WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1992

ENROLLED
Committee Substitute for
SENATE BILL NO. 348

(By Senator Spears, et al)

PASSED March 7, 1992
In Effect 90 days from Passage
ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 348

(SENATORS SPEARS, WOOTON, WEHRLE, WIEDEBUSCH, SHARPE, JONES, CLAYPOLE, CHERNENKO, BOLEY, BLATNIK, BURDETTE, MR. PRESIDENT, AND WHITLOW, original sponsors)

[Passed March 7, 1992; in effect ninety days from passage.]

AN ACT to amend and reenact section nine, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said article by adding thereto a new section, designated section eleven, removing nails and fencing from the definition of improvements to real property; exempting health and fitness organizations providing personalized fitness programs from remitting sales tax; exempting sales of services by baby-sitters from remitting sales tax under certain conditions; exempting certain community-based service organizations from collecting and remitting sales tax on specified programs and activities; prohibiting the tax commissioner from taking action against community-based organizations for taxes uncollected prior to the first day of July, one thousand nine hundred ninety-two; and barring refunds of taxes collected and paid over prior to that date.
Be it enacted by the Legislature of West Virginia:

That section nine, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that said article be further amended by adding thereto a new section, designated section eleven, to read as follows:

ARTICLE 15. CONSUMERS SALES TAX.


1 The following sales and services are exempt:

2 (a) Sales of gas, steam and water delivered to consumers through mains or pipes, and sales of electricity;

(b) Sales of textbooks required to be used in any of the schools of this state or in any institution in this state which qualifies as a nonprofit or educational institution subject to the West Virginia department of education and the arts; board of trustees of the university system of West Virginia, or the board of directors for colleges located in this state;

(c) Sales of property or services to the state, its institutions or subdivisions, governmental units, institutions or subdivisions of other states: Provided, That the law of such other state provides the same exemption to governmental units or subdivisions of this state and to the United States, including agencies of federal, state or local governments for distribution in public welfare or relief work;

(d) Sales of vehicles which are titled by the division of motor vehicles and which are subject to the tax imposed by section four, article three, chapter seventeen-a of this code, or like tax;

(e) Sales of property or services to churches and bona fide charitable organizations who make no charge whatsoever for the services they render: Provided, That the exemption herein granted shall apply only to services, equipment, supplies, food for meals and materials directly used or consumed by these organizations, and shall not apply to purchases of
gasoline or special fuel;

(f) Sales of tangible personal property or services to a corporation or organization which has a current registration certificate issued under article twelve of this chapter is exempt from federal income taxes under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended, and is:

(1) A church or a convention or association of churches as defined in Section 170 of the Internal Revenue Code of 1986, as amended;

(2) An elementary or secondary school which maintains a regular faculty and curriculum and has a regularly enrolled body of pupils or students in attendance at the place in this state where its educational activities are regularly carried on;

(3) A corporation or organization which annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions, or membership fees;

(4) An organization which has no paid employees and its gross income from fund raisers, less reasonable and necessary expenses incurred to raise such gross income (or the tangible personal property or services purchased with such net income), is donated to an organization which is exempt from income taxes under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended;

(5) A youth organization, such as the girl scouts of the United States of America, the boy scouts of America or the YMCA Indian guide/princess program and the local affiliates thereof, which is organized and operated exclusively for charitable purposes and has as its primary purpose the nonsectarian character development and citizenship training of its members;

(6) For purposes of this subsection:

(A) The term “support” includes, but is not limited to:

(i) Gifts, grants, contributions or membership fees;
(ii) Gross receipts from fund raisers which include receipts from admissions, sales of merchandise, performance of services or furnishing of facilities in any activity which is not an unrelated trade or business within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended;

(iii) Net income from unrelated business activities, whether or not such activities are carried on regularly as a trade or business;

(iv) Gross investment income as defined in Section 509(e) of the Internal Revenue Code of 1986, as amended;

(v) Tax revenues levied for the benefit of a corporation or organization either paid to or expended on behalf of such organization; and

(vi) The value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge. This term does not include any gain from the sale or other disposition of property which would be considered as gain from the sale or exchange of a capital asset, or the value of an exemption from any federal, state or local tax or any similar benefit;

(B) The term "charitable contribution" means a contribution or gift to or for the use of a corporation or organization, described in Section 170(c)(2) of the Internal Revenue Code of 1986, as amended;

