GSTD 2024/1EC - Compendium

Australian Government
Australian Taxation Office

Public advice and guidance compendium – GSTD 2024/1

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Goods and Services Tax Determination GSTD 2023/D1 *Goods and services tax: supplies of combination food*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

All legislative references in this Compendium are to the *A New Tax System (Goods and Services Tax) Act 1999*, unless otherwise indicated.

Issue number	Issue raised	ATO response
1	***References to 'combination food'*** While the goods and services tax (GST) legislation and the decision in *Chobani Pty Ltd and Commissioner of Taxation* [2023] AATA 1664 (*Chobani*) refer to 'a combination of foods', the draft Determination uses the term 'combination food'. This implies that 'combination food' is a category of product rather than a GST outcome that arises after applying paragraph 38-3(1)(c). While the GST outcome may ultimately not be impacted by this labelling, we request the Commissioner consider whether further explanation can be given on the concept of 'combination food' including how taxpayers should approach this labelling when determining the GST classification of types of foods specifically listed in the legislation or in public advice and guidance such as the Goods and Services Tax Industry Issue FL1 *Detailed Food List* (DFL).	The term 'combination food' has been adopted to improve readability. References to 'combination food' should not be taken to be references to specific or exclusive categories of food. We have made changes to paragraph 2 of the final Determination to clarify the intended meaning of the references to 'combination food', and 'taxable food', throughout the Determination. In the final Determination and in this Compendium: • The phrase 'food of a kind specified in the third column of the table in clause 1 of Schedule 1 from paragraph 38-3(1)(c) will be referred to as 'taxable food'. • Food, the supply of which is taxable under paragraph 38-3(1)(c), because it is a 'combination of one or more foods' at least one of which is a taxable food, will be referred to as 'combination food'. The final Determination includes examples across a broad range of products. The descriptions in the headings (for example, blended food, separate containers, layered foods, mixed foods) are intended to provide a simple,

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		high-level description of the product only. These descriptions do not indicate specific 'categories' of food that are of legislative significance.
2	***Principle 1 – a 'product' comprising separately identifiable foods*** One of the challenges of applying Principle 1 is that it is necessary to determine if there is a supply of 'a product' comprising separately identifiable foods, at least one of which is a taxable food. Guidance is given on when a food is separately identifiable, but guidance is not given on how taxpayers should approach determining if there is supply of a product comprising separately identifiable foods. There is a history of sales tax cases involving when a product becomes a different product, that is, discussing the point at which something ceases to have an independent character and becomes subsumed into a new product or becomes insignificant in its own right as it is incidental or ancillary to another product. This kind of analysis would likely be helpful to taxpayers.	We have made changes in the final Determination to the wording of Principle 1 to clarify that the Determination is not reliant on the concept of a 'product' and does not require the identification of a specific or single 'product'. Principle 1 is satisfied when there is a supply of food that includes at least one separately identifiable taxable food. It is not necessary to identify a single or specific 'product' for the purpose of determining whether a supply of food includes at least one separately identifiable taxable food and therefore may be a combination food. Accordingly, it is not necessary to provide detailed discussion on the meaning of the word 'product'.
3	***Principle 1 – ordinary visual inspection*** The Commissioner's view about the meaning of 'combination food' set out in paragraph 8 of the draft Determination extends beyond the parameters in paragraph 74 of *Chobani* and introduces additional factors to those set out in *Chobani*. For example, the Commissioner expresses the view that food is 'separately identifiable' 'when it can be individually perceived by ordinary visual inspection'. This introduces an unnecessarily complex subjective test that may lead to a variety of unintended interpretations as it relies on an individual's perception. This does not provide a uniform basis upon which to apply classification principles to food products. More commonly used terminology such as 'separate and distinct from' would be more suitable; that is, food is 'separately identifiable' when it is 'physically separated', as was the case in *Chobani*. This interpretation would remove	The Commissioner considers that a taxable food is separately identifiable, in this context, when it can be individually perceived by ordinary visual inspection. While the taxable foods in the product considered in *Chobani* were contained in a separate physical compartment, nothing in the Administrative Appeals Tribunal (AAT) decision indicates that physical separation is required for food to be a combination food. The AAT in *Chobani* did not directly address how the 'separately identifiable' test should be conducted. However, the Commissioner considers that requiring physical separation would be inconsistent with the approach taken by the AAT. In particular, the AAT: • confirmed that GST food classification involves questions of fact and degree, objectively taking all factors into account, to arrive at an

