

# ***GSTD 2024/1 - Goods and services tax: supplies of combination food***

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Status: **legally binding**

## Goods and Services Tax Determination

# Goods and services tax: supplies of combination food

### **📌 Relying on this Determination**

This publication is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Determination applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Determination. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Determination.

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### **What this Determination is about**

1. This Determination provides the Commissioner's view on when, under paragraph 38-3(1)(c) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), a supply is a supply of food that is a combination of one or more foods at least one of which is food of a kind specified in the third column of the table in clause 1 of Schedule 1 to the GST Act.

2. In this Determination:

- All legislative references are to the GST Act, unless otherwise indicated.

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- The phrase 'food of a kind specified in the third column of the table in clause 1 of Schedule 1 to the GST Act' from paragraph 38-3(1)(c) will be referred to as 'taxable food'.
- Food, the supply of which is taxable under paragraph 38-3(1)(c), because it is a 'combination of one or more foods' at least one of which is a taxable food, will be referred to as 'combination food'.

3. This Determination considers what is a combination food for paragraph 38-3(1)(c) purposes by reference to the decision of the Administrative Appeals Tribunal (AAT) in *Chobani Pty Ltd and Commissioner of Taxation* [2023] AATA 1664 (*Chobani*). It does not otherwise consider what is a taxable food, or the extent to which a supply of food is a taxable supply.

4. Goods and Services Tax Ruling GSTR 2001/8 *Goods and services tax: Apportioning the consideration for a supply that includes taxable and non-taxable parts* deals with identifying supplies that include taxable and non-taxable parts. This includes how to distinguish mixed supplies from supplies that are in substance the supply of one thing – composite supplies. GSTR 2001/8 has no application to supplies of combination food, as supplies of combination food are wholly taxable and have no non-taxable parts. The supply of a combination food is not a mixed supply.

5. If a supply is not a supply of a combination food, it may be necessary to determine if the supply is a mixed or composite supply. This is explained in GSTR 2001/8 and is not further considered in this Determination. Even though there may be some similarity in the language used in GSTR 2001/8 and this Determination respectively, the principles that apply in determining whether food is a combination food are different to those that apply in determining whether a supply is a mixed or composite supply.

### **The decision in *Chobani***

6. *Chobani* considered whether Chobani Flip Strawberry Shortcake flavoured yoghurt (product) was a combination food. The product comprised flavoured yoghurt in a plastic tub compartment with dry inclusions (cookie pieces and chocolate chips)<sup>1</sup> in a smaller compartment of the tub. Each of the dry inclusions was a taxable food. It was expected that the dry inclusions would be flipped into the yoghurt before consumption.

7. The AAT accepted that, having no trade meaning, 'combination' takes its ordinary meaning, as the 'product or outcome of joining two or more things together in some way'.<sup>2</sup> The AAT noted that a product whose taxable food ingredients 'have lost their separate identity may, in one sense, be regarded as food that is a combination'.<sup>3</sup> It was accepted by the AAT, however, that a 'combination of that kind is not intended to be excluded by [paragraph] 38-3(1)(c)'.<sup>4</sup> The AAT rejected the position that product components had to be 'practically, economically and commercially distinct'. The AAT stated that<sup>5</sup>:

... the exclusion in s 38-3(1)(c) applies at least when a product meets the description: food that is a combination of foods that includes separately identifiable food or foods excluded by the table in clause 1 of Schedule [1<sup>6</sup>] or foods of that kind. There may be cases where

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<sup>1</sup> See *Chobani* at [101–132] for details of the product, including ingredients, composition, packaging and appearance, instore display, and marketing.

<sup>2</sup> *Chobani* at [32].

<sup>3</sup> *Chobani* at [61]. The definition of food includes 'ingredients for food for human consumption' – paragraph 38-4(1)(d).

<sup>4</sup> *Chobani* at [62].

<sup>5</sup> *Chobani* at [74].

<sup>6</sup> The reference to 'Schedule 2' in this regard by the AAT appears to be a typographical error.

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excluded items remain separately identifiable but nevertheless are so integrated into the overall product, or so insignificant, that they would not affect the characterisation.

