DEPARTMENT OF REVENUE

https://dor.sd.gov/ 1-800-829-9188

Attorneys

The purpose of this tax fact is to explain how South Dakota taxes apply to attorney services. It is not intended to answer all questions that may arise. The information contained in this fact sheet is current as of the date of publication.

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Attorney services are subject to South Dakota state sales or use tax, plus applicable municipal sales or use tax. Sales or use tax applies to the attorney's total receipts after deducting allowable expenses.

South Dakota Taxes and Rates	
State Sales and Use Tax – Applies to all sales or purchases of taxable products and service. Sales tax does not apply to products or vehicles subject to the ag excise or motor vehicle excise taxes.	**4.2%**
Municipal Sales and Use Tax – Applies to all sales of products and services that are subject to the state sales tax or use tax if the purchaser receives or uses the product or service in a municipality that imposes a sales tax or use tax.	**1 to 2%**

Sales or use tax applies as follows:

1. If you have an office in South Dakota, you are responsible for collecting and paying state sales tax plus the municipal sales tax. **Sales tax is due based on your office location.**
2. If you do not have an office in South Dakota, but enter South Dakota to provide services, you are responsible for collecting and paying South Dakota state and municipal use tax on behalf of your clients. Entering South Dakota to provide services may include making a court appearance, taking a deposition in South Dakota, or having any agents or representatives acting on your behalf in the state, whether permanently or temporarily. (SDCL 10-46-20)

Use tax is due where your client uses your services in South Dakota. Use tax is due when the client requires the services for a legal issue in the State of South Dakota or affecting South Dakota real estate. The use taxable amount includes all items billed to the customer except reimbursable expenses (see 'Reimbursable Expenses' on page 2). Use tax is due on all items invoiced to the client, even if the work is completed outside of South Dakota.

If you do not collect the sales or use tax, your client is responsible for remitting use tax. Use tax is due if no sales tax was collected, or if the sales tax collected is at a lower rate than the use tax due. The purchaser may take credit for sales tax paid to the attorney based on the attorney's office.

Nonresident attorneys performing legal services pursuant to SDCL 16-18-2 must have a South Dakota sales tax license.

Any nonresident attorney that has a South Dakota sales tax license is responsible for collecting and remitting use tax on behalf of their clients.

Examples - Sales or Use Tax on Attorney Services:

Jane hires an attorney from Iowa to complete her will. Jane is from Pierre. The attorney obtains the details from Jane, writes the will and mails a copy to Jane.

- The attorney does not owe sales tax because the attorney's office is in Iowa.
- If the attorney is not licensed in South Dakota and does not enter South Dakota to provide services, the attorney is not responsible for paying the use tax.
- Jane will owe state and municipal use tax based on Jane's address.

Apply for a tax license online at https://dor.sd.gov/online-services/.

Doing Business in Multiple States?

Apply through the Streamlined Sales Tax System at www.streamlinedsalestax.org to obtain a license with the programs 24-member states.

Examples - Sales or Use Tax on Attorney Services:

1. *A law firm from Ohio represents a client from Ohio concerning an injury received at a business in South Dakota. The attorney conducts interviews and depositions in Ohio and South Dakota. After several months of negotiations, the case is filed in court in South Dakota.*
   - Because the attorney's office is in Ohio, the attorney does not owe sales tax.
   - **However**, because the attorney entered South Dakota to provide services, the attorney is required to have a South Dakota sales and use tax license and is responsible for collecting and paying South Dakota use tax for his/her clients.
   - The attorney owes state and municipal use tax based on the court location. Use tax is due on fees received for services beginning when the case is filed in court.
2. *A corporation in Wyoming has a store in South Dakota. They hire a Wyoming attorney to settle an employee issue at the South Dakota store. The attorney is not licensed and had not entered South Dakota to provide services.*
   - Because the attorney's office is in Wyoming, the attorney does not owe sales tax.
   - **However**, the corporation uses the service to settle a matter in South Dakota. The corporation will owe South Dakota use tax based on the South Dakota store location.
3. *Sam hires an attorney from Pierre to complete his will. Sam is from Iowa. The attorney obtains the details from Sam, writes the will and mails a copy to Sam.*
   - The attorney owes state and Pierre municipal sales tax because the attorney's office is in Pierre.
   - Use tax is not due because state and municipal sales tax was collected.
4. *A Corporation from Iowa has five store locations in South Dakota. They purchase legal services for these locations from a law firm in Iowa. The law firm is not licensed and has not entered South Dakota to do business.*
   - Because the attorney's office is not in South Dakota, the attorney does not owe sales tax.
   - Because the corporation is using the legal services for the store locations in South Dakota, state and municipal use tax is due. If the corporation does not have a breakout of the services by store location, the corporation may allocate the attorney fees between the five locations.
5. *An attorney from Wall, South Dakota, is representing a Colorado client in the probate of her mother's estate in South Dakota.*
   - The attorney charges state plus Wall municipal sales tax.
   - In this case, no additional South Dakota use tax is due as 6.2% is the highest state and municipal tax rate imposed in South Dakota.

