

# State of South Dakota

EIGHTY-SEVENTH SESSION  
LEGISLATIVE ASSEMBLY, 2012

672T0312

## HOUSE BILL NO. 1214

Introduced by: Representatives Wick, Greenfield, Haggar, Hansen (Jon), Hickey, Jensen, Kirkeby, Kirschman, Miller, Olson (Betty), Russell, Stricherz, Venner, and Verchio and Senators Novstrup (Al) and Lederman

1 FOR AN ACT ENTITLED, An Act to to lower the state sales and use tax on certain food items  
2 if certain economic conditions occur.

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 imposed a tax of three and one-half percent on gross receipts from the sale of food  
7 as defined in § 10-45-1. This section is effective on October first following any state fiscal year  
8 when the total revenue collected pursuant to chapters 10-45, 10-46, and 10-46E is at least six  
9 percent more than the total revenue collected pursuant to chapters 10-45, 10-46, and 10-46E in  
10 the prior state fiscal year and is at least three percent more than the index factor as defined in  
11 § 10-13-38. The tax imposed by this section shall be lowered by an additional one-half percent  
12 on October first following a subsequent state fiscal year when the total revenue collected  
13 pursuant to chapters 10-45, 10-46, and 10-46E is at least six percent more than the total revenue  
14 collected pursuant to chapters 10-45, 10-46, and 10-46E in the prior state fiscal year and is at



1 least three percent more than the index factor as defined in § 10-13-38.

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

4 There is imposed a tax of three and one-half percent on the privilege of the use of food as  
5 defined in § 10-46-1. This section is effective on October first following any state fiscal year  
6 when the total revenue collected pursuant to chapters 10-45, 10-46, and 10-46E is at least six  
7 percent more than the total revenue collected pursuant to chapters 10-45, 10-46, and 10-46E in  
8 the prior state fiscal year and is at least three percent more than the index factor as defined in  
9 § 10-13-38. The tax imposed by this section shall be lowered by an additional one-half percent  
10 on October first following a subsequent state fiscal year when the total revenue collected  
11 pursuant to chapters 10-45, 10-46, and 10-46E is at least six percent more than the total revenue  
12 collected pursuant to chapters 10-45, 10-46, and 10-46E in the prior state fiscal year and is at  
13 least three percent more than the index factor as defined in § 10-13-38.

14 Section 3. That § 10-45-1 be amended to read as follows:

15 10-45-1. Terms used in this chapter mean:

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

20 (1A) "Alcoholic beverages," any beverage that is suitable for human consumption and  
21 contains one-half of one percent or more of alcohol by volume;

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

24 (3) "Candy," any preparation of sugar, honey, or other natural or artificial sweeteners in

1 combination with chocolate, fruits, nuts or other ingredients or flavorings in the form  
2 of bars, drops, or pieces. The term, candy, does not include any preparation  
3 containing flour ~~and does not~~. No candy may require refrigeration;

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

8 (4A) "Dietary supplement," any product, other than tobacco, intended to supplement the  
9 diet that:

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

11 (i) A vitamin;

12 (ii) A mineral;

13 (iii) An herb or other botanical;

14 (iv) An amino acid;

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

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

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

23 (c) Is required to be labeled as a dietary supplement, identifiable by the  
24 supplemental facts box, found on the label and as required pursuant to 21

1                    C.F.R. § 101.36 as of January 1, 2011;

2            (5)    "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid,  
3                    frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans  
4                    and is consumed for its taste or nutritional value. The term, food, does not include  
5                    any alcoholic beverages beverage, tobacco, soft drink, candy, dietary supplement,  
6                    food sold through a vending machine, 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)    Repealed by SL 2007, ch 56, § 1.

