Committee Substitute for

House Bill 2704

(By Delegate Morgan)

[Originating in the Committee on Finance, February 27, 2016.]
A BILL to amend and reenact §11-15-2, §11-15-3, §11-15-7a, §11-15-8, §11-15-8a and §11-15-9h of the Code of West Virginia, 1931, as amended; to amend said code by adding three new sections thereto, designated §11-15-8e, §11-15-8f and §11-15-9o; and to amend and reenact §11-15A-2 of said code, all relating to consumer sales and service taxes and use taxes generally; including certain activities within definition of contracting; including contracting and certain payments within definition of “service” and “selected service”; reducing rate of consumer sales and service taxes and conditioning reductions on certain events; removing reduced taxation of certain sales of mobile homes; removing exception for the imposition of tax on the value of labor relating to manufacture, sale or installation of modular dwellings; removing exemption from tax for certain professional services; removing the exception to application of tax contracting services; removing exemptions from tax for selected advertising services, certain memberships or services provided by certain health and fitness organizations, certain sales of computer hardware or software, electronic data processing services and products transferred electronically; reducing rate of use taxes and conditioning reductions on certain events; specifying effective dates; providing for emergency and legislative rules; and naming the act the West Virginia Tax Decrease Act of 2016.

Be it enacted by the Legislature of West Virginia:

That §11-15-2, §11-15-3, §11-15-7a, §11-15-8, §11-15-8a of the Code of West Virginia, 1931, as amended, be amended and reenacted; that said code be amended by adding three new sections thereto, designated §11-15-8e, §11-15-8f and §11-15-9o; and that §11-15A-2 of said code be amended and reenacted, all to read as follows:

ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.


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

(b) Definitions. —

(1) “Business” includes all activities engaged in or caused to be engaged in with the object of gain or economic benefit, direct or indirect, and all activities of the state and its political subdivisions which involve sales of tangible personal property or the rendering of services when those service activities compete with or may compete with the activities of other persons.

(2) “Communication” means all telephone, radio, light, light wave, radio telephone, telegraph and other communication or means of communication, whether used for voice communication, computer data transmission or other encoded symbolic information transfers and includes commercial broadcast radio, commercial broadcast television and cable television.

(3) “Contracting”:

(A) In general. — “Contracting” means and includes the furnishing of work, or both materials and work, for another (by a sole contractor, general contractor, prime contractor, subcontractor or construction manager) in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for removal or demolition of a building or structure, or any part thereof, or for the alteration, improvement or development of real property. Contracting also includes services provided by a construction manager so long as the project for which the construction manager provides the services results in a capital improvement to a building or structure or to real property.

(B) Form of contract not controlling. — An activity that falls within the scope of the definition of contracting constitutes contracting regardless of whether the contract governing the activity is written or verbal and regardless of whether it is in substance or form a lump sum contract, a cost-plus contract, a time and materials contract, whether or not open-ended, or any other kind of construction contract.

(C) Special rules. — For purposes of this definition:
(i) The term “structure” includes, but is not limited to, everything built up or composed of parts joined together in some definite manner and attached or affixed to real property or which adds utility to real property or any part thereof or which adds utility to a particular parcel of property and is intended to remain there for an indefinite period of time;

(ii) The term “alteration” means, and is limited to, alterations which are capital improvements to a building or structure or to real property;

(iii) The term “repair” means, and is limited to, repairs which are capital improvements to a building or structure or to real property;

(iv) The term “decoration” means, and is limited to, decorations which are capital improvements to a building or structure or to real property;

(v) The term “improvement” means, and is limited to, improvements which are capital improvements to a building or structure or to real property;

(vi) The term “capital improvement” means improvements that are affixed to or attached to and become a part of a building or structure or the real property or which add utility to real property, or any part thereof, and that last or are intended to be relatively permanent. As used herein, “relatively permanent” means lasting at least a year in duration without the necessity for regularly scheduled recurring service to maintain the capital improvement. “Regular recurring service” means regularly scheduled service intervals of less than one year;

(vii) Contracting does not include the furnishing of work, or both materials and work, in the nature of hookup, connection, installation or other services if the service is incidental to the retail sale of tangible personal property from the service provider’s inventory: Provided, that on and after January 1, 2017, contracting does include the furnishing of work, or both materials and work, in the nature of hookup, connection, installation or other services if the service is incidental to the retail sale of tangible personal property from the service provider’s inventory: Provided, however, that the hookup, connection or installation of the foregoing is incidental to the sale of the same and performed by the seller thereof or performed in accordance with
arrangements made by the seller thereof. Examples of transactions that are excluded from the
definition of contracting pursuant to this subdivision prior to January 1, 2017, and that are included
in the definition of contracting on and after January 1, 2017, include, but are not limited to, the
sale of wall-to-wall carpeting and the installation of wall-to-wall carpeting, the sale, hookup and
connection of mobile homes, window air conditioning units, dishwashers, clothing washing
machines or dryers, other household appliances, drapery rods, window shades, venetian blinds,
canvas awnings, free-standing industrial or commercial equipment and other similar items of
tangible personal property. Repairs made to the foregoing are within the definition of contracting
if the repairs involve permanently affixing to or improving real property or something attached
thereto which extends the life of the real property or something affixed thereto or allows or intends
to allow the real property or thing permanently attached thereto to remain in service for a year or
longer; and

(viii) The term “construction manager” means a person who enters into an agreement to
employ, direct, coordinate or manage design professionals and contractors who are hired and
paid directly by the owner or the construction manager. The business activities of a “construction
manager” as defined in this subdivision constitute contracting, so long as the project for which the
construction manager provides the services results in a capital improvement to a building or
structure or to real property.