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	subjectivity and minimise the likelihood of differences in opinion and classification disputes, particularly when compared to the example of caramel-flavoured yoghurt.	answer by way of 'overall impression'.[1] The physical composition and presentation of the product were factors that the AAT considered in making its assessment but were not determinative.[2] • specifically noted the 'physical separation' of the taxable food as a factor supporting the conclusion that the taxable food was not integrated into the yoghurt or insignificant in the product, rather than being relevant to whether the taxable food was separately identifiable.[3] • referred to the white chocolate chips as being 'plainly identifiable' within the blend of dry ingredients, even though they were not physically separated from the cookie pieces.[4] We have provided further guidance in the final Determination to explain when a taxable food is separately identifiable because it can be individually perceived by ordinary visual inspection.
4	***Example 1 – blended foods*** The reason for including the percentage of roasted hazelnuts (20%) in Example 1 of the draft Determination is unclear. Is this intended to suggest a bright-line test regarding the amount of a taxable food included before it is regarded as a combination food? Example 1 of the draft Determination also raises questions about the treatment of 'crunchy' varieties of nut spreads which are confirmed later in paragraph 22 of the draft Determination under Principle 3. Without reading paragraph 22, Example 1 could be construed as misleading and may suggest that a spread with 20% unblended roasted nuts could be a combination food. Further examples for Principle 1 would assist taxpayers in determining when taxable food is separately identifiable.	We have removed the reference to percentage weight (20%) from Example 1 of the final Determination. The inclusion of this fact was not necessary as it is not relevant to the point being illustrated, which is that food is not separately identifiable in this context if it cannot be individually perceived by ordinary visual inspection. The percentage was previously included to describe a realistic example of this type of product and should not be taken to suggest that there is a bright-line test regarding the amount of taxable food that is required for a food to be a combination food. We have included new footnote 16 before Example 1 in the final Determination to cross reference examples appearing later in the Determination, which provide contrasting examples of food that include at least one separately identifiable taxable food. We have also included a new example (Example 3 in the final Determination) which explains how the principles would apply if the chocolate-hazelnut

[1] *Chobani* at [80].
[2] *Chobani* at [144].
[3] *Chobani* at [74].
[4] *Chobani* at [131].