(C) The term "membership fee" does not include any amounts paid for tangible personal property or specific services rendered to members by the corporation or organization; or

(7) The exemption allowed by this subsection (f) does not apply to sales of gasoline or special fuel or to sales of tangible personal property or services to be used or consumed in the generation of unrelated business income as defined in Section 513 of the Internal Revenue Code of 1986, as amended. The provisions of
this subsection as amended by this act shall apply to
sales made after the thirtieth day of June, one thou-
sand nine hundred eighty-nine. Provided, That the
exemption herein granted shall apply only to services,
equipment, supplies and materials used or consumed
in the activities for which such organizations qualify
as tax exempt organizations under the Internal Reve-
 nue Code by these organizations and shall not apply to
purchases of gasoline or special fuel;

(g) Sales of property or services to persons engaged
in this state in the business of manufacturing, trans-
portation, transmission, communication or in the
production of natural resources. Provided, That the
exemption herein granted shall apply only to services,
machinery, supplies and materials directly used or
consumed in the businesses or organizations named
above, and shall not apply to purchases of gasoline or
special fuel. Provided, however, That on and after the
first day of July, one thousand nine hundred eighty-
seven, the exemption provided in this subsection shall
apply only to services, machinery, supplies and mate-
rials directly used or consumed in the activities of
manufacturing, transportation, transmission, commu-
ication or the production of natural resources in the
businesses or organizations named above and shall not
apply to purchases of gasoline or special fuel;

(h) An isolated transaction in which any taxable
service or any tangible personal property is sold,
transferred, offered for sale or delivered by the owner
thereof or by his representative for the owner’s
account, such sale, transfer, offer for sale or delivery
not being made in the ordinary course of repeated and
successive transactions of like character by such owner
or on his account by such representative. Provided,
That nothing contained herein may be construed to
prevent an owner who sells, transfers or offers for sale
tangible personal property in an isolated transaction
through an auctioneer from availing himself or herself
of the exemption provided herein, regardless where
such isolated sale takes place. The tax commissioner
may adopt such legislative rule pursuant to chapter
(i) Sales of tangible personal property or of any taxable services rendered for use or consumption in connection with the commercial production of an agricultural product the ultimate sale of which will be subject to the tax imposed by this article or which would have been subject to tax under this article: Provided, That sales of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property and sales of gasoline and special fuel shall not be exempt: Provided, however, That nails and fencing shall not be considered as improvements to real property.

(j) Sales of tangible personal property to a person for the purpose of resale in the form of tangible personal property: Provided, That sales of gasoline and special fuel by distributors and importers shall be taxable except when the sale is to another distributor for resale: Provided, however, That sales of building materials or building supplies or other property to any person engaging in the activity of contracting, as defined in this article, which is to be installed in, affixed to or incorporated by such person or his agent into any real property, building or structure shall not be exempt under this subsection, except that sales of tangible personal property to a person engaging in the activity of contracting pursuant to a written contract with the United States, this state, or with a political subdivision thereof, or with a public corporation created by the Legislature or by another governmental entity pursuant to an act of the Legislature, for a building or structure, or improvement thereto, or other improvement to real property that is or will be owned and used by the governmental entity for a governmental or proprietary purpose, who incorporates such property in such building, structure or improvement shall, with respect to such tangible personal property, nevertheless be deemed to be the vendor of such property to the governmental entity and any person seeking to qualify for and assert this
exception must do so pursuant to such legislative rules and regulations as the tax commissioner may promulgate and upon such forms as the tax commissioner may prescribe. A subcontractor who, pursuant to a written subcontract with a prime contractor who qualifies for this exception, provides equipment, or materials, and labor to such a prime contractor shall be treated in the same manner as the prime contractor is treated with respect to the prime contract under this exception and the legislative rules and regulations promulgated by the tax commissioner: Provided further, That the exemption for government contractors in the preceding proviso shall expire on the first day of October, one thousand nine hundred ninety, subject to the transition rules set forth in section eight-c of this article;

(k) Sales of property or services to nationally chartered fraternal or social organizations for the sole purpose of free distribution in public welfare or relief work: Provided, That sales of gasoline and special fuel shall be taxable;

(l) Sales and services, fire fighting or station house equipment, including construction and automotive, made to any volunteer fire department organized and incorporated under the laws of the state of West Virginia: Provided, That sales of gasoline and special fuel shall be taxable;

(m) Sales of newspapers when delivered to consumers by route carriers;