(4) “Directly used or consumed” in the activities of manufacturing, transportation,
transmission, communication or the production of natural resources means used or consumed in
those activities or operations which constitute an integral and essential part of the activities, as
contrasted with and distinguished from those activities or operations which are simply incidental,
convenient or remote to the activities.

(A) Uses of property or consumption of services which constitute direct use or
consumption in the activities of manufacturing, transportation, transmission, communication or
the production of natural resources include only:
(i) In the case of tangible personal property, physical incorporation of property into a finished product resulting from manufacturing production or the production of natural resources;
(ii) Causing a direct physical, chemical or other change upon property undergoing manufacturing production or production of natural resources;
(iii) Transporting or storing property undergoing transportation, communication, transmission, manufacturing production or production of natural resources;
(iv) Measuring or verifying a change in property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
(v) Physically controlling or directing the physical movement or operation of property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
(vi) Directly and physically recording the flow of property undergoing transportation, communication, transmission, manufacturing production or production of natural resources;
(vii) Producing energy for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
(viii) Facilitating the transmission of gas, water, steam or electricity from the point of their diversion to property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
(ix) Controlling or otherwise regulating atmospheric conditions required for transportation, communication, transmission, manufacturing production or production of natural resources;
(x) Serving as an operating supply for property undergoing transmission, manufacturing production or production of natural resources, or for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
(xi) Maintaining or repairing of property, including maintenance equipment, directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
(xii) Storing, removal or transportation of economic waste resulting from the activities of manufacturing, transportation, communication, transmission or the production of natural resources;

(xiii) Engaging in pollution control or environmental quality or protection activity directly relating to the activities of manufacturing, transportation, communication, transmission or the production of natural resources and personnel, plant, product or community safety or security activity directly relating to the activities of manufacturing, transportation, communication, transmission or the production of natural resources; or

(xiv) Otherwise using as an integral and essential part of transportation, communication, transmission, manufacturing production or production of natural resources.

(B) Uses of property or services which do not constitute direct use or consumption in the activities of manufacturing, transportation, transmission, communication or the production of natural resources include, but are not limited to:

(i) Heating and illumination of office buildings;

(ii) Janitorial or general cleaning activities;

(iii) Personal comfort of personnel;

(iv) Production planning, scheduling of work or inventory control;

(v) Marketing, general management, supervision, finance, training, accounting and administration; or

(vi) An activity or function incidental or convenient to transportation, communication, transmission, manufacturing production or production of natural resources, rather than an integral and essential part of these activities.

(5) “Directly used or consumed” in the activities of gas storage, the generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business means used or consumed in those activities or operations which constitute an
integral and essential part of those activities or operation, as contrasted with and distinguished from activities or operations which are simply incidental, convenient or remote to those activities.

(A) Uses of property or consumption of services which constitute direct use or consumption in the activities of gas storage, the generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business include only:

(i) Tangible personal property, custom software or services, including equipment, machinery, apparatus, supplies, fuel and power and appliances, which are used immediately in production or generation activities and equipment, machinery, supplies, tools and repair parts used to keep in operation exempt production or generation devices. For purposes of this subsection, production or generation activities shall commence from the intake, receipt or storage of raw materials at the production plant site;

(ii) Tangible personal property, custom software or services, including equipment, machinery, apparatus, supplies, fuel and power, appliances, pipes, wires and mains, which are used immediately in the transmission or distribution of gas, water and electricity to the public, and equipment, machinery, tools, repair parts and supplies used to keep in operation exempt transmission or distribution devices, and these vehicles and their equipment as are specifically designed and equipped for those purposes are exempt from the tax when used to keep a transmission or distribution system in operation or repair. For purposes of this subsection, transmission or distribution activities shall commence from the close of production at a production plant or wellhead when a product is ready for transmission or distribution to the public and shall conclude at the point where the product is received by the public;

(iii) Tangible personal property, custom software or services, including equipment, machinery, apparatus, supplies, fuel and power, appliances, pipes, wires and mains, which are used immediately in the storage of gas or water, and equipment, machinery, tools, supplies and repair parts used to keep in operation exempt storage devices;
(iv) Tangible personal property, custom software or services used immediately in the storage, removal or transportation of economic waste resulting from the activities of gas storage, the generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business;

(v) Tangible personal property, custom software or services used immediately in pollution control or environmental quality or protection activity or community safety or security directly relating to the activities of gas storage, generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business.

(B) Uses of property or services which would not constitute direct use or consumption in the activities of gas storage, generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business include, but are not limited to:

(i) Heating and illumination of office buildings;

(ii) Janitorial or general cleaning activities;

(iii) Personal comfort of personnel;

(iv) Production planning, scheduling of work or inventory control;

(v) Marketing, general management, supervision, finance, training, accounting and administration; or

(vi) An activity or function incidental or convenient to the activities of gas storage, generation or production or sale of electric power, the provision of public utility service or the operation of a utility business.

