

1 **H. B. 2928**

2
3 (By Delegates White, T. Campbell)

4 (By Request of the State Tax Department)

5 [Introduced January 28, 2011; referred to the
6 Committee on Finance.]

7
8
9
10
11 A BILL to amend and reenact §11-15B-2, §11-15B-2a, §11-15B-24 and
12 §11-15B-32 of the Code of West Virginia, 1931, as amended, all
13 relating to the administration of sales and use tax generally;
14 adding new definitions; clarifying present definitions;
15 incorporating changes to the Streamlined Sales and Use Tax
16 Agreement; adding a computer software maintenance contract as
17 a Streamlined Sales and Use Tax Agreement; relieving seller of
18 tax liability in certain instances; and providing new
19 effective dates.

20 *Be it enacted by the Legislature of West Virginia:*

21 That §11-15B-2, §11-15B-2a, §11-15B-24 and §11-15B-32 of the
22 Code of West Virginia, 1931, as amended, be amended and reenacted,
23 all to read as follows:

24 **ARTICLE 15B. SALES AND USE TAX ADMINISTRATION.**

1 **§11-15B-2. Definitions.**

2 (a) *General.* -- When used in this article and articles fifteen
3 and fifteen-a of this chapter, words defined in subsection (b) of
4 this section shall have the meanings ascribed to them in this
5 section, except where a different meaning is distinctly expressed
6 or the context in which the term is used clearly indicates that a
7 different meaning is intended by the Legislature.

8 (b) *Terms defined.* --

9 (1) "Agent" means a person appointed by a seller to represent
10 the seller before the member states.

11 (2) "Agreement" means the Streamlined Sales and Use Tax
12 Agreement as defined in section two-a of this article.

13 (3) "Alcoholic beverages" means beverages that are suitable
14 for human consumption and contain one half of one percent or more
15 of alcohol by volume.

16 (4) "Bundled transaction" means the retail sale of two or more
17 products, except real property and services to real property,
18 where: (i) The products are otherwise distinct and identifiable;
19 and (ii) the products are sold for one nonitemized price. A
20 "bundled transaction" does not include the sale of any products in
21 which the "sales price" varies, or is negotiable, based on the
22 selection by the purchaser of the products included in the
23 transaction.

24 (A) "Distinct and identifiable products" does not include:

1 (i) Packaging such as containers, boxes, sacks, bags and
2 bottles or other materials such as wrapping, labels, tags and
3 instruction guides that accompany the "retail sale" of the products
4 and are incidental or immaterial to the "retail sale" thereof.
5 Examples of packaging that are incidental or immaterial include
6 grocery sacks, shoe boxes, dry cleaning garment bags and express
7 delivery envelopes and boxes;

8 (ii) A product provided free of charge with the required
9 purchase of another product. A product is "provided free of charge"
10 if the "sales price" of the product purchased does not vary
11 depending on the inclusion of the product "provided free of
12 charge"; or

13 (iii) Items included in the member state's definition of
14 "sales price" as defined in this section.

15 (B) The term "one nonitemized price" does not include a price
16 that is separately identified by product on binding sales or other
17 supporting sales-related documentation made available to the
18 customer in paper or electronic form including, but not limited to,
19 an invoice, bill of sale, receipt, contract, service agreement,
20 lease agreement, periodic notice of rates and services, rate card
21 or price list.

22 (C) A transaction that otherwise meets the definition of a
23 "bundled transaction", as defined in this subdivision, is not a
24 "bundled transaction" if it is:

1 (i) The "retail sale" of tangible personal property and a
2 service where the tangible personal property is essential to the
3 use of the service and is provided exclusively in connection with
4 the service and the true object of the transaction is the service;
5 or

6 (ii) The "retail sale" of services where one service is
7 provided that is essential to the use or receipt of a second
8 service and the first service is provided exclusively in connection
9 with the second service and the true object of the transaction is
10 the second service; or

11 (iii) A transaction that includes taxable products and
12 nontaxable products and the "purchase price" or "sales price" of
13 the taxable products is de minimis;

14 (I) "De minimis" means the seller's "purchase price" or "sales
15 price" of the taxable products is ten percent or less of the total
16 "purchase price" or "sales price" of the bundled products;

17 (II) Sellers shall use either the "purchase price" or the
18 "sales price" of the products to determine if the taxable products
19 are de minimis. Sellers may not use a combination of the "purchase
20 price" and "sales price" of the products to determine if the
21 taxable products are de minimis;

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

24 (iv) A transaction that includes products taxable at the

1 general rate of tax and food or food ingredients taxable at a lower
2 rate of tax and the "purchase price" or "sales price" of the
3 products taxable at the general sales tax rate is de minimis. For
4 purposes of this subparagraph, the term "de minimis" has the same
5 meaning as ascribed to it under subparagraph (iii) of this
6 paragraph;

7 (v) The "retail sale" of exempt tangible personal property, or
8 food and food ingredients taxable at a lower rate of tax, and
9 tangible personal property taxable at the general rate of tax
10 where:

11 (I) The transaction includes "food and food ingredients",
12 "drugs", "durable medical equipment", "mobility-enhancing
13 equipment", "over-the-counter drugs", "prosthetic devices" or
14 medical supplies, all as defined in this article; and

15 (II) Where the seller's "purchase price" or "sales price" of
16 the taxable tangible personal property taxable at the general rate
17 of tax is fifty percent or less of the total "purchase price" or
18 "sales price" of the bundled tangible personal property. Sellers
19 may not use a combination of the "purchase price" and "sales price"
20 of the tangible personal property when making the fifty percent
21 determination for a transaction.

