


# ***GIR/food-industry-ch35 -***

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# Food Industry Partnership – issues register

This issues register, originally published on our main website, provides guidance on issues identified during past consultation with industry participants.

Issues in this register that are a public ruling can now be found in the *Public Rulings* section of this Legal Database.

Issues in this register that have not been labelled as public rulings, constitute written guidance. We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.

If you follow our information on these issues and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we must still apply the law correctly. If that means you owe us money, we must ask you to pay it but we will not charge you a penalty. Also, if you acted reasonably and in good faith we will not charge you interest. If correcting the mistake means we owe you money, we will pay it to you. We will also pay you any interest you are entitled to.

If you feel that the guidance in this issues register does not fully cover your circumstances, or you are unsure how it applies to you, you can seek further assistance from us.

## Introduction

Where an issue in this issue register simply sets out the way the law applies, rather than dealing substantially with a question of legal interpretation, we have added to the item the description 'non-interpretative'.

For GST, Luxury Car Tax and Wine Equalisation Tax purposes, from 1 July 2015, where the term 'Australia' is used in this document, it is referring to the 'indirect tax zone' as defined in subsection 195-1 of the GST Act.

This is a register of food issues the ATO has determined. Click on the link to view the issue of interest to you.

(a) added, (u) updated, (w) withdrawn

| Date         | Issue  |
|--------------|--|
| 18/01/01 (u) | <a href="#">Issue 1 - What is food?</a>  |
| 27/07/00 (u) | <a href="#">Issue 2 - Farm to 'food' product transformation</a>  |
| 30/03/01 (u) | <a href="#">Issue 3 - Grain</a>  |
| 14/03/00 (a) | Issue 4 - Premises<br>This issue is addressed in two ATO determinations (GSTD 2000/4 and GSTD 2000/5)  |
| 16/05/01 (u) | <a href="#">Issue 5 - Prepared food</a>  |
| 14/03/00 (a) | Issue 6 - Packaging<br>This issue is the subject of a determination (GSTD 2000/6). It considers when a supply of food packaging is GST-free. |
| 15/03/02 (w) | <a href="#">Issue 7 - The previous information has been withdrawn pending the placement of up to date information</a>                        |

| <b>Date</b>  | <b>Issue</b>   |
|--------------|--|
| 28/02/24 (w) | <a href="#">Issue 8 - Hampers</a>  |
| 28/05/01 (u) | <a href="#">Issue 9 - Fats and oils</a>  |
| 18/05/00 (a) | <a href="#">Issue 10 - Ingredients for beverages</a>   |
| 12/07/02 (u) | <a href="#">Issue 11 - Are food additives GST-free under section 38-2 of the GST Act?</a>  |
| 26/05/00 (a) | <a href="#">Issue 12 - Food marketed as confectionery or ingredients for confectionery</a>   |
| 16/02/01 (u) | <a href="#">Issue 13 - What is a 'pudding'?</a>  |
| 03/10/01 (u) | <a href="#">Issue 14 - Beverages for infants</a>   |
| 02/06/00 (a) | <a href="#">Issue 15 - Ice</a>   |
| 21/09/00 (u) | <a href="#">Issue 16 - Are coffee beans subject to GST?</a>  |
| 27/07/00 (a) | <a href="#">Issue 17 - Are seed potatoes 'food' for GST purposes?</a>  |
| 30/05/01 (u) | <a href="#">Issue 18 - Is psyllium considered to be food for the purposes of the GST Act?</a>  |
| 04/09/00 (a) | <a href="#">Issue 19 - Concentrated fruit juice and concentrated fruit drinks</a>  |
| 04/02/02 (w) | <a href="#">Issue 20 - The previous information has been withdrawn pending the placement of up to date information</a>   |
| 08/10/02 (u) | <a href="#">Issue 21 - Vitamins and minerals</a>   |
| 19/09/00 (u) | <a href="#">Issue 22 - Are supplies of oyster spat and adult oysters GST-free?</a>   |
| 15/09/00 (a) | <a href="#">Issue 23 - Is the supply of distilled water subject to GST?</a>  |
| 18/10/02 (u) | <a href="#">Issue 24 - Ingredients used for home brewing or wine making</a>  |
| 20/08/01 (u) | <a href="#">Issue 25 - Tea</a>   |
| 04/12/00 (a) | <a href="#">Issue 26 - Are crispbreads and ricecakes subject to GST?</a>   |
| 11/12/00 (a) | <a href="#">Issue 27 - Is a decoction made from herbs prescribed in a Chinese herbal medicine formula considered to be a tea, tea preparation or preparation marketed principally as a substitute for a tea preparation?</a> |
| 22/12/00 (a) | <a href="#">Issue 28 - How are hot and cold chickens treated for the purposes of the GST Act?</a>  |
| 29/02/01 (a) | <a href="#">Issue 29 - The GST treatment of different types of chocolate</a>   |
| 29/02/01 (a) | <a href="#">Issue 30 - Pastry products</a>   |
| 07/05/01 (a) | <a href="#">Issue 31 - Aloe vera juice and aloe vera concentrate</a>   |
| 03/03/02 (a) | <a href="#">Issue 32 - Are raw/unprocessed olives GST-free as food for human consumption?</a>  |
| 23/04/02 (a) | <a href="#">Issue 33 - What is the GST treatment of whey protein products (formulated supplementary sports food or dietary supplement)</a>   |

| Date         | Issue  |
|--------------|--|
| 21/05/02 (a) | <a href="#">Issue 34 - Are green runners and natural sausage casings GST-free as ingredients for food for human consumption?</a> |
| 25/10/08 (u) | <a href="#">Issue 35 - Are powdered chocolate and cocoa based drinking preparations that are added to water GST-free?</a>        |

## Issue 1

The content for this issue is a public ruling for the purposes of the *Taxation Administration Act 1953* and can be found [here](#).

## Issue 2

### Farm to 'food' product transformation

#### At what point is fresh produce considered to be 'food'?

The content for this issue is a public ruling for the purposes of the *Taxation Administration Act 1953* and can be found [here](#).

## Issue 3

### Grain, cereal and sugar cane

For source of the ATO view, refer to:

- [GSTB 2001/1](#) - *Pulses supplied as food for human consumption*
- [Detailed food list](#)

Grain, cereal and sugar cane are not considered food for the purposes of the GST Act until they have been processed or treated resulting in an alteration of their form, nature or condition (paragraph 38-4(1)(h) of the GST Act).

#### ***What sort of processing treatment do grains, cereals and sugar cane need to undergo before they can be considered 'food'?***

Generally grain, cereal and sugar cane will be considered food once they have been milled, machine dressed, cleaned and/or sprouted or processed in some other way. Harvesting is not considered to be a process or treatment that alters the form, nature or condition of the product. After the grain, cereal or sugar cane has been treated or processed resulting in an alteration in form, nature or condition, they can be classed as food. The supply however will be GST-free only where it is food for human consumption or ingredients for food for human consumption ([section 38-4](#) of the Act).

(See [GSTB 2001/1](#) for a detailed discussion of dried pulses.)

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#### **Example 1**

*There are grains, which include peas, beans, chickpeas, and lentils that once they are harvested, have only to be packaged and/or cleaned before they are supplied for consumption.*

*The cleaning of the grains is regarded as a process or treatment resulting in an alteration of the form, nature or condition of the grains. If the cleansing treatment results in the grains being of a grade or quality suitable for human consumption, then the supply of the grains as food will be GST-free under section 38-2 of the GST Act. It then needs to be ascertained whether these grains are food for human consumption or ingredients for food for human consumption.*

#### **Example 2**

*A sugar cane grower sells sugar cane to a mill. As the cane has not been subject to any processing or treatment, GST is payable on the sale even though the sugar is ultimately for human consumption. However, the mill is entitled to input tax credits for the GST included in the price of the sugar cane.*

*The mill processes the sugar cane and sells the raw sugar to a refinery. GST is payable on the sale as the sugar is still not fit for human consumption. However, the refinery is entitled to input tax credits for the GST included in the price.*

*The refinery processes the raw sugar and sells the refined sugar to a wholesaler. The price does not include GST, as the sugar is now food for human consumption. Because there is no GST, no input tax credits arise in relation to the purchase of the sugar.*

*The wholesaler sells sugar to a retailer, again without GST included in the price. The retailer sells the sugar to consumers and the sale is GST-free.*

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## Issue 5

### Prepared food

The content for this issue is a public ruling for the purposes of the *Taxation Administration Act 1953* and can be found [here](#).



## **Issue 7**

Issue 7 is currently under revision. The new issue 7 will be published on completion.

## Issue 8

### Hampers (Withdrawn)

For the current source of ATO view, refer to:

- [GSTD 2024/1](#) - *Goods and services tax: supplies of combination food*
- [GSTR 2001/8](#) - *Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts*
- [GSTR 2006/9](#) - *Goods and services tax: supplies*
- [Detailed food list](#)

#### This information has now been withdrawn.

Issue 8 previously read:

Generally, where food is a combination of one or more foods packaged together, at least one of which is taxable, then that food product will be subject to GST (for example a snack pack containing cheese and crackers - refer Issue No. 7 - Snack Packs). This is provided for in paragraph 38-3(1)(c) of the GST Act.

However, paragraph 1.18 of the Further Supplementary Explanatory Memorandum to the GST Bill clarifies the intended scope of this provision by stating that it does not apply to a mix of packaged goods packed and sold together, such as a hamper.

Paragraph 1.18 states that where a mix of individually packaged goods is packed and sold together, these items are to be taxed individually. For example, where a hamper contains a packet of biscuits, a box of chocolates and a jar of coffee, the biscuits and chocolates are subject to GST and the coffee is GST-free. If there is a need to apportion the value of the hamper to each of the items to determine the GST payable, the rule in section 9-80 will be relevant.

A 'hamper' is defined in The Macquarie Concise Dictionary as 'a large basket or receptacle made from cane, wickerwork, etc., usu. with a cover'. Based on this definition, it is the ATO view that for the purposes of the GST Act a 'hamper' can be a basket, decorative box or other similar container, containing any number of separately identifiable products. A hamper will be sold for a single consideration.

Like a snack pack, a hamper will include various food items. It may also include things other than food. However, unlike a snack pack, the different products in a hamper are not designed to be combined or blended for simultaneous consumption.

For example a hamper may be a large cane basket consisting of tea, biscuits, champagne, chocolates, jam, Christmas pudding and mince pies. Where a hamper includes goods which are subject to GST and other goods which are GST-free, the value of the taxable goods will be calculated according to section 9-80 of the GST Act.

Where the basket or similar packaging has a lasting value (for example, a picnic basket), the supply of the basket may be subject to GST.

It should be noted, that where you are making a mixed supply the tax invoice need only show the value of the taxable supplies and the GST-free supplies and not an itemised list of all products contained in the hamper.

# Issue 9

## Fats and oils

### ***Non-interpretative - straight application of the law.***

'Food' is defined in subsection 38-4(1)(f) of the GST Act to include fats and oils marketed for culinary purposes - paragraph 38-4(1)(f). Therefore, the marketing of the fats and oils will determine their GST status. If the fats and oils are marketed as being for culinary purposes they will satisfy the definition of food in subsection 38-4(1)(f) of the GST Act and will be GST-free.

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### ***Example***

*A manufacturer produces peanut oil that is bottled and marketed for use as a cooking oil. This oil will satisfy the definition of food in paragraph 38-4(1)(f) of the GST Act and will be GST-free.*

### ***Example***

*The same manufacturer produces lavender oil that is bottled and marketed as an essential oil for use in aromatherapy. This oil is not marketed for culinary purposes and therefore fails to satisfy the definition of food in subsection 38-4(1) of the GST Act and will be subject to GST.*

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# Issue 10

## Ingredients for beverages

### ***What is an ingredient for a beverage?***

#### ***Non-interpretative - straight application of the law.***

The term 'ingredients for beverages for human consumption' (paragraph 38-4(1)(d)) is not limited except in that the ingredients must be for beverages for human consumption.

However, ingredients for beverages for human consumption are only GST-free to the extent that the ingredients are specified in the third column of Schedule 2 in accordance with paragraph 38-3(1)(d) of the Act.