(6) “Gas storage” means the injection of gas into a storage reservoir or the storage of gas for any period of time in a storage reservoir or the withdrawal of gas from a storage reservoir engaged in by businesses subject to the business and occupation tax imposed by sections two and two-e, article thirteen of this chapter.

(7) “Generating or producing or selling of electric power” means the generation, production or sale of electric power engaged in by businesses subject to the business and occupation tax imposed by section two, two-d, two-m or two-n, article thirteen of this chapter.
(8) “Gross proceeds” means the amount received in money, credits, property or other consideration from sales and services within this state, without deduction on account of the cost of property sold, amounts paid for interest or discounts or other expenses whatsoever. Losses may not be deducted, but any credit or refund made for goods returned may be deducted.

(9) “Includes” and “including”, when used in a definition contained in this article, does not exclude other things otherwise within the meaning of the term being defined.

(10) “Manufacturing” means a systematic operation or integrated series of systematic operations engaged in as a business or segment of a business which transforms or converts tangible personal property by physical, chemical or other means into a different form, composition or character from that in which it originally existed.

(11) “Person” means any individual, partnership, association, corporation, limited liability company, limited liability partnership or any other legal entity, including this state or its political subdivisions or an agency of either, or the guardian, trustee, committee, executor or administrator of any person.

(12) “Personal service” includes those: (A) Compensated by the payment of wages in the ordinary course of employment; and (B) rendered to the person of an individual without, at the same time, selling tangible personal property, such as nursing, barbering, shoe shining, manicuring and similar services.

(13) “Prepaid wireless calling service” means a telecommunications service that provides the right to utilize mobile wireless service as well as other nontelecommunications services, including the download of digital products delivered electronically, content and ancillary services, which must be paid for in advance that is sold in predetermined units or dollars of which the number decline with use in a known amount.

(14) Production of natural resources.

(A) “Production of natural resources” means, except for oil and gas, the performance, by either the owner of the natural resources or another, of the act or process of exploring, developing,
severing, extracting, reducing to possession and loading for shipment and shipment for sale, profit or commercial use of any natural resource products and any reclamation, waste disposal or environmental activities associated therewith and the construction, installation or fabrication of ventilation structures, mine shafts, slopes, boreholes, dewatering structures, including associated facilities and apparatus, by the producer or others, including contractors and subcontractors, at a coal mine or coal production facility.

(B) For the natural resources oil and gas, “production of natural resources” means the performance, by either the owner of the natural resources, a contractor or a subcontractor, of the act or process of exploring, developing, drilling, well-stimulation activities such as logging, perforating or fracturing, well-completion activities such as the installation of the casing, tubing and other machinery and equipment and any reclamation, waste disposal or environmental activities associated therewith, including the installation of the gathering system or other pipeline to transport the oil and gas produced or environmental activities associated therewith and any service work performed on the well or well site after production of the well has initially commenced.

(C) All work performed to install or maintain facilities up to the point of sale for severance tax purposes is included in the “production of natural resources” and subject to the direct use concept.

(D) “Production of natural resources” does not include the performance or furnishing of work, or materials or work, in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for the alteration, improvement or development of real property, by persons other than those otherwise directly engaged in the activities specifically set forth in this subdivision as “production of natural resources”.

(15) “Providing a public service or the operating of a utility business” means the providing of a public service or the operating of a utility by businesses subject to the business and occupation tax imposed by sections two and two-d, article thirteen of this chapter.
(16) “Purchaser” means a person who purchases tangible personal property, custom software or a service taxed by this article.

(17) “Sale”, “sales” or “selling” includes any transfer of the possession or ownership of tangible personal property or custom software for a consideration, including a lease or rental, when the transfer or delivery is made in the ordinary course of the transferor’s business and is made to the transferee or his or her agent for consumption or use or any other purpose. “Sale” also includes the furnishing of a service for consideration. Notwithstanding anything to the contrary in this code, effective after June 30, 2008, “sale” also includes the furnishing of prepaid wireless calling service for consideration.

(18) “Service” or “selected service” includes all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal property or custom software, but does not include contracting, personal services or the services rendered by an employee to his or her employer or any service rendered for resale: Provided, That the term “service” or “selected service” does not include payments received by a vendor of tangible personal property as an incentive to sell a greater volume of such tangible personal property under a manufacturer’s, distributor’s or other third party’s marketing support program, sales incentive program, cooperative advertising agreement or similar type of program or agreement, and these payments are not considered to be payments for a “service” or “selected service” rendered, even though the vendor may engage in attendant or ancillary activities associated with the sales of tangible personal property as required under the programs or agreements: Provided, however, That on and after January 1, 2017, “service” or “selected service” includes contracting and includes payments received by a vendor of tangible personal property as an incentive to sell a greater volume of such tangible personal property under a manufacturer’s, distributor’s or other third party’s marketing support program, sales incentive program, cooperative advertising agreement or similar type of program or agreement, and these payments are considered to be payments for a “service” or “selected service” rendered.
even where the vendor may engage in attendant or ancillary activities associated with the sales
of tangible personal property as required under the programs or agreements.