Barter

Payment does not need to be cash to be subject to sales tax – barter income is also taxable. Barter income includes any product or service you receive in exchange for providing services.

Retainers and Trusts

Retainer fees are subject to sales tax when received. Retainers placed in a trust are subject to sales tax when the fees are withdrawn from the trust to pay for legal services.

Application of tax to retainers varies by reporting method used by the attorney.

- Cash method: Retainer is taxed when received unless the retainer is placed in a trust account. If the retainer is placed in a trust account it is subject to sales tax when the attorney transfers the money to a non-trust account.
- Accrual method: Tax will not apply to retainers until service is invoiced and entered onto the attorney's books.

Reimbursable Expenses

As an attorney licensed pursuant to SDCL ch. 16-16, you may deduct from your gross receipts amounts that represent charges to clients for products or services you purchased on behalf of a client, if the following three criteria are met:

- You did not buy the product or service as a sale for resale;
- The charge is the same as the expense incurred; and
- You itemize and separately bill the amount on the client's invoice.

If you did not pay sales or use tax on the purchase, your receipts for the reimbursable expenses are taxable.

However, services or items that are exempt from sales tax, such as filing fees paid to a governmental entity, may be deducted as a reimbursable expense provided the above criteria are met.

If you charge the client more for the item or service than the amount you paid for the item or service, all receipts are subject to sales tax, even if sales or use tax was paid on the purchase.

Reimbursable Expenses (cont.)

Expenses incurred in the day-to-day operation of an office are not reimbursable expenses. You cannot deduct these expenses from your gross receipts even if you itemize the expense on the client's invoice. Services your employees provide are not reimbursable expenses; you did not purchase these services on behalf of a specific client.

Services you contract for a specific client may be a reimbursable expense. However, when you contract for services that you use for multiple customers, you cannot treat that service as a reimbursable expense.

Examples - Reimbursable Expenses:

1. *An attorney contracts with a paralegal to work on John Doe's case. The paralegal charges South Dakota sales tax on her service.*
   - The attorney may deduct this amount as a reimbursable expense if itemized, without markup, on the client's invoice.
2. *A law firm contracts with a paralegal to work on various projects for the firm for six months. The paralegal collects South Dakota sales tax.*
   - Because the firm did not purchase the paralegal's service for a specific customer, the firm cannot deduct the service as a reimbursable expense.
3. *An attorney takes a deposition. The attorney bills his client for his service and separately lists the cost of the motel room, meals, and court reporter. Sales tax was paid on the motel room, meals, and court reporter.*
   - The attorney does not include the motel room, meals, or court re- porter charges in the attorney's taxable receipts because the reimbursable charges are itemized on the customer's invoice and are not marked up.
4. *An attorney bills a customer $2.00 per long distance call based on the average expense of calls.*
   - Because the average expense represents an expense incurred for that customer, and the charge of the call is itemized, this charge is a reimbursable expense and is not included in the attorney's taxable receipts.

Examples of products and services you can deduct as reimbursable expenses if the three criteria listed on page 2 are met:

- Court reporter fees
- Expert consulting and testimony
- Filing and recording fees
- Investigative agent services
- Medical records
- Paralegal services
- Photocopying fees from a third party or in house
- Postage
- Service of process
- Travel expenses including: Airfare, Meals, Mileage (Expense of own vehicle, not to exceed IRS allowed rate), Motels, and Vehicle Rentals
- Telephone and FAX charges if itemized by the phone company. You may use an average charge instead of actual expense, if it is based on the actual expense. If not itemized and an average is not used, the cost may not be deducted as a reimbursable expense. Average charges are subject to audit.

Examples of products and services that are <u>not</u> reimbursable expenses:

- Employee services-secretarial
- Office supplies
- Services purchased for resale
- Temporary help agency services, unless bought for a specific customer

Resale Purchases

Persons providing attorney services must pay sales or use tax on all products and services used or consumed in providing such services. However, you can buy services for resale if the following criteria are met:

- You buy the service for or on behalf of a current client;
- You do not use the service; and
- You deliver the service to your client without any alteration or change. You cannot buy services your business uses without sales tax.

You cannot deduct products and services bought for resale as a reimbursable expense. Receipts for products and services bought without sales or use tax are included in your taxable receipts.

Documentation: To buy products or services without sales tax, you must provide an exemption certificate to the seller. Exemption certificates are available online at https://sddor.seamlessdocs.com/f/2040.

