

# State of South Dakota

EIGHTY-SECOND SESSION  
LEGISLATIVE ASSEMBLY, 2007

285N0754

## SENATE BILL NO. 201

Introduced by: Senators Jerstad, Katus, Kloucek, and Koetzle and Representatives Van Norman, Feinstein, and Thompson

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 three 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



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~~. No candy may 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 (1) A vitamin;

13 (2) A mineral;

14 (3) A herb or other botanical;

15 (4) An amino acid;

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

18 (6) 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, 2007;

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, tobacco, soft drink, candy, dietary supplement, or prepared food;

7 (5A) "Food sold through a vending machine," any food dispensed from a machine or other  
8 mechanical device that accepts payment;

9 (6) "Gross receipts," the total amount or consideration, including cash, credit, property,  
10 and services, for which tangible personal property or services are sold, leased, or  
11 rented, valued in money, whether received in money or otherwise, without any  
12 deduction for the following:

13 (a) The retailer's cost of the property or service sold;  
14 (b) The cost of materials used, labor or service cost, interest, losses, all costs of  
15 transportation to the retailer, all taxes imposed on the retailer, and any other  
16 expense of the retailer;

17 (c) Except as provided in chapter 10-46A or 10-46B, charges by the retailer for  
18 any services necessary to complete the sale whether or not separately stated,  
19 including delivery charges; and

20 (d) The value of exempt tangible personal property whether or not separately  
21 stated on the invoice, billing, or similar document given to the purchaser  
22 where taxable and exempt tangible personal property have been bundled  
23 together and sold by the retailer as a single product or piece of merchandise;

24 Gross receipts do not include:

- 1 (a) Discounts, including cash, term, or coupons that are not reimbursed by a third  
2 party that are allowed by a retailer and taken by a purchaser on a sale;
- 3 (b) Interest, financing, and carrying charges from credit extended on the sale of  
4 tangible personal property or services, if the amount is separately stated on the  
5 invoice, bill of sale or similar document given to the purchaser; and
- 6 (c) Any taxes legally imposed directly on the consumer that are separately stated  
7 on the invoice, bill of sale, or similar document given to the purchaser;
- 8 (7) "Person," any individual, firm, copartnership, joint adventure, association, limited  
9 liability company, corporation, municipal corporation, estate, trust, business trust,  
10 receiver, the State of South Dakota and its political subdivisions, or any group or  
11 combination acting as a unit;
- 12 (8) "Prepared food," any food sold in a heated state or heated by the seller; two or more  
13 food ingredients mixed or combined by the seller for sale as a single item; or food  
14 sold with eating utensils provided by the seller, including plates, knives, forks,  
15 spoons, glasses, cups, napkins, or straws. A plate does not include a container or  
16 packaging used to transport the food.
- 17 Prepared food does not include food ~~that is only cut, repackaged, or pasteurized by~~  
18 ~~the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods~~  
19 ~~requiring cooking by the consumer as recommended by the Food and Drug~~  
20 ~~Administration in chapter 3, part 401.11 of its Food Code as of January 1, 2003, so~~  
21 as to prevent food borne illnesses sold by a seller whose proper primary NAICS  
22 classification is manufacturing in sector 311, except subsector 3118 (bakeries); food  
23 sold in an unheated state by weight or volume as a single item; or bakery items,  
24 including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish,

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

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

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

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

5 10-46-1. Terms, as used in this chapter mean:

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

8 (1A) "Alcoholic Beverages," any beverage that is suitable for human consumption and  
9 contains one-half of one percent or more of alcohol by volume;

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

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

17 (3A) "Dietary supplement," any product, other than tobacco, intended to supplement the  
18 diet that:

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

20 (1) A vitamin;

21 (2) A mineral;

22 (3) A herb or other botanical;

23 (4) An amino acid;

24 (5) A dietary substance for use by humans to supplement the diet by

- 1                   increasing the total dietary intake; or
- 2                   (6) A concentrate, metabolite, constituent, extract, or combination of any
- 3                   ingredient described in this subsection;
- 4                   (b) Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid
- 5                   form, or if not intended for ingestion in such a form, is not represented as
- 6                   conventional food and is not represented for use as a sole item of a meal or of
- 7                   the diet; and
- 8                   (c) Is required to be labeled as a dietary supplement, identifiable by the
- 9                   supplemental facts box, found on the label and as required pursuant to 21
- 10                  C.F.R § 101.36 as of January 1, 2007;
- 11                  (4) "Fair market value," the price at which a willing seller and willing buyer will trade.
- 12                  Fair market value shall be determined at the time of purchase. If a public corporation
- 13                  is supplying tangible personal property that will be used in the performance of a
- 14                  contract, fair market value shall be determined pursuant to § 5-18-5.1. This definition
- 15                  also applies to chapter 10-45;
- 16                  (5) "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid,
- 17                  frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans
- 18                  and is consumed for its taste or nutritional value. The term, food, does not include
- 19                  alcoholic beverages, tobacco, soft drink, candy, dietary supplement, or prepared food;
- 20                  (5A) "Food sold through a vending machine," any food dispensed from a machine or other
- 21                  mechanical device that accepts payment;
- 22                  (6) "Included in the measure of tax," the tangible personal property or the service was
- 23                  purchased from a retailer licensed under chapter 10-45 and that retailer has included
- 24                  the tax in the amount received from the sale;

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

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

9 Prepared food does not include food ~~that is only cut, repackaged, or pasteurized by~~  
10 ~~the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods~~  
11 ~~requiring cooking by the consumer as recommended by the Food and Drug~~  
12 ~~Administration in chapter 3, part 401.11 of its Food Code as of January 1, 2003, so~~  
13 ~~as to prevent food borne illnesses~~ sold by a seller whose proper primary NAICS  
14 classification is manufacturing in sector 311, except subsector 3118 (bakeries); food  
15 sold in an unheated state by weight or volume as a single item; or bakery items,  
16 including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish,  
17 cakes, tortes, pies, tarts, muffins, bars, cookies, or tortillas;

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

22 (10) "Purchase price," shall have the same meaning as gross receipts defined in  
23 subdivision 10-45-1(4);

24 (11) "Retailer," any person performing services in this state or engaged in the business of

1 selling tangible personal property for use, storage or other consumption within the  
2 meaning of this chapter. However, if in the opinion of the secretary of revenue and  
3 regulation, it is necessary for the efficient administration of this chapter to regard any  
4 salesmen, representatives, truckers, peddlers, or canvassers as agents of the dealers,  
5 distributors, supervisors, employers, or persons under whom they operate or from  
6 whom they obtain the tangible personal property sold by them irrespective of whether  
7 they are making sales on their own behalf or on behalf of such dealers, distributors,  
8 supervisors, employers, or persons, the secretary of revenue and regulation may so  
9 regard them and may regard the dealers, distributors, supervisors, employers, or  
10 persons as retailers for purposes of this chapter;

11 (12) "Retailer maintaining a place of business in the state," any retailer having or  
12 maintaining within this state, directly or by a subsidiary, an office, distribution house,  
13 sales house, warehouse, or other place of business, or any agents operating within the  
14 state under the authority of the retailer or its subsidiary, irrespective of whether such  
15 place of business or agent is located here permanently or temporarily or whether such  
16 retailer or subsidiary is admitted to do business within this state pursuant to the laws  
17 of the State of South Dakota granting the rights of foreign corporations to do business  
18 in this state;

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

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

1 vegetable or fruit juice by volume;

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

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

8 (16A) "Tobacco," any cigarettes, cigars, chewing or pipe tobacco, or any other item that  
9 contains tobacco;

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