(19) “Streamlined Sales and Use Tax Agreement” or “agreement”, when used in this
article, has the same meaning as when used in article fifteen-b of this chapter, except when the
context in which the word “agreement” is used clearly indicates that a different meaning is
intended by the Legislature.

(20) “Tax” includes all taxes, additions to tax, interest and penalties levied under this article
or article ten of this chapter.

(21) “Tax Commissioner” means the State Tax Commissioner or his or her delegate. The
term “delegate” in the phrase “or his or her delegate”, when used in reference to the Tax
Commissioner, means any officer or employee of the state Tax Division duly authorized by the
Tax Commissioner directly, or indirectly by one or more redelegations of authority, to perform the
functions mentioned or described in this article or rules promulgated for this article.

(22) “Taxpayer” means any person liable for the tax imposed by this article or additions to
tax, penalties and interest imposed by article ten of this chapter.

(23) “Transmission” means the act or process of causing liquid, natural gas or electricity
to pass or be conveyed from one place or geographical location to another place or geographical
location through a pipeline or other medium for commercial purposes.

(24) “Transportation” means the act or process of conveying, as a commercial enterprise,
passengers or goods from one place or geographical location to another place or geographical
location.

(25) “Ultimate consumer” or “consumer” means a person who uses or consumes services
or personal property.

(26) “Vendor” means any person engaged in this state in furnishing services taxed by this
article or making sales of tangible personal property or custom software. “Vendor” and “seller” are
used interchangeably in this article.
(c) **Additional definitions.** — Other terms used in this article are defined in article fifteen-b of this chapter, which definitions are incorporated by reference into article fifteen of this chapter. Additionally, other sections of this article may define terms primarily used in the section in which the term is defined.

§11-15-3. **Amount of tax; allocation of tax and transfers.**

(a) **Vendor to collect.** — For the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article, the vendor shall collect from the purchaser the tax as provided under this article and article fifteen-b of this chapter, and shall pay the amount of tax to the Tax Commissioner in accordance with the provisions of this article or article fifteen-b of this chapter.

(b) **Amount of tax.** — (1) Except as otherwise provided under this subsection, the general consumer sales and service tax imposed by this article shall be at the rate of 6¢ on the dollar of sales or services, excluding gasoline and special fuel sales, which remain taxable at the rate of 5¢ on the dollar of sales.

(2) After December 31, 2016, the general consumer sales and service tax imposed by this article shall be at the rate of 5.50 cents on the dollar of sales or services, excluding gasoline and special fuel sales, which remain taxable at the rate of 5¢ on the dollar of sales.

(3) After December 31, 2017, the general consumer sales and service tax imposed by this article shall be at the rate of 5.25 cents on the dollar of sales or services, excluding gasoline and special fuel sales, which remain taxable at the rate of 5¢ on the dollar of sales: **Provided, That**

the reduction in tax authorized by this subdivision shall be suspended if the combined balance of funds as of June 30, 2017, in the Revenue Fund Shortfall Reserve Fund and the Revenue Fund Shortfall Reserve Fund - Part B established in section twenty, article two, chapter eleven-b of this code does not equal or exceed fifteen percent of the General Revenue Fund budgeted for the fiscal year commencing July 1, 2016: **Provided, however, That** the rate reduction schedule will resume in the calendar year immediately following any subsequent fiscal year when the combined
balance of funds as of June 30 of that fiscal year in the Revenue Fund Shortfall Reserve Fund and the Revenue Fund Shortfall Reserve Fund - Part B next equals or exceeds fifteen percent of the General Revenue Fund budgeted for the immediately succeeding fiscal year.

(4) After December 31, 2018, the general consumer sales and service tax imposed by this article shall be at the rate of five cents on the dollar of sales or services, excluding gasoline and special fuel sales, which remain taxable at the rate of 5¢ on the dollar of sales: Provided, That the reduction in tax authorized by this subdivision shall be suspended for one calendar year subsequent to the occurrence of the suspension of the reduction in tax authorized by subdivision (3) of this section: Provided, however, That the reduction in tax on the first day of any calendar year authorized by this subsection shall be suspended if the combined balance of funds as of June 30 of the preceding year in the Revenue Fund Shortfall Reserve Fund and the Revenue Fund Shortfall Reserve Fund - Part B established in section twenty, article two, chapter eleven-b of this code does not equal or exceed fifteen percent of the General Revenue Fund budgeted for the fiscal year commencing July 1, of the preceding year.

(5) After December 31, 2019, the general consumer sales and service tax imposed by this article shall be at the rate of 4.75 cents on the dollar of sales or services: Provided, That the reduction in tax authorized by this subdivision shall be suspended for one calendar year subsequent to the occurrence of the suspension of the reduction in tax authorized by subdivision (4) of this section: Provided, however, That the reduction in tax on the first day of any calendar year authorized by this subsection shall be suspended if the combined balance of funds as of June 30 of the preceding year in the Revenue Fund Shortfall Reserve Fund and the Revenue Fund Shortfall Reserve Fund - Part B established in section twenty, article two, chapter eleven-b of this code does not equal or exceed fifteen percent of the General Revenue Fund budgeted for the fiscal year commencing July 1, of the preceding year.
(6) The Tax Commissioner may provide for the administration of the provisions of the amendments to this section enacted in 2016 by emergency rule pending the promulgation of legislative rules for that purpose under chapter twenty-nine-a of this code.