(n) Sales of drugs dispensed upon prescription and sales of insulin to consumers for medical purposes;

(o) Sales of radio and television broadcasting time, preprinted advertising circulars and newspaper and outdoor advertising space for the advertisement of goods or services;

(p) Sales and services performed by day-care centers;

(q) Casual and occasional sales of property or services not conducted in a repeated manner or in the ordinary course of repetitive and successive transac-
tions of like character by a corporation or organization
which is exempt from tax under subsection (f) of this
section on its purchases of tangible personal property
or services:

(1) For purposes of this subsection, the term "casual
and occasional sales not conducted in repeated manner
or in the ordinary course of repetitive and successive
transactions of like character" means sales of tangible
personal property or services at fund raisers sponsored
by a corporation or organization which is exempt,
under subsection (f) of this section, from payment of
the tax imposed by this article on its purchases, when
such fund raisers are of limited duration and are held
no more than six times during any twelve-month
period and limited duration means no more than
eighty-four consecutive hours;

(2) The provisions of this subsection, as amended by
this article, shall apply to sales made after the thirtieth
day of June, one thousand nine hundred eighty-nine;

(r) Sales of property or services to a school which
has approval from the board of trustees of the univer-
sity system of West Virginia or the board of directors
of the state college system to award degrees, which has
its principal campus in this state, and which is exempt
from federal and state income taxes under Section
501(c)(3) of the Internal Revenue Code of 1986, as
amended: Provided, That sales of gasoline and special
fuel shall be taxable;

(s) Sales of mobile homes to be utilized by purchas-
ers as their principal year-round residence and dwell-
ing: Provided, That these mobile homes shall be
subject to tax at the three percent rate;

(t) Sales of lottery tickets and materials by licensed
lottery sales agents and lottery retailers authorized by
the state lottery commission, under the provisions of
article twenty-two, chapter twenty-nine of this code;

(u) Leases of motor vehicles titled pursuant to the
provisions of article three, chapter seventeen-a of this
code to lessees for a period of thirty or more conse-

utive days. This exemption shall apply to leases executed on or after the first day of July, one thousand nine hundred eighty-seven, and to payments under long-term leases executed before such date, for months thereof beginning on or after such date;

(v) Notwithstanding the provisions of subsection (g) of this section or any provisions of this article to the contrary, sales of property and services to persons subject to tax under article thirteen, thirteen-a or thirteen-b of this chapter: Provided, That the exemption herein granted shall apply both to property or services directly or not directly used or consumed in the conduct of privileges which are subject to tax under such articles but shall not apply to purchases of gasoline or special fuel;

(w) Sales of propane to consumers for poultry house heating purposes, with any seller to such consumer who may have prior paid such tax in his price, to not pass on the same to the consumer, but to make application and receive refund of such tax from the tax commissioner, pursuant to rules and regulations which shall be promulgated by the tax commissioner; and notwithstanding the provisions of section eighteen of this article or any other provisions of such article to the contrary;

(x) Any sales of tangible personal property or services purchased after the thirtieth day of September, one thousand nine hundred eighty-seven, and lawfully paid for with food stamps pursuant to the federal food stamp program codified in 7 United States Code, §2011, et seq., as amended, or with drafts issued through the West Virginia special supplemental food program for women, infants and children codified in 42 United States Code, §1786;

(y) Sales of tickets for activities sponsored by elementary and secondary schools located within this state;

(z) Sales of electronic data processing services and related software: Provided. That for the purposes of this subsection “electronic data processing services”
308 means: (1) The processing of another's data, including
309 all processes incident to processing of data such as
310 keypunching, keystroke verification, rearranging or
311 sorting of previously documented data for the purpose
312 of data entry or automatic processing, and changing
313 the medium on which data is sorted, whether these
314 processes are done by the same person or several
315 persons; and (2) providing access to computer equip-
316 ment for the purpose of processing data or examining
317 or acquiring data stored in or accessible to such
318 computer equipment;
319 (aa) Tuition charged for attending educational
320 summer camps;
321 (bb) Sales of building materials or building supplies
322 or other property to an organization qualified under
323 Section 501(c)(3) or (c)(4) of the Internal Revenue Code
324 of 1986, as amended, which are to be installed in,
325 affixed to or incorporated by such organization or its
326 agent into real property, or into a building or structure
327 which is or will be used as permanent low-income
328 housing, transitional housing, emergency homeless
329 shelter, domestic violence shelter or emergency chil-
330 dren and youth shelter if such shelter is owned,
331 managed, developed or operated by an organization
332 qualified under Section 501(c)(3) or (c)(4) of the
333 Internal Revenue Code of 1986, as amended;
334 (cc) Dispensing of services performed by one corpo-
335 ration for another corporation when both corporations
336 are members of the same controlled group. Control
337 means ownership, directly or indirectly, of stock
338 possessing fifty percent or more of the total combined
339 voting power of all classes of the stock of a corporation
340 entitled to vote or ownership, directly or indirectly, of
341 stock possessing fifty percent or more of the value of
342 the corporation;
343 (dd) Food for the following shall be exempt:
344 (1) Food purchased or sold by public or private
345 schools, school sponsored student organizations, or
346 school sponsored parent-teacher associations to stu-
347 dents enrolled in such school or to employees of such
school during normal school hours; but not those sales
of food made to the general public;