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		spread in Example 1 of the final Determination was sold in a 'crunchy' variety where the taxable food remained separately identifiable
5	***Principle 2 – Hampers*** The reference to hampers is important but it has been included without a detailed explanation as to why a hamper is not a combination food. We request a more detailed explanation as to why a hamper is not a combination food. The Commissioner may simply need to reference the Explanatory Memorandum to this provision which specifically notes a hamper is not a combination of foods. As the Determination confirms that a hamper containing 'a range of individual commercially packaged food products that remain distinct' is not a combination food, why does GST issues register – Food industry partnership *Issue 8 Hampers* need to be removed? *Issue 8 Hampers* contains useful guidance information. If *Issue 8 Hampers* is removed, please advise if this detailed information will be located elsewhere**.**	We have provided further detail in paragraph 20 of the final Determination to explain why a hamper is not a combination food and to address any concern that the Commissioner's position has changed. Issue 8 has been archived because the Commissioner's unchanged view is now set out in the final Determination as part of explaining the principles that apply when determining whether there is a supply of a combination food. Issue 8 was not a public ruling and referred to Goods and Services Tax Ruling GSTR 2001/8 *Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable part*s and the DFL as the source of the ATO view. Both GSTR 2001/8 and the DFL confirm that the supply of a hamper is a mixed supply. As with all information on the Legal database, the information previously contained in Issue 8 will not be removed entirely. As indicated above, the issue has simply been archived and annotated as not current.
6	***Example 2 – meal preparation kits*** The Commissioner's view on 'meal kits' should be explained in more detail. In Example 2 of the draft Determination, the Commissioner indicates that meal kits are not a combination food. The rationale appears to be that meal kits are a bundle of products that are capable of assembly, but typically require further preparation, cooking, or ingredients to be added. Example 2 of the draft Determination creates the impression that 'meal kits' as a food product are not taxable. The Commissioner should flag whether there are other circumstances in which the supply of a meal kit may be taxable under paragraph 38-3(1)(c) or another provision. Meal kits are treated as mixed supplies by industry and the taxable component of such kits is often determined by way of an apportionment based on a fair and reasonable	In the final Determination, we have provided further detail in Example 2 to explain why the particular meal preparation kit described in the example is not a combination food. We have also emphasised that whether separately identifiable foods are sufficiently joined together is a matter of overall impression, taking into account various factors, with no single factor being necessarily determinative. The labelling of the product as a 'meal preparation kit' in Example 2 of the final Determination is not determinative. Food may be labelled as a 'meal kit' or 'meal preparation kit' in circumstances where an assessment of the relevant factors leads to a finding that the components are sufficiently joined together. Examples 3 to 9 of the final Determination provide contrasting examples where the separately identifiable taxable food is sufficiently joined together with the other components of the overall product at the time of sale. In

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	methodology. Example 2 of the draft Determination does not acknowledge this mixed supply concept. Further examples for Principle 2 would assist taxpayers.	particular, Example 7 (Tuna Lunch Pack) of the final Determination considers the scenario where the taxable food is contained in a separate tub.
7	***Principle 3 – so integrated into or so insignificant within the overall product*** Further explanation is required in relation to insignificant foods and when they will have 'no effect on the essential character of that product'. What does 'no effect' mean in practical terms? When is something so insignificant that it doesn't alter the essential character? The key distinction in the draft Determination appears to be the proportion by weight and this can be seen as influencing what the product really is? Is this the Commissioner's view?	We have updated the final Determination to remove references to 'essential character' from Principle 3 as this concept has a specific meaning for customs purposes that may cause confusion in this context. The final Determination emphasises that these questions of integration and significance require a qualitative assessment and are a matter of overall impression. These are questions of fact and there is no bright-line test (for example, no minimum weight or volume, or percentage quantity) for when taxable food will be so integrated or so insignificant that the overall product does not have the character of being a combination food (see paragraph 28 of the final Determination). We acknowledge that food classification is a complex area and that determining the GST treatment can be difficult in practice. We have provided additional examples to provide further guidance and illustrate the practical application of Principle 3 of the final Determination. Where a particular fact, such a percentage weight or quantity, is provided in an example, this is just one relevant factor. This should not be taken to indicate that there is a bright-line test for determining whether a product is a combination food.
8	***Example 4 – insignificant foods*** This example introduces the concept of insignificance to classifying a product for GST purposes. In this example, the roasted seeds are so insignificant within the overall bread product that they do not impact the essential character of the product. As this currently stands, this insignificance 'test' will just create more work and complexity in trying to rate a product for GST purposes.	The consideration of insignificance in the final Determination follows directly from the reasoning adopted in *Chobani.*[5] In the final Determination, we have made updates to Example 4 (now Example 5) to clarify the application of the principles in that case. The final Determination emphasises that these questions of integration and significance require a qualitative assessment and are a matter of overall impression. These are questions of fact and there is no bright-line test (for example, no minimum weight or volume, or percentage quantity) for when taxable food will be so integrated or so insignificant that the overall product

[5] See for example [74], which is referenced at footnote 20 and [144]