(c) Calculation tax on fractional parts of a dollar until January 1, 2004. — There shall be no tax on sales where the monetary consideration is 5¢ or less. The amount of the tax shall be computed as follows:

(1) On each sale, where the monetary consideration is from 6¢ to 16¢, both inclusive, 1¢.
(2) On each sale, where the monetary consideration is from 17¢ to 33¢, both inclusive, 2¢.
(3) On each sale, where the monetary consideration is from 34¢ to 50¢, both inclusive, 3¢.
(4) On each sale, where the monetary consideration is from 51¢ to 67¢, both inclusive, 4¢.
(5) On each sale, where the monetary consideration is from 68¢ to 84¢, both inclusive, 5¢.
(6) On each sale, where the monetary consideration is from 85¢ to $1, both inclusive, 6¢.
(7) If the sale price is in excess of $1, 6¢ on each whole dollar of sale price, and upon any fractional part of a dollar in excess of whole dollars as follows: 1¢ on the fractional part of the dollar if less than 17¢; 2¢ on the fractional part of the dollar if in excess of 17¢ but less than 34¢; 3¢ on the fractional part of the dollar if in excess of 34¢ but less than 51¢; 4¢ on the fractional part of the dollar if in excess of 51¢ but less than 68¢; 5¢ on the fractional part of the dollar if in excess of 67¢ but less than 85¢; and 6¢ on the fractional part of the dollar if in excess of 84¢. For example, the tax on sales from $1.01 to $1.16, both inclusive, 7¢; on sales from $1.17 to $1.33, both inclusive, 8¢; on sales from $1.34 to $1.50, both inclusive, 9¢; on sales from $1.51 to $1.67, both inclusive, 10¢; on sales from $1.68 to $1.84, both inclusive, 11¢ and on sales from $1.85 to $2, both inclusive, 12¢. Provided, That beginning January 1, 2004, tax due under this article shall be calculated as provided in subsection (d) of this subsection and this subsection (c) does not apply to sales made after December 31, 2003.

(d)(c) Calculation of tax on fractional parts of a dollar after December 31, 2003. — Beginning January 1, 2004, the tax computation under subsection (b) of this section shall be
carried to the third decimal place, and the tax rounded up to the next whole cent whenever the third decimal place is greater than four and rounded down to the lower whole cent whenever the third decimal place is four or less. The vendor may elect to compute the tax due on a transaction on a per item basis or on an invoice basis provided the method used is consistently used during the reporting period.

(e) No aggregation of separate sales transactions, exception for coin-operated devices.

— Separate sales, such as daily or weekly deliveries, shall not be aggregated for the purpose of computation of the tax even though the sales are aggregated in the billing or payment therefor. Notwithstanding any other provision of this article, coin-operated amusement and vending machine sales shall be aggregated for the purpose of computation of this tax.

(f) Rate of tax on certain mobile homes. — Notwithstanding any provision of this article to the contrary, after December 31, 2003, the tax levied on sales of mobile homes to be used by the owner thereof as his or her principal year-round residence and dwelling shall be an amount equal to six percent of fifty percent of the sales price: Provided, That after December 31, 2016, the tax levied on sales of mobile homes to be used by the owner thereof as his or her principal year-round residence and dwelling shall be an amount equal to the rate established in subsection (b) of this section.

(g) Construction; custom software. — After December 31, 2003, whenever the words “tangible personal property” or “property” appear in this article, the same shall also include the words “custom software”.

(h) Computation of tax on sales of gasoline and special fuel. — The method of computation of tax provided in this section does not apply to sales of gasoline and special fuel.

(h) This act shall be known as the West Virginia Tax Decrease Act of 2016.

§11-15-7a. Tax on the manufacture, sale and installation of modular dwellings.

(a) Notwithstanding the provisions of section seven of this article, persons engaged in the manufacture and sale or the manufacture, sale and installation of a modular dwelling shall pay
the tax imposed by this article only on the value of the building supplies and materials used in the
manufacture and installation of the modular dwelling and the preparation of the site for permanent
installation, and not on the labor involved in such activities: \textit{Provided, That after December 31, 2016, persons engaged in the manufacture and sale or the manufacture, sale and installation of a modular dwelling shall pay the tax imposed by this article on the labor involved in such activities.}

For purposes of this section, the value of the building supplies and materials shall be the actual
cost of the building supplies and materials. If the manufacturer asserts an exemption at the time
of purchase of the building supplies and materials, the manufacturer shall remit the tax due on
the value of the building supplies and materials used in the manufacture of the modular dwelling
at the time of sale of the modular dwelling. If the manufacturer pays the tax at the time of purchase
of the building supplies and materials, the manufacturer is responsible for maintaining records evidencing payment of the tax. Failure to maintain such records will result in the tax being assessed to the manufacturer.