8. Following *Lansell House Pty Ltd v Commissioner of Taxation* [2010] FCA 329<sup>7</sup>, the AAT accepted that classification of a food product involves questions of fact and degree, objectively taking all factors into account<sup>8</sup>, to arrive at an answer by way of ‘overall impression’.<sup>9</sup> The AAT found it ‘inescapable’ that the product was a combination of flavoured yoghurt, cookie pieces and chocolate chips, within which the latter components were ‘not insignificant; remain readily identifiable; and are not subsumed into a separate product’.<sup>10</sup> The dry inclusions, it was found, were not integrated into the yoghurt and were significant, as indicated by their physical separation in the product as sold, their relative weight and cost, and the marketing and consumer experience.<sup>11</sup>

9. The AAT noted that the product was to be classified at the point of supply. The AAT also noted that the policy to exempt ‘basic food’, comparisons to the older sales tax provisions, the Explanatory Memorandum<sup>12</sup> and the fact GST was a ‘practical business tax’<sup>13</sup> were each of limited assistance in the context of this matter.

## Ruling

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

- A supply of a combination food involves the supply of food that includes at least one separately identifiable taxable food.
- A food is *separately identifiable* when it can be individually perceived by ordinary visual inspection. Being listed as an ingredient in a food alone is not sufficient to establish that a food is separately identifiable.
- The word ‘combination’ in paragraph 38-3(1)(c) takes its ordinary meaning, as the ‘product or outcome of joining two or more things together in some way’.<sup>14</sup>
- Whether separately identifiable foods are *sufficiently joined together* so that they form a combination food is a matter of overall impression, having regard to factors including physical appearance and packaging, labelling, marketing, product design, manner of sale and consumer experience.
- A separately identifiable taxable food may be so *integrated* into the overall product, or be so *insignificant* within that product, that it has no effect on its characterisation.
- Whether food is a combination food must be determined at the point of supply. An expectation or likelihood that the combination food may be later separated, mixed or blended does not prevent it from being a combination food.

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<sup>7</sup> Upheld in *Lansell House Pty Ltd v Commissioner of Taxation* [2011] FCAFC 6.

<sup>8</sup> These include appearance, taste, ingredients, process of manufacture, marketing and packaging.

<sup>9</sup> *Chobani* at [80].

<sup>10</sup> *Chobani* at [144].

<sup>11</sup> *Chobani* at [74].

<sup>12</sup> Further Supplementary Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 (GST Bill).

<sup>13</sup> *Chobani* at [64].

<sup>14</sup> *Chobani* at [32].

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11. Accordingly, it is the Commissioner's view that that the following 3 principles apply when determining whether there is a supply of a combination food:

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

### ***Principle 1 – at least one separately identifiable taxable food***

12. A supply of a combination food involves the supply of food that includes at least one separately identifiable taxable food.<sup>15</sup> A food is separately identifiable when it can be individually perceived by ordinary visual inspection.

13. To be capable of being individually perceived by ordinary visual inspection, the taxable food must be capable of being seen by a person looking carefully at the food. This may involve some interaction with the food, including removing packaging and moving components to view different aspects of the food. This does not extend to taxable food that can only be seen or detected with the use of special equipment.

14. The taxable food does not need to be physically separated from the other components (for example, in separate compartments) to be separately identifiable, nor does it need to be capable of being eaten separately.

15. Food is not a combination food solely because it is made from ingredients, at least one of which is a taxable food.<sup>16</sup> Being listed as an ingredient in a food alone is not sufficient to establish that a food is separately identifiable for these purposes.

16. Example 1 of this Determination illustrates circumstances where food does not include at least one separately identifiable taxable food.<sup>17</sup>

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

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

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<sup>15</sup> *Chobani* at [74–144].

<sup>16</sup> *Chobani* at [61–62].

<sup>17</sup> Refer to Examples 2 to 8 of this Determination for contrasting examples of food that include at least one separately identifiable taxable food. Refer to Example 3 of this Determination which explains how the principles would apply if the chocolate-hazelnut spread in Example 1 of this Determination was sold in both 'smooth' and 'crunchy' varieties.

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**Principle 2 – sufficiently joined together**

18. The word ‘combination’ in paragraph 38-3(1)(c) takes its ordinary meaning as the ‘product or outcome of *joining* two or more things together in some way’.<sup>18</sup>

19. To be a supply of a combination food, the separately identifiable taxable food must be sufficiently joined together with the other components of the overall product at the time of sale. To be sufficiently joined together, the components must be supplied as a single item for consumption, as opposed to 2 or more distinct supplies of food made at the same time. The mere fact that items of food are purchased at the same time does not make those items a combination food, even if the purchaser eats or intends to eat them together. Most obviously, this includes a person purchasing milk and chocolate biscuits in the same transaction.

20. Another example of 2 or more distinct items supplied together is a hamper. A hamper containing a range of individual commercially packaged food products that remain distinct is not a combination food.<sup>19</sup> The common packaging does not change the fact that the items in the hamper remain distinct items and are not supplied as a single item for consumption.