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	Include an example of when the insignificance threshold is reached, and the seeds would impact on the essential character of the products. Is it 5% or 10% or 50%?	does not have the character of being a combination food (see paragraph 28 of the final Determination). Where a particular fact, such a percentage weight or quantity, is provided in an example, this is just one relevant factor. This should not be taken to indicate that there is a bright-line test for determining whether a product is a combination food
9	***Example 5 – separate containers*** Example 5 of the draft Determination explores the marketing test and the concept of 'sufficiently joined together'. The tuna and biscuits are both separately packaged within a broader packaging display made available to customers. The tuna is separately packaged in a can (or other container) for food standards reasons. When the packaging for the product is broken open, the customer has a container of tuna and a separately packaged biscuit offering. This is a mixed supply. If the customer wanted to discard the biscuits, they could. Contrast this to the 'flip yoghurt' product considered in *Chobani*. The packaging is a container that keeps the yoghurt and dry ingredients to be 'flipped' into the yoghurt still together once opened, in separate compartments under the same lid. This allows the 'flip' to occur when the customer is ready to consume the product. The packaging of the yoghurt food combination is always maintained and not broken apart – this does not occur for a mixed supply of tuna and biscuits which are separately packaged and can be separated from each other. The ATO aims to classify separately packaged items, such as tuna and biscuits, in separate sealed containers held together with a cardboard wrapping, as combination foods. This approach contradicts the previous classification of such products as mixed supplies. Application of a marketing test	In the final Determination, we have made updates to Example 5 (now Example 7) but remain of the view that the biscuits are sufficiently joined together with the tuna, and that the overall impression of the product is that it is a combination of biscuits and tuna. We do not consider this to be a change of view as it is consistent with the DFL, which provides the Commissioner's view that a 'lunch kit (containing taxable and GST-free foods, e.g. tuna and biscuits)' is taxable as it is a combination food. However, as indicated in the draft Determination, an addendum to the DFL has been published to ensure broader consistency with the principles in this Determination. While this involved updates to a number of DFL items, there was only one DFL item where the 'GST status' changed (from mixed supply to taxable) – 'dip (with biscuits, wrapped individually and packaged together)'. The addendum to the DFL applies to tax periods both before and after its date of issue. This has the effect that the pre-addendum wording of the DFL and the revised wording in the addendum apply for overlapping periods of time. In these circumstances, entities can choose to rely on either version when applying the DFL during that period.[6] As outlined in the Determination, 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*.

[6] Subsection 357-75(1A) of Schedule 1 to the *Taxation Administration Act 1953*. See also paragraph 58A of Taxation Ruling TR 2006/10 *Public Rulings*.

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	cannot change the fact the product in this example is a mixed supply (as it has been treated since the introduction of GST). It is unclear how the outcome in *Chobani* supports a change in the GST treatment for these types of products.	
10	***Example 6 – layered foods*** Applying the concept of combination food to 'layered foods' appears to be taking the concept a step too far. This is not a sensible outcome and seems to be out of step with the outcome in *Chobani*. This example introduces a novel concept based on what appears to be a bright-line test. Specifically, if 10% of a food product consists of an otherwise taxable food product (for example, toasted nuts) then the entire product is deemed a taxable 'combination food,' regardless of whether the various foods are separated to some extent or combined within the same package. The commercial value of these inputs is relatively and absolutely low, this would overstate the GST to be paid on the combination foods. This example suggests a 10% threshold is used to determine whether a taxable food is a 'significant' food. If that is the case, this should be expressly set out in the Determination. The legislative basis for this interpretation is not clear as in other food-related matters, a 'consisting principally' (that is, 50%) test is required. While the same 10% threshold was used to describe the product in *Chobani*, the white chocolate and biscuit mix in that product sat in a separate part of the container to the yoghurt. In this example, the nut layer sits atop the custard in this example. This is an example of where the 'test' for separately identifiable foods of 'when it can be individually perceived by ordinary visual inspection' does not give rise to a sensible outcome. While the nut layer may be identifiable from the	In the final Determination, we have made updates to Example 6 (now Example 8 in the final Determination) to clarify the application of the principles in that case, but remain of the view that the overall impression of the product is that it is a combination of roasted nuts and custard. In relation to Principle 1, the Commissioner considers that a taxable food is separately identifiable, in this context, when it can be individually perceived by ordinary visual inspection. While the taxable foods in the product considered in *Chobani* were contained in a separate physical compartment, nothing in the AAT's decision indicates that physical separation is required for food to be a combination food. For further discussion see response to Issue 3 of this Compendium. In relation to Principle 3, the final Determination emphasises that the questions of integration and significance require a qualitative assessment and are a matter of overall impression. These are questions of fact and there is no bright-line test (for example, no minimum weight or volume, or percentage quantity) for when taxable food will be so integrated or so insignificant that the overall product does not have the character of being a combination food (see paragraph 28 of the final Determination). Where a particular fact, such a percentage weight or quantity, is provided in an example, this is just one relevant factor. This should not be taken to indicate that there is a bright-line test for determining whether a product is a combination food.