(b) Persons engaged in the sale and installation of a modular dwelling shall pay the tax imposed by this article on only the value of the materials used in the manufacture and installation of the modular dwelling and the preparation of the site for permanent installation, and not on the labor involved in such activities: \textit{Provided, That after December 31, 2016, persons engaged in the manufacture and sale or the manufacture, sale and installation of a modular dwelling shall pay the tax imposed by this article on the labor involved in such activities.} For purposes of this section, the value of the materials used in the manufacture of the modular dwelling shall be the actual cost of the materials and building supplies to the manufacturer as delineated on the invoice to the purchaser. If the actual cost of the materials is not available, then the cost of the materials used in the manufacture of the modular dwelling shall be sixty percent of the total cost of the modular dwelling. A credit will be given to the purchaser for any sales or use tax that has been lawfully imposed by another state and paid by the manufacturer on the purchase of building supplies and materials used in the manufacture of the modular dwelling. If the manufacturer pays
the tax at the time of purchase of the building supplies and materials, the manufacturer is responsible for maintaining records evidencing payment of the tax and delineating this amount on the invoice. Failure to maintain such records will result in the credit being denied.

(c) Definition of modular dwelling. — For purposes of this article, a modular dwelling shall include, but not be limited to, single and multifamily houses, apartment units and commercial dwellings comprised of two or more sections without a permanent chassis, built to a state or model code other than the National Manufactured Housing Construction and Safety Standards Act of 1974, which are primarily constructed at a location other than the permanent site at which they are to be finally assembled and which are shipped to the site with most permanent components in place.

§11-15-8. Furnishing of services included; exceptions.

(a) Except as provided in subsection (b) of this section, the provisions of this article apply not only to selling tangible personal property and custom software, but also to the furnishing of all services, except professional and personal services, and except those services furnished by businesses subject to the control of the Public Service Commission when the service or the manner in which it is delivered is subject to regulation by the Public Service Commission.

(2) Notwithstanding any other provision of this section to the contrary, on and after January 1, 2017, the consumers sales and service tax imposed by this article and the use tax imposed by article fifteen-a of this chapter shall apply to the furnishing of professional services rendered by lawyers, certified public accountants, public accountants, architects, professional engineers and veterinarians. In addition, services for which a professional license is required and which are provided by corporations, regardless of whether such corporations are professional or business are subject to the consumers sales and service tax imposed by this article and the use tax imposed by article fifteen-a of this chapter. The Tax Commissioner may provide for the administration of the provisions of this subdivision by emergency rule pending the promulgation of legislative rules for that purpose under chapter twenty-nine-a of this code.

(a) The provisions of this article shall not apply to contracting services. However, purchases by a contractor of tangible personal property or taxable services for use or consumption in the providing of a contracting service shall be taxable beginning March 1, 1989, except as otherwise provided in this article: Provided, That after December 31, 2016, the provisions of this article apply to contracting services.

(b) Transition rules until January 1, 2017. — The exemption from payment of tax on purchases of tangible personal property or taxable services directly used or consumed in the activity of contracting, as defined in section two of this article, which expires as of March 1, 1989, shall nevertheless remain in effect with respect to:

(1) Tangible personal property or taxable services purchased by a contractor on or after said first day of March in fulfillment of a written contract for contracting, as defined in section two of this article, that was executed and legally binding on the parties thereto on or before February 15, 1989; or in fulfillment of a written contract entered into after February 15 pursuant to a written bid for contracting that was made on or before February 15 that was binding on the contractor, but only to the extent that the bid is subsequently incorporated into a written contract; or

(2) Tangible personal property or taxable services purchased by a contractor on or after March 1 pursuant to a written contract executed on or before February 15, 1989, to purchase in specified quantities identified tangible personal property or specified taxable services; or

(3) Tangible personal property or taxable services purchased by a contractor for consumption or use in fulfillment of a written contract entered into before September 1, 1989, when such contract is for the construction of a new improvement to real property the construction or operation of which was approved by a federal or state regulatory body prior to February 1, 1989, or pursuant to a federal grant awarded prior to such first day of February.

(c) Renewals and extensions. — A renewal of any contract shall constitute a new contract for purposes of this section, and the date of entry into a contract renewal by the parties, the date
or dates of tender of consideration and the time of performance of any contractual obligations under a renewed contract shall be treated as the dates for determining application of this section to the renewed contract. Extensions of time granted or agreed upon by the parties to a contract for performance of the contract or for tender of consideration under the contract shall not be treated as contract renewals. Contracts to which such extensions apply shall be treated under these transition rules as if the original contractual provisions for performance and tender of consideration remain in effect.

(d) Definitions. — For purposes of this section:

(1) The term “contract” or “contracts” means written agreements reciting or setting forth a fixed price consideration or a consideration based upon cost plus a stated percentage or a stated monetary increment. This term shall not mean or include ongoing sales contracts, contracts whereby any element of the consideration or the property or services sold or to be rendered in performance of the contract are undefined, or determined, as to either nature or quantity, subsequent to the making of the contract, or any open-ended contract.

(2) The term “contract renewal” or “renewal” means a covenant or agreement entered into or assumed by parties which have a current contractual relation or which have had a past contractual relation, whereby the parties agree to incur obligations beyond those which they were, or would have been, required, at the minimum, to carry out under their current or past contractual relation.

§11-15-8e. Furnishing of selected advertising services included.