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### ***Example***

*Sammy's Supermarkets sell a strawberry flavoured dry preparation that is used for flavouring milk. The sale of this dry preparation will be GST-free in accordance with clause 1, item 9 of Schedule 2. Products that are not included on Schedule 2 will not be GST-free as an ingredient for beverages for human consumption, however they may still be GST-free under one of the other provisions in [section 38-4](#).*

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# Issue 11

## **Are food additives GST-free under section 38-2 of the GST Act?**

For source of ATO view, refer to the [Detailed food list](#). A supply of food is GST-free under section 38-2 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), if the product satisfies the definition of food in section 38-4 of the GST Act and the supply is not excluded from being GST-free by section 38-3 of the GST Act.

Food is defined in subsection 38-4(1) of the GST Act to include ingredients for food for human consumption (paragraph 38-4(1)(b) of the GST Act), ingredients for beverages for human consumption (paragraph 38-4(1)(d) of the GST Act) and goods to be mixed with or added to food for human consumption (paragraph 38-4(1)(e) of the GST Act).

The word 'additive' is defined in *The Macquarie Dictionary* (3rd edition, 1997) to mean '...3. a substance added to a product, usually to preserve or improve its quality'. Examples of products that are considered to be food additives for GST purposes include:

- colourings
- flavourings
- preservatives
- antioxidants
- sweeteners
- vitamins
- minerals
- modifying agents (vegetable gums, mineral salts, food acids, emulsifiers, humectants, thickeners).

Some of these additives fall within the term 'ingredient for food for human consumption' as stated in paragraph 38-4(1)(b), whilst others are specifically included in paragraph of the GST Act as 'goods to be mixed with or added to food for human consumption'. Those products included in paragraph 38-4(1)(e) of the GST Act include:

- condiments (for example, tomato sauce, jam, chutney)
- spices (for example, pepper, cinnamon, cloves)
- seasonings
- sweetening agents
- flavourings (for example, vanilla essence).

Products that satisfy paragraph 38-4(1)(e) are used for the purpose of adding to the taste or flavour of finished foods and are not products that are used in the manufacturing process (although some products may fall for consideration as both an ingredient for food and as a good to be mixed with or added to food for human consumption).

As a result of the introduction of a regulation effective from 1 December 2001 the previous GST treatment of some additives will have changed. The following paragraphs therefore consider the GST treatment of additives for the periods from 1 July 2000 to 30 November 2001 and the period from 1 December 2001.

### ***GST treatment from 1 July 2000 to 30 November 2001***

The mere fact that an additive is capable of being added to food is insufficient for it to qualify as food under subsection 38-4(1) of the GST Act. It was initially the ATO view, that in order for an additive to qualify as food under paragraph 38-4(1)(b) of the GST Act or

paragraph 38-4(1)(e) of the GST Act, they must be made and intended only for use in food.

Additives, including chemicals, manufactured for a wide range of uses, that included limited use in food, were not GST-free. It did not matter whether the additives were manufactured to 'food grade' quality. For example, hydrochloric acid and sulphuric acid can be produced to 'food grade' quality and are listed in the Australian Food Standards Code. However, these additives are not manufactured for use exclusively in food. Treatment of such additives as GST-free would not have been consistent with the underlying policy of making 'basic foods' GST-free. These products were therefore subject to GST.

Industry experts advised that the majority of additives are specifically blended 'pre-mixes' that vary from product to product and from client to client. The additives included in these food 'premixes' vary, with some purchased from chemical manufacturers and some produced by the pre-mix manufacturers themselves. They are then blended with other substances along the supply chain to produce the premix, which is a new product.

Based on the above, where food ingredient (premix) manufacturers bought additives to make products for inclusion in food, the purchase of these additives was subject to GST. However the manufactured 'premix' satisfied the definition of food in paragraph 38-4(1)(e), of the GST Act and therefore was GST-free under section 38-2 of the GST Act.

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### **Example 1**

*A chemical manufacturer makes hydrochloric acid to food grade standard. The acid is used widely across many industries including steel manufacturing and construction. The acid is taxable because it is not produced solely for use in food.*

### **Example 2**

*A flavour manufacturer purchases a variety of chemicals and other raw materials that she mixes in order to make a flavour. Although the chemicals will be subject to GST, once combined, the supply of the flavour will satisfy paragraph 38-4(1)(e) of the GST Act and therefore be GST-free in accordance with [section 38-2](#) of the GST Act.*

### **Example 3**

*A company manufactures sausage premixes. These premixes consist of flour, cereals, salts, thickening agents (for example, corn flour) flavourings and spices. The flour, cereals salts and thickening agents are all considered to be ingredients for food for human consumption in accordance with paragraph 38-4(1)(b) of the GST Act and are therefore GST-free under section 38-2 of the GST Act. The flavourings and spices are considered to be goods to be mixed with or added to food for human consumption in accordance with paragraph 38-4(1)(e) of the GST Act and will also be GST-free under section 38-2 of the GST Act.*

*The manufacturer also adds preservatives to the sausage premix. Sulphur dioxide is used as a preservative in the sausage premix. It is also used in other industrial processes. Sulphur dioxide does not satisfy the definition of food in paragraph 38-4(1)(b) of the GST Act. It will therefore be subject to GST when purchased by the manufacturer.*

*However, once all the ingredients are combined, a new product is created. The sausage premix is considered to be an ingredient for the sausage and will be GST-free under paragraph 38-4(1)(b) of the GST Act. As the manufacturer can claim input tax credits for GST paid on the sulphur dioxide no GST will flow through to the GST-free premix.*

### ***GST treatment from 1 December 2001***

Section 38-3.01 of the *A New Tax System (Goods and Services Tax) Regulations 2019* (GST Regulations) applies to food additives. This regulation gives effect to paragraph 38-3(1)(e) of the GST Act and determines those foods that are not GST-free.

Subsection 38-3.01(1) of the GST Regulations states that food additives other than exempt food additives will be subject to GST. The term 'exempt food additive' is defined in subsection 38-3.01(2) of the GST Regulations to mean:

- a food additive which, at the time of supply is packaged and marketed for retail sale; or
- a food additive which, at the time of supply:
  - has a measurable nutritional value; and
  - is supplied for use solely or predominantly in the composition of food; and
  - is essential to the composition of that food.

By excluding food additives available for retail sale from being subject to GST ensures that the supply of food additives, such as small bottles of vanilla essence or food colouring, purchased from a supermarket remain GST-free.

If a food additive is not supplied at the retail level then it must have a measurable nutritional value, be supplied for use solely or predominantly in the composition of food and it must be essential to the composition of that food. These three tests are intended to limit the application of the GST-free provisions to food additives that play an integral part in the make-up of food.

Although the term 'measurable nutritional value' is used in the regulation, it is not defined in the GST Act. The ATO will accept that a product has measurable nutritional value for the purposes of the regulation where the nutritional information is prepared in accordance with the Food Standards Code published by the Australia and New Zealand Food Authority (ANZFA), and that information contains any measured values of nutrition (such as sugars, protein, fat or carbohydrates).

Similarly, the term 'essential' is used in the regulation and is not defined in the GST Act. The ATO will accept that a product is essential to an item of food where it is manufactured specifically for use in foods.

Therefore, a supply of substances which have only an incidental use in the composition of food but are generally manufactured for other commercial purposes will be subject to GST.

# Issue 12

## Food marketed as confectionery or ingredients for confectionery

For source of ATO view, refer to the [Detailed food list](#).

[Clause 1, Item 8 of Schedule 1](#) of *A New Tax System (Goods and Services Tax) Act 1999* ('the Act') states that:

'confectionery, food marketed as confectionery, food marketed as ingredients for confectionery or food consisting principally of confectionery'

will be subject to GST.

Paragraph 1.44 of the [Further Supplementary Explanatory Memorandum to the GST Bill](#) ('the EM') provides that Schedule 1 lists certain products that will be taxed as confectionery. This list is essentially the same as the definition of confectionery used in the wholesale sales tax (WST) legislation.

Paragraph 1.45 of the [EM](#) goes on to say:

'Confectionery includes food that is marketed as confectionery, such as chocolate, boiled sweets, lollipops, sherbet, marshmallow and fruit lollies, as well as the specific types of goods included in Schedule 1.'

Where products are currently WST exempt and are not captured under [Schedule 1](#) of the GST Act, the WST exemption will carry across to the GST legislation and the products will be GST-free.

There are a number of court cases that assist in determining whether a product is confectionery. The reasoning in *Zerz Pty Ltd v DFC of T 97 ATC 4277* and the decisions in *Allied Mills Industries v FC of T 87 ATC 4387* and *Candy Maid Confections v Customs & Excise Commissioners* (1969) 1 Ch. 6111 lead to the conclusion that the word 'confectionery' must be given its ordinary meaning.

*Candy Maid* decided whether a toffee apple was confectionery. It was held in this case that toffee apples were not articles of confectionery similar to chocolates or sweets.

Aickin J in the High Court decision *Landau and Anor. v Goldwater and Anor.* 13 ALR 192 gave a general description of confectionery:

'one of common usage which embraces a wide variety of articles, many readily recognisable as examples of confectionery. They are primarily small articles of a sweet character containing substantial amounts of sugar and regarded as being in the nature of a delicacy in whatever quantity they may be consumed. There is, however, no doubt that in the ordinary parlance the term would now include blocks of chocolate, however small or however large.'

Further to the above, in determining whether food is marketed as a 'confectionery' or 'ingredients for confectionery' the activities of the seller are relevant. Consideration is given to the following:

- the name of the goods
- the price of the goods
- the labelling on any containers for the goods
- literature or instructions packed with the goods
- how the goods are packaged
- how the goods are promoted or advertised
- how the goods are distributed.



In determining whether food is marketed as confectionery or as an ingredient for confectionery, it is relevant to look at the uses to which the product is put.

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### **Example 1**

*Willy Wonka's Chocolate Factory purchases confectioner's glaze that it uses on its chocolates. Confectioner's glaze is only used by confectionery manufacturers and is therefore considered to be 'food marketed as an ingredient for confectionery' ([Clause 1, Item 8 of Schedule 1](#)).*

*Willy Wonka's Chocolate Factory will pay GST when they purchase confectioner's glaze and will be entitled to claim an input tax credit.*

### **Example 2**

*Willy Wonka's Chocolate Factory also purchases sugar that is used in the manufacture of their chocolates. Sugar is not considered to be 'food marketed as an ingredient for confectionery', although it is an ingredient used in the manufacture of confectionery. However, sugar has any number of different uses and is used as an ingredient in various foods. Sugar is therefore considered to be an 'ingredient for food for human consumption' (subsection 38-4(1)(b) of the GST Act) and will be GST-free.*

### **Example 3**

*Gaynor's Gourmet Delights makes and sells chocolate dessert cups that can be used to hold mousse, ice cream, fruit or a variety of other desserts. The chocolate dessert cups are made from compound or cooking chocolate. Gaynor purchases this chocolate from a supplier who is not marketing the chocolate as confectionery. The chocolate is packaged and sold in the supermarket as 'cooking chocolate' and is available in the same aisle as other cooking ingredients (for example, flour, icing sugar, slivered almonds and so forth).*

*The compound or cooking chocolate purchased by Gaynor is not considered to be 'food marketed as confectionery' or 'food marketed as ingredients for confectionery' ([Clause 1, item 8 of Schedule 1](#) of the GST Act) and will be GST-free.*

*Similarly, the chocolate dessert cups sold by Gaynor are not considered to be 'food marketed as confectionery' and will be GST-free as 'food for human consumption' in accordance with subsection 38-4(1)(a) of the GST Act.*

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# Issue 13

## What is a 'pudding'?

For source of ATO view, refer to the [Detailed food list](#).

### ***What is the definition of a 'pudding' for the purposes of item 20 in Schedule 1?***

[Clause 1, item 20 of Schedule 1](#) of the GST Act operates to subject the following products to GST:

'cakes, slices, cheesecakes, pancakes, waffles, crepes, muffins and puddings'

These terms are not defined in the GST Act and are therefore afforded their ordinary meaning. Therefore, the word 'pudding' is defined to mean:

a cooked food that is a sweet or savoury dish made in many forms and of various ingredients, as flour (or rice, tapioca, or the like), milk and for eggs, with or without fruit, meat or other ingredients and is a cooked dish consisting of various sweet or savoury ingredients, especially as enclosed within a flour-based crust or mixed with flour, for eggs, etc., and boiled or steamed; a baked batter mixture.

