

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 247

(BY SENATORS KESSLER (ACTING PRESIDENT) AND HALL,
BY REQUEST OF THE EXECUTIVE)

[Passed March 12, 2011; in effect from passage.]

AN ACT to amend and reenact §11-15-8d of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §11-15-9n, all relating to consumers sales and service tax and use tax; specifying that restrictions on exemptions by a construction contractor do not apply for certain purchases of computers and computer software, primary material handling equipment, racking and racking systems and their components nor do these restrictions on exemptions apply to purchases of building materials and certain tangible personal property if the purchaser of computers and computer software and contracting services would be entitled to claim a newly created exemption; specifying exemption for certain purchases of computers and computer software, primary material handling equipment, racking and racking systems and their components, building materials and certain tangible personal property; specifying the application for certification of exemption and plan describing investment to be made; specifying application and plan filing date; specifying treatment of late filings and untimely filings of

application and plan; specifying loss of exemption if investment is not made within the expansion period; defining terms; specifying exclusions and limitations for qualified warehouses and distribution facilities; specifying exclusions and disqualifications for failure to meet statutory criteria and requirements; specifying over-the-counter sales restrictions; specifying manufacturing, fabrication and assembly restrictions; specifying statute of limitations; specifying issuance of assessments against the purchaser of contracting services entitled to the newly created exemption and not against a contractor who relied in good faith upon validity of an exemption; specifying that the taxpayer first pay to the vendor the tax and then apply to the State Tax Commissioner for a refund or credit; and alternative use of the direct pay permit number.

Be it enacted by the Legislature of West Virginia:

That §11-15-8d of the Code of West Virginia, 1931, as amended be amended and reenacted; and that said code be amended by adding thereto a new section, designated §11-15-9n, all to read as follows:

ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.

§11-15-8d. Limitations on right to assert exemptions.

1 (a) Persons who perform “contracting” as defined in
2 section two of this article, or persons acting in an agency
3 capacity, may not assert any exemption to which the pur-
4 chaser of such contracting services or the principal is
5 entitled. Any statutory exemption to which a taxpayer may
6 be entitled shall be invalid unless the tangible personal
7 property or taxable service is actually purchased by such
8 taxpayer and is directly invoiced to and paid by such
9 taxpayer. This section shall not apply to purchases by an
10 employee for his or her employer; purchases by a partner for
11 his or her partnership; or purchases by a duly authorized
12 officer of a corporation, or unincorporated organization, for
13 his or her corporation or unincorporated organization so
14 long as the purchase is invoiced to and paid by the employer,
15 partnership, corporation or unincorporated organization.

16 (b) *Transition rule.* — This section shall not apply to
17 purchases of tangible personal property or taxable services
18 in fulfillment of a purchasing agent or procurement agent
19 contract executed and legally binding on the parties thereto
20 prior to September 15, 1999: *Provided*, That this transition
21 rule shall not apply to any purchases of tangible personal
22 property or taxable services made under such a contract
23 after August 31, 1991; and this transition rule shall not apply
24 if the primary purpose of the purchasing agent or procure-
25 ment agent contract was to avoid payment of consumers
26 sales and use taxes. However, effective July 1, 2007, this
27 section shall not apply to purchases of services, machinery,
28 supplies or materials, except gasoline and special fuel, to be
29 directly used or consumed in the construction, alteration,
30 repair or improvement of a new or existing building or
31 structure by a person performing “contracting”, as defined
32 in section two of this article, if the purchaser of the “con-
33 tracting” services would be entitled to claim the refundable
34 exemption under subdivision (2), subsection (b), section nine
35 of this article had it purchased the services, machinery,
36 supplies or materials. Effective July 1, 2009, this section
37 shall not apply to purchases of services, computers, servers,
38 building materials and tangible personal property, except
39 purchases of gasoline and special fuel, to be installed into a
40 building or facility or directly used or consumed in the
41 construction, alteration, repair or improvement of a new or
42 existing building or structure by a person performing
43 “contracting”, as defined in section two of this article, if the
44 purchaser of the “contracting” services would be entitled to
45 claim the exemption under subdivision (7), subsection (a),
46 section nine-h of this article. This section shall not apply to
47 qualified purchases of computers and computer software,
48 primary material handling equipment, racking and racking
49 systems, and their components, or to qualified purchases of
50 building materials and certain tangible personal property, as
51 those terms are defined in section nine-n of this article, by a
52 person performing “contracting,” as defined in section two
53 of this article, if the purchaser of the “contracting” services
54 would be entitled to claim the refundable exemption under
55 section nine-n of this article. Purchases of gasoline and

56 special fuel shall not be treated as exempt pursuant to this
57 section.

