer (311XX);

083.03B Bakery items such as bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas that are not sold in a heated state or with eating utensils;

083.03C Food that is only cut, repackaged, or pasteurized by the seller, including, but not limited to, luncheon meats, cheeses, meat and cheese trays, and fruit trays;

083.03D Food sold in an unheated state by weight or volume as a single item, including, but not limited to, containers of potato salad, coleslaw or fruit salad, pudding, and popcorn; or

083.03E Eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer to prevent foodborne illnesses.

083.04 Sales and use tax applies to the gross receipts from preparing or serving prepared food and alcoholic beverages, including, for example charges for food, wages, use of dishes, room service, silverware, glassware, chairs, and tables.

083.04A Single-use, disposable food service items available to customers as a part of the retail sale of prepared food may be purchased for resale. Examples include, but are not limited to paper napkins, place mats, straws, plastic utensils, and paper cups.

083.05 Charges made by a caterer, restaurant or other retailer of prepared food or alcoholic beverages, for furnishing employees, for example, bartenders, servers, or chefs are taxable even if separately stated at the time of billing. Sales and use tax is not applied to charges for announcers, coat check services, ushers, or other persons not connected with preparing or serving of prepared food or alcoholic beverages if the charges for these services are separately stated on the invoice and the type of service is adequately described.

083.06 Sales and use tax applies to sales of prepared food or alcoholic beverages by railroads, airlines, or other transportation companies while operating in Nebraska.

083.06A If transportation companies provide prepared food or alcoholic beverages to passengers without charge, the transportation company's purchases of prepared food or alcoholic beverages are considered retail sales and subject to sales or use tax regardless of where the prepared food or alcoholic beverages are served to passengers.

083.07 If a retailer adds a charge for gratuities or tips to charges for prepared food and alcoholic beverages, these charges are taxable even if all or a portion of the amount is paid by the retailer to his or her employees.

083.07A Discretionary gratuities or tips given by customers are exempt even if charged to the customer's account and not paid directly to the server, waiter, or waitress at the time of sale or service.

083.08 The following sales of prepared food are not taxable:

083.08A Prepared food sold and served by a religious organization at a function of the religious organization;

083.08B Prepared food sold and served to patients, residents, and inmates of hospitals and other institutions licensed by the state for the care of human beings;

083.08C Prepared food sold and served at political fund-raising events by ballot question committees, candidate committees, independent committees, and political party committees;

083.08D Prepared food sold and served to the elderly, handicapped, or recipients of Supplemental Security Income by organizations that accept payments from the Supplemental Nutrition Assistance Program (SNAP);

083.08E Any purchases made with payments from SNAP; and

083.08F Prepared food sold or served by public or private schools, school districts, student organizations, or parent-teacher associations pursuant to an agreement with the proper school authorities, or in an elementary or secondary school or any institution of higher education, public or private, during the regular school day or at an approved function of the school or institution. (Reg-1-092, Educational Institutions).

083.08F(1) This exemption does not apply to sales of prepared food by an institution of higher education at a facility or event that is open to the public.

083.09 Fraternities, sororities, dorms, boarding houses, retirement communities, or other residential facilities where members or residents reside at a common location and prepared food is provided by the residential facilities as part of the agreement for occupancy, are not selling prepared food at retail.

083.09A If the residential facility contracts with a caterer, restaurant, or other food service provider to provide prepared food to members or residents of the residential facility, the charge to the residential facility is subject to sales and use tax.

083.09B If prepared food is provided to non-members or non-residents for a charge, or if there is a charge for additional prepared food served to the member or resident, the charge is subject to sales and use tax.

083.10 If a recreational, athletic, or summer camp charges a single price for attendance, these charges are not considered sales of prepared food and are exempt from sales and use tax.

083.11 Organizations that conduct fund-raising functions where prepared food and alcoholic beverages are served must compute the tax in accordance with Reg-1-090.06. The organizations may purchase prepared food or alcoholic beverages for these functions for resale.

083.12 If an employer pays to have prepared food or alcoholic beverages provided to its employees, the charge is taxable whether the employer pays the entire price, an amount per meal, or a percentage of the price of a meal.

083.12A Management fees or subsidy payments made by an employer to the provider, that are not based on the number served or the amount charged, are not taxable retail sales.

083.12B Any amount paid by an employee for the prepared food is subject to sales tax.

083.13 If a caterer, restaurant, or other food service provider provides prepared food to its employees, no use tax is due on the ingredients used to provide the free meals because food and food ingredients are not taxable. Any amount paid by an employee for the prepared food is subject to sales tax.

083.14 Concession sales are sales of food, prepared food, or alcoholic beverages made during the conduct of an event or recreational activity. Examples of concession sales include sales made at athletic events, concerts, movies, plays, amusement parks, fairs, and golf courses.

083.14A The sales tax does not have to be separately stated and collected from the customer on concession sales of food, prepared food, and alcoholic beverages. Retailers who do not separately state the sales tax will determine their taxable receipts using the procedure set out in Reg-1-008.03. Including the tax in the sales price does not exempt the concession retailer from reporting and remitting the applicable sales tax on the gross receipts from those sales.

083.14B The concession retailer may separately state and collect sales tax if he or she chooses to do so.

083.14C If more than 75% of the sales of the concession retailer are sales of prepared food under 083.02A or 083.02B as calculated under 083.02C(3), and eating utensils, as defined in 083.02C are available on the premises, the concession retailer must collect sales tax on all its sales.

(Neb. Rev. Stat. §§ 77-2701.16, 77-2703(1)(c), 77-2704.10, 77-2704.24, and 77-2704.25. July 3, 2013.)