

# ***STD 98/6 - Classification of frozen yoghurt***



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# Sales Tax Determination

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**Title:** Classification of frozen yoghurt

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## Background

*Frozen yoghurt* is sold in a number of different forms. Like ice-cream, it is sold in hard serve or soft serve varieties. Retail sales are made from specialty stores, some ice-cream outlets, department stores, foodhalls and supermarkets. It is sold in individual and family sizes, and in various forms including in a cone, sundae style, or prepacked in tubs or on a stick.

This Determination sets out the Commissioner's view on the sales tax classification of frozen yoghurt.

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## Issues

1. What is *frozen yoghurt*?
  2. Is *frozen yoghurt* exempt from sales tax?
  3. Is *frozen yoghurt* exempt from sales tax if it is also an *ice-cream substitute*?
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## Decision

1. *Frozen yoghurt* is a mixture of yoghurt, sweeteners and flavourings, which is aerated and frozen. It may also include emulsifiers or stabilisers. The primary constituent of *frozen yoghurt* is yoghurt.
  2. *Frozen yoghurt* is exempt from sales tax under Item 68 in Schedule 1 to the *Sales Tax (Exemptions and Classifications) Act 1992* (ST(E&C) Act).
  3. *Frozen yoghurt* retains its exempt status if it is also an *ice-cream substitute*.
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## Date of effect

This Determination is effective immediately. It replaces any previous public or private rulings to the extent that they are inconsistent with this Determination.

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## Reasons

*We have based our decision on the following legislative provisions:*

*Item 68 in Schedule 1 to the ST(E&C) Act; subsections 3(2) and 14(f) of the ST(E&C) Act.*

*and case law:*

*Case 4/96 96 ATC 150; (1995) 32 ATR 1047; Zeroz Pty Ltd v. DFC of T 96 ATC 4740; (1996) 33 ATR 258; Zeroz Pty Ltd v. DFC of T 97 ATC 4277; (1997) 35 ATR 349; Zeroz Pty Ltd v. DFC of T 98 ATC 2031; (1997) 37 ATR 1251*

Milk products<sup>1</sup> and food, or ingredients of food for human consumption<sup>2</sup>, are exempt from sales tax provided they meet all the requirements of the relevant exemption Item. However, *ice-cream goods* are excluded from exemption.<sup>3</sup>

*Ice-cream goods* means the following goods, or any similar goods:

- (a) ice-cream, ice-cream cakes, ice-creams and ice-cream substitutes;
- (b) frozen confectionery (other than frozen yoghurt);
- (c) flavoured iceblocks (whether or not marketed in a frozen state).<sup>4</sup>

The meaning of *frozen yoghurt* was considered in a series of cases culminating in a decision by the Full Federal Court to remit the case to the Administrative Appeals Tribunal for rehearing.

The Full Federal Court found that there was nothing in the sales tax legislation that suggests the words *frozen yoghurt* are used in any trade or special sense which is narrower than the ordinary English meaning.

On rehearing the case, the Tribunal found that *frozen yoghurt* is a distinct product and not just yoghurt that has been frozen. It is produced in a distinctly different way from the manufacture of ice-cream. The Tribunal also found that *frozen yoghurt* is prepared from yoghurt that is mixed with sweeteners and flavourings. Emulsifiers may be added before the mixture is aerated and frozen.

*Yoghurt* was described by the Tribunal as a distinct product, derived from a mixture of milk or cream and stabilisers, which is pasteurised, heated and then cooled to kill any unwanted bacteria. This mixture is inoculated with live cultures or bacterial organisms and coagulated or curdled. Evidence before the Tribunal was that coagulation only occurs if the pH level (a measure of acidity) has decreased to within a range of 4.2 to 4.5.<sup>5</sup>

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<sup>1</sup> Item 70 in Schedule 1 to the ST(E&C) Act.

<sup>2</sup> Item 68 in Schedule 1 to the ST(E&C) Act.

<sup>3</sup> Section 14(f) of the ST(E&C) Act.

<sup>4</sup> Subsection 3(2) of the ST(E&C) Act.

<sup>5</sup> Standard H8 of the Food Standards Code, sanctioned by the Australian National Food Authority, requires that a product labelled as 'yoghurt' must have a pH value of not greater than 4.5. This Standard was not accepted as determining the classification of *frozen yoghurt* for sales tax.