**§11-15-9n. Exemption of qualified purchases of computers and
computer software, primary material handling
equipment, racking and racking systems, and
components, building materials and certain tangi-
ble personal property.**

1 (a) *Definitions.* - For purposes of this section:

2 (1) "Building materials" means all tangible personal
3 property, including any device or appliance used by builders,
4 contractors or landowners in making improvements, addi-
5 tions, or alterations to a building or other structure or to real
6 property in such a way that such tangible personal property
7 becomes a part of the building or other structure or the
8 realty, which is installed into or directly used or consumed
9 in the construction, addition, alteration, repair or improve-
10 ment of a qualified, new or expanded warehouse or distribu-
11 tion facility. "Building materials" does not include tools,
12 construction equipment or any property or device which does
13 not become a permanent part of the realty when construction
14 is completed. A device or appliance becomes a fixture and a
15 part of the building or other structure or the real property to
16 which it is connected when it is built into or is attached to
17 the property in such a way that its removal would substan-
18 tially damage or deface such property.

19 (2) "Computers and computer software" as defined in
20 section two, article fifteen-b of this chapter means computer
21 equipment and related software directly and primarily used
22 to control automated machinery in the facility and the
23 movement of goods within the facility, to facilitate customer
24 delivery operations including shipment, preparation for
25 shipment, order tracking and delivery inventory control,
26 printing of packing lists and labels and any other customer
27 order fulfillment functions.

28 (3) "Distribution facility" means a warehouse, facility,
29 structure, or enclosed area which is used primarily for the

30 storage, shipment, preparation for shipment, or any combi-
31 nation of such activities, of finished goods, consumer ready
32 wares, and consumer ready merchandise.

33 (4) “Expansion period” means the period of time beginning
34 one year prior to the start of the construction or expansion
35 of the qualified, new or expanded warehouse or distribution
36 facility, and ending one year after the substantial completion
37 of the construction or expansion of the facility. In no event
38 shall the expansion period exceed five years.

39 (5) “Full-time employment” for purposes of determining a
40 full-time employee or a full-time equivalent employee, means
41 employment for at least one hundred forty hours per month
42 at a wage not less than the prevailing state or federal
43 minimum wage, depending on which minimum wage provi-
44 sion is applicable to the business.

45 (A) For purposes of this definition, any employee paid less
46 than state or federal minimum wage, depending on which
47 minimum wage provision is applicable, shall be excluded
48 from the count of employees for the purpose of determining
49 the three hundred jobs requirement of this section.

50 (B) For purposes of this definition, seasonal employees and
51 part-time employees may be converted into full-time equiva-
52 lent employees if the part-time or seasonal employee is
53 customarily performing job duties not less than twenty hours
54 per week for at least six months during the tax year. Persons
55 who have worked less than twenty hours per week or who
56 have worked less than six months during the tax year do not
57 qualify as part-time employees or as seasonal employees.

58 (6) “Primary material handling equipment” means the
59 principal machinery and equipment used directly and
60 primarily for the handling and movement of tangible
61 personal property in a qualified, new or expanded warehouse
62 or distribution facility.

63 (A) The following items may be considered primary
64 material handling equipment:

65 (i) Conveyers, carousels, lifts, positioners, pick-up-
66 and-place units, cranes, hoists, mechanical arms and robots;

67 (ii) Mechanized systems, including containers which are an
68 integral part thereof, whose purpose is to lift or move
69 tangible personal property;

70 (iii) Automated storage and retrieval systems, including
71 computers and software which control them, whose purpose
72 is to lift or move tangible personal property; and

73 (iv) Forklifts and other off-the-road vehicles which are
74 used to lift or move tangible personal property and which
75 cannot be legally operated on roads and streets.

