

OFFICIAL OPINION NO. 90-44, Scope of SDCL 32-9-3(7) Exception to SDCL 32-9-7 Traffic Violation

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**OFFICIAL OPINION NO. 90-44**

Scope of SDCL 32-9-3(7) Exception to SDCL 32-9-7 Traffic Violation

Dear Mr. Todd:

You have requested an official opinion from this Office based upon the following factual situation:

**FACTS:**

Several traffic violation citations have been issued by law enforcement personnel in Walworth County for violation of SDCL 32-9-7. Some of those traffic citations have been contested claiming to fall within the exceptions to such regulations as set forth in SDCL 32-9-3. The portion of SDCL 32-9-3 most often claimed is subparagraph 7.

SDCL 32-9-3(7) states that:

A motor vehicle registered in South Dakota of less than thirty thousand pounds gross weight owned by a merchant licensed under chapter 10-45 or his commissioned paid employee and used to transport the merchant's previously sold merchandise to a purchaser outside the limits of a municipality and to return exchanged property or to transport fuels to a purchaser within a municipality or an unincorporated town which is without such service. (Emphasis supplied.)

Based on the above factual situation, you have asked the following questions:

**QUESTIONS:**

1. What is merchant's previously sold merchandise?
2. Who qualifies as a purchaser, i.e., can another retailer be considered a purchaser under this exception?
3. Is the merchant required to "return exchanged property" or can he just transport to a purchaser?

#### **DISCUSSION:**

The statutory scheme was adopted by the Legislature to provide for the payment of compensation by motor carriers as defined by law to establish a broad and comprehensive definition of the term "motor carriers"; and then to exempt from this definition certain vehicles. *Mitchell Produce Co. v. Morrison*, 257 N.W. 47 (S.D. 1934). A party invoking the protection of an exception to a general law must show himself clearly within the terms of the exception. *State v. Peters*, 334 N.w.2d 217, 221 (S.D. 1983); *Paddock v. Balgord*, 2 S.D. 100, 48 N.W. 840 (1891). Exceptions in statutes should be strictly, but reasonably, construed; they extend only so far as their language fairly warrants; and all doubts should be resolved in favor of the general provision rather than the exception.

#### **IN RE QUESTION NO. 1:**

Certain other terms need to be clarified before defining "merchant's previously sold merchandise." The Uniform Commercial Code defines a "merchant" as:

A person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

SDCL 57A-2-104(1). "Merchandise" consists of any "object, wares, goods, commodity, intangible, instruction, or service." SDCL 37-24-2(6). Thus, "merchant's previously sold merchandise," when used in SDCL 32-9-3(7), consists of "merchandise," as defined by SDCL 57A-2-104(1), which is sold by a "merchant," as defined by SDCL 37-24-2(6), at the time it is transported. In addition, the "merchant" must be licensed to collect sales and use taxes under SDCL ch. 10-45 to come within the exception set out in SDCL 32-9-3(7).

**IN RE QUESTION NO. 2:**

A "purchaser" is a "person who takes by purchase." SDCL 57A-1-201(33). The term "purchaser" is a broad term when used by itself; however, its meaning must be construed as used in SDCL 32-9-3(7). The statutory exception, SDCL 32-9-3(7), makes reference to SDCL ch. 10-45, which concerns retail sales and service taxes. Therefore, SDCL 32-9-3(7) applies to the retail sales industry, and, "purchaser", when used in SDCL 32-9-3(7), pertains to a buyer in a retail sales transaction. Another retailer may qualify as a purchaser under this exception to SDCL 32-9-7, but the purchase must be a retail sale and thus may not be made with resale intended. The answer to your question is, therefore, a qualified "yes."

**IN RE QUESTION NO. 3:**

It is my opinion that the merchant is required to "return exchanged property" to be included in the scope of the exception. SDCL 32-9-3(7) deals with motor vehicles used to transport a merchant's previously sold merchandise to a purchaser outside the limits of a municipality "and" to return exchanged property. Transporting "a merchant's previously sold merchandise" to purchasers outside the limits of a municipality without at some time returning exchanged property is an activity which is not covered by SDCL 32-9-3(7). SDCL 32-9-3(7) concerns motor vehicles used to transport a merchant's previously sold merchandise to a purchaser outside the limits of a municipality "and" to return exchanged property. Thus, for the vehicle to be included within the statutory exemption, the vehicle must be regularly used in the business for the purpose of returning exchanged property.

Respectfully submitted,

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