

Agenda

- GST on Cakes is Easy- 1983
- GST is Not a Consumption Tax
- GST Law in 2000- All Food Was Supposed to be Taxable
- GST-free Food Provisions
- Words and Phrases for Food & Beverage Classifications
- Custard & Yoghurt: Food or Beverage
- Water: Taxable or GST-free
- ATO Detailed Food List

GST Classifications of F&B- It's a Trap

GST Classifications of Food & Beverages

It's an unexpected trap that's so easy to fall into!

Will you fall into that trap as a business or advisor?

Dr Hewson's Famous Cake

- Let me first take you back forty years ago to one of the most well known moments in Australian GST history
- In March 1983, Dr John Hewson, then Opposition Leader, was being interviewed on live TV by Mike Willisee
- Hewson 'lost the unlosable election' as a result of it
- Almost everyone in tax to this day refers to this interview
- Yet almost everyone who refers to this interview 'gets it wrong!!'

Watch Dr Hewson Stumble



The Basics: GST Is Not a Consumption Tax

The Basics

- GST is a tax that's imposed on entities making them liable to pay GST on 'supplies' they make for consideration in the course of carrying on an enterprise in Australia
- Entities can claim input tax credits of the GST they bear for acquisitions they make in the carrying on of an enterprise
- It's not imposed on consumers. There's no presumption of, nor need for there to be any consumption by anyone. Yet we call it a consumption tax. This is very relevant when referring to the F&B sector

The Basics: GST Is Not a Consumption Tax

The Basics

- Where do you look to see the list of 'goods and services' that are subject to GST? Where does it say all F&B are taxable?
- No such place. The GST law starts off by making 'everything' subject to GST. They don't even have to be 'goods' or 'services'
- But it does go on to list exceptions as to what 'supplies' are not taxable

Taxable Supplies

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999 - SECT 9.5

Taxable supplies

You make a taxable supply if:

- (a) you make the supply for * consideration; and
- (b) the supply is made in the course or furtherance of an * enterprise that you * carry on; and
- (c) the supply is * connected with the indirect tax zone; and
- (d) you are * registered, or * required to be registered.

However, the supply is not a * taxable supply to the extent that it is * GST-free or * input taxed.

Taxable Supplies

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999 - SECT 9.10

Meaning of supply

(1) A supply is any form of supply whatsoever.

NOTE

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999 - SECT 195.1

Dictionary

In this Act, except so far as the contrary intention appears:

"*thing*" means anything that can be supplied or imported.

Taxable Supplies

- (2) Without limiting [subsection](#) (1), [supply](#) includes any of these:
- (a) a [supply](#) of [goods](#);
 - (b) a [supply](#) of services;
 - (c) a provision of advice or information;
 - (d) a grant, assignment or surrender of * [real property](#);
 - (e) a creation, grant, transfer, assignment or surrender of any [right](#);
 - (f) a * [financial supply](#);

Taxable Supplies

(g) an entry into, or release from, an obligation:

(i) to do anything; or

(ii) to refrain from an act; or

(iii) to tolerate an act or situation;

(h) any combination of any 2 or more of the matters referred to in [paragraphs](#) (a) to (g).

(3) It does not matter whether it is lawful to do, to refrain from doing or to tolerate the act or situation constituting the [supply](#).

Sales Tax Transition to GST

Classifications under the Sales Tax (Exemption and Classifications) Act (1930 to 2000) were inconsistent, out of date (after government policy and lobbying for over 70 years) and getting impossible to administer. It was to be fixed/corrected/updated by new GST, but:

- The “Lines in the Sand” became highly politicised by government, political parties, industry, the public and the so-called experts, leading to the Vos Report
- Many of the Sales Tax F&B classification problems ended up being simply carried forward into GST law
- GST-free status on only some foods was forced on government and was rushed
- Highly emotive and ended up being negatively impactful on lower income citizens

Food & Beverages Provisions

Where are the specific F&B provisions found in the GST Act:

- Sections 38-2 to 38-6
- GST Regulation 38-3
- Schedule 1 (Taxable Food) and Schedule 2 (GST-free Beverages)

The broad approach:

- Food (GST-free, but Taxable by exception eg Schedule 1)
- Beverages (Taxable, but GST-free by exception eg Schedule 2)

Food is GST-free to Start: 38-2

**A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999
- SECT 38.2**

Food

A supply of * food is *GST-free* .

