

Sixty-third  
Legislative Assembly  
of North Dakota

**SENATE BILL NO. 2232**

Introduced by

Senators Miller, Armstrong, Hogue

1 A BILL for an Act to create and enact a new subsection to section 57-39.2-04 of the North  
2 Dakota Century Code, relating to a sales and use tax exemption for business-to-business sales;  
3 to amend and reenact section 57-39.2-01 of the North Dakota Century Code, relating to  
4 imposition of sales and use taxes on sales of services; and to provide an effective date.

5 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

6 **SECTION. AMENDMENT.** Section 57-39.2-01 of the North Dakota Century Code is  
7 amended and reenacted as follows:

8 **57-39.2-01. Definitions.**

9 The following words, terms, and phrases, when used in this chapter, have the meaning  
10 ascribed to them in this section, unless the context clearly indicates a different meaning:

11 1. "Bundled transaction" means the retail sale of two or more products, except real  
12 property and services to real property, where the products are otherwise distinct and  
13 identifiable, and the products are sold for one nonitemized price. A bundled transaction  
14 does not include the sale of any products in which the sales price varies, or is  
15 negotiable, based on the selection by the purchaser of the products included in the  
16 transaction.

17 a. Distinct and identifiable products do not include:

18 (1) Packaging such as containers, boxes, sacks, bags, and bottles or other  
19 materials such as wrapping, labels, tags, and instruction guides that  
20 accompany the retail sale of the products and are incidental or immaterial to  
21 the retail sale. Examples of packaging that are incidental or immaterial  
22 include grocery sacks, shoeboxes, drycleaning garment bags, and express  
23 delivery envelopes and boxes.

(2) A product provided free of charge with the required purchase of another product. A product is provided free of charge if the sales price of the product purchased does not vary depending on the inclusion of the product provided free of charge.

(3) Items included in the definition of gross receipts.

b. The phrase "one nonitemized price" does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form, including an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list.

c. A transaction that otherwise meets the definition of a bundled transaction as defined in this section is not a "bundled transaction" if it is:

(1) The retail sale of tangible personal property and a service where the tangible personal property is essential to the use of the service, and is provided exclusively in connection with the service, and the true object of the transaction is the service;

(2) The retail sale of services where one service is provided that is essential to the use or receipt of a second service and the first service is provided exclusively in connection with the second service and the true object of the transaction is the second service;

(3) A transaction that includes taxable products and nontaxable products and the purchase price or sales price of the taxable products is de minimis.

(a) "De minimis" means the seller's purchase price or sales price of the taxable products is ten percent or less of the total purchase price or sales price of the bundled products.

(b) Sellers shall use either the purchase price or the sales price of the products to determine if the taxable products are de minimis. Sellers may not use a combination of the purchase price and sales price of the products to determine if the taxable products are de minimis.

(c) Sellers shall use the full term of a service contract to determine if the taxable products are de minimis; or

(4) The retail sale of exempt tangible personal property and taxable tangible personal property where:

(a) The transaction includes food and food ingredients, drugs, durable medical equipment, mobility-enhancing equipment, over-the-counter drugs, prosthetic devices, or medical supplies; and

(b) If the seller's purchase price or sales price of the taxable tangible personal property is fifty percent or less of the total purchase price or sales price of the bundled tangible personal property. Sellers may not use a combination of the purchase price and sales price of the tangible personal property when making the fifty percent determination for a transaction.

2. "Business" includes any activity engaged in by any person or caused to be engaged in by the person with the object of gain, benefit, or advantage, either direct or indirect.

3. "Certified automated system" means software certified under chapter 57-39.4 to calculate the tax imposed by each jurisdiction on a transaction, determine the amount of tax to remit to the state, and maintain a record of the transaction.

4. "Certified service provider" means an agent certified under the agreement adopted under chapter 57-39.4 to perform all of the seller's sales and use tax functions, other than the seller's obligation to remit taxes on its own purchases.

5. "Commissioner" means the tax commissioner of the state of North Dakota.

6. "Computer software maintenance contract" is a contract that obligates a vendor of computer software to provide a customer with future updates or upgrades to computer software, support services with respect to computer software, or both.

7. "Delivery charges" means charges by the seller for preparation and delivery to a location designated by the purchaser of personal property or services. For purposes of this subsection, "preparation and delivery" includes transportation, shipping, postage, handling, crating, and packing. If shipment includes exempt property and taxable property, the seller should allocate the delivery charge by using a percentage based on:

a. The total sales price of the taxable property compared to the total sales price of all property in the shipment; or

- 1           b.    The total weight of the taxable property compared to the total weight of all  
2               property in the shipment.

3           The seller must tax the percentage of the delivery charge allocated to the taxable  
4           property but does not have to tax the percentage allocated to the exempt property.

- 5       8.    "Direct mail" means printed material delivered or distributed by United States mail or  
6           other delivery service to a mass audience or to addresses on a mailing list provided by  
7           the purchaser or at the direction of the purchaser when the cost of the items are not  
8           billed directly to the recipients. "Direct mail" includes tangible personal property  
9           supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in  
10          the package containing the printed material. "Direct mail" does not include multiple  
11          items of printed material delivered to a single address.