Although 'puddings' are incorporated under the category 'Bakery products', the category headings are not operative, as per Note 2 in [Schedule 1](#) and section [182-15](#) of the GST Act. However, the category 'Bakery products' can be considered in accordance with subsection 182-10(2) to assist

- (a) in determining the purpose or object underlying the provision; or
- (b) to confirm that the provision's meaning is the ordinary meaning conveyed by its text, taking into account its context in the Act and the purpose or object underlying the provision; or
- (c) in determining the provision's meaning if the provision is ambiguous or obscure; ...'

Therefore, the ATO is of the view that 'puddings' for the purposes of [item 20 in Schedule 1](#) of the GST Act only include those products that satisfy the above meaning.

Below are examples of products that would be considered a 'pudding' and subject to GST:

- Rice pudding\*\*
- Tapioca pudding
- Self-saucing puddings
- Steamed puddings
- Christmas pudding

It should be noted that the following products are not considered to be a 'pudding' and will be GST-free:

- Yoghurt
- Dessert mousse (for example, chocolate)
- Crème caramel
- Dairy desserts
- Custard
- Jelly

\*\* Products that are commonly known as creamed rice, creamed rice dairy dessert or rice puddings that consist of boiled rice in a milk or cream solution, which are **not** baked, will be GST-free.

# Issue 14

## Beverages for infants

For source of ATO view, refer to the [Detailed food list](#).

### ***What is the definition of 'infant' for the purposes of the GST Act?***

Item 13 of the table in clause 1 of Schedule 2 of the GST Act (item 13) provides that 'beverages, or ingredients for beverages, of a kind marketed principally as food for infants or invalids' will be GST-free.

The word 'infant' is not defined for the purposes of item 13. Although the ordinary meaning is generally adopted where a word is not defined in the Act, there are instances where it is more appropriate to adopt the trade meaning of a word.

The word 'infant' is defined in the *Food Standards Australia New Zealand/Food Standards Code* at clause 1 of Standard 2.9.2 as 'a person up to the age of 12 months'.

The Courts in *Collector of Customs v. Agfa-Gevaert Ltd* 35 ATR 249 stated:

'When construing revenue statutes that utilise trade or technical terms, therefore, the law generally favours interpretation of the terms as they are understood in the trade to which the statute applies. In *Herbert Adams Pty Ltd v FCT*, Dixon J said:

A revenue law directed to commerce usually employs the descriptions and adopts the meanings in use among those who exercise the trade concerned.'

The judges went on to say:

'...Nevertheless, when construing a composite phrase which does not have a trade meaning, it will ordinarily make sense for a court or tribunal to take notice of the trade meaning of a word or words within that expression, provided such an interpretation does not lead to a result which is absurd in the sense that the result may be unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, or artificial. Consideration of the trade meaning of individual words in such cases is more likely than not to lead to the interpretation that the makers of the instrument had in mind.'

Therefore the meaning to be attributed to the word 'infant' as referred to in item 13 is the trade meaning which is clearly reflected in the *Food Standards Australia New Zealand/Food Standards Code*. Food and beverages for infants are commonly known within the food industry as providing specific nutritional benefits to a group that are yet unable to consume ordinary foods. The Australia New Zealand Food Authority (ANZFA) has stated:

'Infants have different physiological needs from other population groups which influence food suitability. These physiological differences relate to the degree of development of tongue and facial musculature, digestion ability, renal capacity, the 'unique' microbiological and immunological susceptibility of infants, the potential for development of food allergy or the adverse reactions to foods and the need for high energy and nutrient intake to support rapid growth and development...

The developing functional capacity of the body organs of infants gradually improves the infant's ability to deal with the composition of a wide range of foods. However, the younger the infant, the less capable is the infant's body in dealing with different food consistencies and compositions.' - Australia New Zealand Food Authority, Explanatory Notes, Proposal P215, Food for infants and young children, 13 October 1999 ([www.anzfa.gov.au](http://www.anzfa.gov.au))

It was clearly intended by the legislature that the beverages and ingredients for beverages referred to in item 13 are those to be consumed by people with special dietary needs. Therefore, the word 'infant' for the purposes of item 13 means 'a person up to the age of 12 months'.

## Issue 15

### Is ice considered to be food for human consumption and therefore GST-free?

For source of ATO view, refer to the [Detailed food list](#).

In order to determine whether ice is food for the purposes of the GST legislation it is necessary to examine Subdivision 38-A, [Schedule 1](#) - 'Food that is not GST-free' and [Schedule 2](#) – 'Beverages that are GST-free' of *A New Tax System (Goods and Services Tax) Act 1999* ('the Act').

[Section 38-2](#) of the Act states that a supply of food is GST-free. 'Food' is defined in [section 38-4](#) of the Act to mean:

- '(1) Food means any of these, or any combination of any of these:
  - (a) food for human consumption (whether or not requiring processing or treatment);
  - (b) ingredients for food for human consumption;
  - (c) beverages for human consumption;
  - (d) ingredients for beverages for human consumption;...
- (2) Beverage includes water.'

A supply of food is not GST-free in accordance with [section 38-3](#) of the Act if it is a supply of:

- '(c) food of a kind specified in the third column of the table in clause 1 of Schedule 1, or food that is a combination of one or more foods at least one of which is food of such a kind; or
- (d) a beverage (or an ingredient for a beverage), other than a beverage (or ingredient) of a kind specified in the third column of the table in clause 1 of Schedule 2; or ...'

Ice is not specifically listed in either [Schedule 1](#) or [Schedule 2](#) of the Act.

Water is GST-free as it is specifically included in subsection 38-4(2) as a beverage, and by virtue of this inclusion, considered to be a food. If water were not included in this way, it would not be considered as a food or beverage. In a similar way, ice is not considered to be food for human consumption.

It should be noted that although ice was exempt from sales tax, it was not classified as food. Schedule 1 of *The Sales Tax (Exemption and Classification) Act 1992* includes a reference to food, water and ice. However, ice is not included in the Chapter of the Schedule that specifies 'food for human consumption' as being exempt for sales tax purposes. Chapter 7 of the Schedule covers [Food and drink for human consumption](#) while [ice](#) is listed under Chapter 15 Miscellaneous. For the purposes of the sales tax legislation, water was also listed under Chapter 15.

Ice is not considered a beverage, as it is not a liquid. Only those beverages that are specifically included in Schedule 2 of the GST Act are GST-free. Further, ice is not considered to be a food as it has no nourishment, no calories and no energy. Ice is generally used for cooling and storage purposes.

As a consequence of the above, a supply of ice will be subject to GST.

Further to this, where ice forms part of another supply, for example, fish is packed on ice or ice is added to a drink, the ice is generally supplied for no consideration. However, where there is a separate charge for the ice, [section 9-80](#) will operate to treat the supply as a mixed supply.

# Issue 16

## Are coffee beans and green tea subject to GST?

For source of ATO view, refer to the [Detailed food list](#)

**A supply of food for human consumption is generally GST-free under [section 38-2](#) of the GST Act.**

[Section 38-4](#) of the GST Act defines food to include:

- (c) beverages for human consumption;
- (d) ingredients for beverages for human consumption...

Paragraph 38-3(1)(d) of the GST Act states that, food is not GST-free under [section 38-2](#) if it is a supply of a beverage (or an ingredient for a beverage), other than a beverage (or ingredient) of a kind specified in the third column of the table in clause 1 of Schedule 2.

Schedule 2 of the GST Act specifically lists the following ingredients for beverages as being GST-free:

Clause 1, item 5 of Schedule 2 of the GST Act:

'tea (including herbal tea, fruit tea, ginseng tea and other similar beverage preparations), coffee and coffee essence...'

Item 7:

'preparations for drinking purposes that are marketed principally as tea, coffee preparations...'

### **Coffee Beans**

The ATO is of the view that both roasted and green coffee beans that are an ingredient for a beverage for human consumption will be GST-free in accordance with item 5 of Schedule 2 of the GST Act.

### **Green tea**

Information from industry is that green tea goes through the following processes after it is picked. Processing for green tea is different from processing for black tea. To make black tea, the fresh leaf is withered by exposure to air and is broken and left to ferment after picking.

For green tea, the leaf is not fermented at all. Instead, it is steamed and heated immediately after harvesting to stop the fermentation process. This softens the leaves for rolling and keeps the juices from oxidising. The steamed leaves are then rolled and dried, loosening the fibres, which brings out the flavour in the whole leaf. In the process of rolling the tea leaves become twisted. At first the tea leaves are rolled coarsely and then are rolled more finely to give it a uniform twist. The water content is reduced to protect it from changes in quality.

Finally the tea is sorted and the stems and dust are removed and the leaf shape and size are arranged before it is finished as tea that is in its final form as a preparation for a beverage. At this point the green tea is GST-free as an *'ingredient for a beverage for human consumption'* - paragraph 38-4(1)(d) of the GST Act.

However, this does not include beverages marketed in a ready-to-drink form (for example, iced tea and takeaway tea), as these types of beverages are specifically excluded by Clause 2 of Schedule 2 of the GST Act.

## Issue 17

### Are seed potatoes 'food' for GST purposes?

For source of ATO view, refer to the [Detailed food list](#).

Seed potatoes are normally subject to GST as they are not food for human consumption pursuant to paragraph 38-4(1)(a) of the GST Act. However, where the grower determines that the seed potatoes be supplied to the market as food, the supply will be GST-free.

This decision is made on the basis of information provided by industry that seed potatoes are generally used to grow potato crops. Seed potatoes are sold as certified seed potatoes. They are potatoes that are grown under special conditions to ensure they are disease free and have a high purity level. A certified seed crop is differentiated from other potato crops in that it has followed a system of management protocols and crop health checks determined by the certification authority. When harvested, the potatoes are visually no different from any other potatoes of the same variety, but they are able to be labelled as certified seed and generally attract a premium price if sold for seed purposes.

Section 38-2 states that a supply of food is GST-free. The meaning of food is contained in [section 38-4](#) of the GST Act and includes food for human consumption. As seed potatoes are used to grow potato crops, they are not considered to be food for human consumption.

Information from industry indicates that seed potatoes are sold as food for human consumption when the grower can obtain a good price for the potatoes. At the time the farmer decides to sell the seed potatoes as food rather than for the purpose of growing crops, the potatoes are food for human consumption pursuant to paragraph 38-4(1)(a) of the GST Act and this sale will be GST-free.

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#### **Example**

*A farmer sells certified seed potatoes to another farmer to use to grow potato crops. As the seed potatoes are for the purpose of growing potato crops, they are not food for human consumption.*

#### **Example**

*A seed potato grower sells some of his seed potatoes to the local fish and chip shop. The potatoes are sold as food for human consumption pursuant to paragraph 38-4(1)(a) of the GST Act and they will be GST-free in accordance with 38-2 of the GST Act.*

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# Issue 18

## Is psyllium seed husks considered to be food for the purposes of the GST Act?

For source of ATO view, refer to the [Detailed food list](#).

[Section 38-2](#) of the GST Act states that a supply of food is GST-free. 'Food' is defined in subsection 38-4(1) of the GST Act and includes:

- (a) food for human consumption (whether or not requiring further processing or treatment);...
- (d) ingredients for beverages for human consumption;
- (e) goods to be mixed with or added to food for human consumption (including condiments, spices, seasonings, sweetening agents or flavourings);...

In order to determine the correct classification of psyllium seed husks, it is first necessary to consider whether they satisfy the definition of food contained in subsection 38-4(1) of the GST Act. The relevant paragraph to consider is paragraph 38-4(1)(a) - 'food for human consumption (whether or not requiring further processing or treatment)'.

Although 'food', as referred to in subsection 38-4(1), is not further defined in the GST Act, it will be taken to have its ordinary meaning. The Macquarie Dictionary 3rd Edition ('the dictionary') defines 'food' as:

- '1. what is eaten, or taken into the body for nourishment...'

However, not all substances that provide nourishment will satisfy the definition of food in the GST Act.