*Frozen yoghurt* may be sold as a substitute for ice-cream and, as such, would fall within the meaning of *ice-cream goods*. The Tribunal found that the exclusion of *frozen yoghurt* from one part of the definition of *ice-cream goods* demonstrated a clear intention in the legislation to exempt all *frozen yoghurt* from sales tax, whether or not it also fell within another part of the definition.

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## Application

Whether a product is *frozen yoghurt* is a question of fact and degree. No single factor is conclusive. Matters that are taken into account are:

- (a) the primary constituent of the product must be yoghurt within the meaning given to that term by the Tribunal in the *Zeroz* case (set out at page 2 of this Determination). It is expected that the manufacturer would be able to provide scientific data showing that the primary constituent was yoghurt.
- (b) Other ingredients added to the yoghurt base must have been for the purpose only of sweetening, flavouring or emulsifying so that the resulting product might be frozen and made ready for sale.
- (c) The final product must retain some of the distinctive acidic taste of yoghurt, an indicator of which would be a pH of around 4.5.
- (d) There must be (or must have been, before freezing) a significant presence of live culture in the final product.
- (e) Whether the product is frozen when made ready for sale.

## Example 1

### Facts

Iced Pty Ltd manufactures a product that has the appearance and consistency of ice-cream. The product is sweetened but has a distinctive yoghurt tang. Retail sales are made in a cone or tub.

The product is manufactured by combining fresh milk and cream and then inoculating the mixture with live cultures. The mixture is fermented and coagulated and has a pH level of 4.2. Sweeteners are added and the mixture is then aerated and frozen. There is a significant amount of live culture in the product and the pH of the different flavours ranges between 4.3 and 4.5.

**Decision**

The product is *frozen yoghurt*. The primary constituent was yoghurt and the final product has the characteristics of yoghurt products - a low pH level indicated by the distinctive acidic taste and abundant live culture.

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**Example 2****Facts**

Frozen Pty Ltd manufactures a product that looks and tastes similar to ice-cream. Retail sales are made in individual servings in a cone or tub.

It is manufactured by combining a milk base with live culture and allowing it to partially ferment. Emulsifiers, sweeteners and flavourings are added and the product is frozen. Neither the milk base nor the final product is coagulated. There is a significant amount of live culture in the finished product but not as much as in yoghurt. The pH level of the different flavours ranges between 5.2 and 6.2.

**Decision**

This product is not *frozen yoghurt*. Yoghurt is not a primary ingredient.

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**Example 3****Facts**

Dairy Pty Ltd manufactures a product that looks and tastes similar to soft-serve ice-cream. The mixture is processed in a soft-serve dispensing unit before selling by retail. Retail sales are usually made in individual servings in a cone or tub.

The product is manufactured by combining a dairy mix that is not coagulated, with a quantity of yoghurt. Sweeteners and flavourings are added. Although the mixture contains yoghurt, the proportion of yoghurt to other ingredients is not sufficient to retain any distinctive acidic taste of yoghurt. It contains significant amounts of live culture but not as much as in yoghurt. The pH level of the different flavours ranges between 4.8 and 6.3.

**Decision**

The product is not *frozen yoghurt*. The proportion of yoghurt in the product is not sufficient to maintain any of the characteristics of yoghurt products being distinctive acidic taste and low pH level with a high level of live culture.

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**Communication  
of the Decision**

This Determination has been made available by the sales tax publishing houses and will be provided to interested persons upon request.

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**Commissioner of Taxation**

4 November 1998

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Not previously released in draft form

Related Determinations:

Related Rulings:

Subject Ref: Food; frozen yoghurt; general exclusions from exemption; ice-cream goods

Legislative Ref: ST(E&C) 3(2); 14(f); 14 (g); Schedule 1, Item 68; Schedule 2, Item 11

Case Ref: Case 4/96 96 ATC 150; (1995) 32 ATR 1047; Zeroz Pty Ltd v. DFC of T 96 ATC 4740; (1996) 33 ATR 258; Zeroz Pty Ltd v. DFC of T 97 ATC 4277; (1997) 35 ATR 349; Zeroz Pty Ltd v. DFC of T 98 ATC 2031; (1997) 37 ATR 1251

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