(2) Food purchased or sold by a public or private
college or university or by a student organization
officially recognized by such college or university to
students enrolled at such college or university when
such sales are made on a contract basis so that a fixed
price is paid for consumption of food products for a
specific period of time without respect to the amount
of food product actually consumed by the particular
individual contracting for the sale and no money is
paid at the time the food product is served or
consumed;

(3) Food purchased or sold by a charitable or private
nonprofit organization, a nonprofit organization or a
governmental agency under a program to provide food
to low-income persons at or below cost;

(4) Food sold in an occasional sale by a charitable or
nonprofit organization including volunteer fire depart-
ments and rescue squads, if the purpose of the sale is
to obtain revenue for the functions and activities of
the organization and the revenue so obtained is
actually expended for that purpose;

(5) Food sold by any religious organization at a social
or other gathering conducted by it or under its
auspices, if the purpose in selling the food is to obtain
revenue for the functions and activities of the organi-
zation and the revenue obtained from selling the food
is actually used in carrying on such functions and
activities: Provided, That purchases made by such
organizations shall not be exempt as a purchase for
resale;

(ee) Sales of food by little leagues, midget football
leagues, youth football or soccer leagues and similar
types of organizations, including scouting groups and
church youth groups, if the purpose in selling the food
is to obtain revenue for the functions and activities of
the organization and the revenues obtained from
selling the food is actually used in supporting or
carrying on functions and activities of the groups:
Provided, That such purchases made by such organizations shall not be exempt as a purchase for resale;

(ff) Charges for room and meals by fraternities and sororities to their members: Provided, That such purchases made by a fraternity or sorority shall not be exempt as a purchase for resale;

(gg) Sales of or charges for the transportation of passengers in interstate commerce;

(hh) Sales of tangible personal property or services to any person which this state is prohibited from taxing under the laws of the United States or under the constitution of this state;

(ii) Sales of tangible personal property or services to any person who claims exemption from the tax imposed by this article or article fifteen-A of this chapter pursuant to the provisions of any other chapter of this code;

(jj) Charges for the services of opening and closing a burial lot;

(kk) Sales of livestock, poultry or other farm products in their original state by the producer thereof or a member of the producer's immediate family who is not otherwise engaged in making retail sales of tangible personal property; and sales of livestock sold at public sales sponsored by breeder's or registry associations or livestock auction markets: Provided, That the exemptions allowed by this subsection shall apply to sales made on or after the first day of July, one thousand nine hundred ninety, and may be claimed without presenting or obtaining exemption certificates: Provided, however, That the farmer shall maintain adequate records;

(ll) Sales of motion picture films to motion picture exhibitors for exhibition if the sale of tickets or the charge for admission to the exhibition of the film is subject to the tax imposed by this article and sales of coin-operated video arcade machines or video arcade games to a person engaged in the business of providing such machines to the public for a charge upon which
the tax imposed by this article is remitted to the tax
commissioner: Provided, That the exemption provided
in this subsection shall apply to sales made on or after
the first day of July, one thousand nine hundred
ninety, and may be claimed by presenting to the seller
a properly executed exemption certificate;

