

GSTD 2023/D1 - Goods and services tax: supplies of combination food

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Status: **draft only – for comment**

Draft Goods and Services Tax Determination

Goods and services tax: supplies of combination food

❗ Relying on this draft Determination

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Determination applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Determination turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

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What this draft Determination is about

1. This draft Determination¹ provides guidance on when, under paragraph 38-3(1)(c) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), a supply is a supply of food that is a combination of one or more foods (combination food) at least one of which is food of a kind specified in the third column of the table in clause 1 of Schedule 1 to the GST Act (taxable food).
2. All legislative references in this Determination are to the GST Act, unless otherwise indicated.
3. This Determination considers what is a combination food for paragraph 38-3(1)(c) purposes by reference to the decision of the Administrative Appeals Tribunal (AAT) in *Chobani Pty Ltd and Commissioner of Taxation* [2023] AATA 1664 (*Chobani*). It does not otherwise consider what is a taxable food.

The decision in *Chobani*

4. *Chobani* considered whether Chobani Flip Strawberry Shortcake flavoured yoghurt (product) was a combination food. The product comprised flavoured yoghurt in a plastic tub compartment with dry inclusions (cookie pieces and chocolate chips)² in a smaller compartment of the tub. Each of the dry inclusions was a taxable food. It was expected that the dry inclusions would be mixed with the yoghurt before consumption.
5. The AAT accepted that, having no trade meaning, ‘combination’ takes its ordinary meaning, as the ‘product or outcome of joining two or more things together in some way’.³ The AAT noted that a product whose taxable food ingredients ‘have lost their separate identity may, in one sense, be regarded as food that is a combination’.⁴ It was accepted by the AAT, however, that a ‘combination of that kind is not intended to be excluded by paragraph 38-3(1)(c)’.⁵ The AAT rejected the position that product components had to be ‘practically, economically and commercially distinct’. The AAT stated that⁶:

... the exclusion in s 38-3(1)(c) applies at least when a product meets the description: food that is a combination of foods that includes separately identifiable food or foods excluded by the table in clause 1 of Schedule [17] or foods of that kind. There may be cases where excluded items remain separately identifiable but nevertheless are so integrated into the overall product, or so insignificant, that they would not affect the characterisation.
6. The AAT accepted that classification of a food product involves questions of fact and degree, objectively taking all factors into account⁸ (including personal experience), to arrive at an answer by way of ‘overall impression’.⁹ The AAT found it ‘inescapable’ that the product was a combination of flavoured yoghurt, cookie pieces and chocolate chips – in which the latter components were ‘not insignificant; remain readily identifiable; and are not subsumed into a separate product’.¹⁰ The dry inclusions, it was found, were not integrated

¹For readability, all further references to ‘this Determination’ refer to the Determination as it will read when finalised. Note that this Determination will not take effect until finalised.

² The dry inclusions together comprised 10% of the product by weight. See *Chobani* at [101–132].

³ *Chobani* at [32].

⁴ *Chobani* at [61]. The definition of food includes ‘ingredients for food for human consumption’ – paragraph 38-4(1)(d).

⁵ *Chobani* at [62].

⁶ *Chobani* at [74].

⁷ The reference to ‘Schedule 2’ in this regard by the AAT is a typographical error.

⁸ These include appearance, taste, ingredients, process of manufacture, marketing and packaging.

⁹ *Lansell House Pty Ltd v Commissioner of Taxation* [2010] FCA 329 followed.

¹⁰ *Chobani* at [144].

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into the yoghurt and were significant, as indicated by their physical separation in the product as sold, their relative weight and cost, marketing and consumer experience.¹¹

7. The AAT noted that the product was to be classified at the point of supply. The AAT also noted that the policy to exempt ‘basic food’, comparisons to the older sales tax provisions, the Explanatory Memorandum¹² and the fact GST was a ‘practical business tax’¹³ were each of limited assistance in the context of this matter.

Ruling

8. The Commissioner’s view about the meaning of combination food in paragraph 38-3(1)(c) is:

- A supply of a combination food is the supply of a product comprising *separately identifiable* foods, at least one of which is a taxable food.
- A food is *separately identifiable* when it can be individually perceived by ordinary visual inspection. Being listed as an ingredient in a food alone is not sufficient to establish that a food is separately identifiable.
- The word ‘combination’ in paragraph 38-3(1)(c) takes its ordinary meaning as the ‘product or outcome of *joining* 2 or more things together in some way’.
- Whether separately identifiable foods are *sufficiently joined together* so that they form a combination food is a matter of overall impression, having regard to factors including physical appearance and packaging, labelling, marketing, product design, manner of sale and consumer experience.
- Two or more foods that are *separately identifiable* and *sufficiently joined* will not be a combination food if the taxable food is so *integrated* into the overall product, or is so *insignificant* within that product, that it has no effect on the essential character of that product.
- Whether food is a combination food must be evaluated at the point of supply. An expectation or likelihood that the combination food may be later separated or mixed does not prevent it from being a combination food.

