



2023 South Dakota Legislature

House Bill 1094

SENATE ENGROSSED

This bill has been extensively amended (hoghoused) and may no longer be consistent with the original intention of the sponsor.

Introduced by: **Representative Derby**

1 **An Act to lower the state sales tax rate and the state use tax rate on food to zero**
 2 **percent, and to repeal a conditional reduction of certain gross receipts tax**
 3 **rates.**

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

5 **Section 1. That § 10-45-1 be AMENDED:**

6 **10-45-1.** Terms used in this chapter mean:

- 7 (1) "Agricultural purposes," the producing, raising, growing, or harvesting of food or
 8 fiber upon agricultural land, including dairy products, livestock, and crops. The
 9 services of custom harvesters, chemical applicators, fertilizer spreaders, hay
 10 grinders, and cultivators are considered agricultural purposes. The harvesting of
 11 timber on land within the state is considered an agricultural purpose;
- 12 (2) "Business," any activity engaged in by any person or caused to be engaged in by
 13 such person with the object of gain, benefit, or advantage, either direct or indirect;
- 14 (3) "Candy," any preparation of sugar, honey, or other natural or artificial sweeteners
 15 in combination with chocolate, fruits, nuts or other ingredients or flavorings in the
 16 form of bars, drops, or pieces. The term, candy, does not include any preparation
 17 containing flour and does not require refrigeration;
- 18 (4) "Delivery charges," charges by the retailer for preparation and delivery to a location
 19 designated by the purchaser of tangible personal property, any product transferred
 20 electronically, or services including transportation, shipping, postage, handling,
 21 crating, and packing. The term does not include postage for direct mail;
- 22 (5) "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid,
 23 frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans
 24 and is consumed for its taste or nutritional value. The term, food, does not include
 25 any:
 26 (a) ~~alcoholic beverages~~, Alcoholic beverage as defined by § 35-1-1;

- 1 (b) ~~_____tobacco~~Tobacco product as defined by § 10-50-1;
- 2 (c) Cigarette as defined by § 10-50B-4;
- 3 (d) Cannabis or cannabis product as defined by § 34-20G-1; or
- 4 (e) ~~_____prepared~~Prepared food;
- 5 (6) Repealed by SL 2007, ch 56, § 1.
- 6 (7) "Person," any individual, firm, copartnership, joint adventure, association, limited
- 7 liability company, corporation, municipal corporation, estate, trust, business trust,
- 8 receiver, the State of South Dakota and its political subdivisions, or any group or
- 9 combination acting as a unit;
- 10 (8) "Prepared food," any food sold in a heated state or heated by the seller; two or
- 11 more food ingredients mixed or combined by the seller for sale as a single item; or
- 12 food sold with eating utensils provided by the seller, including plates, knives, forks,
- 13 spoons, glasses, cups, napkins, or straws. A plate does not include a container or
- 14 packaging used to transport the food.
- 15 Prepared food does not include food that is only cut, repackaged, or pasteurized
- 16 by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal
- 17 foods requiring cooking by the consumer as recommended by the Food and Drug
- 18 Administration in chapter 3, part 401.11 of its Food Code as of January 1, 2003,
- 19 so as to prevent food borne illnesses;
- 20 (8A) "Product transferred electronically," any product obtained by the purchaser by
- 21 means other than tangible storage media. A product transferred electronically does
- 22 not include any intangible such as a patent, stock, bond, goodwill, trademark,
- 23 franchise, or copyright.
- 24 (9) "Relief agency," the state, and county, municipality or district thereof, or any
- 25 agency engaged in actual relief work;
- 26 (10) "Retail sale" or "sale at retail," any sale, lease, or rental for any purpose other than
- 27 for resale, sublease, or subrent;
- 28 (11) "Retailer," any person engaged in the business of selling tangible goods, wares, or
- 29 merchandise at retail, or the furnishing of gas, electricity, water, and
- 30 communication service, and tickets or admissions to places of amusement and
- 31 athletic events as provided in this chapter, and the sale at retail of products
- 32 transferred electronically. The term also includes any person subject to the tax
- 33 imposed by §§ 10-45-4 and 10-45-5. The isolated or occasional sale of tangible
- 34 personal property or any product transferred electronically at retail by a person
- 35 who does not hold himself or herself out as engaging in the business of selling such

