

State of South Dakota

NINETY-FIRST SESSION
LEGISLATIVE ASSEMBLY, 2016

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SENATE BILL NO. 161

Introduced by: Senators Buhl O'Donnell, Bradford, Heinert, Hunhoff (Bernie), Parsley, Peterson (Jim), and Sutton and Representatives Ring, Bartling, Bordeaux, Gibson, Hawks, Hawley, Killer, Kirschman, McCleerey, Schrempp, and Soli

1 FOR AN ACT ENTITLED, An Act to lower the state sales and use tax on certain food items
2 and to increase the rate of taxation for the sales and use tax on certain goods and services.

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

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

5 There is imposed a tax of zero percent on the gross receipts from the sale of food as defined
6 in § 10-45-1.

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

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;



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

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

7 (4) "Delivery charges," charges by the retailer for preparation and delivery to a location
8 designated by the purchaser of tangible personal property, any product transferred
9 electronically, or services including transportation, shipping, postage, handling,
10 crating, and packing. The term does not include postage for direct mail;

11 (4A) "Dietary supplement," any product, other than tobacco, intended to supplement the
12 diet that:

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

14 (i) A vitamin;

15 (ii) A mineral;

16 (iii) An herb or other botanical;

17 (iv) An amino acid;

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

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

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

- 1 the diet; and
- 2 (c) Is required to be labeled as a dietary supplement, identifiable by the
- 3 supplemental facts box, found on the label and as required pursuant to 21
- 4 C.F.R. § 101.36 as of January 1, 2016;
- 5 (5) "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid,
- 6 frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans
- 7 and is consumed for its taste or nutritional value. The term, food, does not include
- 8 any alcoholic beverages beverage, tobacco, soft drink, candy, dietary supplement,
- 9 food sold through a vending machine, or prepared food;
- 10 (5A) "Food sold through a vending machine," any food dispensed from a machine or other
- 11 mechanical device that accepts payment;
- 12 (6) Repealed by SL 2007, ch 56, § 1.
- 13 (7) "Person," any individual, firm, copartnership, joint adventure, association, limited
- 14 liability company, corporation, municipal corporation, estate, trust, business trust,
- 15 receiver, the State of South Dakota and its political subdivisions, or any group or
- 16 combination acting as a unit;
- 17 (8) "Prepared food," any food sold in a heated state or heated by the seller; two or more
- 18 food ingredients mixed or combined by the seller for sale as a single item; or food
- 19 sold with eating utensils provided by the seller, including plates, knives, forks,
- 20 spoons, glasses, cups, napkins, or straws. A plate does not include a container or
- 21 packaging used to transport the food.
- 22 Prepared food does not include food that is only cut, repackaged, or pasteurized by
- 23 the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods
- 24 requiring cooking by the consumer as recommended by the Food and Drug

1 Administration in chapter 3, part 401.11 of its Food Code as of January 1, 2003, so
2 as to prevent food borne illnesses;

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

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

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

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

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

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

22 (13) "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 (14) "Tangible personal property," personal property that can be seen, weighed, measured,
3 felt, or touched, or that is in any other manner perceptible to the senses. The term
4 includes electricity, water, gas, steam, and prewritten computer software;

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

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

8 There is imposed a tax of zero percent on the privilege of the use of food as defined in § 10-
9 46-1.

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

11 10-46-1. Terms, as used in this chapter mean:

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

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

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

20 (3) "Delivery charges," charges by the retailer for preparation and delivery to a location
21 designated by the purchaser of tangible personal property, any product transferred
22 electronically, or services including transportation, shipping, postage, handling,
23 crating, and packing. The term does not include postage for direct mail;

24 (3A) "Dietary supplement," any product, other than tobacco, intended to supplement the

1 diet that:

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

3 (i) A vitamin;

4 (ii) A mineral;

5 (iii) An herb or other botanical;

6 (iv) An amino acid;

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

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

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

15 (c) Is required to be labeled as a dietary supplement, identifiable by the
16 supplemental facts box, found on the label and as required pursuant to 21
17 C.F.R. § 101.36 as of January 1, 2016;

18 (4) "Fair market value," the price at which a willing seller and willing buyer will trade.
19 Fair market value shall be determined at the time of purchase. If a public corporation
20 is supplying tangible personal property or any product transferred electronically that
21 will be used in the performance of a contract, fair market value shall be determined
22 pursuant to § 5-18B-7. This definition also applies to chapter 10-45;

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

1 and is consumed for its taste or nutritional value. The term, food, does not include
2 any alcoholic beverages beverage, tobacco, soft drink, candy, dietary supplement,
3 food sold through a vending machine, or prepared food;

