

State of South Dakota

EIGHTY-THIRD SESSION
LEGISLATIVE ASSEMBLY, 2008

357P0132

HOUSE BILL NO. 1243

Introduced by: Representatives Glenski, Cutler, Miles, Nygaard, Sigdestad, Steele, Thompson, and Van Etten and Senators Katus, Hoerth, and Schmidt (Dennis)

1 FOR AN ACT ENTITLED, An Act to impose sales and use taxes on certain advertising
2 services and products and to dedicate the increased tax revenue to the food tax relief fund
3 for the purpose of reducing sales and use taxes on food.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

5 Section 1. That chapter 10-45 be amended by adding thereto a NEW SECTION to read as
6 follows:

7 There is hereby imposed a tax at the same rate as that imposed upon sales of tangible
8 personal property in this state upon the gross receipts of all sales, leases, or rentals of any
9 advertising services or products. However, any gross receipts from the sale of radio or television
10 broadcast time when the advertising message is supplied by or on behalf of a national or
11 regional seller or advertiser not having its principal place of business in or being incorporated
12 under the laws of this state, may be deducted from gross receipts.

13 Section 2. That chapter 10-46 be amended by adding thereto a NEW SECTION to read as
14 follows:

15 There is hereby imposed a tax at the same rate as that imposed upon sales of tangible



1 personal property in this state upon the gross receipts of all sales, leases, or rentals of any
2 advertising services or products. However, any gross receipts from the sale of radio or television
3 broadcast time when the advertising message is supplied by or on behalf of a national or
4 regional seller or advertiser not having its principal place of business in or being incorporated
5 under the laws of this state, may be deducted from gross receipts.

6 Section 3. That chapter 10-45 be amended by adding thereto a NEW SECTION to read as
7 follows:

8 There are exempted from the provisions of this chapter and from the computation of the
9 amount of tax imposed by it, gross receipts resulting from the publication of any public or legal
10 notice required by statute or administrative rule.

11 Section 4. That § 10-45-108 be amended to read as follows:

12 10-45-108. For purposes of the tax imposed by this chapter, a retailer shall source sales of
13 tangible personal property and services to the location where the tangible personal property or
14 service is received. The department shall promulgate rules, pursuant to chapter 1-26, defining
15 the location of receipt. The rules promulgated pursuant to this section may provide an alternative
16 method of sourcing telecommunication services and advertising services.

17 Section 5. That § 10-45-12.1 be amended to read as follows:

18 10-45-12.1. The following services enumerated in the Standard Industrial Classification
19 Manual, 1987, as prepared by the Statistical Policy Division of the Office of Management and
20 Budget, Office of the President are exempt from the provisions of this chapter: health services
21 (major group 80); educational services (major group 82) except schools and educational services
22 not elsewhere classified (industry no. 8299); social services (major group 83); agricultural
23 services (major group 07) except veterinarian services (group no. 074) and animal specialty
24 services, except veterinary (industry no. 0752); forestry services (group no. 085); radio and

1 television broadcasting (group no. 483); railroad transportation (major group 40); local and
2 suburban passenger transportation (group no. 411) except limousine services; school buses
3 (group no. 415); trucking and courier services, except air (group no. 421) except collection and
4 disposal of solid waste; farm product warehousing and storage (industry no. 4221);
5 establishments primarily engaged in transportation on rivers and canals (group no. 444);
6 establishments primarily engaged in air transportation, certified carriers (group no. 451);
7 establishments primarily engaged in air transportation, noncertified carriers (group no. 452)
8 except chartered flights (industry no. 4522) and airplane, helicopter, balloon, dirigible, and
9 blimp rides for amusement or sightseeing; pipe lines, except natural gas (major group 46);
10 arrangement of passenger transportation (group no. 472); arrangement of transportation of
11 freight and cargo (group no. 473); rental of railroad cars (group no. 474); water supply (industry
12 no. 4941); sewerage systems (industry no. 4952); security brokers, dealers and flotation
13 companies (group no. 621); commodity contracts brokers and dealers (group no. 622); credit
14 counseling services provided by individual and family social services (industry no. 8322);
15 construction services (division C) except industry no. 1752 and locksmiths and locksmith shops;
16 consumer credit reporting agencies, mercantile reporting agencies, and adjustment and
17 collection agencies (group no. 732), if the debt was incurred out-of-state and the client does not
18 reside within the state. The following are also specifically exempt from the provisions of this
19 chapter: financial services of institutions subject to tax under chapter 10-43 including loan
20 origination fees, late payment charges, nonsufficient fund check charges, stop payment charges,
21 safe deposit box rent, exchange charges, commission on travelers checks, charges for
22 administration of trusts, interest charges, and points charged on loans; commissions earned or
23 service fees paid by an insurance company to an agent or representative for the sale of a policy;
24 services of brokers and agents licensed under Title 47; the sale of trading stamps; rentals of

