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2001 APR 30 P 4:44

OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

ENROLLED

SENATE BILL NO. 650

(By Senator Craig, et al)

PASSED April 13, 2001

In Effect July 1, 2001 Passage

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SECRETARY OF STATE

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Senate Bill No. 650

(BY SENATORS CRAIGO, MCCABE, FANNING AND SHARPE)

[Passed April 13, 2001; to take effect July 1, 2001.]

AN ACT to amend and reenact section two, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to including construction management within the definition of contracting for sales and use tax purposes.

Be it enacted by the Legislature of West Virginia:

That section two, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.

§11-15-2. Definitions.

- 1 For the purpose of this article:
- 2 (a) "Business" includes all activities engaged in or
- 3 caused to be engaged in with the object of gain or eco-

4 nomic benefit, direct or indirect, and all activities of the
5 state and its political subdivisions which involve sales of
6 tangible personal property or the rendering of services
7 when those service activities compete with or may compete
8 with the activities of other persons.

9 (b) "Communication" means all telephone, radio, light,
10 light wave, radio telephone, telegraph and other communi-
11 cation or means of communication, whether used for voice
12 communication, computer data transmission or other
13 encoded symbolic information transfers and shall include
14 commercial broadcast radio, commercial broadcast
15 television and cable television.

16 (c) "Contracting":

17 (1) *In general.* - "Contracting" means and includes the
18 furnishing of work, or both materials and work, for
19 another (by a sole contractor, general contractor, prime
20 contractor, subcontractor or construction manager) in
21 fulfillment of a contract for the construction, alteration,
22 repair, decoration or improvement of a new or existing
23 building or structure, or any part thereof, or for removal
24 or demolition of a building or structure, or any part
25 thereof, or for the alteration, improvement or development
26 of real property.

27 Contracting means and includes services provided by a
28 construction manager so long as the project for which the
29 construction manager provides the services results in a
30 capital improvement to a building or structure or to real
31 property.

32 (2) *Form of contract not controlling.* - An activity that
33 falls within the scope of the definition of contracting shall
34 constitute contracting regardless of whether the contract
35 governing the activity is written or verbal and regardless
36 of whether it is in substance or form a lump sum contract,
37 a cost-plus contract, a time and materials contract,

38 whether or not open-ended, or any other kind of construc-
39 tion contract.

40 (3) *Special rules.* – For purposes of this definition:

41 (A) The term “structure” includes, but is not limited to,
42 everything built up or composed of parts joined together
43 in some definite manner and attached or affixed to real
44 property or which adds utility to real property or any part
45 thereof or which adds utility to a particular parcel of
46 property and is intended to remain there for an indefinite
47 period of time;

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

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

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

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

60 (F) The term “capital improvement” means improve-
61 ments that are affixed to or attached to and become a part
62 of a building or structure or the real property or which add
63 utility to real property, or any part thereof, and that last
64 or are intended to be relatively permanent. As used herein,
65 “relatively permanent” means lasting at least a year in
66 duration without the necessity for regularly scheduled
67 recurring service to maintain the capital improvement.
68 “Regular recurring service” means regularly scheduled
69 service intervals of less than one year;

70 (G) Contracting does not include the furnishing of work,
71 or both materials and work, in the nature of hookup,

72 connection, installation or other services if the service is
73 incidental to the retail sale of tangible personal property
74 from the service provider's inventory: *Provided*, That the
75 hookup, connection or installation of the foregoing is
76 incidental to the sale of the same and performed by the
77 seller thereof or performed in accordance with arrange-
78 ments made by the seller thereof. Examples of transac-
79 tions that are excluded from the definition of contracting
80 pursuant hereto include, but are not limited to, the sale of
81 wall-to-wall carpeting and the installation of wall-to-wall
82 carpeting, the sale, hookup and connection of mobile
83 homes, window air conditioning units, dishwashers,
84 clothing washing machines or dryers, other household
85 appliances, drapery rods, window shades, venetian blinds,
86 canvas awnings, free standing industrial or commercial
87 equipment and other similar items of tangible personal
88 property. Repairs made to the foregoing are within the
89 definition of contracting if the repairs involve perma-
90 nently affixing to or improving real property or something
91 attached thereto which extends the life of the real property
92 or something affixed thereto or allows or intends to allow
93 the real property or thing permanently attached thereto to
94 remain in service for a year or longer.

95 (H) The term "construction manager" means a person
96 who enters into an agreement to employ, direct, coordinate
97 or manage design professionals and contractors who are
98 hired and paid directly by the owner or the construction
99 manager. The business activities of a "construction
100 manager" as defined herein shall constitute contracting, so
101 long as the project for which the construction manager
102 provides the services results in a capital improvement to a
103 building or structure or to real property.

104 (d) (1) "Directly used or consumed" in the activities of
105 manufacturing, transportation, transmission, communica-
106 tion or the production of natural resources means used or
107 consumed in those activities or operations which consti-
108 tute an integral and essential part of the activities, as

109 contrasted with and distinguished from those activities or
110 operations which are simply incidental, convenient or
111 remote to the activities.