76 (B) "Primary material handling equipment" does not
77 include:

78 (i) Motor vehicles licensed for operation on the roads and
79 highways of this state or any other state of the United States
80 or any other political jurisdiction;

81 (ii) Parts or equipment used to repair, refurbish, or recon-
82 dition other equipment; or.

83 (iii) Equipment which replaces, in whole or in part,
84 primary material handling equipment.

85 (7) "Qualified, new or expanded warehouse or distribution
86 facility" means a new or expanded facility, subject to the
87 following:

88 (A) Qualification criteria. "Qualified, new or expanded
89 warehouse or distribution facility" means a new or expanded
90 facility located in this state, that is a warehouse or distribu-
91 tion facility that will employ three hundred or more West
92 Virginia domiciled, West Virginia residents, as full-time
93 employees in the warehouse or distribution facility once the
94 expansion period is complete and which is either:

95 (i) An existing warehouse or distribution facility that will
96 be expanded over the expansion period where the total value
97 of all real and personal property purchased or acquired over

98 the expansion period as direct investment in the facility is
99 \$50 million or more; or

100 (ii) A new warehouse or distribution facility where the
101 total value of all real and personal property purchased or
102 acquired over the expansion period as direct investment in
103 the facility is \$50 million or more.

104 (B) Exclusions and disqualifications.

105 (i) Subject to the limitations and restrictions set forth in
106 this section, “qualified, new or expanded warehouse or
107 distribution facility” does not include a building or facility
108 where tangible personal property is manufactured, fabri-
109 cated or assembled.

110 (ii) Subject to the limitations and restrictions set forth in
111 this section, “qualified, new or expanded warehouse or
112 distribution facility” does not include a building or facility
113 where annual calendar year retail sales of tangible personal
114 property are made over-the-counter from such building or
115 facility to the general public, if such sales exceed five
116 percent of the total annual calendar year revenues of the
117 warehouse or distribution facility during the same calendar
118 year.

119 (iii) Subject to the limitations and restrictions set forth in
120 this section, “qualified, new or expanded warehouse or
121 distribution facility” does not include a building or facility
122 where the average monthly full-time employment (deter-
123 mined by including full-time equivalent employees) for each
124 calendar year at the facility is less than three hundred West
125 Virginia domiciled, West Virginia residents. For purposes of
126 determining average monthly employment for the calendar
127 year, the taxpayer shall divide the sum of the twelve monthly
128 averages of qualified full-time and full-time equivalent West
129 Virginia employees at the qualified, new or expanded
130 warehouse or distribution facility by twelve. Each monthly
131 average is computed as the average of West Virginia employ-
132 ment at the beginning of each calendar month and at the end
133 of each calendar month. *Provided*, That the State Tax

134 Commissioner may specify a different method for computa-
135 tion of average monthly full-time employment, on a state-
136 wide basis or on a case-by-case basis, or both, as the State
137 Tax Commissioner may prescribe.

138 (8) “Qualified West Virginia employee” means a full-time
139 employee or full-time equivalent employee who is a West
140 Virginia domiciled West Virginia resident.

141 (9) “Racking and racking systems” means any system of
142 machinery, equipment, fixtures, or portable devices whose
143 function is to store, organize, or move tangible personal
144 property within a warehouse or distribution facility, includ-
145 ing, but not limited to, conveying systems, chutes, shelves,
146 racks, bins, drawers, pallets, and other containers and
147 storage devices which form a necessary part of the facility’s
148 storage system, and which is used directly and primarily for
149 the storage, handling and movement of tangible personal
150 property in a qualified, new or expanded warehouse or
151 distribution facility.

152 (10) “Tangible personal property” means tangible personal
153 property as defined in section two, article fifteen-b of this
154 chapter.

155 (11) “Warehouse” means a facility, structure, or enclosed
156 area which is used primarily for the storage of finished
157 goods, consumer ready wares, and consumer ready merchan-
158 dise.