Except when it's not GST-free: 38-3

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999 - SECT 38.3

Food that is not GST-free

(1) A [supply](#) is not [GST-free](#) under section 38-2 if it is a [supply](#) of:

- (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; 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
 - (e) [food](#) of a kind specified in regulations made for the purposes of this [subsection](#).
- (2) However, this section does not [apply](#) to a [supply](#) of * [food](#) of a kind specified in regulations made for the purposes of this [subsection](#).
- (3) The items in the table in clause 1 of Schedule 1 or 2 are to be interpreted subject to the other clauses of Schedule 1 or 2, as the case requires.

Meaning of Food: 38-4

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999 - SECT 38.4

Meaning of food

(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;
- (e) goods to be mixed with or added to food for human consumption (including condiments, spices, seasonings, sweetening agents or flavourings);
- (f) fats and oils marketed for culinary purposes;

but does not include:

Meaning of Food: 38-4

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999 - SECT 38.4

Meaning of food

but does not include:

- (g) live animals (other than crustaceans or molluscs); or
- (ga) unprocessed cow's milk; or
- (h) any grain, cereal or sugar cane that has not been subject to any process or treatment resulting in an alteration of its form, nature or condition; or
- (i) plants under cultivation that can be consumed (without being subject to further process or treatment) as [food](#) for human consumption.

(2) [Beverage](#) includes water.

Food Premises: 38-5

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999 - SECT 38.5

Premises , in relation to a supply of * food, includes:

(a) the place where the supply takes place; or

(b) the grounds surrounding a cafe or public house, or other outlet for the supply;

or

(c) the whole of any enclosed space such as a football ground, garden, showground, amusement park or similar area where there is a clear boundary or limit;

but does not include any part of a public thoroughfare unless it is an area designated for use in connection with supplies of food from an outlet for the supply of food.

Packaging for Food: 38-6

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999 - SECT 38.6

Packaging of food

- (1) A supply of the packaging in which * food is supplied is GST-free if the supply of the food is GST-free.
- (2) However, the supply of the packaging is GST-free under this section only to the extent that the packaging:
 - (a) is necessary for the supply of the food; and
 - (b) is packaging of a kind in which food of that kind is normally supplied.

Schedule 1: Food Not GST-Free

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999 – SCHEDULE 1

Food that is not GST-free

Note 1: See section 38-3.

Note 2: The second column of the table is not operative (see section 182-15). Food that is not GST-free

Food specified in the third column of the table is not GST-free.

http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/antsasta1999402/sch1.html

Schedule 2: Beverages GST-free

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999 – SCHEDULE 2

Beverages that are GST-free

Note 1: See section 38-3.

Note 2: The second column of the table is not operative (see section 182-15).

Beverages specified in the third column of the table are GST-free.

http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/antsasta1999402/sch2.html

Words and Phrases in 38-2 to 38-6

“for consumption”

“on the premises”

“of a kind specified”

“an ingredient for”

”interpreted subject to”

“for culinary purposes”

”under cultivation”

”preparations”

“for human consumption”

“away from the premises”

“a combination of”

“requiring processing or treatment”

“not subject to any process or treatment”

“alteration of form, nature or condition”

“hot food”

“marketed as ingredients for”

Words and Phrases in 38-2 to 38-6

“packaging ... necessary”

“prepared food”

“arrangements of food”

“similar foodstuffs”

“consisting principally of”

“marketed principally as”

“marketed in ready-to-drink form”

“at least 90% by volume”

“packaging ... normally supplied”

“similar ... food”

“food known as ...”

“any food similar to”

“marketed principally as a prepared meal”

“substitutes”

“to the extent of at least 95%”

“wholly”

Custard and Yoghurt: Eaten, Drunk or Swallowed?



