

COMMITTEE SUBSTITUTE

FOR

H. B. 2754

(BY MR. SPEAKER, (MR. THOMPSON)

AND DELEGATE ARMSTEAD)

[BY REQUEST OF THE EXECUTIVE]

(Originating in the Committee on Finance)

[March 25, 2013]

A BILL to amend and reenact §11-15A-1 of the Code of West Virginia, 1931, as amended, relating to expanding the definition of a “retailer engaging in business in this state” for purposes of sales and use taxes to include any retailer that is related to, or part of a unitary business with, a person, entity or business that is a subsidiary of the retailer, or is related to, or unitary with, the retailer as a related entity, a related member or part of a unitary

business that meets one of four certain additional criteria; providing illustrative examples of the term “service” for purposes of the expanded definition; and providing effective date for the change of definition.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 15A. USE TAX.

§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 ~~shall~~ have the meanings ascribed to them in this section, except
4 in those instances where a different meaning is provided in this
5 article or the context in which the word is used clearly indicates
6 that a different meaning is intended by the Legislature:

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

11 (2) “Consumer” means any person purchasing tangible
12 personal property, custom software or a taxable service from a

13 retailer as defined in paragraph (7) of this subsection ~~(b)~~ or from
14 a seller as 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
23 the 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
26 whatsoever, for a consideration;

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

29 (7) "Retailer" means and includes every person engaging in
30 the business of selling, leasing or renting tangible personal
31 property or custom software or furnishing a taxable service for
32 use within the meaning of this article, or in the business of

33 selling, at auction, tangible personal property or custom software
34 owned by the person or others for use in this state: *Provided*,
35 That when in the opinion of the Tax Commissioner it is
36 necessary for the efficient administration of this article to regard
37 any salespersons, representatives, truckers, peddlers or
38 canvassers as the agents of the dealers, distributors, supervisors,
39 employees or persons under whom they operate or from whom
40 they obtain the tangible personal property sold by them,
41 irrespective of whether they are making sales on their own
42 behalf or on behalf of the dealers, distributors, supervisors,
43 employers or persons, the Tax Commissioner may so regard
44 them and may regard the dealers, distributors, supervisors,
45 employers, or persons as retailers for purposes of this article;

46 (8) “Retailer engaging in business in this state” or any like
47 term, unless otherwise limited by federal statute, ~~shall mean and~~
48 ~~include, but not be~~ means and includes, but is not limited to:

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

53 within this state under the authority of the retailer or its
54 subsidiary, irrespective of whether the place of business or agent
55 is located here permanently or temporarily, or whether the
56 retailer or subsidiary is admitted to do business within this state
57 pursuant to article fifteen, chapter thirty-one-d of this code or
58 article fourteen, chapter thirty-one-e of this code; or

59 (B) On and after January 1, 2014, any retailer that is related
60 to, or part of a unitary business with, a person, entity or business
61 that, without regard to whether the retailer is admitted to do
62 business in this state pursuant to article fifteen, chapter thirty-
63 one-d of this code or article fourteen, chapter thirty-one-e of this
64 code, is a subsidiary of the retailer, or is related to, or unitary
65 with, the retailer as a related entity, a related member or part of
66 a unitary business, all as defined in article twenty four, section
67 three-a of this chapter;

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

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

74 (iii) That, by any agent, or representative (by whatever name
75 called), or employee, performs services in this state in
76 connection with tangible personal property or services sold by
77 the retailer, or any related entity, related member or part of the
78 unitary business; or

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

83 (C) For purposes of paragraph (B) of this subdivision, the
84 term “service” means and includes, but is not limited to,
85 customer support services, help desk services, call center
86 services, repair services, engineering services, installation
87 service, assembly service, delivery service by means other than
88 common carrier or the United States Postal Service, technical
89 assistance services, the service of investigating, handling or
90 otherwise assisting in resolving customer issues or complaints
91 while in this state, the service of operating a mail order business
92 or telephone, Internet or other remote order business from
93 facilities located within this state, the service of operating a

94 website or Internet-based business from a location within the
95 state, or any other service.

96 (9) “Sale” means any transaction resulting in the purchase or
97 lease of tangible personal property, custom software or a taxable
98 service from a retailer;

99 (10) “Seller” means a retailer, and includes every person
100 selling or leasing tangible personal property or custom software
101 or furnishing a taxable service in a transaction that is subject to
102 the tax imposed by this article;

103 (11) “Streamlined sales and use tax agreement” or
104 “agreement,” when used in this article, ~~shall have~~ has the same
105 meaning as when used in article fifteen-b of this chapter, except
106 when the context in which the word agreement is used clearly
107 indicates that a different meaning is intended by the Legislature;

108 (12) “Tangible personal property” means personal property
109 that can be seen, weighed, measured, felt, or touched, or that is
110 in any manner perceptible to the senses. “Tangible personal
111 property” includes, but is not limited to, electricity, water, gas,
112 and prewritten computer software;

113 (13) “Tax commissioner” or “commissioner” means the
114 State Tax Commissioner, or his or her delegate. The term

115 “delegate” in the phrase “or his or her delegate,” when used in
116 reference to the Tax Commissioner, means any officer or
117 employee of the State Tax Division duly authorized by the Tax
118 Commissioner directly, or indirectly by one or more
119 redelegations of authority, to perform the functions mentioned
120 or described in this article or rules promulgated for this article;

121 (14) “Taxpayer” includes any person within the meaning of
122 this section, who is subject to a tax imposed by this article,
123 whether acting for himself or herself or as a fiduciary; and

124 (15) “Use” means and includes:

125 (A) The exercise by any person of any right or power over
126 tangible personal property or custom software incident to the
127 ownership, possession or enjoyment of the property, or by any
128 transaction in which possession of or the exercise of any right or
129 power over tangible personal property, custom software or the
130 result of a taxable service is acquired for a consideration,
131 including any lease, rental or conditional sale of tangible
132 personal property or custom software; or

133 (B) The use or enjoyment in this state of the result of a
134 taxable service. As used in this subdivision, ~~(15)~~ “enjoyment”

135 includes a purchaser's right to direct the disposition of the
136 property or the use of the taxable service, whether or not the
137 purchaser has possession of the property.

138 The term "use" does not include the keeping, retaining or
139 exercising any right or power over tangible personal property,
140 custom software or the result of a taxable service for the purpose
141 of subsequently transporting it outside the state for use thereafter
142 solely outside this state.

143 ~~(b)~~ (c) *Additional definitions.* — Other terms used in this
144 article are defined in articles fifteen and fifteen-b of this chapter,
145 which definitions are incorporated by reference into article
146 fifteen-a. Additionally, other sections of this article may define
147 terms primarily used in the section in which the term is defined.