159 (b) *Exemption.* — Qualified purchases of computers and
160 computer software, primary material handling equipment,
161 racking and racking systems, and components thereof,
162 building materials and tangible personal property installed
163 into or directly used or consumed in the construction,
164 addition, alteration or improvement of a qualified, new or
165 expanded warehouse or distribution facility, as such terms
166 are defined in this section, purchased during the expansion
167 period are exempt from the tax imposed by this article and
168 article fifteen-a of this chapter. This exemption may apply
169 either to qualified purchases made by a person or entity

170 which will be the owner and operator of the qualified, new
171 or expanded warehouse or distribution facility or to quali-
172 fied purchases made by a lessor or lessee of the qualified,
173 new or expanded warehouse or distribution facility. A
174 purchase of computers and computer software, primary
175 material handling equipment, racking and racking systems,
176 and components thereof, building materials and tangible
177 personal property is a qualified purchase if all requirements
178 for exemption set forth in this section are met with relation
179 to the purchase.

180 (c) *Application for certification of exemption and plan*
181 *describing investment to be made.* —

182 (1) In order to qualify for the exemption authorized by this
183 section, a taxpayer must submit an application for certifica-
184 tion of the exemption to the State Tax Commissioner,
185 together with a plan describing the investment to be made in
186 the qualified, new or expanded warehouse or distribution
187 facility. The application and plan shall be submitted on
188 forms prescribed by the State Tax Commissioner. The plan
189 shall demonstrate that the requirements of the law will be
190 met.

191 (2) Filing date. The application for certification of the
192 exemption and plan describing the investment to be made
193 must be filed on or before the start of the construction or
194 expansion of the proposed qualified, new or expanded
195 warehouse or distribution facility.

196 (3) Late filing. If the taxpayer fails to timely file the
197 application for certification of the exemption with the State
198 Tax Commissioner, together with a plan describing the
199 investment to be made, on or before the start of the construc-
200 tion or expansion of the proposed qualified, new or expanded
201 warehouse or distribution facility, the exemption allowed by
202 this section shall not be available for any purchases of
203 computer and computer software, primary material handling
204 equipment, racking and racking systems, and components
205 thereof, building materials and tangible personal property

206 otherwise exempt under this section that were made prior to
207 the filing date of the application for certification of the
208 exemption, and no refund shall be issued for any such
209 purchase.

210 (4) Exemption in cases of untimely filing. Notwithstanding
211 the untimely filing of the application for certification of the
212 exemption and plan describing the investment to be made, if
213 certification of the exemption and plan is issued by the State
214 Tax Commissioner of an untimely filed application and plan,
215 the exemption shall be available for qualified purchases of
216 computers and computer software, primary material han-
217 dling equipment, racking and racking systems, and compo-
218 nents thereof, building materials and tangible personal
219 property made subsequent to the filing date of the applica-
220 tion and plan and before the end of the expansion period.

221 (5) Exemption limited to expansion period purchases.

222 (A) Upon approval of the application and certification of
223 the exemption, qualified purchases of computers and
224 computer software, primary material handling equipment,
225 racking and racking systems, and components thereof,
226 building materials and tangible personal property shall be
227 exempt from the tax imposed by this article and article
228 fifteen-a of this chapter. However, if the requisite investment
229 is not made within the expansion period, or if the terms and
230 requirements of this section are not satisfied, the taxpayer
231 shall be subject to assessment for any tax, penalty or interest
232 that would otherwise have been due.

233 (B) Limitations. Any statute of limitations set forth in
234 article ten of this chapter for assessment made under this
235 subsection for any such tax, penalty or interest shall not
236 close until five years subsequent to the end of the expansion
237 period.

238 (d) Any person having a right or claim to any exemption set
239 forth in this section shall first pay to the vendor the tax
240 imposed by this article and then apply to the State Tax
241 Commissioner for a refund or credit or, as provided in

242 section nine-d of this article, give to the vendor his or her
243 West Virginia direct pay permit number.

244 (e) *Additional Restrictions, Assessments and Statutes of*
245 *Limitations.* —

246 (1) Over-the-counter sales restrictions.

247 (A) If within ten years after the end of the expansion
248 period, over-the-counter sales are made in any one calendar
249 year, from a warehouse or distribution facility for which
250 qualification for exemption under this section was originally
251 established, which over-the-counter sales, in the aggregate,
252 exceed five percent of the total revenues of the warehouse or
253 distribution facility during the same calendar year, the
254 taxpayer will be disqualified from receiving the exemption
255 under this section as of the close of the calendar year in
256 which over-the-counter sales first exceed five percent of the
257 total revenues of the warehouse or distribution facility
258 during the same calendar year; and the taxpayer shall be
259 subject to assessment for any tax, penalty or interest that
260 would otherwise have been due had the exemption set forth
261 in this section never been applied. This over-the-counter
262 sales restriction shall not apply to any year subsequent to the
263 end of the tenth year after the end of the expansion period.