9. The following 3 principles apply when determining whether there is a supply of a combination food:

- There must be at least one separately identifiable taxable food.
- The separately identifiable taxable food must be sufficiently joined together with the overall product.
- The separately identifiable taxable food must not be so integrated into the overall product, or be so insignificant within that product, that it has no effect on the essential character of that product.

¹¹ *Chobani* at [74].

¹² Further Supplementary Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

¹³ *Chobani* at [64].

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Principle 1 – at least one separately identifiable taxable food

10. A supply of a combination food is the supply of a product comprising separately identifiable foods, at least one of which is a taxable food.¹⁴ Food is separately identifiable when it can be individually perceived by ordinary visual inspection.

11. Food is not a combination food solely because it is made from ingredients, at least one of which is a taxable food.¹⁵

Example 1 – food that is not a combination food – blended foods

12. *Squirrel Ltd manufactures and sells a chocolate-hazelnut spread. The spread contains 20% roasted hazelnuts. While one of the ingredients is a taxable food (roasted hazelnuts), the product is not a combination food. The roasted hazelnuts are not separately identifiable as they cannot be individually perceived by ordinary visual inspection.*

Principle 2 – sufficiently joined together with the overall product

13. The word ‘combination’ in paragraph 38-3(1)(c) takes its ordinary meaning as the ‘product or outcome of *joining* 2 or more things together in some way’.

14. For foods to be sufficiently joined together with the overall product, they must be supplied as a single item for consumption, as opposed to 2 or more distinct supplies of food made at the same time. The mere fact that items of food are purchased at the same time does not make those items a combination food, even if the purchaser may intend that they be eaten together. Most obviously, this includes a person purchasing milk and chocolate biscuits in the same transaction. Additionally, a hamper containing a range of individual commercially-packaged food products that remain distinct is not a combination food.

15. The components of the combination food do not need to be physically mixed, whether at the time of supply or afterwards, to be sufficiently joined together with the overall product.¹⁶ (See Example 5 and Example 6 of this Determination regarding separate containers and layered foods.)

16. Whether or not separately identifiable foods are joined together so that they form a combination food is a matter of overall impression having regard to factors including physical appearance and packaging, labelling, marketing, product design, manner of sale and consumer experience. No one factor is necessarily determinative, and the individual weighting of each factor will depend on the circumstances of each case.

Example 2 – food that is not a combination food – meal preparation kits

17. *Meal Box Ltd supplies meal preparation kits, which involve a box containing a range of ingredients and a recipe for a meal. The ingredients are in the correct quantity for making the meal but require various preparation steps under the recipe to make that meal.*

¹⁴ *Chobani* at [74–144].

¹⁵ *Chobani* at [61–62].

¹⁶ *Chobani* at [130–134].

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One of the kits, the Nutty Chicken Pasta Kit, includes a package of roasted peanuts (taxable food).

18. *The Nutty Chicken Pasta Kit is not a combination food. While the roasted peanuts are separately identifiable, they are not sufficiently joined together with the overall product, considering the factors stated in paragraphs 8 and 16 of this Determination. The meal kit's product design, marketing and packaging give the overall impression that it is an assortment of distinct ingredients that have been included in the box to prepare a meal.*

19. *Several steps must still be undertaken to make the meal, including chopping the ingredients and cooking the chicken. Further, some required ingredients are not supplied, like water, oil and seasoning. The fact that the food items are supplied together with a recipe in the one box does not for that reason make them a combination food.*

Principle 3 – so integrated into or insignificant within the overall product

20. Two or more foods that are separately identifiable and sufficiently joined will not be a combination food if the taxable food is so integrated into the overall product, or is so insignificant within that product, that it has no effect on the essential character of that product.