Notwithstanding the provisions of subdivision (12), section nine of this article to the contrary, on and after January 1, 2017, the consumers sales and service tax imposed by this article and the use tax imposed by article fifteen-a of this chapter shall apply to sales of radio and television broadcasting time, preprinted advertising circulars and newspaper and outdoor advertising space for the advertisement of goods or services by means of advertising that is broadcast from, printed at, or distributed from, a location in this State if the advertising is primarily
intended to be disseminated to consumers located in this State and is only secondarily or
incidentally disseminated to bordering jurisdictions. For purposes of this section, advertising
which is broadcast from a radio or television station located in this State or is printed in or
distributed by a newspaper published in this State is rebuttably presumed to be primarily intended
for dissemination to consumers located in this State. The Tax Commissioner may provide for the
administration of the provisions of this section by emergency rule pending the promulgation of
legislative rules for that purpose under chapter twenty-nine-a of this code.

§11-15-8f. Charges for memberships or services provided by health and fitness
organizations relating to personalized fitness programs included; exceptions.

Notwithstanding the provisions of subdivision (34), section nine of this article to the
contrary, on and after January 1, 2017, except for sales of taxable services described under
section eleven of this article, the consumers sales and service tax imposed by this article and the
use tax imposed by article fifteen-a of this chapter shall apply to charges for memberships or
services provided by health and fitness organizations relating to personalized fitness programs.

§11-15-9h. Exemptions for sales of computer hardware and software directly incorporated
into manufactured products; certain leases; sales of electronic data
processing service; sales of computer hardware and software directly used
in communication; sales of educational software; sales of Internet
advertising; sales of high-technology business services directly used in
fulfillment of a government contract; sales of tangible personal property for
direct use in a high-technology business or Internet advertising business;
definitions.

(a) In order to modernize the exemptions from tax contained in this article as a result of
technological advances in computers and the expanded role of computers, the Internet and global
instant communications in business and to encourage computer software developers, computer
hardware designers, systems engineering firms, electronic data processing companies and other high-technology companies to locate and expand their businesses in West Virginia, the following sales of tangible personal property and software are exempt:

(1) Sales of computer hardware or software (including custom designed software) to be directly incorporated by a manufacturer into a manufactured product. For purposes of this subsection, the payment of licensing fees for the right to incorporate hardware or software developed by persons other than the manufacturer into a manufactured product is exempt from the tax imposed by this article: Provided, That the exemption provided by this subdivision is terminated on and after January 1, 2017;

(2) Sales of computer hardware or software (including custom designed software) directly used in communication as defined in this article: Provided, That the exemption provided by this subdivision is terminated on and after January 1, 2017;

(3) Sales of electronic data processing services: Provided, That the exemption provided by this subdivision is terminated on and after January 1, 2017;

(4) Sales of educational software required to be used in any of the public schools of this state or in any institution in this state which qualifies as a nonprofit or educational institution subject to administration, regulation, certification or approval of the Department of Education, the Department of Education and the Arts or the Higher Education Policy Commission;

(5) Sales of Internet advertising of goods and services;

(6) Sales of high-technology business services to high-technology businesses which enter into contracts with this state, its institutions and subdvisions, governmental units, institutions or subdivisions of other states, or with the United States, including agencies of federal, state or local governments for direct use in fulfilling the government contract; and

(7) Sales of prewritten computer software, computers, computer hardware, servers and building materials and tangible personal property to be installed into a building or facility for direct use in a high-technology business or an Internet advertising business.
(b) Definitions. —

As used in this article, the following terms have the following meanings:

(1) “Computer hardware” means a computer, as defined in article fifteen-b of this chapter, and the directly and immediately connected physical equipment involved in the performance of data processing or communications functions, including data input, data output, data processing, data storage, and data communication apparatus that is directly and immediately connected to the computer. The term “computer hardware” does not include computer software.

(2) “High-technology business” means and is limited to businesses primarily engaged in the following activities: Computer hardware design and development; computer software design, development, customization and upgrade; computer systems design and development; website design and development; network design and development; design and development of new manufactured products which incorporate computer hardware and software; electronic data processing; network management, maintenance, engineering, administration and security services; website management, maintenance, engineering, administration and security services and computer systems management, maintenance, engineering, administration and security services. High-technology business as defined herein is intended to include businesses which engage in the activities enumerated in this definition as their primary business activity, and not as a secondary or incidental activity and not as an activity in support of or incidental to business activity not specifically enumerated in this definition.

(3) “High-technology business services” means and is limited to computer hardware design and development; computer software design, development, customization and upgrade; computer systems design and development; website design and development; network design and development; electronic data processing; computer systems management; computer systems maintenance; computer systems engineering; computer systems administration and computer systems security services.
(4) “Internet advertising business” means a for-profit business that is engaged, for monetary remuneration, in the primary business activity of announcing, or calling public attention to, goods or services in order to induce the public to purchase those goods or services, and which uses the Internet as its sole advertising communications medium. For purposes of this definition, Internet advertising must be the primary business activity of the business and not a secondary or incidental activity and not an activity in support of or incidental to other business activity.

(5) “Network” means a group of two or more computer systems linked together.

(6) “Server” means a computer or device on a network that manages network resources.