- 1 tangible personal property or products transferred electronically at retail does not
 2 constitute such person a retailer;
- 3 (12) "Sale," any transfer, exchange, or barter, conditional or otherwise, in any manner
 4 or by any means whatsoever, for a consideration;
- 5 (13) "Soft drinks," any nonalcoholic beverages that contain natural or artificial
 6 sweeteners. The term, soft drinks, does not include any beverage that contains
 7 milk or milk products, soy, rice or similar milk substitutes, or greater than fifty
 8 percent of vegetable or fruit juice by volume;
- 9 (14) "Tangible personal property," personal property that can be seen, weighed,
 10 measured, felt, or touched, or that is in any other manner perceptible to the
 11 senses. The term includes electricity, water, gas, steam, and prewritten computer
 12 software.

13 **Section 2. That chapter 10-45 be amended with a NEW SECTION:**

14 The rate of tax imposed by this chapter on retailers upon the gross receipts of all
 15 sales of food and food ingredients as defined by § 10-45-1 is zero percent.

16 **Section 3. That § 10-46-1 be AMENDED:**

17 **10-46-1.** Terms, as used in this chapter mean:

- 18 (1) "Business," any activity engaged in by any person or caused to be engaged in by
 19 such person with the object of gain, benefit or advantage either direct or indirect;
- 20 (2) "Candy," any preparation of sugar, honey, or other natural or artificial sweeteners
 21 in combination with chocolate, fruits, nuts or other ingredients or flavorings in the
 22 form of bars, drops, or pieces. The term, candy, does not include any preparation
 23 containing flour and does not require refrigeration;
- 24 (3) "Delivery charges," charges by the retailer for preparation and delivery to a location
 25 designated by the purchaser of tangible personal property, any product transferred
 26 electronically, or services including transportation, shipping, postage, handling,
 27 crating, and packing. The term does not include postage for direct mail;
- 28 (4) "Fair market value," the price at which a willing seller and willing buyer will trade.
 29 Fair market value shall be determined at the time of purchase. If a public
 30 corporation is supplying tangible personal property or any product transferred
 31 electronically that will be used in the performance of a contract, fair market value
 32 shall be determined pursuant to § 5-18B-7. This definition also applies to chapter
 33 10-45;

- 1 (5) "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid,
 2 frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans
 3 and is consumed for its taste or nutritional value. The term, food, does not include
 4 any:
- 5 (a) ~~alcoholic beverages~~, Alcoholic beverage as defined by § 35-1-1;
 - 6 (b) ~~tobacco~~, Tobacco product as defined by § 10-50-1;
 - 7 (c) Cigarette as defined by § 10-50B-4;
 - 8 (d) Cannabis or cannabis product as defined by § 34-20G-1, or
 - 9 (e) ~~prepared~~ Prepared food;
- 10 (6) "Included in the measure of tax," the tangible personal property, any product
 11 transferred electronically, or the service was purchased from a retailer licensed
 12 under chapter 10-45 and that retailer has included the tax in the amount received
 13 from the sale;
- 14 (7) "In this state" or "in the state," within the exterior limits of the State of South
 15 Dakota and includes all territory within such limits owned by or ceded to the United
 16 States of America;
- 17 (8) "Prepared food," any food sold in a heated state or heated by the seller; two or
 18 more food ingredients mixed or combined by the seller for sale as a single item; or
 19 food 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
 23 by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal
 24 foods requiring cooking by the consumer as recommended by the Food and Drug
 25 Administration in chapter 3, part 401.11 of its Food Code as of January 1, 2003,
 26 so as to prevent food borne illnesses;
- 27 (8A) "Product transferred electronically," any product obtained by the purchaser by
 28 means other than tangible storage media. A product transferred electronically does
 29 not include any intangible such as a patent, stock, bond, goodwill, trademark,
 30 franchise, or copyright.
- 31 (9) "Purchase," any transfer, exchange, or barter, conditional or otherwise, in any
 32 manner or by any means whatsoever, for a consideration. A transaction, whereby
 33 the possession of property is transferred but the seller retains the title as security
 34 for the payment of the price, is a purchase;