1 motor vehicles as defined by § 32-5-1 leased under a single contract for more than twenty-eight
2 days; ~~advertising services~~; services provided by any corporation to another corporation which
3 is centrally assessed having identical ownership and services provided by any corporation to a
4 wholly owned subsidiary which is centrally assessed; continuing education programs; tutoring;
5 vocational counseling, except rehabilitation counseling; and motion picture rentals to a
6 commercially operated theater primarily engaged in the exhibition of motion pictures.

7 Section 6. That chapter 10-45 be amended by adding thereto a NEW SECTION to read as
8 follows:

9 There is hereby created in the state treasury the food tax relief fund. The revenue collected
10 pursuant to sections 1 and 2 of this Act shall be deposited in the food tax relief fund for the
11 purpose of reducing the rate of taxation on food. The fund shall be invested as provided by law,
12 and the interest earned shall be credited to the fund.

13 Section 7. That chapter 10-45 be amended by adding thereto a NEW SECTION to read as
14 follows:

15 There is hereby imposed a tax of three percent on the gross receipts from the sale of food.

16 Section 8. That § 10-45-1 be amended to read as follows:

17 10-45-1. Terms used in this chapter mean:

18 (1) "Agricultural purposes," the producing, raising, growing, or harvesting of food or
19 fiber upon agricultural land, including dairy products, livestock, and crops. The
20 services of custom harvesters, chemical applicators, fertilizer spreaders, hay grinders,
21 and cultivators are considered agricultural purposes;

22 (1A) "Alcoholic beverages," any beverage that is suitable for human consumption and
23 contains one-half of one percent or more of alcohol by volume;

24 (2) "Business," any activity engaged in by any person or caused to be engaged in by such

1 person with the object of gain, benefit, or advantage, either direct or indirect;

2 (3) "Candy," any preparation of sugar, honey, or other natural or artificial sweeteners in
3 combination with chocolate, fruits, nuts or other ingredients or flavorings in the form
4 of bars, drops, or pieces. The term, candy, does not include any preparation
5 containing flour and does not require refrigeration;

6 (4) "Delivery charges," charges by the retailer for preparation and delivery to a location
7 designated by the purchaser of tangible personal property or services including
8 transportation, shipping, postage, handling, crating, and packing;

9 (4A) "Dietary supplement," any product, other than tobacco, intended to supplement the
10 diet that:

11 (a) Contains one or more of the following dietary ingredients:

12 (i) A vitamin;

13 (ii) A mineral;

14 (iii) An herb or other botanical;

15 (iv) An amino acid;

16 (v) A dietary substance for use by humans to supplement the diet by
17 increasing the total dietary intake; or

18 (vi) A concentrate, metabolite, constituent, extract, or combination of any
19 ingredient described in this subsection;

20 (b) Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid
21 form, or if not intended for ingestion in such a form, is not represented as
22 conventional food and is not represented for use as a sole item of a meal or of
23 the diet; and

24 (c) Is required to be labeled as a dietary supplement, identifiable by the

1 supplemental facts box, found on the label and as required pursuant to 21
2 C.F.R § 101.36 as of January 1, 2008;

3 (5) "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid,
4 frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans
5 and is consumed for its taste or nutritional value. The term, food, does not include
6 alcoholic beverages, soft drinks, candy, dietary supplements, tobacco, or prepared
7 food;

8 (6) Repealed by SL 2007, ch 56, § 1.

9 (7) "Person," any individual, firm, copartnership, joint adventure, association, limited
10 liability company, corporation, municipal corporation, estate, trust, business trust,
11 receiver, the State of South Dakota and its political subdivisions, or any group or
12 combination acting as a unit;

13 (8) "Prepared food," any food sold in a heated state or heated by the seller; two or more
14 food ingredients mixed or combined by the seller for sale as a single item; or food
15 sold with eating utensils provided by the seller, including plates, knives, forks,
16 spoons, glasses, cups, napkins, or straws. A plate does not include a container or
17 packaging used to transport the food.