The Official American Nutraceutical Association Guide titled '*Nutraceuticals - The Complete Encyclopedia of Supplements, Herbs, Vitamins and Healing Foods*' provides information on psyllium:

'Psyllium seed is one of the most popular bulk-producing laxatives. As a supplement or laxative, it is made of the cleaned, dried ripe seed of the *Plantago psyllium* plant, which is grown mainly in India. The outer covering or husk of the seeds contains a thick, gel-like material-soluble fiber- that is not digested by humans. When this soluble fiber comes in contact with water, it swells, providing both bulk and lubrication to the mass of food as it moves through the intestinal tract.'

The guide also states that psyllium seeds assist in the prevention and treatment of constipation as well as reducing blood cholesterol levels. However, the dosage should not exceed 30gm of psyllium per day.

A survey of psyllium seed husks available on the market indicates that they are commonly taken by mixing with water, juice or yoghurt, or by adding to breakfast cereal.

In the UK the Tribunal considered the meaning of food in *Brewhurst Health Food Supplies* [1993] BVC 610. In this case the issue was whether fruit cubes, containing a mixture of dried fruits were zero-rated for Value Added Tax purposes as food of a kind used for human consumption.

The appellant argued that the fruit cube was food of a kind used for human consumption because it had the essential characteristics of food in that it looked, tasted, smelled and felt like food.

The Commissioners ruled that the fruit cubes were not food, but a remedial preparation to counteract the effects of constipation so that the product was liable to VAT at the standard rate. The product in question was not food of a kind used for human consumption. Its bulk forming qualities provided a laxative effect. The nutritive value of the fruit cube was of marginal significance, and this pointed to it being something other than food.

It is considered that the essential character of psyllium seed husks is not that of a food but that of a supplement or laxative. Therefore, for GST purposes, psyllium seed husks are not

considered to be food for human consumption under paragraph 38-4(1)(a) of the GST Act. As only 'food' as defined in subsection 38-4(1) is GST-free, and psyllium seed husks fail to satisfy this definition, they will be subject to GST.

***Alternative view***

Alternatively, it needs to be determined whether psyllium seed husks are an ingredient for a beverage in accordance with paragraph 38-4(1)(d) of the GST Act. Examination of psyllium seed husks available on the market indicates that they are consumed by mixing in water, juice or milk, however, they are not ingredients for those beverages. The beverages to which the psyllium seed husks are added are the means by which they are to be taken and they are not considered to be an ingredient for the beverage itself. As such, they are not an ingredient for a beverage for the purposes of the GST Act. Therefore psyllium seed husks fail to satisfy the definition of food in subsection 38-4(1) and will be subject to GST.

Another view to consider is whether psyllium seed husks satisfy paragraph 38-4(1)(e) of the GST Act as a good to be mixed with or added to food for human consumption (including condiments, spices, seasonings, sweetening agents and flavourings) . Products that satisfy this paragraph are for the purpose of adding to the taste or flavour of food, as indicated by the scope of the words in the brackets. However, psyllium seed husks are mixed with or added to food in order that they can be ingested. They are not mixed with or added to food for the purpose of enhancing its taste or flavour. The mere fact that psyllium seed husks can be added to food is insufficient for them to qualify as food under paragraph 38-4(1)(e) of the GST Act. Therefore psyllium seed husks fail to satisfy the definition of food in subsection 38-4(1) and will be subject to GST.



# Issue 19

## What is the GST status of concentrated fruit juice and concentrated fruit drinks?

For source of ATO view, refer to:

- [GSTD 2002/2](#) – *Goods and services tax: what supplies of fruit and vegetable juices are GST-free?*
- [Detailed food list](#)

For GST classification purposes, it is important to ensure that the correct product is being considered. When determining the status of fruit juice concentrates, it is necessary to consider *the product being sold*, which is the packaged concentrate.

Generally a supply of food will be GST-free in accordance with [section 38-2](#) of the GST Act. 'Food' is defined in [section 38-4](#) of the Act to include:

- (c) beverages for human consumption;
- (d) ingredients for beverages for human consumption;

In order for beverages (or ingredients for beverages) to be GST-free, they must be specifically included in Schedule 2 of the GST Act. In determining whether fruit concentrates are GST-free, Item 10 of Schedule 2 of the GST Act is relevant:

'concentrates for making non-alcoholic beverages, if the concentrates consist of at least 90% by volume of juices of fruits'

As can be seen, this item in the GST Act requires a concentrate to satisfy three tests before it will be classified as GST-free. These are:

1. The concentrate **must** be used for making **non-alcoholic** beverages; **and**
2. The concentrate **must** comprise juices of **fruits**; **and**
3. The concentrate **must** be at least 90% **by volume** of juices of fruit.

These tests do not require consideration to be given to the degree of concentration of the fruit juice contained in the product.

In determining whether fruit juice concentrates and concentrated fruit drinks are GST-free, it is necessary to look at the composition of each of these products:

### **Concentrated fruit juice**

These products in the main contain concentrated fruit juice, and when reconstituted return to a 'pure fruit juice' state. Generally, they do not contain sugar or other additives, other than a small amount of preservatives and vitamin C. When the contents of the package are examined, the concentrated fruit juice generally makes up more than 90% by volume of the contents of the package in which they are supplied.

Provided that the product contains at least 90% by volume of concentrate, it is not for making alcoholic beverages and it contains concentrated juices of fruit, then the product will be GST-free.

### **Concentrated fruit drink**

These products are different to fruit juice concentrates in that they contain further additives such as sugar. When considered in their entirety, the volume of concentrated fruit juice in these products is generally less than 90% by volume of the total contents in the package. The other additives, which commonly include sugar, preservatives, food acids etc are usually in excess of 10% of the total volume of products supplied. As a result, these products are taxable.

The classification of these products is **not** determined by either:

1. The degree of concentration of the juice (that is, It does not matter whether it is 150%, 400% or any other degree of concentration); or
2. The degree of concentration once the product is reconstituted (for example, 35% juice).

It should be noted that Item 10 of Schedule 2 refers only to 'juices of fruit'. Therefore concentrates that consist of juices of vegetables will not be GST-free.

## Issue 20

The previous information has been withdrawn pending the placement of up to date information

# Issue 21

## Vitamins and minerals

### ***Are vitamins and minerals considered to be food?***

For source of ATO view, refer to the [Detailed food list](#).

[Section 38-2](#) of the GST Act states that a supply of food is GST-free. 'Food' is defined in subsection 38-4(1) of the GST Act and includes:

- (a) food for human consumption (whether or not requiring processing or treatment);
- (b) ingredients for food for human consumption;...
- (e) goods to be mixed with or added to food for human consumption (including condiments, spices, seasonings, sweetening agents or flavourings);...

In order to determine the correct classification of vitamins and minerals, it is first necessary to consider whether they satisfy the definition of food contained in subsection 38-4(1) of the GST Act.

Although 'food' as referred to in subsection 38-4(1) is not further defined in the GST Act, it will be taken to have its ordinary meaning. The Macquarie Dictionary 3rd Edition ('the dictionary') defines 'food' as 'what is eaten, or taken into the body for nourishment...'

However, not all substances that provide nourishment will satisfy the definition of food in the GST Act.

Vitamins and minerals are supplied in various forms:

- capsule
- caplet, or
- tablet.

Unlike food, vitamins and minerals are 'taken', not eaten. Instructions are often provided with the product including a recommended dosage and suggesting that the product be taken at certain times of the day, either on an empty stomach or with food or a beverage, such as water or juice. Often these products are taken for therapeutic or medicinal reasons, or to prevent or compensate for a nutritional deficiency.

Vitamins and minerals are commonly taken by swallowing or in some instances may be added to food.

It is considered that the essential character of vitamins and minerals is not that of food, but that of a supplement. Therefore, for GST purposes, vitamins and minerals are not considered to be food for human consumption under paragraph 38-4(1)(a) of the GST Act.

Support for this view can be found in the Chairman's comments in *Grosvenor Commodities* (LON/90/1805X) No 7221; [1992] BVC 761, where royal jelly capsules were not considered to be food. The Chairman said:

'the capsules do not satisfy hunger ... they do not look like food, taste like food or fill the stomach like food. In my mind the capsules are clearly not food.'

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### ***Example***

*Multivitamin tablets are not considered to be food for human consumption for GST purposes. As a result, they are subject to GST.*

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## Issue 22

### **Are supplies of oyster spat and adult oysters GST-free?**

For source of ATO view, refer to the [Detailed food list](#).

In accordance with [section 38-2](#) of *A New Tax System (Goods and Services Tax) Act 1999* ('the Act') a supply of food, as defined in the Act, is GST-free. Relevant paragraphs of the definition of food in subsection 38-4(1) include:

(a) food for human consumption (whether or not requiring processing or treatment);

(b) ingredients for food for human consumption:...

but does not include:

(g) live animals (other than crustaceans or molluscs);...

Live oysters, being molluscs, are not excluded by paragraph 38-4(1)(g) from being food for the purposes of the Act.

In order to be considered as food according to the definition in the Act, oysters must be 'food for human consumption (whether or not requiring further processing or treatment)' or 'ingredients for food for human consumption'.

Information from industry is that oysters supplied as food for human consumption are graded according to size and quality. The highest grade is the large premium table oyster. The lowest grade is the bottling oyster which is usually smaller than the table oyster. Where oysters are supplied for bottling as a culinary delicacy, then this supply is GST-free as it is a supply of food for human consumption. Oysters are not normally marketable as food for human consumption until they attain a shell length of at least 50mm; more usually 60mm, however information from the New South Wales Oyster Committee indicates that oysters may be marketable as food when they attain a shell length of 30-40mm.

Once oysters reach a size and quality at which they are marketable as food for human consumption they satisfy the definition of food in paragraph 38-4(1)(a). It does not matter that they are supplied in the shell since that paragraph refers to 'food for human consumption (whether or not requiring further processing or treatment)'. Removal from the shells would be 'further processing'. Once removed from their shells, food grade oysters will also qualify as 'ingredients for food for human consumption' as per paragraph 38-4(1)(b).

### ***Oyster spat and juvenile oysters***

Information from industry is that oyster spat and juvenile oysters are sold by hatcheries and oyster growers to other oyster growers to be 'grown-on' until they reach a size at which they are marketable as food. Supplies of oysters below the size at which they are marketable as food will not be 'supplies of food for human consumption' and are subject to GST.

### ***Adult oysters***

Supplies of adult oysters that are below the size at which they are marketable as food are not supplies of food for human consumption and are subject to GST.

When adult oysters of marketable size are sold as 'food for human consumption' they are GST-free. Such sales could be to seafood wholesalers, marketing organisations, food processors, restaurants or consumers. Supplies of adult oysters from one grower to another will also be GST-free provided they are of sufficient size and quality to be marketable as food for human consumption.

### **Example 1**

*Grower A supplies seed stock to Grower B. The oysters are not of sufficient size to be marketable as food. The supply by Grower A is not a supply of food for human consumption so it is subject to GST.*

### **Example 2**

*Grower C farms oysters and also sells oysters direct to the public. Grower C anticipates a high demand from the public during the coming holiday period. Grower C orders 80 mm oysters from Grower D. The oysters supplied by Grower D are food grade. Grower D has supplied food for human consumption. This supply is GST-free.*

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### **Oysters supplied for consumption on premises or as hot takeaway food.**

Paragraphs 38-3(1)(a) and (b) of the Act apply to make food that would otherwise be GST-free, taxable in certain circumstances. A supply of oysters is not GST-free if it is supplied:

- for consumption on the premises<sup>1</sup> from where it is supplied (for example restaurants, cafes, snack bars or similar businesses that provide eating facilities);  
or
- as hot takeaway food - paragraph 38-3(1)(b) of the Act.

<sup>1</sup> Note that the word 'premises' extends to include areas outside a food outlet that are designated for use by customers, such as tables and chairs in the open air.

## Issue 23

### Is the supply of distilled water subject to GST?

For source of ATO view, refer to the [Detailed food list](#).

'Food' as defined will be GST-free in accordance with [section 38-2](#) of the GST Act.