- 1 (10) "Purchase price," shall have the same meaning as gross receipts defined in chapter
2 10-45;
- 3 (11) "Retailer," any person performing services in this state or engaged in the business
4 of selling tangible personal property or products transferred electronically for use,
5 storage or other consumption within the meaning of this chapter. However, if in
6 the opinion of the secretary of revenue, it is necessary for the efficient
7 administration of this chapter to regard any salesmen, representatives, truckers,
8 peddlers, or canvassers as agents of the dealers, distributors, supervisors,
9 employers, or persons under whom they operate or from whom they obtain the
10 tangible personal property or any product transferred electronically sold by them
11 irrespective of whether they are making sales on their own behalf or on behalf of
12 such dealers, distributors, supervisors, employers, or persons, the secretary of
13 revenue may so regard them and may regard the dealers, distributors, supervisors,
14 employers, or persons as retailers for purposes of this chapter;
- 15 (12) "Retailer maintaining a place of business in the state," any retailer having or
16 maintaining within this state, directly or by a subsidiary, an office, distribution
17 house, sales house, warehouse, or other place of business, or any agents operating
18 within the state under the authority of the retailer or its subsidiary, irrespective of
19 whether such place of business or agent is located here permanently or temporarily
20 or whether such retailer or subsidiary is admitted to do business within this state
21 pursuant to the laws of the State of South Dakota granting the rights of foreign
22 corporations to do business in this state;
- 23 (13) "Secretary," the secretary of the Department of Revenue or any duly authorized
24 and appointed assistant, deputies, or agents of the secretary charged with the
25 administration or enforcement of this chapter;
- 26 (14) "Soft drinks," any nonalcoholic beverages that contain natural or artificial
27 sweeteners. The term, soft drinks, does not include any beverage that contains
28 milk or milk products, soy, rice or similar milk substitutes, or greater than fifty
29 percent of vegetable or fruit juice by volume;
- 30 (15) "Storage," any keeping or retention in this state for use or other consumption in
31 the State of South Dakota for any purpose except sale in the regular course of
32 business;
- 33 (16) "Tangible personal property," personal property that can be seen, weighed,
34 measured, felt, or touched, or that is in any other manner perceptible to the senses

1 if furnished or delivered to consumers or users within this state. The term includes
2 electricity, water, gas, steam, and prewritten computer software;
3 (17) "Use," the exercise of right or power over tangible personal property or any product
4 transferred electronically incidental to the ownership of that property, except that
5 it does not include the sale of that property in the regular course of business. Use
6 also includes the use of the types of services, the gross receipts from the sale of
7 which are to be included in the measure of the tax imposed by chapter 10-45, and
8 the delivery or causing delivery into this state of tangible personal property or any
9 product transferred electronically intended to advertise any product or service or
10 promote or facilitate any sale to South Dakota residents.

11 **Section 4. That chapter 10-46 be amended with a NEW SECTION:**

12 The rate of tax imposed by this chapter on the use, storage, or consumption in this
13 state of food and food ingredients as defined by § 10-46-1 is zero percent.

14 **Section 5. That § 10-64-9 be REPEALED:**

15 ~~If the state is able to enforce the obligation to collect and remit sales tax on remote~~
16 ~~sellers who deliver tangible personal property, products transferred electronically, or~~
17 ~~services directly to the citizens of South Dakota, the additional net revenue from such~~
18 ~~obligation shall be used to reduce the rate of certain taxes. The rate of tax imposed by~~
19 ~~§§ 10-45-2, 10-45-5, 10-45-5.3, 10-45-6, 10-45-6.1, 10-45-6.2, 10-45-8, 10-45-71, 10-~~
20 ~~46-2.1, 10-46-2.2, 10-46-58, 10-46-69, 10-46-69.1, 10-46-69.2, 10-46E-1, and 10-58-~~
21 ~~1 shall be reduced by one-tenth percent on July first following the calendar year for which~~
22 ~~each additional twenty million dollar increment of net revenue is collected and remitted~~
23 ~~by such remote sellers. However, the rate of tax imposed by §§ 10-45-2, 10-45-5, 10-~~
24 ~~45-5.3, 10-45-6, 10-45-6.1, 10-45-6.2, 10-45-8, 10-45-71, 10-46-2.1, 10-46-2.2, 10-~~
25 ~~46-58, 10-46-69, 10-46-69.1, 10-46-69.2, 10-46E-1, and 10-58-1 may not be reduced~~
26 ~~below four percent pursuant to the provisions of this section.~~