18 Prepared food does not include food that is only cut, repackaged, or pasteurized by
19 the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods
20 requiring cooking by the consumer as recommended by the Food and Drug
21 Administration in chapter 3, part 401.11 of its Food Code as of January 1, 2003, so
22 as to prevent food borne illnesses;

23 (9) "Relief agency," the state, and county, municipality or district thereof, or any agency
24 engaged in actual relief work;

- 1 (10) "Retail sale" or "sale at retail," any sale, lease, or rental for any purpose other than
2 for resale, sublease, or subrent;
- 3 (11) "Retailer," any person engaged in the business of selling tangible goods, wares, or
4 merchandise at retail, or the furnishing of gas, electricity, water, and communication
5 service, and tickets or admissions to places of amusement and athletic events as
6 provided in this chapter. The term also includes any person subject to the tax
7 imposed by §§ 10-45-4 and 10-45-5. The isolated or occasional sale of tangible
8 personal property at retail by a person who does not hold himself or herself out as
9 engaging in the business of selling such tangible personal property at retail does not
10 constitute such person a retailer;
- 11 (12) "Sale," any transfer, exchange, or barter, conditional or otherwise, in any manner or
12 by any means whatsoever, for a consideration;
- 13 (13) "Soft drinks," any nonalcoholic beverages that contain natural or artificial
14 sweeteners. The term, soft drinks, does not include any beverage that contains milk
15 or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of
16 vegetable or fruit juice by volume;
- 17 (14) "Tangible personal property," personal property that can be seen, weighed, measured,
18 felt, or touched, or that is in any other manner perceptible to the senses. The term
19 includes electricity, water, gas, steam, and prewritten computer software;
- 20 (15) "Tobacco," any cigarettes, cigars, chewing or pipe tobacco, or any other item that
21 contains tobacco.

22 Section 9. That chapter 10-46 be amended by adding thereto a NEW SECTION to read as
23 follows:

24 There is hereby imposed a tax of three percent on the privilege of the use of food.

1 Section 10. That § 10-46-1 be amended to read as follows:

2 10-46-1. Terms, as used in this chapter mean:

3 (1) "Business," any activity engaged in by any person or caused to be engaged in by such
4 person with the object of gain, benefit or advantage either direct or indirect;

5 (1A) "Alcoholic beverages," any beverage that is suitable for human consumption and
6 contains one-half of one percent or more of alcohol by volume;

7 (2) "Candy," any preparation of sugar, honey, or other natural or artificial sweeteners in
8 combination with chocolate, fruits, nuts or other ingredients or flavorings in the form
9 of bars, drops, or pieces. The term, candy, does not include any preparation
10 containing flour and does not require refrigeration;

11 (3) "Delivery charges," charges by the retailer for preparation and delivery to a location
12 designated by the purchaser of tangible personal property or services including
13 transportation, shipping, postage, handling, crating, and packing;

14 (3A) "Dietary supplement," any product, other than tobacco, intended to supplement the
15 diet that:

16 (a) Contains one or more of the following dietary ingredients:

17 (i) A vitamin;

18 (ii) A mineral;

19 (iii) An herb or other botanical;

20 (iv) An amino acid;

21 (v) A dietary substance for use by humans to supplement the diet by
22 increasing the total dietary intake; or

23 (vi) A concentrate, metabolite, constituent, extract, or combination of any
24 ingredient described in this subsection;

1 (b) Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid
2 form, or if not intended for ingestion in such a form, is not represented as
3 conventional food and is not represented for use as a sole item of a meal or of
4 the diet; and

5 (c) Is required to be labeled as a dietary supplement, identifiable by the
6 supplemental facts box, found on the label and as required pursuant to 21
7 C.F.R § 101.36 as of January 1, 2008;

8 (4) "Fair market value," the price at which a willing seller and willing buyer will trade.
9 Fair market value shall be determined at the time of purchase. If a public corporation
10 is supplying tangible personal property that will be used in the performance of a
11 contract, fair market value shall be determined pursuant to § 5-18-5.1. This definition
12 also applies to chapter 10-45;

