WEST VIRGINIA CODE: §11-15-9n

§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 tangible personal property.

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

(1) "Building materials" means all tangible personal property, including any device or appliance used by builders, contractors or landowners in making improvements, additions, or alterations to a building or other structure or to real property in such a way that such tangible personal property becomes a part of the building or other structure or the realty, which is installed into or directly used or consumed in the construction, addition, alteration, repair or improvement of a qualified, new or expanded warehouse or distribution facility. "Building materials" does not include tools, construction equipment or any property or device which does not become a permanent part of the realty when construction is completed. A device or appliance becomes a fixture and a part of the building or other structure or the real property to which it is connected when it is built into or is attached to the property in such a way that its removal would substantially damage or deface such property.

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

(3) "Distribution facility" means a warehouse, facility, structure, or enclosed area which is used primarily for the storage, shipment, preparation for shipment, or any combination of such activities, of finished goods, consumer ready wares, and consumer ready merchandise.

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

(5) "Full-time employment" for purposes of determining a full-time employee or a full-time equivalent employee, means employment for at least one hundred forty hours per month at a wage not less than the prevailing state or federal minimum wage, depending on which minimum wage provision is applicable to the business.

(A) For purposes of this definition, any employee paid less than state or federal minimum wage, depending on which minimum wage provision is applicable, shall be excluded from the

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count of employees for the purpose of determining the three hundred jobs requirement of this section.

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

(6) "Primary material handling equipment" means the principal machinery and equipment used directly and primarily for the handling and movement of tangible personal property in a qualified,

new or expanded warehouse or distribution facility.

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

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

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

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

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

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

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

(ii) Parts or equipment used to repair, refurbish, or recondition other equipment; or.

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

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

(A) Qualification criteria. "Qualified, new or expanded warehouse or distribution facility" means a new or expanded facility located in this state, that is a warehouse or distribution facility that will employ three hundred or more West Virginia domiciled, West Virginia residents, as full-time employees in the warehouse or distribution facility once the expansion

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period is complete and which is either:

(i) An existing warehouse or distribution facility that will be expanded over the expansion period where the total value of all real and personal property purchased or acquired over the expansion period as direct investment in the facility is $50 million or more; or

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

(B) Exclusions and disqualifications.

(i) Subject to the limitations and restrictions set forth in this section, "qualified, new or expanded warehouse or distribution facility" does not include a building or facility where tangible personal property is manufactured, fabricated or assembled.

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

(iii) Subject to the limitations and restrictions set forth in this section, "qualified, new or expanded warehouse or distribution facility" does not include a building or facility where the average monthly full-time employment (determined by including full-time equivalent employees) for each calendar year at the facility is less than three hundred West Virginia domiciled, West Virginia residents. For purposes of determining average monthly employment for the calendar year, the taxpayer shall divide the sum of the twelve monthly averages of qualified full-time and full-time equivalent West Virginia employees at the qualified, new or expanded warehouse or distribution facility by twelve. Each monthly average is computed as the average of West Virginia employment at the beginning of each calendar month and at the end of each calendar month. Provided, That the State Tax Commissioner may specify a different method for computation of average monthly full-time employment, on a state-wide basis or on a case-by-case basis, or both, as the State Tax Commissioner may prescribe.

(8) "Qualified West Virginia employee" means a full-time employee or full-time equivalent employee who is a West Virginia domiciled West Virginia resident.

(9) "Racking and racking systems" means any system of machinery, equipment, fixtures, or portable devices whose function is to store, organize, or move tangible personal property within a warehouse or distribution facility, including, but not limited to, conveying systems, chutes, shelves, racks, bins, drawers, pallets, and other containers and storage devices which form a necessary part of the facility's storage system, and which is used directly and

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primarily for the storage, handling and movement of tangible personal property in a qualified, new or expanded warehouse or distribution facility.

(10) "Tangible personal property" means tangible personal property as defined in section two, article fifteen-b of this chapter.

(11) "Warehouse" means a facility, structure, or enclosed area which is used primarily for the storage of finished goods, consumer ready wares, and consumer ready merchandise.