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

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

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

24           (8A)   "Product transferred electronically," any product obtained by the purchaser by means

1 other than tangible storage media. A product transferred electronically does not  
2 include any intangible such as a patent, stock, bond, goodwill, trademark, franchise,  
3 or copyright;

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

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

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

12 The term also includes any person subject to the tax imposed by §§ 10-45-4 and 10-  
13 45-5. The isolated or occasional sale of tangible personal property or any product  
14 transferred electronically at retail by a person who does not hold himself or herself  
15 out as engaging in the business of selling such tangible personal property or products  
16 transferred electronically at retail does not constitute such person a retailer;

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

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

23 (14) "Tangible personal property," personal property that can be seen, weighed, measured,  
24 felt, or touched, or that is in any other manner perceptible to the senses. The term

1 includes electricity, water, gas, steam, and prewritten computer software;

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

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, any product transferred  
16 electronically, or services including transportation, shipping, postage, handling,  
17 crating, and packing. The term does not include postage for direct mail;

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

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

21 (i) A vitamin;

22 (ii) A mineral;

23 (iii) An herb or other botanical;

24 (iv) An amino acid;

- 1           (v) A dietary substance for use by humans to supplement the diet by
- 2                           increasing the total dietary intake; or
- 3           (vi) A concentrate, metabolite, constituent, extract, or combination of any
- 4                           ingredient described in this subsection;
- 5           (b) Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid
- 6                           form, or if not intended for ingestion in such a form, is not represented as
- 7                           conventional food and is not represented for use as a sole item of a meal or of
- 8                           the diet; and
- 9           (c) Is required to be labeled as a dietary supplement, identifiable by the
- 10                           supplemental facts box, found on the label and as required pursuant to 21
- 11                           C.F.R. § 101.36 as of January 1, 2011;
- 12           (4) "Fair market value," the price at which a willing seller and willing buyer will trade.
- 13                           Fair market value shall be determined at the time of purchase. If a public corporation
- 14                           is supplying tangible personal property or any product transferred electronically that
- 15                           will be used in the performance of a contract, fair market value shall be determined
- 16                           pursuant to § 5-18B-7. This definition also applies to chapter 10-45;
- 17           (5) "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid,
- 18                           frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans
- 19                           and is consumed for its taste or nutritional value. The term, food, does not include
- 20                           any alcoholic beverages beverage, tobacco, soft drink, candy, dietary supplement,
- 21                           food sold through a vending machine, or prepared food;
- 22           (5A) "Food sold through a vending machine," any food dispensed from a machine or other
- 23                           mechanical device that accepts payment;
- 24           (6) "Included in the measure of tax," the tangible personal property, any product

1 transferred electronically, or the service was purchased from a retailer licensed under  
2 chapter 10-45 and that retailer has included the tax in the amount received from the  
3 sale;

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

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

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

17 (8A) "Product transferred electronically," any product obtained by the purchaser by means  
18 other than tangible storage media. A product transferred electronically does not  
19 include any intangible such as a patent, stock, bond, goodwill, trademark, franchise,  
20 or copyright;

21 (9) "Purchase," any transfer, exchange, or barter, conditional or otherwise, in any manner  
22 or by any means whatsoever, for a consideration. A transaction, whereby the  
23 possession of property is transferred but the seller retains the title as security for the  
24 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 of  
4           selling tangible personal property or products transferred electronically for use,  
5           storage or other consumption within the meaning of this chapter. However, if in the  
6           opinion of the secretary of revenue, it is necessary for the efficient administration of  
7           this chapter to regard any salesmen, representatives, truckers, peddlers, or canvassers  
8           as agents of the dealers, distributors, supervisors, employers, or persons under whom  
9           they operate or from whom they obtain the tangible personal property or any product  
10          transferred electronically sold by them irrespective of whether they are making sales  
11          on their own behalf or on behalf of such dealers, distributors, supervisors, employers,  
12          or persons, the secretary of revenue may so regard them and may regard the dealers,  
13          distributors, supervisors, employers, or persons as retailers for purposes of this  
14          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 house,  
17          sales house, warehouse, or other place of business, or any agents operating within the  
18          state under the authority of the retailer or its subsidiary, irrespective of whether such  
19          place of business or agent is located here permanently or temporarily or whether such  
20          retailer or subsidiary is admitted to do business within this state pursuant to the laws  
21          of the State of South Dakota granting the rights of foreign corporations to do business  
22          in this state;
- 23       (13) "Secretary," the secretary of the Department of Revenue or any duly authorized and  
24          appointed assistant, deputies, or agents of the secretary charged with the

1 administration or enforcement of this chapter;

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

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

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

12 (16A) "Tobacco," any cigarettes, cigars, chewing or pipe tobacco, or any other item that  
13 contains tobacco;

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