22 (5) "Candy" means a preparation of sugar, honey or other
23 natural or artificial sweeteners in combination with chocolate,
24 fruits, nuts or other ingredients or flavorings in the form of

1 bars, drops or pieces. "Candy" shall not include any preparation
2 containing flour and shall require no refrigeration.

3 (6) "Clothing" means all human wearing apparel suitable for
4 general use. The following list contains examples and is not
5 intended to be an all-inclusive list.

6 (A) "Clothing" shall include:

- 7 (i) Aprons, household and shop;
- 8 (ii) Athletic supporters;
- 9 (iii) Baby receiving blankets;
- 10 (iv) Bathing suits and caps;
- 11 (v) Beach capes and coats;
- 12 (vi) Belts and suspenders;
- 13 (vii) Boots;
- 14 (viii) Coats and jackets;
- 15 (ix) Costumes;
- 16 (x) Diapers, children and adult, including disposable diapers;
- 17 (xi) Ear muffs;
- 18 (xii) Footlets;
- 19 (xiii) Formal wear;
- 20 (xiv) Garters and garter belts;
- 21 (xv) Girdles;
- 22 (xvi) Gloves and mittens for general use;
- 23 (xvii) Hats and caps;
- 24 (xviii) Hosiery;

- 1 (xix) Insoles for shoes;
 - 2 (xx) Lab coats;
 - 3 (xxi) Neckties;
 - 4 (xxii) Overshoes;
 - 5 (xxiii) Pantyhose;
 - 6 (xxiv) Rainwear;
 - 7 (xxv) Rubber pants;
 - 8 (xxvi) Sandals;
 - 9 (xxvii) Scarves;
 - 10 (xxviii) Shoes and shoe laces;
 - 11 (xxix) Slippers;
 - 12 (xxx) Sneakers;
 - 13 (xxxi) Socks and stockings;
 - 14 (xxxii) Steel-toed shoes;
 - 15 (xxxiii) Underwear;
 - 16 (xxxiv) Uniforms, athletic and nonathletic; and
 - 17 (xxxv) Wedding apparel.
- 18 (B) "Clothing" shall not include:
- 19 (i) Belt buckles sold separately;
 - 20 (ii) Costume masks sold separately;
 - 21 (iii) Patches and emblems sold separately;
 - 22 (iv) Sewing equipment and supplies, including, but not limited
 - 23 to, knitting needles, patterns, pins, scissors, sewing machines,
 - 24 sewing needles, tape measures and thimbles; and

1 (v) Sewing materials that become part of "clothing" including,
2 but not limited to, buttons, fabric, lace, thread, yarn and
3 zippers.

4 (7) "Clothing accessories or equipment" means incidental items
5 worn on the person or in conjunction with "clothing". "Clothing
6 accessories or equipment" are mutually exclusive of and may be
7 taxed differently than apparel within the definition of "clothing",
8 "sport or recreational equipment" and "protective equipment". The
9 following list contains examples and is not intended to be an all-
10 inclusive list. "Clothing accessories or equipment" shall include:

11 (A) Briefcases;

12 (B) Cosmetics;

13 (C) Hair notions, including, but not limited to, barrettes,
14 hair bows and hair nets;

15 (D) Handbags;

16 (E) Handkerchiefs;

17 (F) Jewelry;

18 (G) Sunglasses, nonprescription;

19 (H) Umbrellas;

20 (I) Wallets;

21 (J) Watches; and

22 (K) Wigs and hair pieces.

23 (8) "Certified automated system" or "CAS" means software
24 certified under the agreement to calculate the tax imposed by each

1 jurisdiction on a transaction, determine the amount of tax to remit
2 to the appropriate state and maintain a record of the transaction.

3 (9) "Certified service provider" or "CSP" means an agent
4 certified under the agreement to perform all of the seller's sales
5 and use tax functions other than the seller's obligation to remit
6 tax on its own purchases.

7 (10) "Computer" means an electronic device that accepts
8 information in digital or similar form and manipulates the
9 information for a result based on a sequence of instructions.

10 (11) "Computer software" means a set of coded instructions
11 designed to cause a "computer" or automatic data processing
12 equipment to perform a task.

13 (12) "Computer software maintenance contract" is a contract
14 that obligates a vendor of computer software, or other person, to
15 provide a customer with future updates or upgrades to computer
16 software, support services with respect to computer software or
17 both. The term "computer software maintenance contract" includes
18 contracts sold by a person other than the vendor of the computer
19 software to which the contract relates.

20 (A) A "mandatory computer software maintenance contract" is a
21 computer software maintenance contract that the customer is
22 obligated by contract to purchase as a condition to the retail sale
23 of computer software.

24 (B) An "optional computer maintenance contract" is a computer

1 software maintenance contract that a customer is not obligated to
2 purchase as a condition to the retail sale of computer software.

3 (13) "Delivered electronically" means delivered to the
4 purchaser by means other than tangible storage media.