Water

Water

How hard can it be to determine the GST classification a plain and simple 500ml bottle of non-carbonated water?

Bottle of Water



Water

“water” not defined in GST Act

s 9-5 supply of goods: taxable, but

s 38-285(1) water: GST-free,

but

s 38-285(2)(3) water in a container with a capacity <100 litres (regardless of actual volume of water in the container): taxable, but since:

38-4(2) ‘beverage’ is defined to ‘include water’

38-4(1)(c) ‘food’ is defined to include ‘beverages’

38-4(1)(d) “food” is defined to include ‘ingredients for beverages’

38-2 food: GST-free, but

Water

38-3(1)(d) beverages (or ingredients for beverages): taxable, but

- Item 17, Schedule 2: Water; natural, non-carbonated and no additives: GST-free, but

38-3(1)(a)(b)

- Food for consumption on premises of supply: taxable
- Hot food away from premises of supply; taxable

38-3(2) and GST Regulation 38-3

- Water that would be taxable under 38-3(1)
- Sold in a vending machine
- For consumption in the premises where the vending machine is: GST-free

‘Chobani Flip Yoghurt’ Case

The ATO has recently been winning hands down in the Courts in relation to everyday supermarket food becoming subject to GST.

The “Chobani Flip Strawberry Shortcake Yoghurt” was recently ruled by the AAT to be ‘a combination of one or more foods at least one of which is food of such a kind’ that were taxable pieces of cookies and chocolate. Hence, the entire product was subject to 10% GST under section 38-3 (1)(c) and being ‘food of a kind specified in the third column of the table in clause 1 of Schedule 1’

It was argued that after the sale, the consumers would ‘flip’ the pack over to combine all of the ingredients before eating it, and the manufacturer could have supplied all of the ingredients as a single pre-combined pack of flavoured yoghurt. However, at the point of ‘supply,’ it was a combination of separate ingredients that met the test of being a taxable supply as stated above, and was therefore subject to full GST on the entire product, even though most of it was made up of GST-free yoghurt.

Birdseye Frozen ‘Prepared Meals’

The Choibani case was followed by the Federal Court ruling a whole range of frozen ‘Birds Eye’ products such as the ‘SteamFresh Fried Rice Style with Vegetables and Omelette’ and the ‘VeggieRice Rissotto Taste Creations Cauli Rice, Mixed Mushroom and Pea’ to be taxable supplies of “food of a kind” that were “marketed as prepared foods”.

The Court took into account contemporary meanings in 2023 of words and phrases such as “marketed”, “prepared”, “of a kind” and very importantly, what constitutes a “meal”. It should also be noted that not only did the decision have to consider section 38-3 (1) (c) and being food of a kind specified in the third column of the table in clause 1 of Schedule 1, in particular Item 4. Further, Note 3 to Schedule 1 Specifies that Note 4 in the table only applies to food that requires refrigeration or freezing for its storage.

More F&B Classifications to Change and More to Become Subject to GST

These above judicial decisions are based on the precise wording in the GST law and factual evidence, not whether they seem to be fair or reasonable from an industry point of view.

After GST being around for a nearly a quarter century and being based on (if I may be so bold to say) the ridiculous old Sales Tax law classifications and categories of food, this is just the thin edge of the wedge.

Be warned- the ATO is currently conducting a major review of its GST Detailed Food Guide, the most referred to GST Public Ruling on the ATO website. This is good as this review is well overdue, and much will result in clarifications and there being more consistency.

However, more foods are about to be ruled to be taxable (eg cheese and crackers combined in a single package) .

ATO Detailed Food List

ATO GST Public Ruling on Food & Beverages

Details of the GST status of major food and beverage product lines

<https://www.ato.gov.au/law/view/document?DocID=GII/GSTIIFL1/NAT/ATO/00001&PiT=99991231235958>



Hi, my name is Ken

I am a GST Specialist, Advisor and Mentor empowering Boards, Executives and Business Owners to convert complex GST issues into tangible business opportunities using a proven methodology and keeping them safe

DON'T TAKE CHANCES BY ROLLING THE DICE ON GST