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	custard layer on visual inspection, the nut layer would not be able to be readily physically separated from the custard layer without some of the custard coming with the nuts if they were to be 'scraped' off the top of the custard. The more appropriate test of whether food items are 'separately identifiable' would be when the items are actually 'physically separated'. When compared to Example 3 of the draft Determination (integrated foods) and Example 4 of the draft Determination (insignificant food), is Example 6 of the draft Determination another category of food entirely? This incorrectly suggests that Example 6 is not an integrated food. The distinction between layered foods (separately identifiable by visual inspection) and situations where food is separately identifiable but insignificant, may prove to be challenging in practice. The application of this concept in practice could prove to be unworkable as at a retail level the supplier will not necessarily have sufficient information (other than the ingredients of the product) to make a decision as to the percentage of the product that the supposed taxable food may represent. The ATO position would appear to increase the risk of potential misclassification of food products rather than assist in clearly and simply determining what is a combination food.	
11	***Example 6 – layered foods*** Paragraph 38 of the draft Determination that states '[t]he roasted nuts have an impact on what the product really is'. An important ingredient in chocolate-hazelnut spread (Example 1 of the draft Determination) is hazelnuts, but it is just that – an ingredient. The inclusion of the hazelnuts in a chocolate hazelnut spread (or peanuts in peanut butter) makes the product 'what it is' but it still remains GST-free as a spread.	We do not consider there to be any inconsistency between Example 6 in the draft Determination (now Example 8 in the final Determination) and Example 1. Example 1 illustrates circumstances where food does not include at least one separately identifiable taxable food. As the taxable food (roasted hazelnuts) are not separately identifiable, it is not necessary to consider the questions of integration and significance, which require a qualitative assessment and are a matter of overall impression. In the final Determination, we have included new Example 3 which explains how the principles would apply if the chocolate-hazelnut spread in Example 1

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	The wording in paragraph 38 of the draft Determination is inconsistent with the position in Example 1 and the comments in paragraph 22 of the draft Determination which confirms that separately identifiable nuts in a crunchy nut spread 'are so integrated into the overall product that they do not have an impact on what it really is'.	was sold in a 'crunchy' variety where the taxable food remained separately identifiable. We have also made updates to Example 8 to clarify the application of the principles in that case – see our response to Issue 7 of this Compendium.
12	***Example 7 – mixed foods*** Example 7 of the draft Determination appears to indicate that there is a category of product that is 'combination food'. What should be the approach when the essential character of a mixed food is that of another product? The outcome may be the same, or it may not, and this aspect warrants further exploration. An example of this is trail mix and also breakfast cereal (we understand that the Commissioner is considering breakfast cereals with a nut and grain content of greater than 50% to be a combination food). Another example of a common food that has the essential character of another basic food product is soup. Soup is a blended food that is intended to be GST-free as the default position. We query however whether soup could potentially be a combination food. The Determination does not give any guidance on whether, and if so at what point, a soup if it were sold with another food such as a dry roasted seed sprinkle or a cracker or crispy noodles, may become taxable under paragraph 38-3(1)(c). Consideration and inclusion of comments to address this would be useful.	*References to 'combination food'* We have made changes to paragraph 2 of the final Determination to clarify the intended meaning of the references to 'combination food' throughout the Determination. The phrase 'combination food' has been adopted in the Determination, including in the example headings, to improve readability and should not be taken to refer to specific or exclusive categories of food. *Consists principally* A supply of food is taxable under item 19 of the table in clause 1 of Schedule 1 if the food consists principally of seeds or nuts that have been processed or treated by salting, spicing, smoking or roasting, or in any other similar way. This potentially applies to all types of food, including breakfast cereals. The 'consists principally' test is a separate legislative test to the test for combination foods. The Determination does not consider whether food is taxable under item 19 of the table in clause 1 of Schedule 1. The DFL has been updated to clarify that breakfast cereals and other breakfast products that consist principally of seeds or nuts that have been processed or treated by salting, spicing, smoking or roasting, or in any other similar way (including toasting or baking) are taxable food. *Combination food* Whether or not different types of products (including trail mix, breakfast cereal and soup) are combination foods depends on an application of the principles outlined in the Determination. There is no bright-line test for the amount of taxable food required to be present for something to be a combination food.