5 ~~(12)~~ (14) "Delivery charges" means charges by the seller of
6 personal property or services for preparation and delivery to a
7 location designated by the purchaser of personal property or
8 services including, but not limited to, transportation, shipping,
9 postage, handling, crating and packing.

10 ~~(13)~~ (15) "Dietary supplement" means any product, other than
11 "tobacco", intended to supplement the diet that:

12 (A) Contains one or more of the following dietary ingredients:

13 (i) A vitamin;

14 (ii) A mineral;

15 (iii) An herb or other botanical;

16 (iv) An amino acid;

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

19 (vi) A concentrate, metabolite, constituent, extract or
20 combination of any ingredient described in subparagraph (i) through
21 (v), inclusive, of this paragraph;

22 (B) And is intended for ingestion in tablet, capsule, powder,
23 softgel, gelcap or liquid form, or if not intended for ingestion in
24 such a form, is not represented as conventional food and is not

1 represented for use as a sole item of a meal or of the diet; and

2 (C) Is required to be labeled as a dietary supplement,
3 identifiable by the "Supplemental Facts" box found on the label as
4 required pursuant to 21 CFR § 101.36 or in any successor section of
5 the Code of Federal Regulations.

6 ~~(14)~~ (16) "Direct mail" means printed material delivered or
7 distributed by United States mail or other delivery service to a
8 mass audience or to addressees on a mailing list provided by the
9 purchaser or at the direction of the purchaser when the cost of the
10 items are not billed directly to the recipients. "Direct mail"
11 includes tangible personal property supplied directly or indirectly
12 by the purchaser to the direct mail seller for inclusion in the
13 package containing the printed material. "Direct mail" does not
14 include multiple items of printed material delivered to a single
15 address.

16 ~~(15)~~ (17) "Drug" means a compound, substance or preparation,
17 and any component of a compound, substance or preparation, other
18 than food and food ingredients, dietary supplements or alcoholic
19 beverages:

20 (A) Recognized in the official United States Pharmacopoeia,
21 official Homeopathic Pharmacopoeia of the United States or official
22 National Formulary, and supplement to any of them;

23 (B) Intended for use in the diagnosis, cure, mitigation,
24 treatment or prevention of disease; or

1 (C) Intended to affect the structure or any function of the
2 body. The amendment to this subdivision enacted during the 2009
3 regular legislative session shall apply to sales made after July 1,
4 2009.

5 ~~(16)~~ (18) "Durable medical equipment" means equipment,
6 including repair and replacement parts for the equipment, but does
7 not include "mobility-enhancing equipment", which:

8 (A) Can withstand repeated use;

9 (B) Is primarily and customarily used to serve a medical
10 purpose;

11 (C) Generally is not useful to a person in the absence of
12 illness or injury; and

13 (D) Is not worn in or on the body.

14 ~~(17)~~ (19) "Electronic" means relating to technology having
15 electrical, digital, magnetic, wireless, optical, electromagnetic
16 or similar capabilities.

17 ~~(18)~~ (20) "Eligible property" means an item of a type, such as
18 clothing, that qualifies for a sales tax holiday exemption in this
19 state.

20 ~~(19)~~ (21) "Energy Star qualified product" means a product that
21 meets the energy efficient guidelines set by the United States
22 Environmental Protection Agency and the United States Department of
23 Energy that are authorized to carry the Energy Star label. Covered
24 products are those listed at www.energystar.gov or successor

1 address.

2 ~~(20)~~ (22) "Entity-based exemption" means an exemption based on
3 who purchases the product or service or who sells the product or
4 service. An exemption that is available to all individuals shall
5 not be considered an entity-based exemption.

6 ~~(21)~~ (23) "Food and food ingredients" means substances,
7 whether in liquid, concentrated, solid, frozen, dried or dehydrated
8 form, that are sold for ingestion or chewing by humans and are
9 consumed for their taste or nutritional value. "Food and food
10 ingredients" does not include alcoholic beverages, prepared food or
11 tobacco.

12 ~~(22)~~ (24) "Food sold through vending machines" means food
13 dispensed from a machine or other mechanical device that accepts
14 payment.

15 ~~(23)~~ (25) "Fur clothing" means "clothing" that is required to
16 be labeled as a fur product under the Federal Fur Products Labeling
17 Act (15 U.S.C. §69) and the value of the fur components in the
18 product is more than three times the value of the next most
19 valuable tangible component. "Fur clothing" is human-wearing
20 apparel suitable for general use but may be taxed differently from
21 "clothing". For the purposes of the definition of "fur clothing",
22 the term "fur" means any animal skin or part thereof with hair,
23 fleece or fur fibers attached thereto, either in its raw or
24 processed state, but shall not include such skins that have been

1 converted into leather or suede, or which in processing the hair,
2 fleece or fur fiber has been completely removed.

3 ~~(24)~~ (26) "Governing board" means the governing board of the
4 Streamlined Sales and Use Tax Agreement.

5 ~~(25)~~ (27) "Grooming and hygiene products" are soaps and
6 cleaning solutions, shampoo, toothpaste, mouthwash, antiperspirants
7 and sun tan lotions and screens, regardless of whether the items
8 meet the definition of "over-the-counter drugs".