(mm) Sales of aircraft repair, remodeling and
maintenance services when such services are to an
aircraft operated by a certified or licensed carrier of
persons or property, or by a governmental entity, or to
an engine or other component part of an aircraft
operated by a certified or licensed carrier of
persons or property, or by a governmental entity and
sales of tangible personal property that is permanently
affixed or permanently attached as a component part
of an aircraft owned or operated by a certified or
licensed carrier of persons or property, or by a
governmental entity, as part of the repair, remodeling
or maintenance service and sales of machinery, tools,
or equipment, directly used or consumed exclusively
in the repair, remodeling, or maintenance of aircraft,
aircraft engines, or aircraft component parts, for a
certificated or licensed carrier of persons or property,
or for a governmental entity;

(nn) Sales of tangible personal property and services
to a person entitled to claim the tax credit for invest-
ment in certain management information services
facilities allowed under section three-c, article
thirteen-d of this chapter, pursuant to the issuance of
a management information services tax credit certifi-
cation by the tax commissioner in accordance with
subsection (e), section three-c, article thirteen-d of this
chapter, when such property or services are directly
used or consumed by the purchaser in the operation of
the management information services facility, as
defined in section two of this article for which credit
is allowed under section three-c, article thirteen-d of
this chapter. Tangible personal property, or services,
directly used or consumed in the operation of a
management information services facility includes
only: (1) Computer processing and telecommunications
equipment; (2) data storage and input/output devices; (3) disaster recovery services; (4) supplies; (5) application, telecommunication and operating system software; (6) repair and maintenance of any of the aforesaid items; and (7) other tangible personal property or services directly used or consumed in the operation of a management information services facility: Provided, That the property is purchased or leased after the thirty-first day of March, one thousand nine hundred ninety-one. This exemption shall not apply to tangible personal property, or services, that are not directly used or consumed in the operation of a management information services facility, or to gasoline or special fuel: Provided, however, That nothing in this paragraph shall be construed to limit, exclude or preclude the application or availability of any other exemption set forth in this section, or elsewhere in this code, which might otherwise apply to any sale of tangible personal property or services;

(oo) Charges for memberships or services provided by health and fitness organizations relating to personalized fitness programs;

(pp) Sales of services by individuals who baby-sit for a profit: Provided, That the gross receipts of the individual from the performance of baby sitting services does not exceed $5,000.00 in a taxable year; and

(qq) A corporation or organization which is a not-for-profit entity which charges membership dues utilized for and contributing significantly to traffic and pedestrian safety and education programs whether or not the corporation or organization is exempt from income tax under Section 501(c)(3) of the Internal Revenue Code of 1985, as amended.


(a) Sales of taxable services by a corporation or organization that are exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, and that meet the requirements set forth in subdivision (b) of this section, are exempt from the tax
imposed by this article, except that this exemption shall not apply to sales of taxable services to the extent that income received from the sales of such services is taxable under Section 511 of the Internal Revenue Code.

(b) The exemption set forth in this section applies only to those corporations or organizations meeting the following criteria:

(1) The corporation or organization is organized and operated primarily for charitable or educational purposes and its activities and programs contribute importantly to promoting the general welfare of youth, families and the aged, improving health and fitness and providing recreational opportunities to the public;

(2) The corporation or organization offers membership or participation in its programs and activities to the general public and charges fees or dues which make its programs and activities accessible by a reasonable cross-section of the community; and

(3) The corporation or organization offers financial assistance on a regular and on-going basis to individuals unable to afford the organization's membership dues or fees.

c) The tax commissioner is prohibited from issuing any assessments and from taking any other action under article ten of this chapter after the thirty-first day of December, one thousand nine hundred ninety-one, to collect the tax imposed by this article from an organization described in subsections (a) and (b) of this section that did not collect the tax on transactions occurring before the first day of July, one thousand nine hundred ninety-two. The tax commissioner is also prohibited from refunding any tax collected by a qualified organization prior to the first day of July, one thousand nine hundred ninety-two, that was paid over to the tax commissioner.

d) For purposes of this section, the term "corporation" and the term "organization" are used
45 interchangeably and mean a corporation or other  
46 organization that is exempt from income tax under  
47 Section 501(c)(3) of the Internal Revenue Code, as  
48 amended.  
49 (e) Nothing in this section shall affect the application  
50 of this article to nonprofit tax-exempt hospitals.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Homerleck
Chairman Senate Committee

Ernest C. Moore
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Russell F. Smith
Clerk of the Senate

Donald D. Kopp
Clerk of the House of Delegates

Neil Bandettine
President of the Senate

Keith Lawyer
Speaker House of Delegates

The within is approved this the 30th day of March, 1992.

Winston C. Capan
Governor