13 (5) "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid,
14 frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans
15 and is consumed for its taste or nutritional value. The term, food, does not include
16 alcoholic beverages, soft drinks, candy, dietary supplements, tobacco, or prepared
17 food;

18 (6) "Included in the measure of tax," the tangible personal property or the service was
19 purchased from a retailer licensed under chapter 10-45 and that retailer has included
20 the tax in the amount received from the sale;

21 (7) "In this state" or "in the state," within the exterior limits of the State of South Dakota
22 and includes all territory within such limits owned by or ceded to the United States
23 of America;

24 (8) "Prepared food," any food sold in a heated state or heated by the seller; two or more

1 food ingredients mixed or combined by the seller for sale as a single item; or food
2 sold with eating utensils provided by the seller, including plates, knives, forks,
3 spoons, glasses, cups, napkins, or straws. A plate does not include a container or
4 packaging used to transport the food.

5 Prepared food does not include food that is only cut, repackaged, or pasteurized by
6 the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods
7 requiring cooking by the consumer as recommended by the Food and Drug
8 Administration in chapter 3, part 401.11 of its Food Code as of January 1, 2003, so
9 as to prevent food borne illnesses;

10 (9) "Purchase," any transfer, exchange, or barter, conditional or otherwise, in any manner
11 or by any means whatsoever, for a consideration. A transaction, whereby the
12 possession of property is transferred but the seller retains the title as security for the
13 payment of the price, is a purchase;

14 (10) "Purchase price," shall have the same meaning as gross receipts defined in chapter
15 10-45;

16 (11) "Retailer," any person performing services in this state or engaged in the business of
17 selling tangible personal property for use, storage or other consumption within the
18 meaning of this chapter. However, if in the opinion of the secretary of revenue and
19 regulation, it is necessary for the efficient administration of this chapter to regard any
20 salesmen, representatives, truckers, peddlers, or canvassers as agents of the dealers,
21 distributors, supervisors, employers, or persons under whom they operate or from
22 whom they obtain the tangible personal property sold by them irrespective of whether
23 they are making sales on their own behalf or on behalf of such dealers, distributors,
24 supervisors, employers, or persons, the secretary of revenue and regulation may so

1 regard them and may regard the dealers, distributors, supervisors, employers, or
2 persons as retailers for purposes of this chapter;

3 (12) "Retailer maintaining a place of business in the state," any retailer having or
4 maintaining within this state, directly or by a subsidiary, an office, distribution house,
5 sales house, warehouse, or other place of business, or any agents operating within the
6 state under the authority of the retailer or its subsidiary, irrespective of whether such
7 place of business or agent is located here permanently or temporarily or whether such
8 retailer or subsidiary is admitted to do business within this state pursuant to the laws
9 of the State of South Dakota granting the rights of foreign corporations to do business
10 in this state;

11 (13) "Secretary," the secretary of the Department of Revenue and Regulation or any duly
12 authorized and appointed assistant, deputies, or agents of the secretary charged with
13 the administration or enforcement of this chapter;

14 (14) "Soft drinks," any nonalcoholic beverages that contain natural or artificial
15 sweeteners. The term, soft drinks, does not include any beverage that contains milk
16 or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of
17 vegetable or fruit juice by volume;

18 (15) "Storage," any keeping or retention in this state for use or other consumption in the
19 State of South Dakota for any purpose except sale in the regular course of business;

20 (16) "Tangible personal property," personal property that can be seen, weighed, measured,
21 felt, or touched, or that is in any other manner perceptible to the senses if furnished
22 or delivered to consumers or users within this state. The term includes electricity,
23 water, gas, steam, and prewritten computer software;

24 (16A) "Tobacco," any cigarettes, cigars, chewing or pipe tobacco, or any other item that

1 contains tobacco;

2 (17) "Use," the exercise of right or power over tangible personal property incidental to the
3 ownership of that property, except that it does not include the sale of that property
4 in the regular course of business. Use also includes the use of the types of services,
5 the gross receipts from the sale of which are to be included in the measure of the tax
6 imposed by chapter 10-45, and any amendments thereto and the delivery or causing
7 delivery into this state of tangible personal property intended to advertise products
8 or services or promote or facilitate sales to South Dakota residents.