9 ~~(26)~~ (28) "Includes" and "including" when used in a definition
10 contained in this article is not considered to exclude other things
11 otherwise within the meaning of the term being defined.

12 ~~(27)~~ (29) "Layaway sale" means a transaction in which property
13 is set aside for future delivery to a customer who makes a deposit,
14 agrees to pay the balance of the purchase price over a period of
15 time and, at the end of the payment period, receives the property.
16 An order is accepted for layaway by the seller when the seller
17 removes the property from normal inventory or clearly identifies
18 the property as sold to the purchaser.

19 ~~(28)~~ (30) "Lease" includes rental, hire and license. "Lease"
20 means any transfer of possession or control of tangible personal
21 property for a fixed or indeterminate term for consideration. A
22 lease or rental may include future options to purchase or extend.

23 (A) "Lease" does not include:

24 (i) A transfer of possession or control of property under a

1 security agreement or deferred payment plan that requires the
2 transfer of title upon completion of the required payments;

3 (ii) A transfer or possession or control of property under an
4 agreement that requires the transfer of title upon completion of
5 required payments and payment of an option price does not exceed
6 the greater of \$100 or one percent of the total required payments;
7 or

8 (iii) Providing tangible personal property along with an
9 operator for a fixed or indeterminate period of time. A condition
10 of this exclusion is that the operator is necessary for the
11 equipment to perform as designed. For the purpose of this
12 subparagraph, an operator must do more than maintain, inspect or
13 set-up the tangible personal property.

14 (iv) "Lease" or "rental" includes agreements covering motor
15 vehicles and trailers where the amount of consideration may be
16 increased or decreased by reference to the amount realized upon
17 sale or disposition of the property as defined in 26 U.S.C.
18 §7701(h)(1).

19 (B) This definition shall be used for sales and use tax
20 purposes regardless if a transaction is characterized as a lease or
21 rental under generally accepted accounting principles, the Internal
22 Revenue Code, the Uniform Commercial Code or other provisions of
23 federal, state or local law.

24 ~~(29)~~ (31) "Load and leave" means delivery to the purchaser by

1 use of a tangible storage media where the tangible storage media is
2 not physically transferred to the purchaser.

3 ~~(30)~~ (32) "Mobility-enhancing equipment" means equipment,
4 including repair and replacement parts to the equipment, but does
5 not include "durable medical equipment", which:

6 (A) Is primarily and customarily used to provide or increase
7 the ability to move from one place to another and which is
8 appropriate for use either in a home or a motor vehicle;

9 (B) Is not generally used by persons with normal mobility; and

10 (C) Does not include any motor vehicle or equipment on a motor
11 vehicle normally provided by a motor vehicle manufacturer.

12 ~~(31)~~ (33) "Model I seller" means a seller registered under the
13 Streamlined Sales and Use Tax Agreement that has selected a
14 certified service provider as its agent to perform all the seller's
15 sales and use tax functions, other than the seller's obligation to
16 remit tax on its own purchases.

17 ~~(32)~~ (34) "Model II seller" means a seller registered under
18 the Streamlined Sales and Use Tax Agreement that has selected a
19 certified automated system to perform part of its sales and use tax
20 functions, but retains responsibility for remitting the tax.

21 ~~(33)~~ (35) "Model III seller" means a seller registered under
22 the agreement that has sales in at least five member states, has
23 total annual sales revenue of at least \$500 million, has a
24 proprietary system that calculates the amount of tax due each

1 jurisdiction and has entered into a performance agreement with the
2 member states that establishes a tax performance standard for the
3 seller. As used in this definition, a seller includes an affiliated
4 group of sellers using the same proprietary system.

5 ~~(34)~~ (36) "Over-the-counter drug" means a drug that contains
6 a label that identifies the product as a drug as required by 21 CFR
7 § 201.66. The "over-the-counter drug" label includes:

8 (A) A "drug facts" panel; or

9 (B) A statement of the "active ingredient(s)" with a list of
10 those ingredients contained in the compound, substance or
11 preparation.

12 ~~(35)~~ (37) "Person" means an individual, trust, estate,
13 fiduciary, partnership, limited liability company, limited
14 liability partnership, corporation or any other legal entity.

15 ~~(36)~~ (38) "Personal service" includes those:

16 (A) Compensated by the payment of wages in the ordinary course
17 of employment; and

18 (B) Rendered to the person of an individual without, at the
19 same time, selling tangible personal property, such as nursing,
20 barbering, manicuring and similar services.

21 ~~(37)~~ (39) (A) "Prepared food" means:

22 (i) Food sold in a heated state or heated by the seller;

23 (ii) Two or more food ingredients mixed or combined by the
24 seller for sale as a single item; or

1 (iii) Food sold with eating utensils provided by the seller,
2 including plates, knives, forks, spoons, glasses, cups, napkins or
3 straws. A plate does not include a container or packaging used to
4 transport the food.

5 (B) "Prepared food" in subparagraph (ii), paragraph (A) of
6 this subdivision does not include food that is only cut, repackaged
7 or pasteurized by the seller, and eggs, fish, meat, poultry and
8 foods containing these raw animal foods requiring cooking by the
9 consumer as recommended by the Food and Drug Administration in
10 Chapter 3, Part 401.11 of its Food Code of 2001 so as to prevent
11 food-borne illnesses.