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		In our review of existing ATO public advice and guidance following the *Chobani* decision, we identified that further updates to the DFL entries for breakfast cereals and breakfast products are required to ensure consistency with the principles in the Determination. That is, to clarify that breakfast cereals and breakfast products are not GST-free if they are a combination food. Not all breakfast cereals or breakfast products that contain processed seeds or nuts will be combination foods. In the final Determination, we have provided a new example of a muesli breakfast product that contains roasted nuts but is not a combination food as the roasted nuts are so insignificant within the overall product that they do not affect its characterisation (see Example 6 of the final Determination). We note that: • 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 draft or proposed changes. • The 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. • The Commissioner will continue to act in accordance with PS LA 2011/27 and PS LA 2012/2 (GA). We will engage with external stakeholders on these further proposed changes.
13	***Example 7 – Mixed foods*** It is unclear why Example 7 of the draft Determination has been included. The tax treatment of trail mixes containing processed or treated nuts, crystallised or glace fruit or confectionery pieces has previously been settled (as taxable) and is contained in the DFL. This example does not need to be included. It creates unnecessary confusion.	Example 7 of the draft Determination (now Example 9 in the final Determination) explains how the principles in the Determination apply to a supply of food of this kind. The example also provides a useful illustration of food that is a combination food despite the lack of physical separation or separate packaging of the taxable food from the other components of the product.

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14	***Examples – what is a combination food*** A number of examples are directed at what is not a combination food. It would be useful if contrasting examples were given regarding what is a combination food.	Examples 7 to 9 in the final Determination provide contrasting examples that are directed at illustrating when food is a combination food.
15	***Characterisation at time of supply*** While the AAT in *Chobani* noted that the point of supply is the relevant point when a decision must be made as to whether something is a combination of foods (the Commissioner references this comment in paragraph 7 of the draft Determination) it may be relevant to consider and set out in more detail factors like consumption patterns after purchase and whether this has influenced the Commissioner's views. For example, is this relevant for hampers? Example 2 of the draft Determination indicates the fact that preparing and cooking the items in the meal kit are relevant to determining that the meal kit is not a combination of foods.	The decision of the AAT in *Chobani* confirms that while food must be evaluated at the point of supply, this does not mean the intended use of the product is necessarily irrelevant in determining whether, at that time, the product is a combination food. The intended use may be relevant when the product is designed and marketed for that use.[7] As outlined in the Determination, the product design, how it is marketed and the consumer experience are relevant factors in forming an overall impression of the product.[8] This is discussed at paragraph 22 of the final Determination and illustrated by Examples 2, 7 and 8 of the final Determination.
16	***Relevance of personal experience*** Care should be taken in how the decision in *Chobani* is described. We note for example the comment in paragraph 6 of the draft Determination that: > The AAT accepted that classification of a food product involves questions of fact and degree, objectively taking all factors into account[8] (including personal experience), to arrive at an answer by way of 'overall impression'. However, what is actually relevant in the character of the product at the point of supply, per paragraph 82 of the decision in *Chobani* regarding the fact the judge sampled the food product in *Lansell House Pty Ltd v Commissioner of Taxation* [2010] FCA 329 (*Lansell House*):	We have taken on board this feedback and removed the words 'including personal experience' from the final Determination. As the Determination confirms that classification of a food product involves questions of fact and degree, objectively taking all factors into account, it is not necessary to single out any one factor. The AAT in *Chobani*, following the approach taken in *Lansell House*, considered it was appropriate to undertake a physical examination of the product, sample the product, and rely on its own experience of how the product is used. The fact that the AAT ultimately considered that it would have reached the same conclusion without sampling the product in this case, does not mean that the approach was not appropriate or that sampling a product will never be relevant to the classification process.

