

1 **ENROLLED**

2 **COMMITTEE SUBSTITUTE**

3 **FOR**

4 **H. B. 2754**

5 (By Mr. Speaker, (Mr. Thompson) and Delegate Armstead)
6 [By Request of the Executive]

7 [Passed April 13, 2013; in effect ninety days from passage.]

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9
10 AN ACT to amend and reenact §11-15A-1 of the Code of West Virginia,
11 1931, as amended, relating to expanding the definition of a
12 "retailer engaging in business in this state" for purposes of
13 sales and use taxes to include any retailer that is related
14 to, or part of a unitary business with, a person, entity or
15 business that is a subsidiary of the retailer, or is related
16 to, or unitary with, the retailer as a related entity, a
17 related member or part of a unitary business that meets one of
18 four certain additional criteria; providing illustrative
19 examples of the term "service" for purposes of the expanded
20 definition; and providing effective date for the change of
21 definition.

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

23 That §11-15A-1 of the Code of West Virginia, 1931, as amended,
24 be amended and reenacted to read as follows:

25 **ARTICLE 15A. USE TAX.**

26 **§11-15A-1. Definitions.**

1 (a) *General.* -- When used in this article and article fifteen
2 of this chapter, terms defined in subsection (b) of this section
3 have the meanings ascribed to them in this section, except in those
4 instances where a different meaning is provided in this article or
5 the context in which the word is used clearly indicates that a
6 different meaning is intended by the Legislature:

7 (b) (1) "Business" means any activity engaged in by any person,
8 or caused to be engaged in by any person, with the object of direct
9 or indirect economic gain, benefit or advantage, and includes any
10 purposeful revenue generating activity in this state;

11 (2) "Consumer" means any person purchasing tangible personal
12 property, custom software or a taxable service from a retailer as
13 defined in paragraph (7) of this subsection or from a seller as
14 defined in section two, article fifteen-b of this chapter;

15 (3) "Lease" includes rental, hire and license;

16 (4) "Person" includes any individual, firm, partnership, joint
17 venture, joint stock company, association, public or private
18 corporation, limited liability company, limited liability
19 partnership, cooperative, estate, trust, business trust, receiver,
20 executor, administrator, any other fiduciary, any representative
21 appointed by order of any court or otherwise acting on behalf of
22 others, or any other group or combination acting as a unit, and the
23 plural as well as the singular number;

24 (5) "Purchase" means any transfer, exchange or barter,
25 conditional or otherwise, in any manner or by any means whatsoever,
26 for a consideration;

1 (6) "Purchase price" means the measure subject to the tax
2 imposed by this article and has the same meaning as sales price;

3 (7) "Retailer" means and includes every person engaging in the
4 business of selling, leasing or renting tangible personal property
5 or custom software or furnishing a taxable service for use within
6 the meaning of this article, or in the business of selling, at
7 auction, tangible personal property or custom software owned by the
8 person or others for use in this state: *Provided*, That when in the
9 opinion of the Tax Commissioner it is necessary for the efficient
10 administration of this article to regard any salespersons,
11 representatives, truckers, peddlers or canvassers as the agents of
12 the dealers, distributors, supervisors, employees or persons under
13 whom they operate or from whom they obtain the tangible personal
14 property sold by them, irrespective of whether they are making
15 sales on their own behalf or on behalf of the dealers,
16 distributors, supervisors, employers or persons, the Tax
17 Commissioner may so regard them and may regard the dealers,
18 distributors, supervisors, employers, or persons as retailers for
19 purposes of this article;

20 (8) "Retailer engaging in business in this state" or any like
21 term, unless otherwise limited by federal statute, means and
22 includes, but is not limited to:

23 (A) Any retailer having or maintaining, occupying or using,
24 within this state, directly or by a subsidiary, an office,
25 distribution house, sales house, warehouse, or other place of
26 business, or any agent (by whatever name called) operating within

1 this state under the authority of the retailer or its subsidiary,
2 irrespective of whether the place of business or agent is located
3 here permanently or temporarily, or whether the retailer or
4 subsidiary is admitted to do business within this state pursuant to
5 article fifteen, chapter thirty-one-d of this code or article
6 fourteen, chapter thirty-one-e of this code; or

7 (B) On and after January 1, 2014, any retailer that is related
8 to, or part of a unitary business with, a person, entity or
9 business that, without regard to whether the retailer is admitted
10 to do business in this state pursuant to article fifteen, chapter
11 thirty-one-d of this code or article fourteen, chapter thirty-one-e
12 of this code, is a subsidiary of the retailer, or is related to, or
13 unitary with, the retailer as a related entity, a related member or
14 part of a unitary business, all as defined in article twenty four,
15 section three-a of this chapter;

16 (i) That, pursuant to an agreement with or in cooperation with
17 the related retailer, maintains an office, distribution house,
18 sales house, warehouse or other place of business in this state;

19 (ii) That performs services in this state in connection with
20 tangible personal property or services sold by the retailer, or any
21 related entity, related member or part of the unitary business;

22 (iii) That, by any agent, or representative (by whatever name
23 called), or employee, performs services in this state in connection
24 with tangible personal property or services sold by the retailer,
25 or any related entity, related member or part of the unitary
26 business; or

1 (iv) That directly, or through or by an agent, representative
2 or employee located in, or present in, this state, solicits
3 business in this state for or on behalf of the retailer, or any
4 related entity, related member or part of the unitary business.

5 (C) For purposes of paragraph (B) of this subdivision, the
6 term "service" means and includes, but is not limited to, customer
7 support services, help desk services, call center services, repair
8 services, engineering services, installation service, assembly
9 service, delivery service by means other than common carrier or the
10 United States Postal Service, technical assistance services, the
11 service of investigating, handling or otherwise assisting in
12 resolving customer issues or complaints while in this state, the
13 service of operating a mail order business or telephone, Internet
14 or other remote order business from facilities located within this
15 state, the service of operating a website or Internet-based
16 business from a location within the state, or any other service.

17 (9) "Sale" means any transaction resulting in the purchase or
18 lease of tangible personal property, custom software or a taxable
19 service from a retailer;

20 (10) "Seller" means a retailer, and includes every person
21 selling or leasing tangible personal property or custom software or
22 furnishing a taxable service in a transaction that is subject to
23 the tax imposed by this article;

24 (11) "Streamlined sales and use tax agreement" or "agreement,"
25 when used in this article, has the same meaning as when used in
26 article fifteen-b of this chapter, except when the context in which

1 the word agreement is used clearly indicates that a different
2 meaning is intended by the Legislature;

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

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

16 (14) "Taxpayer" includes any person within the meaning of this
17 section, who is subject to a tax imposed by this article, whether
18 acting for himself or herself or as a fiduciary; and

19 (15) "Use" means and includes:

20 (A) The exercise by any person of any right or power over
21 tangible personal property or custom software incident to the
22 ownership, possession or enjoyment of the property, or by any
23 transaction in which possession of or the exercise of any right or
24 power over tangible personal property, custom software or the
25 result of a taxable service is acquired for a consideration,

1 including any lease, rental or conditional sale of tangible
2 personal property or custom software; or

3 (B) The use or enjoyment in this state of the result of a
4 taxable service. As used in this subdivision, "enjoyment" includes
5 a purchaser's right to direct the disposition of the property or
6 the use of the taxable service, whether or not the purchaser has
7 possession of the property.

8 The term "use" does not include the keeping, retaining or
9 exercising any right or power over tangible personal property,
10 custom software or the result of a taxable service for the purpose
11 of subsequently transporting it outside the state for use
12 thereafter solely outside this state.

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