'Food' is defined in subsection 38-4 of the Act to include:

*'...(c) beverages for human consumption;...' 38-4(2)*

Subsection 38-4(2) operates to include water as a beverage. Therefore, distilled water satisfies the definition of food. However, section 38-3 of the Act operates to determine those foods that are not GST-free. Reference is made to paragraph 38-3(1)(d) which states:

*'a beverage (or an ingredient for a beverage), other than a beverage (or ingredient) of a kind specified in the third column of the table in clause 1 of Schedule 2;...'*

Schedule 2 of the Act provides a list of beverages that are GST-free. Item 14 of the Schedule lists:

*'natural water, non-carbonated and without any other additives'*

It therefore needs to be determined whether distilled water is 'natural water'. The *Macquarie Concise Dictionary 3rd Edition* defines 'distilled' as 'obtained or produced by distillation'. It goes on to define 'distillation' as

*'1. the volatilization or evaporation and subsequent condensation of a liquid, as when water is boiled in a retort and the steam is condensed in a cool receiver. 2. the purification or concentration of a substance; the obtaining of the essence or volatile properties contained in it, or the separation of one substance from another, by such a process. 3. a product of distilling, a distillate.'*

Therefore, distilled water is natural water that is non-carbonated and free from any other additives. However, only distilled water that is 'for human consumption' will be GST-free.

Information from industry is that not all distilled water is produced by the same process. Some of the production facilities are in food factories, which allows for the product to be used for human consumption. Distilled water that is not bottled in a food factory cannot be labelled as 'suitable for drinking'. Therefore distilled water that is not suitable for drinking will be subject to GST.

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### **Example**

*A bottle of distilled water that has a label stating:*

*For*

- *Steam irons*
  - Batteries
  - Air conditioners
  - Laboratory purposes

*will be subject to GST, as it is not a supply of 'beverages for human consumption' - paragraph 38-4(1)(b).*

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## Issue 24

### Ingredients used for home brewing or wine making

For source of ATO view, refer to the [Detailed food list](#).

#### ***Are ingredients used for home brewing or wine making GST-free?***

It is recognised that there are some products that can be used as ingredients for food, as well as ingredients for beverages. For example, dextrose can be used as both an ingredient for food and an ingredient for beverages. This issue will provide guidance as to whether ingredients that are used in home brewing or wine making will be GST-free under section 38-2 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

Generally, a supply of food is GST-free under section 38-2 of the GST Act provided that it does not come within any of the exclusions listed in of the GST Act.

Food is defined in paragraph 38-4(1)(b) of the GST Act to include ingredients for food for human consumption and in paragraph 38-4(1)(d) of the GST Act to include ingredients for beverages for human consumption. Ingredients that are used for the purpose of making home brew or wine may fall within either or both of these definitions.

In determining whether a product is an ingredient for food or an ingredient for a beverage, it is important to determine the essential character of the product. There are products that are generally only used as an ingredient for a beverage – for example, milk powder. Although milk powder could be used as an ingredient for cooking, its essential character is that of an ingredient for a beverage.

#### **Guidelines for classifying ingredients for home brewing or wine making**

Where a product is supplied as a GST-free ingredient for food, the fact that it could be used as an ingredient for a beverage does not change the GST-free status of the product supplied. The supplier does not need to ascertain how a customer will use the product.

However, where a product is differentiated and held out for sale as an ingredient for a beverage, GST will apply unless the ingredient is of a kind included in the table in clause 1 of Schedule 2 of the GST Act (Schedule 2).

The supplier must determine whether the product is held out for sale as an ingredient for food or an ingredient for a beverage. Some examples of the ways products may be differentiated for use in home brewing or wine making are:

- packaging the product in combination with home brewing ingredients (that is, a home brewing kit), or
- labelling, invoicing, marketing or otherwise displaying them as a home brewing or wine making ingredient.

The onus rests with the supplier to determine whether their product is supplied as an ingredient for food or an ingredient for a beverage.

Some examples of products that are supplied as ingredients for home brewing or wine making are:

- kits for home-brewing, wine making etc
- special wine and brewers' yeast, and
- retail packs that are specialised for home brewing and winemaking, such as brewer's sugars etc.



After determining whether a product is an ingredient for a beverage and therefore satisfies the definition of food in subsection 38-4(1) of the GST Act, it needs to be decided whether it falls under one of the exclusions in section 38-3 of the GST Act. Under paragraph 38-3(1)(d) of the GST Act, the supply of an ingredient for a beverage for human consumption is only GST-free if it is an ingredient of a kind specified in Schedule 2.

Products that have been differentiated and are supplied as ingredients for home brewing or wine making will not be GST-free under section 38-2 of the GST Act as they are not ingredients of a kind listed in Schedule 2.

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### **Example 1**

*A retail store sells home brewing kits. These kits are supplied as ingredients for making alcoholic beverages. Whilst some of the products included in the kit may have been GST-free if they were purchased separately, in this instance, the product to be classified is the kit. Home brewing kits are not ingredients for beverages of a kind listed in Schedule 2. Therefore, the supply of a home brewing kit will not be GST-free under section 38-2 of the GST Act.*

### **Example 2**

*Sweet Treats Pty Ltd is a wholesaler of sugar products. They supply sugar to food manufacturers and beverage manufacturers. The sugar is supplied in bulk in 20kg buckets with a label stating 'Sugar'. The sugar supplied to the beverage manufacturers is not differentiated in any way from that supplied to the food manufacturers. Therefore, the sugar is considered to be an ingredient for food for human consumption (paragraph 38-4(1)(b) of the GST Act) and will be GST-free under section 38-2 of the GST Act.*

### **Example 3**

*S'mart Groceries is a large chain of grocery stores. They purchase dextrose from Active Ingredients Pty Ltd who sell various ingredients. The dextrose is supplied in a clear plastic 250g bag and the only labelling is as follows:*

**Active Ingredients Pty Ltd**  
**26 Masonary Street**  
**West Dandenong VIC 3164**  
**(09) 555 6677**

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### **Dextrose**

The supply of the dextrose by Active Ingredients Pty Ltd to S'mart Groceries will be GST-free under section 38-2 of the GST Act. In this case the dextrose could be classified as either an ingredient for food for human consumption under paragraph 38-4(1)(b) of the GST Act or as an ingredient for a beverage for human consumption under paragraph 38-4(1)(d) of the GST Act. The dextrose has not been differentiated in any way and whilst it may be an ingredient for a beverage of a kind not included in Schedule 2, the dextrose is not an ingredient for food that is subject to GST. The GST-free status of the dextrose will override its taxable status.

Active ingredients do not need to ascertain what S'mart Groceries will do with the product.

## Issue 25

### Tea

#### ***What is considered to be a 'tea' for the purposes of item 5 of Schedule 2 of the GST Act?***

For source of ATO view, refer to the [Detailed food list](#).

Generally a supply of food will be GST-free in accordance with Section 38-2 of the GST Act. 'Food' is defined in subsection 38-4(1) of the GST Act and includes:

'(c) beverages for human consumption; (d) ingredients for beverages for human consumption;...'

However, food (including beverages) will not be GST-free where the provisions of section 38-3 of the GST Act apply. Paragraph 38-3(1)(d) of the GST Act operates to subject the following foods to GST:

'a beverage (or an ingredient for a beverage), other than a beverage (or ingredient) of a kind specified in the third column of the table in clause 1 of Schedule 2;...'

Therefore, beverages for human consumption are only GST-free to the extent that they are specified in clause 1 of Schedule 2 of the GST Act.

In this case the relevant item is item 5 of Schedule 2 of the GST Act which states:

'tea (including herbal tea, fruit tea, ginseng tea and other similar beverage preparations)...

will be GST-free.

Although, it should be noted that tea that is in a ready to drink form will be subject to GST - clause 2 of Schedule 2 of the GST Act.

'Tea' is not further defined in the GST Act and is therefore given its ordinary meaning. The Macquarie Dictionary defines tea as:

'1. the dried and prepared leaves of the shrub, *Thea sinensis*, from which a somewhat bitter, aromatic beverage is made by infusion in boiling water.... 5. any of various infusions prepared from the leaves, flowers, etc., of other plants, used as a beverage or medicines.'

It is therefore determined that tea can be consumed both as a beverage and as a medicine. However, for the purposes of the GST Act, the definition of food is referring to those beverages that are primarily consumed for the purposes of increasing bodily liquid levels, to quench thirst or to give pleasure. It does not cover beverages or ingredients for beverages that are primarily consumed for medicinal or therapeutic purposes.

Therefore, item 5 of Schedule 2 of the GST Act is limited to those teas that have the essential character of a beverage, which by way of item 5 is extended to include substitutes for those teas (for example, herbal teas, fruit teas, ginseng, etc). Therefore item 5 of Schedule 2 of the GST Act excludes teas consumed primarily for medicinal or therapeutic reasons.

#### ***How do we determine whether tea is a beverage or a medicine for the purposes of the GST Act?***

In all cultures, plants are traditionally accredited with real or imagined medicinal properties, and there has always been an overlap between 'medicinal' teas and traditional herbal teas.

It is therefore relevant to use the 'essential character' test adopted under the former wholesale sales tax regime. The Australian Taxation Office adopts the view that the essential character of goods assists in determining their GST classification. This involves ascertaining what the goods essentially are, as distinct from merely identifying one of a number of characteristics the goods might have. This approach relies upon deciding what is the basic nature of the goods and involves consideration of what the goods are made of

and what they might be used for. Therefore, teas consumed for medicinal or therapeutic purposes have an 'essential character' of a medicine, not a beverage.

In [Issue No 1](#), we have dealt with the issue of whether products that can be consumed as food but also have other uses are considered to be food.

The GST status of a product depends on whether it is a supply of food as defined in the GST Act. The mere fact that a product may be consumed as a tea preparation is not sufficient for it to qualify as a GST-free food. Therefore, a product with a GST-free food use will not retain its GST-free status if, in the course of its supply, the supplier differentiates it from the GST-free food product.

In determining whether a supply is a supply of GST-free food, it is not only the physical characteristics of the product that are important but also the nature of the supply. It cannot be said that a supply of a product, which is promoted as a medicinal tea preparation, is a supply of food, even if it is identical in substance to the GST-free food product. The nature of the supply has changed. The product is primarily sold for medicinal purposes.

A tea preparation will be considered to be differentiated for medicinal or therapeutic use where any of the following are satisfied:

- the product has been designated as a medicinal or therapeutic tea preparation;
- the labelling, invoicing, marketing or promotional material identify it as sold and purchased for a specific remedial purpose;
- the directions for consumption (for example, dosage), are similar to those that would be issued with a medicinal product; or
- the product is listed under the Therapeutic Goods Act.

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### **Example 1**

*Ginseng tea is comprised of ground ginseng root. In many cultures, it is commonly consumed as an alternative to black tea.*

*However, it is also thought that ginseng tea has medicinal properties and that its consumption relaxes and stimulates the nervous system, lowers blood sugar levels, alleviates stress and insomnia.*

*Where ginseng tea has the essential character of a beverage and the supplier has not differentiated the product as a medicinal tea preparation, then the supply of ginseng tea will be GST-free.*

*Alternatively, where the supplier has differentiated the product as a medicinal tea preparation, and the label contains a dosage and/or makes specific remedial claims, the ginseng tea preparation, in this instance, will be subject to GST. This is the case even though ginseng tea is specifically included in item 5 of Schedule 2 of the GST Act.*

### **Example 2**

*Good for You Teas Pty Ltd, a herbal tea manufacturer, imports herbal tea into Australia. They do not make specific therapeutic claims on the labels or promotional materials of their herbal tea preparations. There are no specific medicinal type dosages contained on the labels. These products are sold to supermarkets and some health food stores.*

*Where the herbal tea products supplied by Good for You Teas Pty Ltd, have the essential character of a beverage and are supplied as an ingredient for a beverage for human consumption they will be GST-free.*

*However, they will be subject to GST where they have been differentiated as a medicinal tea preparation (that is, they make therapeutic claims).*

**Example 3**

*Slippery elm is found in the white inner bark of the elm tree, and is available in capsules, powder and as a tea. Slippery elm makes specific therapeutic claims and is consumed primarily for medicinal reasons. It is clearly evident that the marketing of the product demonstrates that it is competing with other medicines and therefore has the essential character of a medicine and not a beverage. Even though it is consumed after being infused in boiling water, slippery elm is not considered to be food in accordance with section 38-4 of the GST Act, and therefore it is subject to GST.*

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## Issue 26

### Are crispbreads and ricecakes subject to GST?

For source of ATO view, refer to the [Detailed food list](#).