12 (C) Additionally, "prepared food" as defined in this
13 subdivision does not include:

14 (i) Food sold by a seller whose proper primary NAICS
15 classification is manufacturing in Sector 311, except Subsection
16 3118 (bakeries);

17 (ii) Food sold in an unheated state by weight or volume as a
18 single item; or

19 (iii) Bakery items, including bread, rolls, buns, biscuits,
20 bagels, croissants, pastries, donuts, danish, cakes, tortes, pies,
21 tarts, muffins, bars, cookies, tortillas.

22 ~~(38)~~ (40) "Prescription" means an order, formula or recipe
23 issued in any form of oral, written, electronic or other means of
24 transmission by a duly licensed practitioner authorized by the laws

1 of this state to issue prescriptions.

2 ~~(39)~~ (41) "Prewritten computer software" means "computer
3 software", including prewritten upgrades, which is not designed and
4 developed by the author or other creator to the specifications of
5 a specific purchaser.

6 (A) The combining of two or more prewritten computer software
7 programs or prewritten portions thereof does not cause the
8 combination to be other than prewritten computer software.

9 (B) "Prewritten computer software" includes software designed
10 and developed by the author or other creator to the specifications
11 of a specific purchaser when it is sold to a person other than the
12 specific purchaser. Where a person modifies or enhances computer
13 software of which the person is not the author or creator, the
14 person is considered to be the author or creator only of the
15 person's modifications or enhancements.

16 (C) "Prewritten computer software" or a prewritten portion
17 thereof that is modified or enhanced to any degree, where the
18 modification or enhancement is designed and developed to the
19 specifications of a specific purchaser, remains prewritten computer
20 software. However, where there is a reasonable, separately stated
21 charge or an invoice or other statement of the price given to the
22 purchaser for the modification or enhancement, the modification or
23 enhancement does not constitute prewritten computer software.

24 ~~(40)~~ (42) "Product-based exemption" means an exemption based

1 on the description of the product or service and not based on who
2 purchases the product or service or how the purchaser intends to
3 use the product or service.

4 ~~(41)~~ (43) "Prosthetic device" means a replacement, corrective
5 or supportive device, including repair and replacement parts for
6 the device worn on or in the body, to:

7 (A) Artificially replace a missing portion of the body;

8 (B) Prevent or correct physical deformity or malfunction of
9 the body; or

10 (C) Support a weak or deformed portion of the body.

11 ~~(42)~~ (44) "Protective equipment" means items for human wear
12 and designed as protection of the wearer against injury or disease
13 or as protections against damage or injury of other persons or
14 property but not suitable for general use.

15 ~~(43)~~ (45) "Purchase price" means the measure subject to the
16 tax imposed by article fifteen or fifteen-a of this chapter and has
17 the same meaning as sales price.

18 ~~(44)~~ (46) "Purchaser" means a person to whom a sale of
19 personal property is made or to whom a service is furnished.

20 ~~(45)~~ (47) "Retail sale" or "sale at retail" means:

21 (A) Any sale, lease or rental for any purpose other than for
22 resale as tangible personal property, sublease or subrent; and

23 (B) Any sale of a service other than a service purchased for
24 resale.

1 ~~(46)~~ (48) (A) "Sales price" means the measure subject to the
2 tax levied under article fifteen or fifteen-a of this chapter and
3 includes the total amount of consideration, including cash, credit,
4 property and services, for which personal property or services are
5 sold, leased or rented, valued in money, whether received in money
6 or otherwise, without any deduction for the following:

7 (i) The seller's cost of the property sold;

8 (ii) The cost of materials used, labor or service cost,
9 interest, losses, all costs of transportation to the seller, all
10 taxes imposed on the seller and any other expense of the seller;

11 (iii) Charges by the seller for any services necessary to
12 complete the sale, other than delivery and installation charges;

13 (iv) Delivery charges; and

14 (v) Installation charges.

15 (B) "Sales price" does not include:

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

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

23 (iii) Any taxes legally imposed directly on the consumer that
24 are separately stated on the invoice, bill of sale or similar

1 document given to the purchaser.

2 (C) "Sales price" shall include consideration received by the
3 seller from third parties if:

4 (i) The seller actually receives consideration from a party
5 other than the purchaser and the consideration is directly related
6 to a price reduction or discount on the sale;

7 (ii) The seller has an obligation to pass the price reduction
8 or discount through to the purchaser;

9 (iii) The amount of the consideration attributable to the sale
10 is fixed and determinable by the seller at the time of the sale of
11 the item to the purchaser; and

12 (iv) One of the following criteria is met:

13 (I) The purchaser presents a coupon, certificate or other
14 documentation to the seller to claim a price reduction or discount
15 where the coupon, certificate or documentation is authorized,
16 distributed or granted by a third party with the understanding that
17 the third party will reimburse any seller to whom the coupon,
18 certificate or documentation is presented;

19 (II) The purchaser identifies himself or herself to the seller
20 as a member of a group or organization entitled to a price
21 reduction or discount (a "preferred customer" card that is
22 available to any patron does not constitute membership in such a
23 group); or

24 (III) The price reduction or discount is identified as a

1 third-party price reduction or discount on the invoice received by
2 the purchaser or on a coupon, certificate or other documentation
3 presented by the purchaser.