21. A separately identifiable taxable food will be so integrated into an overall product that it has no impact on the product's essential character where the taxable food has no necessary impact on what the overall product really is.¹⁷

22. For example, if the chocolate-hazelnut spread in Example 1 of this Determination was offered in both 'smooth' and 'crunchy' varieties, neither of these would be a combination food. While the crunchy product would contain separately identifiable roasted hazelnuts (which contribute to the flavour and texture of the food) they are so integrated into the overall product that they do not have an impact on what it really is.

23. A separately identifiable taxable food will be so insignificant within the overall product that it has no effect on the product's essential character where the taxable food is an ingredient in the combination food, but has no necessary impact on what the overall product really is. For example, food may be so insignificant where it is merely an incidental accompaniment to the product.

24. The questions of integration and significance require a qualitative assessment. In *Chobani*, relevant factors were not limited to quantitative factors like physical separation, weight and cost of the product, but also included factors like as marketing, consumer experience and the labelling of the product as a 'flip' product.

Example 3 – food that is not a combination food – integrated foods

25. *A supermarket sells a peanut satay stir-fry sauce with chopped roasted peanuts. The roasted peanuts are a taxable food and can be seen as chunks throughout the sauce at the time of sale.*

26. *This product is not a combination food.*

27. *While the roasted nuts are separately identifiable and are joined with the other ingredients at the time of sale, the roasted peanuts are so integrated into the overall*

¹⁷ See *Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd* [2020] HCA 2 at [47] for discussion of 'essential feature' or 'essential character or purpose'.

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product that they do not affect the product's essential character. The roasted peanuts contribute to the flavour and texture of the stir-fry sauce but are so integrated into the overall product that they do not have an impact on what the overall product really is.

Example 4 – food that is not a combination food – insignificant foods

28. *Bakery Ltd sells loaves of bread with a sprinkling of roasted sesame or poppy seeds on top of the loaf of bread. The roasted seeds are a taxable food.*

29. *This product is not a combination food.*

30. *While the roasted seeds are separately identifiable and are joined with the bread at the time of sale, the roasted seeds are so insignificant within the overall product that they do not affect the product's essential character. The roasted seeds contribute to the flavour and texture of the bread but are so insignificant within the overall product that they do not have an impact on what the overall product really is.*

Example 5 – combination foods – separate containers

31. *Ranchero sells a Tuna Lunch Pak consisting of a tub containing a mixture of tuna and vegetables with dressing, and a separate tub of biscuits, packaged together by cardboard wrapping with the product label. The design and marketing of the product reflects an expectation that the contents of the 2 tubs are intended to be mixed and consumed together.*

32. *The Tuna Lunch Pak is a combination food.*

33. *The biscuits are separately identifiable by ordinary visual inspection of the product. While the biscuits are not physically mixed with the tuna, they are sufficiently joined together with the overall product, considering the factors stated in paragraphs 8 and 16 of this Determination, to give the product the essential character of a combination food.*

34. *The biscuits are neither so integrated into the overall product, nor so insignificant within that product, that they do not affect the product's essential character. The biscuits are significant to the taste, texture and intended manner of consumption of the product, and form a key part of the marketing and design of the product. The biscuits have an impact on what the product really is.*

Example 6 – combination foods – layered foods

35. *Supermarket Co sells a ready-to-eat snack product, Crunchy Custard, consisting of a fruit-flavoured custard topped with a layer of roasted pistachios and almonds. The roasted pistachios and almonds are pictured prominently on the packaging. The roasted pistachios and almonds are taxable foods and make up approximately 10% of the product by weight.*

36. *This product is a combination food.*

37. *The roasted nuts are separately identifiable by ordinary visual inspection of the product. While the roasted nuts are not physically mixed through the custard, they are sufficiently joined together with the overall product, considering the factors stated in paragraphs 8 and 16 of this Determination, to give the product the essential character of a combination food.*

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38. *While the roasted nuts constitute a smaller proportion by weight than the custard, they are neither so integrated into the overall product, nor so insignificant within that product, that they do not affect the product's essential character. The roasted nuts are significant to the taste and texture of the product and are important in the marketing and design of the product. The roasted nuts have an impact on what the product really is.*

Example 7 – combination foods – mixed foods

39. *Snack Ltd sells a range of snack products, including Tall Tales Trail Mix. This consists of a mix of unprocessed raw nuts and seeds, roasted nuts and seeds and confectionery pieces in roughly equal proportions. The roasted nuts and confectionery are taxable foods.*

40. *This product is a combination food.*

41. *Despite being mixed together in one package at the time of sale, the roasted nuts and confectionery are separately identifiable by ordinary visual inspection of the product. The roasted nuts and confectionery are sufficiently joined together with the overall product, considering the factors stated in paragraphs 8 and 16 of this Determination, to give the product the essential character of a combination food.*