Use Tax

Promotional items: You owe sales or use tax on products such as calendars, key chains, pens, caps, t-shirts and jackets that you give to customers or employees.

Donations: If you donate or give away attorney services, you do not owe sales or use tax on the value of the service given away. You owe sales or use tax on any products you purchase to donate or give away.

Failure to account for the use tax due on taxable items you bought from licensed vendors you gave an exemption certificate to may result in a penalty of 50% of the use tax due in accordance with SDCL 10-45-61.

If you buy taxable products or services that are used, stored, or consumed in South Dakota without paying sales tax, you owe use tax. If you buy taxable items in another state and pay another state's sales tax at a lower rate, you owe use tax in South Dakota based on the difference in tax rates when you use or store the product in South Dakota.

You will owe municipal use tax if you buy a product or service in one city (or a rural location) and use, store, or consume that product or service in another city that imposes a higher municipal use tax.

Examples of use taxable items:

- Accountant services
- Computers
- Computer database, programming, support and maintenance
- Database services
- Equipment
- Furniture
- Janitorial services
- Law books
- Maintenance agreements
- Marketing and promotional supplies
- Office supplies
- Security services
- Telephone, VOIP

Court Reporters

Court reporter fees are subject to state sales tax, plus applicable municipal sales tax. Sales tax applies where the court reporter's customer receives the report.

Example:

An attorney contracts with a court reporter to record a deposition for a client. The report is delivered to the attorney's office.

- The court reporter owes sales tax based on where the report is delivered. Because sales tax is paid the attorney may itemize this charge to the customer and deduct it as a reimbursable expense.
- If the attorney issues an exemption certificate, the attorney cannot deduct the court reporter's fee as a reimbursable expense. The attorney will owe sales tax on their receipts for the court reporter's service.

Expert Consulting and Testimony

Except as provided below, expert consulting services and expert testimony associated with litigation are subject to the state and applicable municipal tax. Sales tax applies where the customer receives the service. If the receipt of service is not known, or if the service is received at multiple locations, sales tax will apply based on the customer's address.

An attorney may purchase expert consulting and testimony that is for a specific customer for resale. If sales or use tax is not paid on the purchase of the expert consulting and testimony, the attorney's charges for these services cannot be deducted as a reimbursable expense.

Medical consulting or testimony concerning the diagnosis or treatment of a healthcare professional's patient is not subject to sales or use tax. You may deduct exempt medical consulting or testimony as a reimbursable expense.

Examples:

1. *Attorney Brown contracts with Dr. Smith to testify in a malpractice case for John Doe. John Doe is not Dr. Smith's patient. Dr. Smith reviews the plaintiff's medical records and takes x-rays. Dr. Smith uses this information to form an opinion to present at trial, not to treat the plaintiff. Dr. Smith meets with Attorney Brown to discuss the findings prior to court.*
   - Dr. Smith is providing an expert witness service subject to sales tax. Dr. Smith's receipts for the expert witness service, including the x-rays, are subject to the state and applicable municipal sales tax. Because the service is not received at Dr. Smith's office, sales tax applies based on Attorney Brown's address.
   - Attorney Brown owes sales tax on charges to his client for the x-rays and doctor fees, if sales tax is not paid to Dr. Smith. If Dr. Smith collects sales tax, Attorney Brown may deduct the charge for Dr. Smith as a reimbursable expense.
2. *Dr. Smith's patient, Jim, was in a car accident. Jim's attorney paid Dr. Smith to testify in a lawsuit concerning Jim's injuries.*
   - Dr. Smith does not owe sales tax on the receipts for testifying because the services were associated with the diagnosis or treatment of his patient, Jim.
   - Jim's attorney may deduct the charge for Dr. Smith's service as a reimbursable expense even though sales tax was not charged, because Dr. Smith provided an exempt health care service.

Tax Rates

South Dakota State sales and use tax is 4.2%. All sales of taxable products and services, including attorney services, are subject to the state sales tax.

Municipal sales tax is 1% to 2%. Any municipality may impose a sales and use tax in addition to the state sales tax. If the customer receives or uses a product or service subject to the state sales tax in one of these municipalities, that product or service is also subject to that municipality's sales or use tax.

A list of municipal tax rates and reporting codes is available at https://dor.sd.gov or by calling 1-800-829-9188.

Report municipal sales and use tax and municipal gross receipts tax under the City/Special Jurisdiction Calculations section of your return using the appropriate reporting code and tax rate for each city.

Record Requirements

You are required to keep records at least three years from the date the return is filed. These records must be available for inspection during business hours. Records may include purchase and sales invoices, bills of lading, books of all receipts and sales, cash register receipts, and other pertinent papers and documents.

Contact Us

If you have any questions, please contact the **South Dakota Department of Revenue.**

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