- 12       9.    "Drug" means a compound, substance, or preparation and any component of a  
13           compound, substance, or preparation, other than food and food ingredients, dietary  
14           supplements, or alcoholic beverages:

15           a.   Recognized in the official United States pharmacopoeia, official homeopathic  
16               pharmacopoeia of the United States, or official national formulary, or any  
17               supplement of any of these publications;

18           b.   Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of  
19               disease; or

20           c.   Intended to affect the structure or any function of the body.

- 21       10.   "Farm machinery" means all vehicular implements and attachment units, designed and  
22           sold for direct use in planting, cultivating, or harvesting farm products or used in  
23           connection with the production of agricultural produce or products, livestock, or poultry  
24           on farms, which are operated, drawn, or propelled by motor or animal power. "Farm  
25           machinery" does not include vehicular implements operated wholly by hand or a motor  
26           vehicle required to be registered under chapter 57-40.3. "Farm machinery" does not  
27           include machinery that may be used for other than agricultural purposes, including  
28           tires, farm machinery repair parts, tools, shop equipment, grain bins, feed bunks,  
29           fencing materials, and other farm supplies and equipment. For purposes of this  
30           subsection, "attachment unit" means any part or combination of parts having an

independent function, other than farm machinery repair parts, which when attached or affixed to farm machinery is used exclusively for agricultural purposes.

11. "Farm machinery repair parts" means repair or replacement parts for farm machinery that have a specific or generic part number assigned by the manufacturer of the farm machinery. "Farm machinery repair parts" do not include tires, fluid, gas, grease, lubricant, wax, or paint.

12. a. "Gross receipts" means the measure subject to sales tax and means the total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for the following:

- (1) The seller's cost of the property sold;
- (2) The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) Charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) Delivery charges; and
- (5) Credit for any trade-in, as determined by state law.

b. "Gross receipts" also includes consideration received by the seller from third parties if:

- (1) The seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
- (2) The seller has an obligation to pass the price reduction or discount through to the purchaser;
- (3) The amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
- (4) One of the following criteria is met:
  - (a) The purchaser presents a coupon, certificate, or other documentation to the seller to claim a price reduction or discount where the coupon,

certificate, or documentation is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any seller to whom the coupon, certificate, or documentation is presented;

(b) The purchaser provides identification to the seller to show that the purchaser is a member of a group or organization entitled to a price reduction or discount, however, a "preferred customer" card that is available to any patron does not constitute membership in such a group; or

(c) The price reduction or discount is identified as a third-party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

c. "Gross receipts" also includes the total amount of sales of every clerk, auctioneer, agent, or factor selling tangible personal property owned by any other retailer.

d. "Gross receipts" does not include:

(1) Discounts, including cash, term, or coupons that are not reimbursed by a third party, which are allowed by a seller and taken by a purchaser on a sale;

(2) Interest, financing, and carrying charges from credit extended on the sale of personal property or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(3) Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar documents given to the purchaser; and

(4) The sale price of property returned by a customer when the full sale price is refunded either in cash or credit. When tangible personal property is taken in trade or in a series of trades as a credit or part payment of a retail sale taxable under this chapter, if the tangible personal property traded in will be subject to tax imposed by chapter 57-39.5 or 57-40.3 or if the tangible

personal property traded in is used farm machinery or used irrigation equipment, the credit or trade-in value allowed by the retailer is not included in gross receipts of the retailer.

13. "Irrigation equipment repair parts" means repair or replacement parts for irrigation equipment which have a specific or generic part number assigned by the manufacturer of the irrigation equipment. The term does not include tires, fluid, gas, grease, lubricant, wax, or paint.

14. "Lease or rental" means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. A lease or rental may include future options to purchase or extend. "Lease or rental" does not include:

- a. A transfer of possession or control of property under a security agreement or deferred payment plan, which requires the transfer upon completion of the required payments;
- b. A transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars or one percent of the total required payments; or
- c. Providing tangible personal property with an operator for a fixed or indeterminate period of time. A condition of this exclusion is that the operator is necessary for the equipment to perform as designed. For the purpose of this subdivision, an operator must do more than maintain, inspect, or set up the tangible personal property.

This definition will be applied only prospectively from the date of adoption and will have no retroactive impact on existing leases or rentals.

15. "Local governmental unit" means incorporated cities, counties, school districts, and townships.

16. "Mandatory computer software maintenance contract" is a computer software maintenance contract that the customer is obligated by contract to purchase as a condition to the retail sale of computer software.