4 (5A) "Food sold through a vending machine," any food dispensed from a machine or other
5 mechanical device that accepts payment;

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

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

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 (8A) "Product transferred electronically," any product obtained by the purchaser by means
24 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, it is necessary for the efficient administration of
13 this chapter to regard any salesmen, representatives, truckers, peddlers, or canvassers
14 as agents of the dealers, distributors, supervisors, employers, or persons under whom
15 they operate or from whom they obtain the tangible personal property or any product
16 transferred electronically sold by them irrespective of whether they are making sales
17 on their own behalf or on behalf of such dealers, distributors, supervisors, employers,
18 or persons, the secretary of revenue may so regard them and may regard the dealers,
19 distributors, supervisors, employers, or persons as retailers for purposes of this
20 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 or any duly authorized and
6 appointed assistant, deputies, or agents of the secretary charged with the
7 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.

4 Section 5. That § 10-45-2 be amended to read:

5 10-45-2. There is hereby imposed a tax upon the privilege of engaging in business as a
6 retailer, a tax of four and thirty-five hundredths percent upon the gross receipts of all sales of
7 tangible personal property consisting of goods, wares, or merchandise, except as otherwise
8 provided in this chapter, sold at retail in the State of South Dakota to consumers or users.

9 Section 6. That § 10-45-5 be amended to read:

10 10-45-5. There is imposed a tax at the rate of four and thirty-five hundredths percent upon
11 the gross receipts of any person from engaging or continuing in any of the following businesses
12 or services in this state: abstracters; accountants; ancillary services; architects; barbers; beauty
13 shops; bill collection services; blacksmith shops; car washing; dry cleaning; dyeing;
14 exterminators; garage and service stations; garment alteration; cleaning and pressing; janitorial
15 services and supplies; specialty cleaners; laundry; linen and towel supply; membership or
16 entrance fees for the use of a facility or for the right to purchase tangible personal property, any
17 product transferred electronically, or services; photography; photo developing and enlarging;
18 tire recapping; welding and all repair services, except repair services for farm machinery,
19 attachment units, and irrigation equipment used exclusively for agricultural purposes; cable
20 television; and rentals of tangible personal property except leases of tangible personal property
21 between one telephone company and another telephone company, motor vehicles as defined
22 pursuant to § 32-5-1 leased under a single contract for more than twenty-eight days and mobile
23 homes. However, the specific enumeration of businesses and professions made in this section
24 does not, in any way, limit the scope and effect of the provisions of § 10-45-4.

1 Section 7. That § 10-45-5.3 be amended to read:

2 10-45-5.3. There is imposed, at the rate of four and thirty-five hundredths percent, an excise
3 tax on the gross receipts of any person engaging in oil and gas field services (group no. 138) as
4 enumerated in the Standard Industrial Classification Manual, 1987, as prepared by the Statistical
5 Policy Division of the Office of Management and Budget, Office of the President.

6 Section 8. That § 10-45-6 be amended to read:

7 10-45-6. There is hereby imposed a tax of four and thirty-five hundredths percent upon the
8 gross receipts from sales, furnishing, or service of gas, electricity, and water, including the gross
9 receipts from such sales by any municipal corporation furnishing gas, and electricity, to the
10 public in its proprietary capacity, except as otherwise provided in this chapter, when sold at
11 retail in the State of South Dakota to consumers or users.

12 Section 9. That § 10-45-6.1 be amended to read:

13 10-45-6.1. Except as provided in § 10-45-6.2, there is hereby imposed a tax of four and
14 thirty-five hundredths percent upon the gross receipts from providing any intrastate, interstate,
15 or international telecommunications service that originates or terminates in this state and that
16 is billed or charged to a service address in this state, or that both originates and terminates in this
17 state. However, the tax imposed by this section does not apply to:

- 18 (1) Any eight hundred or eight hundred type service unless the service both originates
19 and terminates in this state;
- 20 (2) Any sale of a telecommunication service to a provider of telecommunication
21 services, including access service, for use in providing any telecommunication
22 service; or
- 23 (3) Any sale of interstate telecommunication service provided to a call center that has
24 been certified by the secretary of revenue to meet the criterion established in § 10-45-

1 6.3 and the call center has provided to the telecommunications service provider an
2 exemption certificate issued by the secretary indicating that it meets the criterion.

3 If a call center uses an exemption certificate to purchase services not meeting the criterion
4 established in § 10-45-6.3, the call center is liable for the applicable tax, penalty, and interest.