21. The components of the combination food do not need to be physically mixed, whether at the time of sale or afterwards, for the taxable food to be sufficiently joined together with the other components of the overall product.<sup>20</sup>

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

23. Example 2 of this Determination illustrates that whether separately identifiable foods are sufficiently joined together, so that they are a combination food, is a matter of overall impression taking into account various factors.<sup>21</sup>

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

24. *Meal Box Ltd supplies meal preparation kits, which involve a box containing a range of ingredients and a recipe for a meal. The ingredients are in the correct quantity for making the meal but require various preparation steps under the recipe to make that meal. One of the kits, the Nutty Chicken Pasta Kit, includes a package of roasted peanuts (taxable food).*

25. *The Nutty Chicken Pasta Kit is not a combination food. While the roasted peanuts are separately identifiable, they are not sufficiently joined together with the other components of the kit at the time of sale, considering the factors stated in paragraph 21 of this Determination. That is, the meal kit’s physical appearance and packaging, labelling,*

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<sup>18</sup> *Chobani* at [32].

<sup>19</sup> The supply of a hamper is a mixed supply. This is consistent with paragraph 1.18 of the Further Supplementary Explanatory Memorandum to the GST Bill. See also the Goods and Services Tax Industry Issue GSTII FL1 *Detailed Food List* entry on ‘hampers’ and GSTR 2001/8.

<sup>20</sup> *Chobani* at [130–134]. See Example 7 and Example 8 of this Determination regarding separate containers and layered foods.

<sup>21</sup> No single factor, including the name given to the product, is determinative. For example, food may be labelled as a ‘meal kit’ or ‘meal preparation kit’ in circumstances where an assessment of the relevant factors leads to a conclusion that the components are sufficiently joined together with the other components of the food. Refer to Examples 3 to 8 of this Determination for contrasting examples of food where the separately identifiable taxable food is sufficiently joined together with the other components of the overall product.

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*marketing and product design give the overall impression that it is an assortment of distinct ingredients packaged together for convenience. There is little difference between the supply of these boxed ingredients by Meal Box Ltd and the supply of similar ingredients ordered online or purchased from a supermarket in a single transaction.*

26. *As a matter of overall impression, evaluated at the time of sale, the food items are not supplied as a single item for consumption. While they may ultimately be consumed together, several steps must still be undertaken to make the meal, including chopping the ingredients and cooking the chicken. Further, some required ingredients are not supplied, like water, oil and seasoning. The fact that the food items are supplied together with a recipe in the one box does not for that reason alone make them a combination food.*

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

27. There will be cases where, even though Principles 1 and 2 are satisfied, the separately identifiable taxable food is so integrated into the overall product, or is so insignificant within that product, that it would not affect its characterisation.<sup>22</sup> For example, food may be so insignificant where it is merely an incidental accompaniment to the product.

28. The questions of integration and significance require a qualitative assessment and are a matter of overall impression. There is no bright-line test (for example, no minimum weight or volume, or percentage quantity) for determining when a taxable food will be so integrated or so insignificant that the overall product does not have the character of being a combination food. Where a percentage quantity is provided in any examples in this Determination, this is just one relevant factor. This should not be taken to indicate that there is a bright-line test for determining whether a product is a combination of food.

29. In *Chobani*, relevant factors were not limited to quantitative factors like physical separation, weight and cost of the product. They also included factors like marketing, consumer experience and the labelling of the product as a ‘flip’ product.

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

30. *The food manufacturer from Example 1 of this Determination, Squirrel Ltd, makes its chocolate-hazelnut spread in ‘smooth’ and ‘crunchy’ varieties. The roasted hazelnuts in the crunchy variety are not blended smooth. Small pieces of roasted hazelnuts are visible throughout the spread.*

31. *The crunchy variety of the chocolate-hazelnut spread is not a combination food.*

32. *While the roasted hazelnuts are separately identifiable and are sufficiently joined together with the other ingredients of the spread, the roasted hazelnuts are so integrated into the overall product that they do not affect its characterisation. While the roasted hazelnuts contribute to certain characteristics of the product, including the flavour and crunchy texture, they are so integrated into the overall product that, as a matter of overall impression, the product does not have the character of being a combination food.*

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<sup>22</sup> *Chobani* at [74].

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**Example 4 – food that is not a combination food – integrated foods**

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

34. This product is not a combination food.

35. While the roasted nuts are separately identifiable and are sufficiently joined together with the other ingredients at the time of sale, the roasted peanuts are so integrated into the overall product that they do not affect its characterisation. While the roasted peanuts contribute to certain characteristics of the product, including the flavour and texture of the stir-fry sauce, they are so integrated into the overall product that, as a matter of overall impression, the product does not have the character of being a combination food.