[7] *Chobani* at [72].
[8] *Chobani* at [144].

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	The Court also relied upon his Honour's own experience of the uses to which a cracker may be put. This suggests it is not inappropriate to take into account how the consumer will use the Product in this case. But that does not detract from the conclusion indicated earlier that it is the character of the Product at the point of supply that is to be determined, not its character after the final consumer has interacted with it, for example by flipping the dry inclusions and mixing them into the flavoured yoghurt. Senior Member Olding noted later at paragraph 84, that following the lead of the Court in *Lansell House*, he too sampled the yoghurt product concluding that he 'did not find flipping and eating the Product particularly useful for the characterisation question which I would have answered the same way without the benefit of consuming the sample'. Therefore, 'personal experience' is not necessarily a factor the AAT accepted is involved in classifying the food product for GST purposes.	
17	***Interaction with GSTR 2001/8*** A better explanation is required as to why or when GSTR 2001/8 does not apply – if something is not a combination food under the draft Determination, might it be a mixed or composite supply instead? Why is the guidance in GSTR 2001/8 on composite supplies not relevant to combination foods? It touches on similar concepts of 'separately identifiable parts'. The picnic box in Example 10 of GSTR 2001/8 could be evaluated as a potential combination food. Compare with Examples 2 and 5 of the draft Determination. On the last sentence – 'Combination foods are always treated under the GST law as a single taxable thing' – what is this based on? The wording in paragraph 38-3(1)(c) suggests there are multiple supplies that are ultimately treated as one supply, but this is similar to what happens with composite	We have taken this feedback on board in the final Determination. We have: • moved the discussion of GSTR 2001/8 to the introduction section of the Determination to provide more detailed context • removed the reference to a supply of combination food being the supply of 'a single taxable thing' • explained that, if a supply is not a supply of a combination food, it may be necessary to determine if the supply is a mixed or composite supply and provided a reference to GSTR 2001/8. However, we do not consider that further explanation is required as to why GSTR 2001/8 does not apply to supplies of combination food. A supply of a combination food is wholly taxable and does not contain any non-taxable parts. It is not a mixed supply.

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	supplies under GSTR 2001/8 (albeit under a different legislative mechanism). This section should be re-written to better help taxpayers apply the guidance from both GSTR 2001/8 and the draft Determination to their food products. Similar to other rulings, where the introduction sets out the high-level context, that is, when you use this guidance, this is when you should look at the other one. At the moment, these 2 pieces of ATO guidance are completely separate and pretend the other does not exist or apply – when, from a taxpayer's perspective, both may be relevant to their new food products.	
18	***Food marketed as a prepared meal*** While we understand that further guidance on the Commissioner's view on the concept of 'food marketed as a prepared meal' following on from the decision in *Simplot Australia Pty Limited v Commissioner of Taxation* [2023] FCA 1115 will likely be released separately to this draft Determination, we consider it prudent to reference this concept/case and the Decision Impact Statement within the draft Determination to ensure taxpayers are alerted to the fact that this draft Determination and concepts contained therein may only represent part of the relevant considerations. A practical example is salad kits.	As outlined in paragraph 3 of the final Determination, the Determination considers what is a combination food for paragraph 38-3(1)(c) purposes by reference to the decision of the AAT in *Chobani*. It does not otherwise consider what is a taxable food. We are currently preparing further public advice on the implications of the *Simplot Australia Pty Limited v Commissioner of Taxation* [2023] FCA 1115 decision and to explain how the principles from this decision apply to other products.
19	***Prospective application*** If the draft Determination is finalised in its current form, it will impact many foods for which the GST treatment is currently settled, for example mixed supplies like John West tuna and biscuits and supermarket own-brand versions of the same product where the tuna and the biscuits are separately contained from each other. The packaging of these products	The date of effect remains unchanged in the final Determination. The Determination applies both before and after its date of issue. We do not consider the position with respect to tuna and biscuits to be a change of view as it is consistent with the DFL, which provides the Commissioner's view that a 'lunch kit (containing taxable and GST-free foods, e.g. tuna and biscuits)' is taxable as it is a combination food.[9]