4 ~~(47)~~ (49) "Sales tax" means the tax levied under article
5 fifteen of this chapter.

6 ~~(48)~~ (50) "School art supply" means an item commonly used by
7 a student in a course of study for artwork. The term is mutually
8 exclusive of the terms "school supply", "school instructional
9 material" and "school computer supply" and may be taxed
10 differently. The following is an all-inclusive list:

- 11 (A) Clay and glazes;
- 12 (B) Paints; acrylic, tempora and oil;
- 13 (C) Paintbrushes for artwork;
- 14 (D) Sketch and drawing pads; and
- 15 (E) Watercolors.

16 ~~(49)~~ (51) "School instructional material" means written
17 material commonly used by a student in a course of study as a
18 reference and to learn the subject being taught. The term is
19 mutually exclusive of the terms "school supply", "school art
20 supply" and "school computer supply" and may be taxed differently.

21 The following is an all-inclusive list:

- 22 (A) Reference books;
- 23 (B) Reference maps and globes;
- 24 (C) Textbooks; and

1 (D) Workbooks.

2 ~~(50)~~ (52) "School computer supply" means an item commonly used
3 by a student in a course of study in which a computer is used. The
4 term is mutually exclusive of the terms "school supply", "school
5 art supply" and "school instructional material" and may be taxed
6 differently. The following is an all-inclusive list:

7 (A) Computer storage media; diskettes, compact disks;

8 (B) Handheld electronic schedulers, except devices that are
9 cellular phones;

10 (C) Personal digital assistants, except devices that are
11 cellular phones;

12 (D) Computer printers; and

13 (E) Printer supplies for computers; printer paper, printer ink.

14 ~~(51)~~ (53) "School supply" means an item commonly used by a
15 student in a course of study. The term is mutually exclusive of the
16 terms "school art supply", "school instructional material" and
17 "school computer supply" and may be taxed differently. The
18 following is an all-inclusive list of school supplies:

19 (A) Binders;

20 (B) Book bags;

21 (C) Calculators;

22 (D) Cellophane tape;

23 (E) Blackboard chalk;

24 (F) Compasses;

- 1 (G) Composition books;
- 2 (H) Crayons;
- 3 (I) Erasers;
- 4 (J) Folders; expandable, pocket, plastic and manila;
- 5 (K) Glue, paste and paste sticks;
- 6 (L) Highlighters;
- 7 (M) Index cards;
- 8 (N) Index card boxes;
- 9 (O) Legal pads;
- 10 (P) Lunch boxes;
- 11 (Q) Markers;
- 12 (R) Notebooks;
- 13 (S) Paper; loose-leaf ruled notebook paper, copy paper, graph
14 paper, tracing paper, manila paper, colored paper, poster board and
15 construction paper;
- 16 (T) Pencil boxes and other school supply boxes;
- 17 (U) Pencil sharpeners;
- 18 (V) Pencils;
- 19 (W) Pens;
- 20 (X) Protractors;
- 21 (Y) Rulers;
- 22 (Z) Scissors; and
- 23 (AA) Writing tablets.
- 24 ~~(52)~~ (54) "Seller" means any person making sales, leases or

1 rentals of personal property or services.

2 ~~(53)~~ (55) "Service" or "selected service" includes all
3 nonprofessional activities engaged in for other persons for a
4 consideration which involve the rendering of a service as
5 distinguished from the sale of tangible personal property, but does
6 not include contracting, personal services, services rendered by an
7 employee to his or her employer, any service rendered for resale or
8 any service furnished by a business that is subject to the control
9 of the Public Service Commission when the service or the manner in
10 which it is delivered is subject to regulation by the Public
11 Service Commission of this state. The term "service" or "selected
12 service" does not include payments received by a vendor of tangible
13 personal property as an incentive to sell a greater volume of such
14 tangible personal property under a manufacturer's, distributor's or
15 other third-party's marketing support program, sales incentive
16 program, cooperative advertising agreement or similar type of
17 program or agreement and these payments are not considered to be
18 payments for a "service" or "selected service" rendered, even
19 though the vendor may engage in attendant or ancillary activities
20 associated with the sales of tangible personal property as required
21 under the programs or agreements.

22 ~~(54)~~ (56) "Soft drink" means nonalcoholic beverages that
23 contain natural or artificial sweeteners. "Soft drinks" do not
24 include beverages that contain milk or milk products, soy, rice or

1 similar milk substitutes or greater than fifty percent of vegetable
2 or fruit juice by volume.

3 ~~(55)~~ (57) "Sport or recreational equipment" means items
4 designed for human use and worn in conjunction with an athletic or
5 recreational activity that are not suitable for general use. "Sport
6 or recreational equipment" are mutually exclusive of and may be
7 taxed differently than apparel within the definition of "clothing",
8 "clothing accessories or equipment" and "protective equipment". The
9 following list contains examples and is not intended to be an all-
10 inclusive list. "Sport or recreational equipment" shall include:

- 11 (A) Ballet and tap shoes;
- 12 (B) Cleated or spiked athletic shoes;
- 13 (C) Gloves, including, but not limited to, baseball, bowling,
14 boxing, hockey and golf;
- 15 (D) Goggles;
- 16 (E) Hand and elbow guards;
- 17 (F) Life preservers and vests;
- 18 (G) Mouth guards;
- 19 (H) Roller and ice skates;
- 20 (I) Shin guards;
- 21 (J) Shoulder pads;
- 22 (K) Ski boots;
- 23 (L) Waders; and
- 24 (M) Wetsuits and fins.