5 Section 10. That § 10-45-6.2 be amended to read:

6 10-45-6.2. There is hereby imposed a tax of four and thirty-five hundredths percent upon
7 the gross receipts of mobile telecommunications services, as defined in 4 U.S.C. § 124(7) as of
8 January 1, 2002, that originate and terminate in the same state and are billed to a customer with
9 a place of primary use in this state or are deemed to have originated or been received in this state
10 and to be billed or charged to a service address in this state if the customer's place of primary
11 use is located in this state regardless of where the service actually originates or terminates.
12 Notwithstanding any other provision of this chapter and for purposes of the tax imposed by this
13 section, the tax imposed upon mobile telecommunication services shall be administered in
14 accordance with 4 U.S.C. §§ 116-126 as in effect on July 28, 2000.

15 Section 11. That § 10-45-8 be amended to read:

16 10-45-8. There is imposed a tax of four and thirty-five hundredths percent upon the gross
17 receipts from all sales of tickets or admissions to places of amusement and athletic contests or
18 events, except as otherwise provided in this chapter.

19 Section 12. That § 10-45-71 be amended to read:

20 10-45-71. There is imposed a tax of four and thirty-five hundredths percent on the gross
21 receipts from the transportation of passengers. The tax imposed by this section shall apply to
22 any transportation of passengers if the passenger boards and exits the mode of transportation
23 within this state.

24 Section 13. That § 10-46-2.1 be amended to read:

1 10-46-2.1. For the privilege of using services in South Dakota, except those types of services
2 exempted by § 10-46-17.3, there is imposed on the person using the service an excise tax equal
3 to four and thirty-five hundredths percent of the value of the services at the time they are
4 rendered. However, this tax may not be imposed on any service rendered by a related
5 corporation as defined in subdivision 10-43-1(11) for use by a financial institution as defined
6 in subdivision 10-43-1(4) or on any service rendered by a financial institution as defined in
7 subdivision 10-43-1(4) for use by a related corporation as defined in subdivision 10-43-1(11).
8 For the purposes of this section, the term related corporation includes a corporation which
9 together with the financial institution is part of a controlled group of corporations as defined in
10 26 U.S.C. § 1563 as in effect on January 1, 1989, except that the eighty percent ownership
11 requirements set forth in 26 U.S.C. § 563(a)(2)(A) for a brother-sister controlled group are
12 reduced to fifty-one percent. For the purpose of this chapter, services rendered by an employee
13 for the use of his employer are not taxable.

14 Section 14. That § 10-46-2.2 be amended to read:

15 10-46-2.2. An excise tax is imposed upon the privilege of the use of rented tangible personal
16 property and any product transferred electronically in this state at the rate of four and thirty-five
17 hundredths percent of the rental payments upon the property.

18 Section 15. That § 10-46-58 be amended to read:

19 10-46-58. There is imposed a tax of four and thirty-five hundredths percent on the privilege
20 of the use of any transportation of passengers. The tax imposed by this section shall apply to any
21 transportation of passengers if the passenger boards and exits the mode of transportation within
22 this state.

23 Section 16. That § 10-46-69 be amended to read:

24 10-46-69. There is hereby imposed a tax of four and thirty-five hundredths percent upon the

1 privilege of the use of mobile telecommunications services, as defined in 4 U.S.C. § 124(7) as
2 of January 1, 2002, that originate and terminate in the same state and are billed to a customer
3 with a place of primary use in this state. Notwithstanding any other provision of this chapter and
4 for purposes of the tax imposed by this section, the tax imposed upon mobile
5 telecommunication services shall be administered in accordance with 4 U.S.C. §§ 116-126 as
6 in effect on July 28, 2000.

7 Section 17. That § 10-46-69.1 be amended to read:

8 10-46-69.1. Except as provided in § 10-46-69, there is hereby imposed a tax of four and
9 thirty-five hundredths percent upon the privilege of the use of any intrastate, interstate, or
10 international telecommunications service that originates or terminates in this state and that is
11 billed or charged to a service address in this state, or that both originates and terminates in this
12 state. However, the tax imposed by this section does not apply to:

- 13 (1) Any eight hundred or eight hundred type service unless the service both originates
14 and terminates in this state;
- 15 (2) Any sale of a telecommunication service to a provider of telecommunication
16 services, including access service, for use in providing any telecommunication
17 service; or
- 18 (3) Any sale of interstate telecommunication service provided to a call center that has
19 been certified by the secretary of revenue to meet the criterion established in § 10-45-
20 6.3 and the call center has provided to the telecommunications service provider an
21 exemption certificate issued by the secretary indicating that it meets the criterion.

22 If a call center uses an exemption certificate to purchase services not meeting the criterion
23 established in § 10-45-6.3, the call center is liable for the applicable tax, penalty, and interest.

24 Section 18. That § 10-46-69.2 be amended to read:

1 10-46-69.2. There is hereby imposed a tax of four and thirty-five hundredths percent upon
2 the privilege of the use of any ancillary services.