

# State of South Dakota

EIGHTY-FOURTH SESSION  
LEGISLATIVE ASSEMBLY, 2009

276Q0131

## HOUSE BILL NO. 1190

Introduced by: Representatives Lange and Iron Cloud III and Senators Merchant, Jerstad,  
Kloucek, and Miles

1 FOR AN ACT ENTITLED, An Act to provide for the reduction of the sales and use tax on  
2 certain food items.

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

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

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

7 Section 2. That § 10-45-1 be amended to read as follows:

8 10-45-1. Terms used in this chapter mean:

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

13 (1A) "Alcoholic beverages," any beverage that is suitable for human consumption and  
14 contains one-half of one percent or more of alcohol by volume;

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



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

(3) "Candy," any preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces. The term, candy, does not include any preparation containing flour ~~and does not~~. No candy may require refrigeration;

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

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

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

(1) A vitamin;

(2) A mineral;

(3) An herb or other botanical;

(4) An amino acid;

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

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

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

(c) Is required to be labeled as a dietary supplement, identifiable by the supplemental facts box, found on the label and as required pursuant to 21 C.F.R. § 101.36 as of January 1, 2009;

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

(5A) "Food sold through a vending machine," any food dispensed from a machine or other mechanical device that accepts payment;

(6) Repealed by SL 2007, ch 56, § 1.

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

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

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

1 as to prevent food borne illnesses;

2 (8A) "Product transferred electronically," any product obtained by the purchaser by means  
3 other than tangible storage media. A product transferred electronically does not  
4 include any intangible such as a patent, stock, bond, goodwill, trademark, franchise,  
5 or copyright.

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

8 (10) "Retail sale" or "sale at retail," any sale, lease, or rental for any purpose other than  
9 for resale, sublease, or subrent;

10 (11) "Retailer," any person engaged in the business of selling tangible goods, wares, or  
11 merchandise at retail, or the furnishing of gas, electricity, water, and communication  
12 service, and tickets or admissions to places of amusement and athletic events as  
13 provided in this chapter, and the sale at retail of products transferred electronically.

14 The term also includes any person subject to the tax imposed by §§ 10-45-4 and 10-  
15 45-5. The isolated or occasional sale of tangible personal property or any product  
16 transferred electronically at retail by a person who does not hold himself or herself  
17 out as engaging in the business of selling such tangible personal property or products  
18 transferred electronically at retail does not constitute such person a retailer;

19 (12) "Sale," any transfer, exchange, or barter, conditional or otherwise, in any manner or  
20 by any means whatsoever, for a consideration;

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

(14) "Tangible personal property," personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. The term includes electricity, water, gas, steam, and prewritten computer software;

(15) "Tobacco," any cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

Section 3. That chapter 10-46 be amended by adding thereto a NEW SECTION to read as follows:

There is hereby imposed a tax of two percent on the privilege of the use, storage, or consumption of food.

Section 4. That § 10-46-1 be amended to read as follows:

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

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

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

(2) "Candy," any preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces. The term, candy, does not include any preparation containing flour ~~and does not~~. No candy may require refrigeration;

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

(3A) "Dietary supplement," any product, other than tobacco, intended to supplement the

diet that:

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

(1) A vitamin;

(2) A mineral;

(3) An herb or other botanical;

(4) An amino acid;

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

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

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

(c) Is required to be labeled as a dietary supplement, identifiable by the supplemental facts box, found on the label and as required pursuant to 21 C.F.R. § 101.36 as of January 1, 2009;

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

(5) "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans

and is consumed for its taste or nutritional value. The term, food, does not include  
any alcoholic beverages beverage, tobacco, soft drink, candy, dietary supplement, or  
prepared food;

(5A) "Food sold through a vending machine," any food dispensed from a machine or other  
mechanical device that accepts payment;

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

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

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

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

(8A) "Product transferred electronically," any product obtained by the purchaser by means  
other than tangible storage media. A product transferred electronically does not

1 include any intangible such as a patent, stock, bond, goodwill, trademark, franchise,  
2 or copyright.

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

7 (10) "Purchase price," shall have the same meaning as gross receipts defined in chapter  
8 10-45;

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

21 (12) "Retailer maintaining a place of business in the state," any retailer having or  
22 maintaining within this state, directly or by a subsidiary, an office, distribution house,  
23 sales house, warehouse, or other place of business, or any agents operating within the  
24 state under the authority of the retailer or its subsidiary, irrespective of whether such



1 place of business or agent is located here permanently or temporarily or whether such  
2 retailer or subsidiary is admitted to do business within this state pursuant to the laws  
3 of the State of South Dakota granting the rights of foreign corporations to do business  
4 in this state;

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

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

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

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

18 (16A) "Tobacco," any cigarettes, cigars, chewing or pipe tobacco, or any other item that  
19 contains tobacco;

20 (17) "Use," the exercise of right or power over tangible personal property or any product  
21 transferred electronically incidental to the ownership of that property, except that it  
22 does not include the sale of that property in the regular course of business. Use also  
23 includes the use of the types of services, the gross receipts from the sale of which are  
24 to be included in the measure of the tax imposed by chapter 10-45, and the delivery

1 or causing delivery into this state of tangible personal property or any product  
2 transferred electronically intended to advertise any product or service or promote or  
3 facilitate any sale to South Dakota residents.