This issue addresses the different GST treatment of crispbreads and ricecakes.

[Clause 1, Item 32 of Schedule 1](#) of the *A New Tax System (Goods and Services Tax) Act 1999* operates to subject the following products to GST:

'food that is, or consists principally of, biscuits, cookies, crackers, pretzels, cones or wafers'

[The further explanatory memorandum to the A New Tax System \(Goods and Services Tax\) Bill 1998 at paragraph 1.52](#) states '...The category of biscuit goods follows the WST definition except that the exclusion for crispbread has been removed. This category would tax amongst other things, dry biscuits, savoury biscuits and chocolate biscuits.'

The word 'crispbread' is defined in the *Macquarie Dictionary 3rd Edition* as 'a kind of crisp biscuit, frequently made to be low in kilojoules'.

'Biscuit' is defined as

**1a** a stiff, sweet mixture of flour, liquid, shortening and other ingredients, shaped into small pieces before baking or sliced after baking, **b** a savoury, unleavened similar mixture, rolled, sliced and baked crisp'.

Clearly, crispbreads fit within item 32 and are therefore subject to GST.

By contrast, rice cakes are made principally from compressed cereal and are considered to be different from biscuits. Accordingly, they are not listed in Schedule 1 and will therefore be GST-free. Other products, similar in nature to rice cakes consisting principally of cereal, such as corn thins, will also not be subject to GST.

Additionally, [Clause 5 of Schedule 1](#) details goods which are not considered to be biscuit goods. This includes breakfast food consisting principally of compressed, rolled or flattened cereal or rusks for infants or invalids.

Dried bread products (such as oven baked toasts, minitoasts, rusks etc) are not considered to be crispbreads. [Items 20 to 27 of clause 1 of Schedule 1](#) lists the bakery products which are not GST-free. Specifically, item 27 relates to bread (including buns) with a sweet filling or coating. Dried bread products do not fall within the bakery products listed in items 20 to 27 nor are they considered to be biscuit goods under item 32. Therefore these products will be GST-free.

## Issue 27

### Is a decoction made from herbs prescribed in a Chinese herbal medicine formula considered to be a tea, tea preparation or preparation marketed principally as a substitute for a tea preparation?

For source of ATO view, refer to the [Detailed food list](#).

One of the modes of treatment in Traditional Chinese Medicine ('TCM') is the use of herbs. Practitioners of TCM who are herbalists will create a herbal medicine formula to deal with the patient's conditions or ailments. The formula is made up of various quantities of different roots, stems, barks, leaves, seeds or flowers of different plants. In some cases, animal and mineral products are included in the formula.

The practitioners may supply the ingredients themselves or a patient may take the formula to a Chinese herbal pharmacist who will dispense the ingredients.

The active ingredients of the herbs in the formula are extracted by a decoction process. This is done by putting the herbs in a pot to which several cups of water are added. The mixture is boiled and simmered until the volume is reduced to generally one cup of liquid. Depending on the prescription, this process may be repeated once or twice. A measured portion of the liquid is taken as one dosage and two or three dosages are taken in a day.

The question has arisen as to whether the herbal decoction is considered to be a tea or a tea preparation or a preparation marketed principally as a substitute for a tea preparation. If so, the herbs supplied in the course of filling the Chinese herbal medicine formula will be GST-free.

[Section 38-2](#) of *A New Tax System (Goods and Services Tax) Act 1999* ('the Act') provides that a supply of food is GST-free.

As far as is relevant, section 38-4(1) of the Act defines food to include:

'(c) beverages for human consumption'.

Relevantly, section 38-3(1)(d) of the Act provides that a supply of food is not GST-free if it is a supply of *'a beverage (or an ingredient for a beverage), other than a beverage (or ingredient) of a kind specified in the third column of the table in clause 1 of Schedule 2'*. Thus only a supply of a beverage (or an ingredient for a beverage) listed in Schedule 2 of the Act is GST-free.

Relevant beverages listed in Schedule 2 that are GST-free provided that they are not marketed in a ready-to-drink form are:

| Item | Category | Beverages   |
|------|----------|---|
| 5    | Tea, ... | Tea (including herbal tea, fruit tea, ginseng tea and other similar beverage preparations), ... |
| 7    | -        | Preparations for drinking purposes that are marketed principally as tea preparations, ...       |
| 8    | -        | Preparations marketed principally as substitutes for preparations covered by item ... 7         |

It is the ATO's view that, when read in the context of the other beverages in Schedule 2, the terms 'tea', 'tea preparations' and 'substitutes for preparations covered by item 7' in items 5, 7 and 8 respectively refer to teas and preparations that are primarily consumed for the purposes of increasing bodily liquid levels, to quench thirst or to give pleasure ([Issue 25](#)). They would not cover drinks that are primarily for medicinal purposes.

Accordingly, the herbal decoction is not considered to be a tea, a tea preparation or a preparation marketed as a substitute for a tea preparation. The decoction is more accurately described as a medicinal decoction. It is drunk specifically for treating medical conditions or ailments. Therefore the herbs supplied in the course of filling a Chinese herbal medicine formula will be subject to GST.

However, supply of the herbs may be GST-free under the GST health provisions. This is discussed at Issues No.2b, 2.b.1, 2.b.2 and 2.b.4 on the [Health Issues Register](#).

## Issue 28

### How are hot and cold chickens treated for the purposes of the GST Act?

For source of ATO view, refer to the [Detailed food list](#).

[Section 38-2](#) of the GST Act provides that food as defined is GST-free. 'Food' is defined in [section 38-4](#) of the GST Act to include

*'food for human consumption (whether or not requiring further processing or treatment)'*

Chicken, whether hot or cold, will satisfy this definition.

However, subsection 38-3(1) of the GST Act operates to specifically subject certain foods to GST. This includes [food for consumption on premises from which it is supplied](#) and hot take-away food. Therefore, chicken will be subject to GST when supplied hot. This includes the supply from both takeaway outlets and supermarkets etc.

The word 'hot' is not defined for the purposes of the GST Act, however paragraph 1.28 of the Further Supplementary Explanatory Memorandum to *A New Tax System (Goods and Services Tax) Bill 1999* provides some guidance:

'Hot food means food that has been heated above the room temperature or above the generally surrounding air temperature for consumption. You do not need to check the precise temperature because food or drink which has been heated so that it can be consumed while still hot will be at a higher temperature than the surrounding air temperature.'

Further to the above, hot chicken will be subject to GST whether it is supplied as a whole chicken or as chicken pieces.

Cold chicken is not caught by the provisions in subsection 38-3(1) and will be GST-free. Therefore, if takeaway outlets or supermarkets provide cold cooked chicken for [consumption away from those premises](#), the supply will be GST-free.

It should be noted that [Schedule 1](#) of the GST Act has no application to the classification of chicken, as the supply is not considered to be the supply of a 'prepared meal' under [clause 1, item 4 of Schedule 1](#).



# Issue 29

## The GST treatment of different types of chocolate

For source of ATO view, refer to the [Detailed food list](#).

### ***The term 'chocolate'***

Although the Australia New Zealand Food Authority (ANZFA) food standards have no legislative basis for the purposes of the GST Act, it is relevant to look at what they consider to be 'chocolate'. The Australian food laws are quite specific about what can and cannot be called 'chocolate'. Chocolate is **any** product that is obtained from cocoa nibs, cocoa mass, cocoa, fat reduced cocoa or any combination of two or more of these ingredients, with or without extracted cocoa butter or sucrose.

Similarly, 'chocolate' is defined in the *Macquarie Concise Dictionary 3rd Edition* as

'1. a preparation of the seeds of cacao, roasted, husked and ground (without removing any of the fat), often sweetened and flavoured, as with vanilla. 2. a beverage or confection made from this. 3. dark brown. 4. made or flavoured with chocolate. 5. having the colour of chocolate.'

Therefore it can be determined that 'chocolate' is more than confectionery. Chocolate is used as an ingredient in many other products, as well as in confectionery - for example, cocoa is considered to be chocolate and is used in a variety of products (both taxable for example, cakes, biscuits, muffins and GST-free for example, drinking chocolate or chocolate topping etc).

### ***Different types of chocolate***

|  |  |
|--|--|
| Chocolate liquor                                       | The base substance of all real chocolate and cocoa products. It comes from the ground nibs.  |
| Unsweetened chocolate (or baking or cooking chocolate) | Chocolate liquor that has been cooled and moulded into squares.  |
| Semisweet chocolate or dark chocolate                  | A blend of chocolate liquor, added sugar, and cocoa butter. A vegetable fat extracted from chocolate liquor. It is available in bars, squares and baking chips. The chips are also called bits or morsels and are specially made to hold their shape when baked. |
| Sweet chocolate  | A combination of chocolate liquor, sugar, a bit of vanilla and cocoa butter. It contains more sugar than does semisweet chocolate. It usually comes in bars and is good for baking and eating.   |
| Bittersweet chocolate                                  | A sub-category of sweet chocolate. Ranges in degrees of sweetness. It contains chocolate liquor, milk, extra cocoa butter (to make it melt easily for baking) and sugar.   |
| Unsweetened cocoa                                      | What remains after cocoa butter has been removed from the chocolate liquor, creating a fine powder. Naturally low in fat and sodium. It has no additives or preservatives.   |
| Milk chocolate   | The most common type of chocolate. It contains chocolate liquor, cocoa butter, milk or cream, sugar and flavourings. Milk chocolate contains at least 10% chocolate.   |

|   |   |
|---|---|
| Compound chocolate  | Made with fats other than cocoa butter. They look a lot like chocolate, their taste is similar to chocolate, but they don't necessarily feel or act like chocolate. They may not have the shine of real chocolate or melt in your mouth. You may have to chew them. They may also be referred to as 'compound coatings' or 'summer coatings'. They are simpler to use than real chocolate in candy making. Instead of having to temper them, as you do real chocolate, you can use them as a coating by simply melting.   |
| White chocolate   | Not actually chocolate because it contains no chocolate liquor, which gives chocolate its colour and flavour. It may be made with vegetable fats, colourings and flavourings.   |
| Decorator's chocolate or confectioner's chocolate<br><br>OR<br><br>Couverture | Not really chocolate, but a sort of chocolate flavoured candy used for things such as covering strawberries. It is created to melt easily and harden quickly, but it is not chocolate.<br><br>'Couverture' is French for 'covering'. A special kind of chocolate that has more cocoa butter than regular chocolate - anywhere from 33% to 38% for a really good brand. This type of chocolate is used as a coating for things like truffles. There are two ways of coating candies, by hand dipping into melted chocolate or enrobing, gently pouring chocolate over the treat. |

### ***The GST legislation***

[Section 38-2](#) of the GST Act states that a supply of food is GST-free. Food is defined in subsection 38-4(1) of the GST Act to include:

- (a) food for human consumption (whether or not requiring further processing or treatment);
- (b) ingredients for food for human consumption;
- (c) beverages for human consumption;
- (d) ingredients for beverages for human consumption;
- (e) goods to be mixed with or added to food for human consumption...

[Section 38-3](#) of the GST Act identifies supplies of food that are not GST-free. Included in this section are foods specified in [clause 1 of Schedule 1](#) of the GST Act. [Clause 1, item 8 of Schedule 1](#) of the GST Act states that:

'confectionery, food marketed as confectionery, food marketed as ingredients for confectionery or food consisting principally of confectionery'

will be subject to GST.

Each of these needs to be considered, in turn, to establish what chocolate will be subject to GST.

### ***What is 'confectionery'?***

As discussed above, not all 'chocolate' will be confectionery. Therefore, what do we mean by the term 'confectionery'? This question has been addressed in [Issue No. 12](#) (Food marketed as confectionery or ingredients for confectionery).

For the purposes of the GST Act it can be determined that when we refer to chocolate under item 8 of [Schedule 1](#) of the GST Act, that we are considering blocks of chocolate, Easter for eggs, chocolate coated confectionery in bars etc that are considered to be a delicacy or a treat.