264 (B) Limitations. Notwithstanding any other provision of
265 this code pertaining to statute of limitations to the contrary,
266 any statute of limitations set forth in article ten of this
267 chapter for assessment for any such tax, penalty or interest
268 shall not close until five years subsequent to the end of the
269 calendar year in which over-the-counter sales first exceed
270 five percent of the total revenues of the warehouse or
271 distribution facility during the same period.

272 (2) Fabrication and Assembly Restriction.

273 (A) Subject to the restriction and limitations set forth in
274 this subsection, a qualified new or expanded warehouse or
275 distribution facility does not include a building or facility
276 where tangible personal property is manufactured, fabri-

277 cated or assembled. If during any calendar year within ten
278 years after the end of the expansion period, the building or
279 facility for which qualification for exemption under this
280 section was originally established, is used for manufacturing,
281 fabrication or assembly of tangible personal property, the
282 taxpayer will be disqualified from receiving the exemption
283 set forth in this section as of the date such manufacturing,
284 fabrication or assembly first occurs, and the taxpayer shall
285 be subject to assessment for any tax, penalty or interest that
286 would otherwise have been due had the exemption set forth
287 in this section never been applied. This restriction against
288 manufacturing, fabrication and assembly shall not apply to
289 any year subsequent to the tenth year after the end of the
290 expansion period.

291 (B) Limitations. Notwithstanding any other provision of
292 this code pertaining to statute of limitations to the contrary,
293 any statute of limitations set forth in article ten of this
294 chapter for

295 assessment for any such tax, penalty or interest shall not
296 close until five years subsequent to the end of the calendar
297 year during which such manufacturing, fabrication or
298 assembly first occurs.

299 (3) Minimum employment restriction.

300 (A) Subject to the limitations and restrictions set forth in
301 this section, "qualified, new or expanded warehouse or
302 distribution facility" does not include a building or facility
303 where the average monthly full-time employment (deter-
304 mined including full-time equivalent employees) for each
305 calendar year at the facility is less than three hundred West
306 Virginia domiciled, West Virginia residents. If during any
307 calendar year within ten years after the end of the expansion
308 period, the average monthly full-time employment at the
309 building or facility for which qualification for exemption
310 under this section was originally established, is fewer than
311 three hundred qualified West Virginia employees, then the
312 taxpayer will be disqualified from receiving the exemption
313 under this section as of the close of the first calendar year in

314 which the average monthly full-time employment at the
315 facility is less than three hundred West Virginia domiciled,
316 West Virginia residents, and the taxpayer shall be subject to
317 assessment for any tax, penalty or interest that would
318 otherwise have been due had the exemption set forth in this
319 section never been applied. This restriction against having
320 fewer than three hundred qualified West Virginia employees
321 shall not apply to any year subsequent to the tenth year after
322 the end of the expansion period.

323 (B) Limitations. Notwithstanding any other provision of
324 this code pertaining to statute of limitations to the contrary,
325 any statute of limitations set forth in article ten of this
326 chapter for assessment for any such tax, penalty or interest
327 shall not close until five years subsequent to the end of the
328 first calendar year in which the average monthly full-time
329 employment at the facility is less than three hundred
330 qualified West Virginia employees.

331 (f) *Assessments Against Taxpayer.* — In circumstances
332 where the exemption authorized under this section has been
333 asserted by a contractor pursuant to the provisions of section
334 eight-d of this article for purchases of computers and
335 computer software, primary material handling equipment,
336 racking and racking systems, and components thereof,
337 building materials and tangible personal property, the
338 assessment of such tax, interest and penalties shall issue
339 against, and liability is hereby imposed upon, the purchaser
340 of the contracting services, which is the taxpayer entitled to
341 the exemption set forth in this section, and not against the
342 contractor who relied in good faith upon the validity of the
343 exemption available under this section to the purchaser of
344 the contracting services.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman Senate Committee

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Chairman House Committee

Originated in the Senate.

In effect from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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Acting President of the Senate

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Speaker of the House of Delegates

The within this the
Day of, 2011.

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Governor