1 ~~(56)~~ (58) "State" means any state of the United States, the
2 District of Columbia and the Commonwealth of Puerto Rico.

3 ~~(57)~~ (59) "Tangible personal property" means personal property
4 that can be seen, weighed, measured, felt or touched or that is in
5 any manner perceptible to the senses. "Tangible personal property"
6 includes, but is not limited to, electricity, steam, water, gas and
7 prewritten computer software.

8 ~~(58)~~ (60) "Tax" includes all taxes levied under articles
9 fifteen and fifteen-a of this chapter and additions to tax,
10 interest and penalties levied under article ten of this chapter.

11 ~~(59)~~ (61) "Tax Commissioner" means the State Tax Commissioner
12 or his or her delegate. The term "delegate" in the phrase "or his
13 or her delegate", when used in reference to the Tax Commissioner,
14 means any officer or employee of the State Tax Division duly
15 authorized by the Tax Commissioner directly, or indirectly by one
16 or more redelegations of authority, to perform the functions
17 mentioned or described in this article or rules promulgated for
18 this article.

19 ~~(60)~~ (62) "Taxpayer" means any person liable for the taxes
20 levied by articles fifteen and fifteen-a of this chapter or any
21 additions to tax penalties imposed by article ten of this chapter.

22 ~~(61)~~ (63) "Telecommunications service" or "telecommunication
23 service" when used in this article and articles fifteen and
24 fifteen-a of this chapter shall have the same meaning as that term

1 is defined in section two-b of this article.

2 ~~(62)~~ (64) "Tobacco" means cigarettes, cigars, chewing or pipe
3 tobacco or any other item that contains tobacco.

4 ~~(63)~~ (65) "Use tax" means the tax levied under article
5 fifteen-a of this chapter.

6 ~~(64)~~ (66) "Use-based exemption" means an exemption based on a
7 specified use of the product or service by the purchaser.

8 ~~(65)~~ (67) "Vendor" means any person furnishing services taxed
9 by article fifteen or fifteen-a of this chapter or making sales of
10 tangible personal property or custom software. "Vendor" and
11 "seller" are used interchangeably in this article and in articles
12 fifteen and fifteen-a of this chapter.

13 (c) Additional definitions.

14 Other terms used in this article are defined in articles
15 fifteen and fifteen-a of this chapter, which definitions are
16 incorporated by reference into this article. Additionally, other
17 sections of this article may define terms primarily used in the
18 section in which the term is defined.

19 **§11-15B-2a. Streamlined Sales and Use Tax Agreement defined.**

20 As used in this article and articles fifteen and fifteen-a of
21 this chapter, the term "Streamlined Sales and Use Tax Agreement" or
22 "agreement" means the agreement adopted November 12, 2002, by
23 states that enacted authority to engage in multistate discussions
24 similar to that provided in section four of this article, except

1 when the context in which the term is used clearly indicates that
2 a different meaning is intended by the Legislature. "Agreement"
3 includes amendments to the agreement adopted by the implementing
4 states in calendar years 2003, 2004, 2005, 2006, 2007, 2008, 2009,
5 2010 and amendments adopted by the governing board on or before,
6 January 31, ~~2010~~ 2011, but does not include any substantive changes
7 in the agreement adopted after January 31, ~~2010~~ 2011.

8 **§11-15B-24. Administration of exemptions.**

9 (a) *General rules.* - When a purchaser claims an exemption from
10 paying tax under article fifteen or fifteen-a of this chapter:

11 (1) Sellers shall obtain identifying information of the
12 purchaser and the reason for claiming a tax exemption at the time
13 of the purchase, as determined by the governing board.

14 (2) A purchaser is not required to provide a signature to
15 claim an exemption from tax unless a paper exemption certificate is
16 used.

17 (3) The seller shall use the standard form for claiming an
18 exemption electronically that is adopted by the governing board.

19 (4) The seller shall obtain the same information for proof of
20 a claimed exemption regardless of the medium in which the
21 transaction occurred.

22 (5) The Tax Commissioner may utilize a system wherein the
23 purchaser exempt from the payment of the tax is issued an
24 identification number that is presented to the seller at the time

1 of the sale.

2 (6) The seller shall maintain proper records of exempt
3 transactions and provide the records to the Tax Commissioner or the
4 Tax Commissioner's designee.

5 (7) The Tax Commissioner shall administer use-based and
6 entity-based exemptions when practicable through a direct pay
7 permit, an exemption certificate or another means that does not
8 burden sellers.

9 (8) ~~After December 31, 2007, in~~ In the case of drop shipments,
10 a third-party vendor such as a drop shipper may claim a resale
11 exemption based on an exemption certificate provided by its
12 customer/reseller or any other acceptable information available to
13 the third-party vendor evidencing qualification for a resale
14 exemption, regardless of whether the customer/reseller is
15 registered to collect and remit sales and use taxes in this state,
16 when the sale is sourced to this state.