To assist in determining whether a chocolate product is confectionery it is relevant to consider the activities of the seller and consideration should be given to the following

- the name of the goods
- the price of the goods
- the labelling on any containers for the goods
- literature or instructions packed with goods
- how the goods are packaged
- how the goods are promoted or advertised; and
- how the goods are distributed.

Can it therefore be concluded that cooking chocolate is confectionery? Generally, the answer to this is no. Cooking/baking chocolate contains different ingredients to chocolate confectionery. Cooking/baking chocolate is often made to hold its shape when baked (for example, the chocolate chips used in chocolate chip cookies or muffins).

However, some, but not all, cooking/baking chocolate may fail a marketing test. Two marketing tests exist in item 8 of [Schedule 1](#) of the GST Act - food marketed as confectionery and food marketed as ingredients for confectionery.

### ***Food marketed as confectionery***

As stated above, confectionery is something that is considered to be a treat or delicacy. Cooking/baking chocolate does not fit into this category. Often it is bitter and unpleasant to eat on its own. It is often found in the ingredient aisle of the supermarket, not with chocolate confectionery in the confectionery aisle.

However, compound chocolate that is sold as confectionery (for example, Easter for eggs) will be subject to GST.

### ***Food marketed as ingredients for confectionery***

Some cooking or baking chocolate will be caught as 'food marketed as ingredients for confectionery'. Some products on the market, although available in the ingredient aisle of the supermarket, contain recipes etc on the packaging. Often these recipes will be for confectionery. Others may contain a couple of different recipes, for example - how to make chocolates and a recipe for chocolate chip cookies. In both instances, the ATO will conclude that the products are marketed as an ingredient for confectionery.

Where cooking chocolate or baking bits are packaged in clear bags with no statements as to their intended use, and are found in the ingredients aisle of the supermarket, it is accepted that they are marketed as an ingredient for food for human consumption and are therefore GST-free.

However the same product is often sold at craft stores and markets. In these instances the cooking chocolate/baking bits are often sitting next to chocolate moulds and fondue that is used to make chocolates and other confectionery. It is therefore difficult to argue that it is being marketed for a purpose other than to make confectionery. Therefore item 8 of [Schedule 1](#) of the GST Act would apply to subject this product, in this instance, to GST.

The application of a marketing test can and will result in different treatments of the same product. This is unavoidable.

---

### ***Example 1***

*BSJ Confectionery Supplies are the suppliers of chocolates and chocolate fillings, food colourings, etc. to Jo Jo's Crafts and to the supermarkets. These products are marketed on a general basis and not marketed specifically as an ingredient for confectionery manufacture. The supply of these products by BSJ's will not be subject to GST.*

### Example 2

Jo Jo's Crafts, a specialised craft store sells chocolate moulds, fillings for handmade chocolates, food colourings and chocolate for handmade chocolates. All these items sit alongside each other on the shelves. These goods (excluding the chocolate moulds) are promoted and distributed specifically as ingredients for confectionery and therefore subject to GST by virtue of item 8 of [Schedule 1](#) of the GST Act. The chocolate moulds are taxable, as they are not food.

### Example 3

A supermarket sells cooking chocolate in clear cellophane bags, labelled 'Cooking Chocolate'. This product is available in the same aisle as other cooking ingredients (for example, flour, icing sugar, slivered almonds, etc.). The cooking chocolate has a variety of confectionery and non-confectionery applications and there are no suggested uses included on the packaging. This product is not considered to be food marketed as an ingredient for confectionery and will be GST-free as an ingredient for food for human consumption.

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### Food consisting principally of confectionery

When referring to 'food consisting principally of confectionery', reference is made to food items that contain confectionery. These are not foods that may be considered to be confectionery in their own right. An example of food consisting principally of confectionery would be frogs in a pond, where there are several chocolate frogs surrounded by jelly. A further example might be chocolate-coated strawberries, where the chocolate coating is thick enough that the strawberry loses its identity.

### Classification of different chocolate products

Therefore, based on the above, it may be possible to classify the different 'chocolate' products as follows

| Product  | GST Classification   |
|--|--|
| Chocolate liquor                                       | Ingredient for food for human consumption - paragraph 38-4(1)(b) (GST-free)  |
| Dark chocolate confectionery                           | Confectionery - item 8 of <a href="#">Schedule 1</a> (subject to GST)  |
| Milk chocolate confectionery                           | Confectionery - item 8 of <a href="#">Schedule 1</a> (subject to GST)  |
| White chocolate confectionery                          | Confectionery - item 8 of <a href="#">Schedule 1</a> (subject to GST)  |
| Compound chocolate<br>Compound chocolate confectionery | Ingredient for food for human consumption - paragraph 38-4(1)(b) (GST-free) <sup>2</sup><br><br>Confectionery - item 8 of <a href="#">Schedule 1</a> (subject to GST). This may include Easter for eggs etc<br><br><b>OR</b><br><br>Food marketed as confectionery - item 8 of <a href="#">Schedule 1</a> (subject to GST) |

|   |   |
|---|---|
| Decorator's chocolate or confectioner's chocolate<br>OR<br>Couverture | Ingredient for food for human consumption - paragraph 38-4(1)(b) (GST-free) <sup>2</sup>  |
| Cooking/Baking Chocolate  | Ingredient for food for human consumption - paragraph 38-4(1)(b) (GST-free) <sup>2</sup>  |
| Cocoa   | Ingredient for food for human consumption - paragraph 38-4(1)(b) (GST-free)<br><b>OR</b><br>Ingredient for a beverage for human consumption - paragraph 38-4(1)(d) (GST-free) |

<sup>2</sup> However, these will be subject to GST where they are marketed as an ingredient for confectionery.

If you are uncertain about the classification of a chocolate product please contact the ATO:  
[gstmail@ato.gov.au](mailto:gstmail@ato.gov.au)

# Issue 30

## Pastry products

### ***What are considered 'pastries' for the purpose of Schedule 1?***

For source of ATO view, refer to the [Detailed food list](#).

A supply of food is GST-free in accordance with [section 38-2](#) of the GST Act. 'Food' is defined in subsection 38-4(1) to include:

- '(a) food for human consumption (whether or not requiring further processing or treatment);...'

However, a supply of food will be subject to GST in accordance with subsection 38-3(1) if it is:

- '(a) food for consumption on the premises from which it is supplied; or
- (b) hot food for consumption away from those premises; or
- (c) **food of a kind** specified in the third column of the table in clause 1 of Schedule 1, or food that is a combination of one or more foods at least one of which is food of such a kind;...' (emphasis added)

[Clause 1 of Schedule 1](#) of the GST Act specifies a range of foods that are not GST-free. In relation to pastry foods, the following items are included in Schedule 1:

Item 22 'pies (meat, vegetable or fruit), pasties and sausage rolls

Item 23 tarts and pastries

Item 24 doughnuts and croissants

Item 25 pastizzi, calzoni and brioche'

[Clause 2 of Schedule 1](#) operates to ensure that these items are subject to GST regardless of whether they are supplied hot or cold, or require cooking, heating, thawing or chilling prior to consumption.

The *Macquarie Concise Dictionary 3rd Edition* ('the dictionary') defines 'pastry' to be:

- '1. food made of paste or dough, as the crust of pies, etc. 2. articles of food of which such paste forms an essential part, as pies, tarts, etc.'

Pastry products that are specifically included in Schedule 1, such as pies, pasties, sausage rolls, pastries and pastizzi, are without any doubt subject to GST. However, there are a number of other products that need to be considered. These include, but are not limited to:

- dim sims
- spring rolls
- samosas
- curry puffs
- chicken filo parcels
- beef wellingtons
- vegetable (and other fillings) triangles/parcels

All of these products incorporate pastry as their outer layer. However, the issue is whether these products are captured by items 22 - 25 of [Schedule 1](#) of the GST Act.

It is possible that these products, although not specifically included in Schedule 1 of the Act, may be subject to GST by virtue of paragraph 38-3(1)(c). Paragraph 38-3(1)(c) of the Act refers to *'food of a kind specified in the third column of the table in clause 1 of Schedule 1...'* (emphasis added). The inclusion of the words **of a kind** indicates that foods are taxable if they are of the class or genus referred to in Schedule 1.

The words 'of a kind' and their meaning have been considered in a number of court cases including *Hygienic Lily Ltd v Deputy Commissioner of Taxation (NSW)* (1987) 13 FCR 399, *Sherwood Overseas Pty Ltd v FC of T* 1985 and *Diethelm Manufacturing Pty Ltd v FC of T* 1992.

Gummow J in *Hygienic Lily Ltd* states:

'...the setting in which the phrase 'goods of a kind' appears suggests it is directed not to the use for which the particular goods in question were designed or manufactured, nor to the purpose to which it is intended those particular goods shall be put, but rather to their nature, quality and adaptation of the goods in the class or genus in question. Thus, goods are 'of a kind ordinarily used for household purposes' if they are to be recognised as members of a class or genus which commonly or regularly (albeit not necessarily exclusively or principally) is used for household purposes: cf *Customs and Excise Commrs v Mechanical Services (Trailer Engineers) Ltd* [1979] 1 WLR 305 at 312-13, 315, 316-17.'

Can it be determined that any of the foods in question are **of a kind** listed in Schedule 1? In considering this, it is relevant to look at the products in question.

The dictionary defines the foods listed in Schedule 1 of the Act as:

Pie 'a **baked** dish consisting of a sweet (fruit, etc.) or savoury (meat, fish, etc.) filling, enclosed in or covered by pastry, or sometimes other topping as mashed potatoes.'

Pastie 'a type of pie in which a circular piece of pastry is folded around a filling of vegetables, meat, etc., and **baked**.'

Sausage roll 'a roll of **baked** pastry filled with sausage meat.'

Pastizzi not defined in the dictionary.

The following dictionary definitions are given to those products that are not listed in [Schedule 1](#). These definitions are beneficial in determining whether particular products are **of a kind** referred to in [Schedule 1](#).

Dim Sim 'a dish of Chinese origin, made of seasoned meat wrapped in thin dough and **steamed or fried**.'

Dim Sum '(in Chinese cookery) small dumplings with savoury or sweet fillings, either **steamed or fried**.'

Spring roll 'a Chinese delicacy consisting of a savoury filling wrapped in a thin dough and **deep fried**.'

Samosa 'a savoury pastry with curried meat or vegetable filling, usually triangular in shape.' Recipe books indicate that samosas are fried.

Curry puffs 'a small puff pastry pasty filled with spiced meat or vegetables, typical of Malay cookery.' Recipe books indicate that curry puffs are generally fried.

The following four products are not defined in the dictionary, however recipe books indicate the following

|                 |  |
|-----------------|--|
| Pastizzi        | A traditional Maltese pastry. It is boat shaped and contains a variety of fillings. It is made from puff pastry and traditionally was filled with ricotta cheese. However, they may also contain various other fillings and are baked. |
| Beef wellington | A piece of raw beef (generally either tenderloin or rib eye), mushrooms and pate enclosed in puff pastry and baked. Generally large enough to feed 4 to 8 people, although can be made for individual servings.                        |

|  |   |
|--|---|
| Chicken filo parcels                             | A raw chicken breast combined with other fillings and baked.  |
| Vegetable (and other fillings) triangles/parcels | Similar to pastizzis but made with filo pastry and <b>baked</b> . These products contain a variety of fillings, including cheese and spinach. |

In order for products to be of a kind known as 'pastizzi', they will need to be baked. Those products that are fried cannot be considered to be of the same kind. Similarly, foods such as beef wellington and chicken filo parcels, although baked, contain raw meat and are not of a kind known as 'pies', 'pasties' and 'sausage rolls' referred to in item 22 of [Schedule 1](#), or 'pastries' referred to in item 23 of [Schedule 1](#) of the Act.

Therefore, only vegetable (and other fillings) triangles/parcels are considered to be food of a kind known as 'pastizzi' in item 25 of [Schedule 1](#) of the Act.

Finally, can the remainder of the products be classified as 'pastries' under item 23 of [Schedule 1](#) of the GST Act? The answer to this is no. The reference to pastries is to those products that are sweet and might be considered similar to a tart, and are generally sold by a bakery (although they may be supplied in other stores for example, supermarkets). For example, Danish pastries, or profiteroles that are made from choux pastry and contain a custard or cream filling. Item 23 of [Schedule 1](#) is not intended to be a catch all provision for all products that are made from pastry.