(c) The amendments to this section made in the first extraordinary session of the Legislature in 2009 shall apply to purchases made on and after July 1, 2009.

§11-15-9o. Sales or use tax on products transferred electronically.

The tax imposed under this article and the tax imposed under article fifteen-a are each hereby imposed separately on products transferred electronically. For purposes of this section, the term “transferred electronically” means obtained by the purchaser by means other than tangible storage media. The Tax Commissioner may provide for the administration of the provisions of this subdivision by emergency rule pending the promulgation of legislative rules for that purpose under chapter twenty-nine-a of this code.

ARTICLE 15A. USE TAX.

§11-15A-2. Imposition of tax; six percent tax rate; inclusion of services as taxable; transition rules; allocation of tax and transfers.

(a) (1) Except as otherwise provided under this subsection, an excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article.
(2) After December 31, 2016, an excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of 5.50 percent of the purchase price of the property or taxable services, except as otherwise provided in this article.

(3) After December 31, 2017, an excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of 5.25 percent of the purchase price of the property or taxable services, except as otherwise provided in this article: Provided, That the reduction in tax authorized by this subdivision shall be suspended if the combined balance of funds as of June 30, 2017, in the Revenue Fund Shortfall Reserve Fund and the Revenue Fund Shortfall Reserve Fund - Part B established in section twenty, article two, chapter eleven-b of this code does not equal or exceed fifteen percent of the General Revenue Fund budgeted for the fiscal year commencing July 1, 2016: Provided, however, That the rate reduction schedule will resume in the calendar year immediately following any subsequent fiscal year when the combined balance of funds as of June 30 of that fiscal year in the Revenue Fund Shortfall Reserve Fund and the Revenue Fund Shortfall Reserve Fund - Part B next equals or exceeds fifteen percent of the General Revenue Fund budgeted for the immediately succeeding fiscal year.

(4) After December 31, 2018, an excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of five percent of the purchase price of the property or taxable services, except as otherwise provided in this article: Provided, That the reduction in tax authorized by this subdivision shall be suspended for one calendar year subsequent to the occurrence of the suspension of the reduction in tax authorized by subdivision (3) of this section: Provided, however, That the reduction in tax on the first day of any calendar year authorized by this subsection shall be suspended if the combined balance of
funds as of June 30 of the preceding year in the Revenue Fund Shortfall Reserve Fund and the
Revenue Fund Shortfall Reserve Fund - Part B established in section twenty, article two, chapter
eleven-b of this code does not equal or exceed fifteen percent of the General Revenue Fund
budgeted for the fiscal year commencing July 1, of the preceding year.

(5) After December 31, 2019, an excise tax is hereby levied and imposed on the use in
this state of tangible personal property, custom software or taxable services, to be collected and
paid as provided in this article or article fifteen-b of this chapter, at the rate of 4.75 percent of the
purchase price of the property or taxable services, except as otherwise provided in this article:
Provided, That the reduction in tax authorized by this subdivision shall be suspended for one
calendar year subsequent to the occurrence of the suspension of the reduction in tax authorized
by subdivision (4) of this section: Provided, however, That the reduction in tax on the first day of
any calendar year authorized by this subsection shall be suspended if the combined balance of
funds as of June 30 of the preceding year in the Revenue Fund Shortfall Reserve Fund and the
Revenue Fund Shortfall Reserve Fund - Part B established in section twenty, article two, chapter
eleven-b of this code does not equal or exceed fifteen percent of the General Revenue Fund
budgeted for the fiscal year commencing July 1, of the preceding year.

(6) The Tax Commissioner may provide for the administration of the provisions of the
amendments to this section enacted in 2016 by emergency rule pending the promulgation of
legislative rules for that purpose under chapter twenty-nine-a of this code.

(b) Calculation of tax on fractional parts of a dollar. — The tax computation under
subsection (a) of this section shall be carried to the third decimal place and the tax rounded up to
the next whole cent whenever the third decimal place is greater than four and rounded down to
the lower whole cent whenever the third decimal place is four or less. The vendor may elect to
compute the tax due on a transaction on a per item basis or on an invoice basis provided the
method used is consistently used during the reporting period.
(c) “Taxable services,” for the purposes of this article, means services of the nature that are subject to the tax imposed by article fifteen of this chapter. In this article, wherever the words “tangible personal property” or “property” appear, the same shall include the words “or taxable services,” where the context so requires.

(d) Use tax is hereby imposed upon every person using tangible personal property, custom software or taxable service within this state. That person’s liability is not extinguished until the tax has been paid. A receipt with the tax separately stated thereon issued by a retailer engaged in business in this state, or by a foreign retailer who is authorized by the Tax Commissioner to collect the tax imposed by this article, relieves the purchaser from further liability for the tax to which the receipt refers.

(e) Purchases of tangible personal property or taxable services made for the government of the United States or any of its agencies by ultimate consumers is subject to the tax imposed by this section. Industrial materials and equipment owned by the federal government within the State of West Virginia of a character not ordinarily readily obtainable within the state, is not subject to use tax when sold, if the industrial materials and equipment would not be subject to use taxes if sold outside of the state for use in West Virginia.

(f) This article does not apply to purchases made by counties or municipal corporations.