17 (b) The Tax Commissioner shall relieve sellers that follow the
18 requirements of this section from the tax otherwise applicable if
19 it is determined that the purchaser improperly claimed an exemption
20 and shall hold the purchaser liable for the nonpayment of tax. This
21 relief from liability does not apply:

22 (A) To a seller who fraudulently fails to collect the tax;

23 (B) To a seller who solicits purchasers to participate in the
24 unlawful claim of an exemption;

1 (C) To a seller who accepts an exemption certificate when the
2 purchaser claims an entity-based exemption when: (i) The subject
3 of the transaction sought to be covered by the exemption
4 certificate is actually received by the purchaser at a location
5 operated by the seller; and (ii) the state in which that location
6 resides provides an exemption certificate that clearly and
7 affirmatively indicates (graying out exemption reason types on
8 uniform form and posting it on a state's website is an indicator)
9 that the claimed exemption is not available in that state.

10 (c) *Time within which seller must obtain exemption*
11 *certificates.* - A seller is relieved from paying tax otherwise
12 applicable under article fifteen or fifteen-a of this chapter if
13 the seller obtains a fully completed exemption certificate or
14 captures the required data elements within ninety days subsequent
15 to the date of sale.

16 (d) (1) If the seller has not obtained an exemption certificate
17 or all required data elements, the seller ~~may~~ shall, within one
18 hundred twenty days subsequent to a request for substantiation by
19 the Tax Commissioner, either prove that the transaction was not
20 subject to tax by other means or obtain a fully completed exemption
21 certificate from the purchaser, taken in good faith. For purposes
22 of this section, the Tax Commissioner may continue to apply this
23 state's standards of good faith until a uniform standard for good
24 faith is defined in the Streamlined Sales and Use Tax Agreement.

1 (2) If the seller obtains the information described in
2 subdivision (1) of this subsection, the seller shall be relieved of
3 any liability for the tax on the transaction unless it is
4 discovered through the audit process that the seller had knowledge
5 or had reason to know at the time such information was provided
6 that the information relating to the exemption claimed was
7 materially false or the seller otherwise knowingly participated in
8 activity intended to purposefully evade the tax that is properly
9 due on the transaction.

10 ~~(2)~~ (e) Nothing in this section shall affect the ability of
11 the Tax Commissioner to require purchasers to update exemption
12 certificate information or to reapply with the state to claim
13 certain exemptions.

14 ~~(3)~~ (f) ~~Notwithstanding the preceding provisions of this~~
15 ~~section, when an exemption may be claimed by exemption~~
16 ~~certificate, a~~ A seller is relieved from paying the tax otherwise
17 applicable if the seller obtains a blanket exemption certificate
18 from a purchaser with which the seller has a recurring business
19 relationship. ~~The~~ Notwithstanding the provisions of subsection (e)
20 of this section, the Tax Commissioner may not request from the
21 seller renewal of blanket certificates or updates of exemption
22 certificate information or data elements when there is a recurring
23 business relationship between the buyer and seller. For purposes of
24 this subdivision, a recurring business relationship exists when a

1 period of no more than twelve months elapses between sales
2 transactions.

3 ~~(d)~~(g) *Exception.* - No exemption certificate or direct pay
4 permit number is required when the sale is exempt per se from the
5 taxes imposed by articles fifteen and fifteen-a of this chapter.

6 **§11-15B-32. Effective date.**

7 (a) The provisions of this article, as amended or added during
8 the regular legislative session in the year 2003, shall take effect
9 January 1, 2004, and apply to all sales made on or after that date
10 and to all returns and payments due on or after that day, except as
11 otherwise expressly provided in section five of this article.

12 (b) The provisions of this article, as amended or added during
13 the second extraordinary legislative session in the year 2003,
14 shall take effect January 1, 2004, and apply to all sales made on
15 or after that date.

16 (c) The provisions of this article, as amended or added by act
17 of the Legislature in the year 2004 shall apply to all sales made
18 on or after the date of passage in the year 2004.

19 (d) The provisions of this article, as amended or added during
20 the regular legislative session in the year 2008, shall apply to
21 all sales made on or after the date of passage and to all returns
22 and payments due on or after that day, except as otherwise
23 expressly provided in this article.

24 (e) The provisions of this article, as amended or added during

1 the 2009 regular legislative session, shall apply to all sales made
2 on or after the date of passage and to all returns and payments due
3 on or after that day, except as otherwise expressly provided in
4 this article.

5 (f) The provisions of this article, as amended or added during
6 the 2010 regular legislative session, shall apply to all sales made
7 on or after the date of passage and to all returns and payments due
8 on or after that day, except as otherwise expressly provided in
9 this article.

10 (g) The provisions of this article, as amended or added during
11 the 2011 regular legislative session, shall apply to all sales made
12 on or after the date of passage and to all returns and payments due
13 on or after that day, except as otherwise expressly provided in
14 this article.

NOTE: This purpose of this bill is to update code provisions to conform to the Streamlined Sales Tax Agreement. The bill adds new definitions and clarifies present definitions. The bill incorporates changes to the Streamlined Sales and Use Tax Agreement and adds computer software maintenance contracts as a Streamlined Sales and Use Tax Agreement. The bill also relieves a seller of tax liability in certain instances. The bill provides new effective dates.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.