Therefore, by applying the words '*food of a kind*' in paragraph 38-3(1)(c) it can be concluded that the following foods

- dim sims
- spring rolls
- samosas
- chicken filo parcels
- vegetable (and other fillings) triangles/parcels
- curry puffs
- beef wellingtons

are not food of a kind known as 'pies', 'pasties' and 'sausage rolls' referred to in item 22 of [Schedule 1](#), or 'pastries' referred to in item 23 of [Schedule 1](#) of the Act.

## Conclusion

The following products are **subject to GST**:

- pies
- pasties
- sausage rolls
- pastizzi
- vegetable (and other fillings) triangles/parcels

The following products are **GST-free**:

- dim sims
- spring rolls
- samosas
- curry puffs



- chicken filo parcels
- beef wellingtons

Queries concerning products that do not fall into these categories should be forwarded to the ATO for advice: [gstmail@ato.gov.au](mailto:gstmail@ato.gov.au).

# Issue 31

## **Aloe vera juice and aloe vera concentrate**

Non-interpretative - other references:

- [GSTD 2002/2](#) - Goods and services tax: what supplies of fruit and vegetable juices are GST-free?
- [Detailed food list](#)

## Issue 32

### **Are raw/unprocessed olives GST-free as food for human consumption?**

For source of ATO view, refer to the [Detailed food list](#).

A supply of food will be GST-free under [section 38-2](#) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). The term 'food' is defined in subsection 38-4(1) of the GST Act to include 'food for human consumption (whether or not requiring processing or treatment)' emphasis added.

Raw/unprocessed olives supplied as food for human consumption satisfy the definition of food contained in paragraph 38-4(1)(a) of the GST Act.

However, under paragraph 38-3(1)(c) of the GST Act, a supply of food will not be GST-free if it is food of a kind specified in the table in [clause 1 of Schedule 1](#) of the GST Act (Schedule 1).

Raw/unprocessed olives are not specified in Schedule 1.

In addition, the supply of raw/unprocessed olives does not fall within any of the other exclusions in section 38-3 of the GST Act.

Accordingly, the supply of raw/unprocessed olives is a GST-free supply under section 38-2 of the GST Act, even though raw/unprocessed olives are unpalatable and require further processing or treatment prior to consumption.

## Issue 33

### What is the GST treatment of Whey Protein Products (formulated supplementary sports food or dietary supplement)

For source of ATO view, refer to the [Detailed food list](#).

A supply of food is GST-free under [section 38-2](#) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) if the product satisfies the definition of food in [section 38-4](#) of the GST Act and the supply is not excluded by [section 38-3](#) of the GST Act.

Food is defined in section 38-4 of the GST Act to include ingredients for beverages for human consumption (paragraph 38-4(1)(d) of the GST Act). Whey protein products are generally mixed with milk, water or other liquids and then consumed. Therefore, the whey protein products satisfy the definition of food contained in paragraph 38-4(1)(d) of the GST Act.

However, under paragraph 38-3(1)(d) of the GST Act, beverages (or ingredients for beverages) are only GST-free if they are specified in the table in clause 1 of Schedule 2 to the GST Act (Schedule 2).

Whey protein products are not specifically listed in Schedule 2. Therefore, it is necessary to determine whether whey protein products are ingredients that are of a kind specified in Schedule 2.

The items in Schedule 2 that are of relevance are:

- Item 1(c) 'whey, whey powder or whey paste'
- Item 9 'dry preparations marketed for the purpose of flavouring milk'

In relation to item 1(c) in Schedule 2, the terms 'whey', 'whey powder' and 'whey paste' are not defined in the GST Act. Therefore, it is necessary to examine the ordinary meanings of those words.

*The Macquarie Dictionary* (1997) defines 'whey' as 'milk serum, separating as a watery liquid from the curd after coagulation, as in cheese making'. Accordingly, 'whey powder' and 'whey paste' are taken to be the powdered and paste versions of this substance.

The products in question are described as 'whey protein powder'. Therefore, it is necessary to determine whether 'whey protein powder' has the same meaning as 'whey powder'.

'Whey powder' is produced after whey is concentrated (by means of reverse osmosis or evaporation) and dried (by means of spray or roller). However, to produce 'whey protein powder', whey must be submitted to a far more complex process in order to isolate and extract the protein from the whey. The whey must undergo precipitation by polyelectrolytes, centrifugation or filtration, separation of precipitation reagents, concentration by evaporation, and spray drying.

'Whey powder' is a complete whey product whereas 'whey protein powder' is one derivative of whey. Therefore, although both products come from the same source (whey), they are produced differently and ultimately possess different characteristics. Accordingly, the 'whey protein powder' is not an ingredient 'of a kind' listed in Item 1(c).

In relation to item 9 of Schedule 2, it is necessary to determine whether whey protein powder products are dry preparations marketed for the purpose of flavouring milk. Although whey protein powder products contain flavouring, they are not marketed for the purpose of flavouring milk; rather, they are marketed as muscle and strength building products. As such, the whey protein powder products are not covered by Item 9.

Although whey protein powder products are ingredients for beverages, they are not ingredients of a kind specified in Schedule 2. Therefore, supplies of these products are not GST-free supplies under [section 38-2](#) of the GST Act and are subject to GST.

## Issue 34

### **Are green runners and natural sausage casings GST-free as ingredients for food for human consumption?**

For source of ATO view, refer to the [Detailed food list](#).

A supply of food is GST-free under section 38-2 of the *A New Tax System (Goods and Services) Tax Act 1999* (GST Act) if the product satisfies the definition of food in section 38-4 of the GST Act, and the supply is not excluded from being GST-free by section 38-3 of the GST Act.

Food is defined in subsection 38-4(1) of the GST Act to include ingredients for food for human consumption (paragraph 38-4(1)(b) of the GST Act).

Before determining whether 'green runners' and 'natural sausage casings' are GST-free under section 38-2 of the GST Act, it is necessary to establish what we mean by the term 'runners', 'green runners' and 'natural sausage casings'.

#### ***Runners and green runners***

Runners are the small intestines after the operation of running (removal from the mesentery and fat).

Green runners are the runners after stripping of ingesta as defined in the Australian Standard for Hygienic Production of Natural Casings for Human Consumption (Draft).

#### ***Natural sausage casings***

Natural sausage casings are the sub-mucosal layer of intestines obtained from green runners after cleaning and placing in a preservative as defined in the Australian Standard for Hygienic Production of Natural Casings for Human Consumption (Draft).

#### ***What is an ingredient for food?***

'Ingredient' is not defined in the GST Act. However, the *Macquarie Dictionary* defines 'ingredient' as 'something that enters as an element into a mixture'.

Ingredients for food for human consumption under paragraph 38-4(1)(b) of the GST Act are only GST-free if they are in a form or condition that does not require processing or treatment to be used as an ingredient.

Green runners require processing and treatment before they can be used as natural sausage casings. These processes include passing the green runners through crushers that break the mucosal and muscular layers and expel those layers. The green runners may pass through a de-threader that removes any final layers, leaving them clean. Additional processes may also be carried out before they are packed and ready for use.

As green runners require further processing before they can be used as an ingredient, they are not covered under the definition of food in paragraph 38-4(1)(b) of the GST Act and are not GST-free under section 38-2 of the GST Act. Therefore, a supply of green runners will be a taxable supply under section 9-5 of the GST Act.

Natural sausage casings do not require further processing and are therefore an ingredient for food for human consumption and are GST-free under section 38-2 of the GST Act.

The ATO is aware that there has been some uncertainty and inconsistency within the industry in relation to the tax treatment of green runners. As a result of discussions with industry representatives, the ATO will allow suppliers of green runners until 1 July 2002 to comply with this advice.

## Issue 35

### Are powdered chocolate and cocoa-based drinking preparations that are added to water GST-free?

For source of ATO view, refer to the [Detailed food list](#).

A supply of food is GST-free under section 38-2 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) if the product satisfies the definition of food in section 38-4 of the GST Act and the supply is not excluded from being GST-free by section 38-3 of the GST Act.

Food is defined in section 38-4 of the GST Act to include ingredients for beverages for human consumption (paragraph 38-4(1)(d) of the GST Act). Drinking chocolate and cocoa-based preparations that are added to water are considered to be ingredients for beverages for human consumption.

However, under paragraph 38-3(1)(d) of the GST Act, ingredients for beverages will only be GST-free if they are of a kind specified in the table in clause 1 of schedule 2 to the GST Act (schedule 2).

The items in schedule 2 that may be applicable to drinking chocolate and cocoa-based preparations that are added to water are:

|         |  |
|---------|--|
| Item 6  | malt extract, if it is marketed principally for drinking purposes  |
| Item 7  | preparations for drinking purposes that are marketed principally as tea preparations, coffee preparations or preparations for malted beverages |
| Item 8  | preparations marketed principally as substitutes for preparations covered by item 6 or 7   |
| Item 9  | dry preparations marketed for the purpose of flavouring milk   |
| Item 13 | beverages, and ingredients for beverages, of a kind marketed principally as food for infants or invalids                                       |

Item 6 of schedule 2 (item 6) applies to malt extracts that are marketed principally for drinking purposes. Chocolate and cocoa-based drinking preparations are different to malt extract. Therefore, chocolate and cocoa-based drinking preparations do not satisfy the requirements of item 6.

Item 7 of schedule 2 (item 7) applies to preparations for drinking purposes that are marketed principally as a tea preparation, coffee preparation or preparations for malted beverages. It is accepted that chocolate and cocoa-based drinking preparations are preparations for drinking purposes. However, in order to satisfy the second requirement of item 7, an assessment needs to be undertaken of the way the preparation is marketed. Products that are added to water and that are marketed principally as chocolate or cocoa-based drinking preparations do not satisfy the requirement of being marketed principally as a tea, coffee or malted beverage preparation. Therefore, the requirements of item 7 are not satisfied.

Item 8 of schedule 2 (item 8) applies to preparations that are marketed principally as a substitute for preparations covered by item 6 or item 7. Therefore, item 8 applies to preparations marketed principally as a substitute for malt extract principally for drinking purposes, tea preparations, coffee preparations or malted beverage preparations. Chocolate and cocoa based dry products that are added to water can satisfy the requirements of item 8.

The term 'marketed' used in item 8 is given a wide interpretation. All factors associated with marketing need to be considered in order to determine if a product is marketed in the manner required. Such factors should include cost, packaging, placement, advertising and promotion.

The term 'substitute' is not defined in the GST Act. The ordinary meaning of 'substitute' as defined in the Australian Concise Oxford Dictionary 4th edition is:

1. a person or thing acting or serving in place of another;
2. an artificial alternative to a natural substance;

A substitute would ordinarily have similarities with the original product, thus making it suitable to use as a substitute to the original. Drinking chocolate or cocoa is used as a common substitute for a hot malted drink or hot tea or coffee. Therefore dry chocolate and cocoa preparations that are marketed similarly to tea or coffee preparations (similar cost, packaging, market placement, advertising or promotion) are GST-free under item 8.

Other chocolate and cocoa products, for example dietary products and soft drinks are not marketed principally as substitutes for malt extract, tea preparations, coffee preparations or malted beverage preparations. It follows that such products would not be GST-free under item 8.

Item 9 of schedule 2 (item 9) applies to dry preparations marketed for the purpose of flavouring milk. Products that are added to water and that are marketed principally as chocolate or cocoa-based drinking preparations, and not for the purpose of flavouring milk, do not satisfy the requirements of item 9.

Item 13 of schedule 2 (item 13) applies to preparations that are ingredients for a beverage that are of a kind marketed principally as food for infants or invalids. Products that are added to water and that are marketed principally as chocolate or cocoa-based drinking preparations, and not marketed for use principally as food for infants and invalids, do not satisfy the requirements of item 13.

The remaining items in schedule 2 are not applicable to the classification of chocolate and cocoa-based drinking preparations that are added to water.

Accordingly, chocolate and cocoa-based drinking preparations that are added to water will be GST-free under section 38-2 of the GST Act where the marketing test in item 8 of clause 1 of schedule 2 is satisfied.

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