

Senate Bill No. 377

(By Senators Kessler (Mr. President) and M. Hall,

By Request of the Executive)

[Introduced February 27, 2013; referred to the Committee on
Finance.]

**FISCAL
NOTE**

A BILL to amend and reenact §11-15A-1 of the Code of West Virginia, 1931, as amended, relating to further defining a “retailer engaging in business in this state” for purposes of sales and use taxes; specifying that any retailer in a unitary business with an entity in this state is included within the definition; and providing effective date.

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.

(a) *General.* -- When used in this article and article fifteen of this chapter, terms defined in subsection (b) of this section

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

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

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

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

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

22 (5) "Purchase" means any transfer, exchange or barter,

1 conditional or otherwise, in any manner or by any means whatsoever,
2 for a consideration;

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

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

22 (8) "Retailer engaging in business in this state" or any like

1 term, unless otherwise limited by federal statute, ~~shall mean and~~
2 ~~include, but not be~~ means and includes, but is not limited to:

3 (A) Any retailer having or maintaining, occupying or using,
4 within this state, directly or by a subsidiary, an office,
5 distribution house, sales house, warehouse, or other place of
6 business, or any agent (by whatever name called) operating within
7 this state under the authority of the retailer or its subsidiary,
8 irrespective of whether the place of business or agent is located
9 here permanently or temporarily, or whether the retailer or
10 subsidiary is admitted to do business within this state pursuant to
11 article fifteen, chapter thirty-one-d of this code or article
12 fourteen, chapter thirty-one-e of this code; or

13 (B) On and after June 1, 2013, any retailer that is related
14 to, or part of a unitary business with, a person, entity or
15 business that, without regard to whether the retailer is admitted
16 to do business in this state pursuant to article fifteen, chapter
17 thirty-one-d of this code or article fourteen, chapter thirty-one-e
18 of this code, is a subsidiary of the retailer, or is related to, or
19 unitary with, the retailer as a related entity, a related member or
20 part of a unitary business, all as defined in article twenty four,
21 section three-a of this chapter;

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

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

7 (iii) That, by any agent, or representative (by whatever name
8 called), or employee, performs services in this state in connection
9 with tangible personal property or services sold by the retailer,
10 or any related entity, related member or part of the unitary
11 business; or

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

16 (C) For purposes of paragraph (B) of this subdivision, the
17 term "service" means and includes, but is not limited to, customer
18 support services, help desk services, call center services, repair
19 services, engineering services, installation service, assembly
20 service, delivery service by means other than common carrier or the
21 United States Postal Service, technical assistance services, the
22 service of investigating, handling or otherwise assisting in

1 resolving customer issues or complaints while in this state, the
2 service of operating a mail order business or telephone, Internet
3 or other remote order business from facilities located within this
4 state, the service of operating a website or Internet-based
5 business from a location within the state, or any other service.

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

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

13 (11) "Streamlined sales and use tax agreement" or "agreement,"
14 when used in this article, ~~shall have~~ has the same meaning as when
15 used in article fifteen-b of this chapter, except when the context
16 in which the word agreement is used clearly indicates that a
17 different meaning is intended by the Legislature;

18 (12) "Tangible personal property" means personal property that
19 can be seen, weighed, measured, felt, or touched, or that is in any
20 manner perceptible to the senses. "Tangible personal property"
21 includes, but is not limited to, electricity, water, gas, and
22 prewritten computer software;

1 (13) "Tax commissioner" or "commissioner" means the State Tax
2 Commissioner, or his or her delegate. The term "delegate" in the
3 phrase "or his or her delegate," when used in reference to the Tax
4 Commissioner, means any officer or employee of the State Tax
5 Division duly authorized by the Tax Commissioner directly, or
6 indirectly by one or more redelegations of authority, to perform
7 the functions mentioned or described in this article or rules
8 promulgated for this article;

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

12 (15) "Use" means and includes:

13 (A) The exercise by any person of any right or power over
14 tangible personal property or custom software incident to the
15 ownership, possession or enjoyment of the property, or by any
16 transaction in which possession of or the exercise of any right or
17 power over tangible personal property, custom software or the
18 result of a taxable service is acquired for a consideration,
19 including any lease, rental or conditional sale of tangible
20 personal property or custom software; or

21 (B) The use or enjoyment in this state of the result of a
22 taxable service. As used in this subdivision, ~~(15)~~ "enjoyment"

1 includes a purchaser's right to direct the disposition of the
2 property or the use of the taxable service, whether or not the
3 purchaser has possession of the property.

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

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

NOTE: The purpose of this bill is to require certain retailers located out of state to collect and remit use tax as provided by West Virginia Code §11-15A-6. Those certain retailers are related to persons and entities in the state which perform services related to the tangible personal property or services sold by the retailer.

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