**Example 5 – food that is not a combination food – insignificant foods**

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

37. This product is not a combination food.

38. While the roasted seeds are separately identifiable and are sufficiently joined together with the other ingredients of the bread at the time of sale, the roasted seeds are so insignificant within the overall product that they do not affect its characterisation. The roasted seeds contribute to certain characteristics of the bread, including flavour and texture, but are so insignificant within the overall product that, as a matter of overall impression, the product does not have the character of being a combination food.

**Example 6 – food that is not a combination food – insignificant foods**

39. Cereal Ltd sells a muesli breakfast product containing rolled oats, sultanas, small pieces of dried apricots, flakes of dried coconut and whole roasted almonds. The roasted almonds are a taxable food and make up approximately 5% of the product by weight. The packaging contains a picture of the muesli in a bowl in which the roasted almonds are visible. The roasted almonds are mentioned in the description of the product but do not feature prominently on the packaging and are not mentioned in the name of the product.

40. This product is not a combination food.

41. While the roasted almonds are separately identifiable and are sufficiently joined together with the other components of the muesli at the time of sale, the roasted almonds are so insignificant within the overall product that they do not affect its characterisation. The roasted almonds contribute to certain characteristics of the muesli, including flavour and texture, but are so insignificant within the overall product that, as a matter of overall impression, the product does not have the character of being a combination food.

**Example 7 – food that is a combination food – separate containers**

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



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43. *The Tuna Lunch Pack is a combination food.*

44. *The biscuits are separately identifiable as they can be individually perceived by ordinary visual inspection of the product at the time of sale.*

45. *Considering the factors stated in paragraph 21 of this Determination, the biscuits are sufficiently joined together with the tuna at the time of sale. While the biscuits are not physically mixed with the tuna, the marketing, consumer experience and labelling of the product give the overall impression that the biscuits and tuna are supplied as a single item for consumption.*

46. *The biscuits are neither so integrated into the overall product, nor so insignificant within that product, that they do not affect the product's characterisation. The biscuits are significant to the taste, texture and intended manner of consumption of the product, and form a key part of the marketing and design of the product. The overall impression of the product is that it is a combination of biscuits and tuna.*

#### **Example 8 – food that is a combination food – layered foods**

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

48. *This product is a combination food.*

49. *The roasted nuts are separately identifiable as they can be individually perceived by ordinary visual inspection of the product. It does not matter that the taxable food is not physically separated in a separate compartment.*

50. *Considering the factors stated in paragraph 22 of this Determination, the roasted nuts are sufficiently joined together with the custard at the time of sale. While the roasted nuts are not physically mixed through the custard, the physical presentation, marketing, consumer experience and labelling of the product give the overall impression that the roasted nuts and custard are supplied as a single item for consumption.*

51. *The roasted nuts are neither so integrated into the overall product, nor so insignificant within that product, that they do not affect the product's characterisation. While the roasted nuts constitute a smaller proportion by weight than the custard, they are significant to the taste and texture of the product and form a key part of the marketing, labelling and design of the product. The overall impression of the product is that it is a combination of roasted nuts and custard.*

#### **Example 9 – food that is a combination food – mixed foods**

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

53. *This product is a combination food.*

54. *Despite being mixed together in one package at the time of sale, the roasted nuts and confectionery are separately identifiable as they can be individually perceived by ordinary visual inspection of the product.*

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55. *Considering the factors stated in paragraph 22 of this Determination, the roasted nuts and confectionery are sufficiently joined together with the other components of the trail mix and are supplied as a single item for consumption.*

56. *The roasted nuts and confectionery are neither so integrated into the overall product, nor so insignificant within that product, that they do not affect the product's characterisation. The taxable foods are significant to the taste and texture of the product, they form the bulk of the overall product by weight and volume and are a key part of the product design. The overall impression of the product is that it is a combination of unprocessed raw nuts and seeds, roasted nuts and seeds, and confectionery.*

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## Date of effect

57. This Determination applies both before and after its date of issue. However, the Determination does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

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

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**Commissioner of Taxation**

28 February 2024

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**References***Previous draft:*

GSTD 2023/D1

*Related Rulings/Determinations:*

GSTR 2001/8; TR 2006/10; GSTII FL1

*Legislative references:*

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

*Cases relied on:*

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

- Lansell House Pty Ltd v Commissioner of Taxation [2011] FCAFC 6; 190 FCR 354; 79 ATR 221

*Other references:*

- Further Supplementary Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998
- PS LA 2012/2 (GA)
- PS LA 2011/27

## ATO references

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