42. *The roasted nuts and confectionery are neither so integrated into the overall product, nor so insignificant within that product, that they do not affect the product's essential character. The taxable foods are significant to the taste and texture of the product and form the bulk of the overall product by weight and volume. The taxable foods have an impact on what the product really is.*

Note on GSTR 2001/8 and combination food

43. Goods and Services Tax Ruling GSTR 2001/8 *Goods and services tax: Apportioning the consideration for a supply that includes taxable and non-taxable parts* deals with identifying supplies that include taxable and non-taxable parts. This includes how to distinguish mixed supplies from supplies that are in substance one thing – composite supplies. GSTR 2001/8 has no application to supplies of combination foods, as combination foods have no non-taxable parts.¹⁸ Combination foods are always treated under the GST law as a single taxable thing.

Date of effect

44. This draft Determination will not take effect until finalised.

45. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

46. The Commissioner will continue to act in accordance with Law Administration Practice Statement PS LA 2011/27 *Determining whether the ATO's views of the law should be applied prospectively only* and Law Administration Practice Statement PS LA 2012/2(GA) *GST classification of food and beverage items*.

¹⁸ Paragraph 14 of GSTR 2001/8.

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Impact on existing ATO public advice and guidance

47. We have identified the following updates to existing ATO public advice and guidance that will be required when the final Determination is issued:

- withdrawal of the following ATO Interpretative Decisions
 - ATO Interpretative Decision ATO ID 2002/994 *GST and cake frosting decorations packaged separately and supplied as one product*
 - ATO Interpretative Decision ATO ID 2003/857 *GST and the supply of mixed fruit with glacé cherries*
 - ATO Interpretative Decision ATO ID 2004/539 *GST and blended seed and nut product*
 - ATO Interpretative Decision ATO ID 2010/145 *GST and dip with biscuits*
- removal of the GST issues register – Food industry partnership *Issue 8 Hampers* (Issue 8)
- addendum to the GST Industry Issue GSTII FL1 *Detailed Food List* (DFL).

48. The ATO IDs outlined in paragraph 47 of this Determination will be withdrawn, and Issue 8 removed, because the principles that apply when determining whether there is a supply of a combination food are stated in this Determination.

49. The addendum to the DFL will be made to ensure consistency with the principles in this Determination. While this will involve updates to a number of DFL items, at this stage, we have identified only one DFL item where the 'GST status' will change (from *mixed supply* to *taxable*):

dip (with biscuits, wrapped individually and packaged together).

50. The DFL is a public ruling and continues to apply subject to its terms. An entity's ability to rely on the DFL is unaffected by this draft Determination.

51. The proposed addendum to the DFL will apply to tax periods both before and after its date of issue. As the addendum will apply both before and after its date of issue, both the pre-addendum wording of the DFL and the revised wording in the addendum will apply for overlapping periods of time. In these circumstances, entities can choose to rely on either version when applying the DFL during that period.¹⁹

Commissioner of Taxation

11 October 2023

¹⁹ Subsection 357-75(1A) of Schedule 1 to the *Taxation Administration Act 1953*. See also paragraph 58A of TR 2006/10.

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Appendix – Your comments

52. You are invited to comment on this draft Determination, including the proposed date of effect and the impact of the Determination on any existing ATO public advice and guidance that you rely on (see paragraphs 47 to 51 of this Determination).

53. Please forward your comments to the contact officer by the due date.

54. A compendium of comments is prepared when finalising this Determination, and an edited version (names and identifying information removed) is published to the Legal database on ato.gov.au

55. Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 10 November 2023

Contact officer details have been removed following publication of the final ruling.

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GSTR 2001/8; TR 2006/10

Legislative references:

- ANTS(GST)A 1999 38-3(1)(c)
- ANTS(GST)A 1999 38-4(1)(d)
- TAA 1953 Sch 1 357-75(1A)

Cases relied on:

- Chobani Pty Ltd and Commissioner of Taxation [2023] AATA 1664; 2023 ATC 10-669
- Lansell House Pty Ltd v Commissioner of Taxation [2010] FCA 329; 2010 ATC 20-173; 76 ATR 19

- Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd [2020] HCA 2; 270 CLR 494; 94 ALJR 182; 375 ALR 98

Other references:

- Further Supplementary Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998

ATO references

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 Goods and services tax ~~ Food ~~ Food classification ~~ Other

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