[9] The wording of this DFL entry was updated on 28 February 2024 and is now 'dip and biscuits sold as a single item for consumption'.

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	is not sufficiently connected to be a food combination and they are a mixed supply, like they have since the commencement of GST in July 2000. In this regard, the draft Determination should apply prospectively only, particularly as the draft Determination in its current form introduces new concepts. Any changes to treat food items as taxable that are currently GST-free should only apply prospectively. This issue is of great concern and in some cases may challenge their current financial viability.	However, as outlined at paragraph 58 of the final Determination, the Commissioner will continue to act in accordance with PS LA 2011/27 and PS LA 2012/2 (GA).
20	***Impact on existing public advice and guidance*** The ATO Interpretative Decisions identified in the Determination do not need to be withdrawn. • ATO Interpretative Decision ATO ID 2002/994 *GST and cake frosting decorations packaged separately and supplied as one product* – the *Chobani* decision doesn't require ATO ID 2022/994 to be removed as this is still a mixed supply and not a combination food. • ATO Interpretative Decision ATO ID 2010/145 *GST and dip with biscuits* – this is a mixed supply and not a food combination, so it is unclear why ATO ID 2010/145 needs to be withdrawn. A change in the GST treatment of these products to taxable would be inconsistent with how these products are packaged and used, noting currently, there is no applicable marketing test for these products. • ATO Interpretative Decision ATO ID 2004/539 *GST and blended seed and nut product* – it is not clear how or why, based on the principles outlined in the draft Determination, the ATO proposes to withdraw ATO ID 2004/539. If the ATO is now suggesting that this product is a combination food, this seems completely at odds with the comments in the ATO ID concerning	The ATO Interpretative Decisions identified in the draft Determination have now been withdrawn. The ATO Interpretative Decisions were withdrawn because the Commissioner's view of principles that apply when determining whether there is a supply of a combination food are now stated in the final Determination. The DFL, a public ruling, has been updated to ensure consistency with the principles in the final Determination. The DFL provides the Commissioner's view on each of the products previously covered in the withdrawn ATO Interpretative Decision: • ATO ID 2002/994 – see updated DFL entry ID 1839 'baking mixes (e.g. biscuit, baking mixes cake, cookie, cupcake, fairy cake) that contain separately packaged taxable foods, such as edible cake decorations, within the box or packet' confirming this is a mixed supply (no change of view). • ATO ID 2010/145 – see updated DFL entry ID 1107 'dip and biscuits sold as a single item for consumption'. Refer to the response to Issue 9 for further discussion of this change of view (from mixed supply to taxable). • ATO ID 2004/539 – see updated DFL entry ID 926 'blended roasted seed and finely ground roasted nut product' confirming the supply of this product is GST-free (no change of view). Although not listed in the submission, for completeness we also note:

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	the fact that the 'nuts have been processed to such a degree that they no longer retain a separate identity and have been incorporated as ingredients into the seed and nut blend'. The ATO should confirm how the *Chobani* decision supports the withdrawal of this ATO ID.	• ATO Interpretative Decision ATO ID 2003/857 *GST and the supply of mixed fruit with glacé cherries* – see updated DFL entry ID 1441 'mixed dried fruit with glace cherries' confirming the supply of this product is taxable (no change of view).