- 1        17. "Optional computer software maintenance contract" is a computer software  
2        maintenance contract that the customer is not obligated to purchase as a condition to  
3        the retail sale of computer software.
- 4        18. "Person" includes any individual, firm, partnership, joint venture, association,  
5        corporation, limited liability company, estate, business trust, receiver, or any other  
6        group or combination acting as a unit and the plural as well as the singular number.
- 7        19. "Prescription" means an order, formula, or recipe issued in any form of oral, written,  
8        electronic, or other means of transmission by a person authorized by the laws of this  
9        state to prescribe drugs.
- 10       20. "Relief agency" means the state, any county, city and county, city or district thereof, or  
11       an agency engaged in actual relief work.
- 12       21. "Retail sale" or "sale at retail" means any sale, lease, or rental for any purpose other  
13       than for resale, sublease, or subrental. "Retail sale" or "sale at retail" includes the sale,  
14       including the leasing or renting, to a consumer or to any person for any purpose, other  
15       than for processing or for resale, of tangible personal property; the sale of steam, gas,  
16       and communication service to retail consumers or users; the sale of ~~vulcanizing,~~  
17       ~~recapping, and retreading~~ services for tires; the ordering, selecting, or aiding a  
18       customer to select any goods, wares, or merchandise from any price list or catalog,  
19       which the customer might order, or be ordered for such customer to be shipped  
20       directly to such customer; the sale or furnishing of hotel, motel, or tourist court  
21       accommodations, tickets, or admissions to any place of amusement, athletic event, or  
22       place of entertainment; and the sales of magazines and other periodicals. By the term  
23       "processing" is meant any tangible personal property, including containers which it is  
24       intended, by means of fabrication, compounding, manufacturing, producing, or  
25       germination shall become an integral or an ingredient or component part of other  
26       tangible personal property intended to be sold ultimately at retail. The sale of an item  
27       of tangible personal property for the purpose of incorporating it in or attaching it to real  
28       property must be considered as a sale of tangible personal property for a purpose  
29       other than for processing; the delivery of possession within the state of North Dakota  
30       of tangible personal property by a wholesaler or distributor to an out-of-state retailer  
31       who does not hold a North Dakota retail sales tax permit or to a person who by



1 contract incorporates such tangible personal property into, or attaches it to, real  
2 property situated in another state may not be considered a taxable sale if such  
3 delivery of possession would not be treated as a taxable sale in that state. As used in  
4 this subsection, the word "consumer" includes any hospital, infirmary, sanatorium,  
5 nursing home, home for the aged, or similar institution that furnishes services to any  
6 patient or occupant. The sale of an item of tangible personal property to a person  
7 under a finance leasing agreement over the term of which the property will be  
8 substantially consumed must be considered a retail sale if the purchaser elects to treat  
9 it as such by paying or causing the transferor to pay the sales tax thereon to the  
10 commissioner on or before the last day on which payments may be made without  
11 penalty as provided in section 57-39.2-12.

12 22. "Retailer" or "seller" includes every person engaged in the business of leasing or  
13 renting hotel, motel, or tourist court accommodations, and every person engaged in  
14 the business of selling tangible goods, wares, or merchandise at retail, or  
15 furnishingsale of ~~steam, gas, and communication~~ services, or tickets or admissions to  
16 places of amusement, entertainment, and athletic events, or magazines or other  
17 periodicals; and includes any person as herein defined who by contract or otherwise  
18 agrees to furnish for a consideration a totally or partially finished product consisting in  
19 whole or in part of tangible personal property subject to the sales tax herein provided,  
20 and all items of tangible personal property entering into the performance of such  
21 contract as a component part of the product agreed to be furnished under said  
22 contract shall be subject to the sales tax herein provided and the sales tax thereon  
23 shall be collected by the contractor from the person for whom the contract has been  
24 performed in addition to the contract price agreed upon, and shall be remitted to the  
25 state in the manner provided in this chapter; and shall include the state or any  
26 municipality furnishing steam, gas, or communication service to members of the public  
27 in its proprietary capacity. For the purpose of this chapter, retailer shall also include  
28 every clerk, auctioneer, agent, or factor selling tangible personal property owned by  
29 any other retailer. A retailer also includes every person who engages in regular or  
30 systematic solicitation of a consumer market in this state by the distribution of  
31 catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio

or television media, by mail, telegraphy, telephone, computer database, cable, optic, microwave, or other communication system.

23. "Sale" means any transfer of title or possession, exchange or barter, conditional or otherwise, in any manner or by any means whatever, for a consideration, and includes the sale of services, furnishing or service of steam, gas, or communication, the furnishing of hotel, motel, or tourist court accommodations, the furnishing of tickets or admissions to any place of amusement, athletic event, or place of entertainment, and sales of magazines and other periodicals. Provided, the words "magazines and other periodicals" as used in this subsection do not include newspapers nor magazines or periodicals that are furnished free by a nonprofit corporation or organization to its members or because of payment by its members of membership fees or dues.

24. "Sales tax" means the tax levied under section 57-39.2-02.1 or a conforming tax imposed under home rule authority by a city or county.

25. "Service" includes all activities engaged in for another person for a fee, retainer, commission, or other consideration but not including services performed by an employee for that employee's employer.

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

**SECTION 2.** A new subsection to section 57-39.2-04 of the North Dakota Century Code is created and enacted as follows:

Gross receipts from the sale of any taxable tangible personal property or taxable service purchased for a business purpose by a person engaged in a trade or business and used in that trade or business for resale or to produce, provide, render, or sell any taxable tangible personal property or taxable service or to further other bona fide business purposes.

**SECTION 3. EFFECTIVE DATE.** This Act is effective for taxable events occurring after June 30, 2013.