(b) Exemption. -- Qualified purchases of computers and computer software, primary material handling equipment, racking and racking systems, and components thereof, building materials and tangible personal property installed into or directly used or consumed in the construction, addition, alteration or improvement of a qualified, new or expanded warehouse or distribution facility, as such terms are defined in this section, purchased during the expansion period are exempt from the tax imposed by this article and article fifteen-a of this chapter. This exemption may apply either to qualified purchases made by a person or entity which will be the owner and operator of the qualified, new or expanded warehouse or distribution facility or to qualified purchases made by a lessor or lessee of the qualified, new or expanded warehouse or distribution facility. A purchase of computers and computer software, primary material handling equipment, racking and racking systems, and components thereof, building materials and tangible personal property is a qualified purchase if all requirements for exemption set forth in this section are met with relation to the purchase.

(c) Application for certification of exemption and plan describing investment to be made. --

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

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

(3) Late filing. If the taxpayer fails to timely file the application for certification of the exemption with the State Tax Commissioner, together with a plan describing the investment to be made, on or before the start of the construction or expansion of the proposed qualified, new or expanded warehouse or distribution facility, the exemption allowed by this section shall not be available for any purchases of computer and computer software, primary material handling equipment, racking and racking systems, and components thereof, building materials and tangible personal property otherwise exempt under this section that were made prior to the filing date of the application for certification of the exemption, and

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no refund shall be issued for any such purchase.

(4) Exemption in cases of untimely filing. Notwithstanding the untimely filing of the application for certification of the exemption and plan describing the investment to be made, if certification of the exemption and plan is issued by the State Tax Commissioner of an untimely filed application and plan, the exemption shall be available for qualified purchases of computers and computer software, primary material handling equipment, racking and racking systems, and components thereof, building materials and tangible personal property made subsequent to the filing date of the application and plan and before the end of the expansion period.

(5) Exemption limited to expansion period purchases.

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

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

(d) Any person having a right or claim to any exemption set forth in this section shall first pay to the vendor the tax imposed by this article and then apply to the State Tax Commissioner for a refund or credit or, as provided in section nine-d of this article, give to the vendor his or her West Virginia direct pay permit number.

(e) Additional Restrictions, Assessments and Statutes of Limitations. --

(1) Over-the-counter sales restrictions.

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

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

(2) Fabrication and Assembly Restriction.

(A) Subject to the restriction and limitations set forth in this subsection, a qualified new or expanded warehouse or distribution facility does not include a building or facility where tangible personal property is manufactured, fabricated or assembled. If during any calendar year within ten years after the end of the expansion period, the building or facility for which qualification for exemption under this section was originally established, is used for manufacturing, fabrication or assembly of tangible personal property, the taxpayer will be disqualified from receiving the exemption set forth in this section as of the date such manufacturing, fabrication or assembly first occurs, and the taxpayer shall be subject to assessment for any tax, penalty or interest that would otherwise have been due had the exemption set forth in this section never been applied. This restriction against manufacturing, fabrication and assembly shall not apply to any year subsequent to the tenth year after the end of the expansion period.

(B) Limitations. Notwithstanding any other provision of this code pertaining to statute of limitations to the contrary, any statute of limitations set forth in article ten of this chapter for assessment for any such tax, penalty or interest shall not close until five years subsequent to the end of the calendar year during which such manufacturing, fabrication or assembly first occurs.

(3) Minimum employment restriction.

(A) Subject to the limitations and restrictions set forth in this section, "qualified, new or expanded warehouse or distribution facility" does not include a building or facility where the average monthly full-time employment (determined including full-time equivalent employees) for each calendar year at the facility is less than three hundred West Virginia domiciled, West Virginia residents. If during any calendar year within ten years after the end of the expansion period, the average monthly full-time employment at the building or facility for which qualification for exemption under this section was originally established, is fewer than three hundred qualified West Virginia employees, then the taxpayer will be disqualified from receiving the exemption under this section as of the close of the first calendar year in which the average monthly full-time employment at the facility is less than three hundred West Virginia domiciled, West Virginia residents, and the taxpayer shall be subject to assessment for any tax, penalty or interest that would otherwise have been due had the exemption set forth in this section never been applied. This restriction against having fewer than three hundred qualified West Virginia employees shall not apply to any year subsequent to the tenth year after the end of the expansion period.

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

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

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