112 (2) Uses of property or consumption of services which
113 constitute direct use or consumption in the activities of
114 manufacturing, transportation, transmission, communica-
115 tion or the production of natural resources includes only:

116 (A) In the case of tangible personal property, physical
117 incorporation of property into a finished product resulting
118 from manufacturing production or the production of
119 natural resources;

120 (B) Causing a direct physical, chemical or other change
121 upon property undergoing manufacturing production or
122 production of natural resources;

123 (C) Transporting or storing property undergoing trans-
124 portation, communication, transmission, manufacturing
125 production or production of natural resources;

126 (D) Measuring or verifying a change in property directly
127 used in transportation, communication, transmission,
128 manufacturing production or production of natural
129 resources;

130 (E) Physically controlling or directing the physical
131 movement or operation of property directly used in
132 transportation, communication, transmission, manufactur-
133 ing production or production of natural resources;

134 (F) Directly and physically recording the flow of prop-
135 erty undergoing transportation, communication, transmis-
136 sion, manufacturing production or production of natural
137 resources;

138 (G) Producing energy for property directly used in
139 transportation, communication, transmission, manufactur-
140 ing production or production of natural resources;

141 (H) Facilitating the transmission of gas, water, steam or
142 electricity from the point of their diversion to property
143 directly used in transportation, communication, transmis-
144 sion, manufacturing production or production of natural
145 resources;

146 (I) Controlling or otherwise regulating atmospheric
147 conditions required for transportation, communication,
148 transmission, manufacturing production or production of
149 natural resources;

150 (J) Serving as an operating supply for property undergo-
151 ing transmission, manufacturing production or production
152 of natural resources, or for property directly used in
153 transportation, communication, transmission, manufactur-
154 ing production or production of natural resources;

155 (K) Maintenance or repair of property, including main-
156 tenance equipment, directly used in transportation,
157 communication, transmission, manufacturing production
158 or production of natural resources;

159 (L) Storage, removal or transportation of economic
160 waste resulting from the activities of manufacturing,
161 transportation, communication, transmission or the
162 production of natural resources;

163 (M) Pollution control or environmental quality or
164 protection activity directly relating to the activities of
165 manufacturing, transportation, communication, transmis-
166 sion or the production of natural resources and personnel,
167 plant, product or community safety or security activity
168 directly relating to the activities of manufacturing,
169 transportation, communication, transmission or the
170 production of natural resources; or

171 (N) Otherwise be used as an integral and essential part
172 of transportation, communication, transmission, manufac-
173 turing production or production of natural resources.

174 (3) Uses of property or services which do not constitute
175 direct use or consumption in the activities of manufactur-
176 ing, transportation, transmission, communication or the
177 production of natural resources include, but are not
178 limited to:

179 (A) Heating and illumination of office buildings;

180 (B) Janitorial or general cleaning activities;

181 (C) Personal comfort of personnel;

182 (D) Production planning, scheduling of work or inven-
183 tory control;

184 (E) Marketing, general management, supervision, fin-
185 ance, training, accounting and administration; or

186 (F) An activity or function incidental or convenient to
187 transportation, communication, transmission, manufactur-
188 ing production or production of natural resources, rather
189 than an integral and essential part of these activities.

190 (e) (1) "Directly used or consumed" in the activities of
191 gas storage, the generation or production or sale of electric
192 power, the provision of a public utility service or the
193 operation of a utility business means used or consumed in
194 those activities or operations which constitute an integral
195 and essential part of those activities or operation, as
196 contrasted with and distinguished from activities or
197 operations which are simply incidental, convenient or
198 remote to those activities.

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

204 (A) Tangible personal property or services, including
205 equipment, machinery, apparatus, supplies, fuel and power
206 and appliances, which are used immediately in production

207 or generation activities and equipment, machinery,
208 supplies, tools and repair parts used to keep in operation
209 exempt production or generation devices. For purposes of
210 this subsection, production or generation activities shall
211 commence from the intake, receipt or storage of raw
212 materials at the production plant site;

213 (B) Tangible personal property or services, including
214 equipment, machinery, apparatus, supplies, fuel and
215 power, appliances, pipes, wires and mains, which are used
216 immediately in the transmission or distribution of gas,
217 water and electricity to the public, and equipment, ma-
218 chinery, tools, repair parts and supplies used to keep in
219 operation exempt transmission or distribution devices, and
220 these vehicles and their equipment as are specifically
221 designed and equipped for such purposes are exempt from
222 the tax when used to keep a transmission or distribution
223 system in operation or repair. For purposes of this subsec-
224 tion, transmission or distribution activities shall com-
225 mence from the close of production at a production plant
226 or wellhead when a product is ready for transmission or
227 distribution to the public and shall conclude at the point
228 where the product is received by the public;

229 (C) Tangible personal property or services, including
230 equipment, machinery, apparatus, supplies, fuel and
231 power, appliance, pipes, wires and mains, which are used
232 immediately in the storage of gas or water, and equipment,
233 machinery, tools, supplies and repair parts used to keep in
234 operation exempt storage devices;

235 (D) Tangible personal property or services used immedi-
236 ately in the storage, removal or transportation of economic
237 waste resulting from the activities of gas storage, the
238 generation or production or sale of electric power, the
239 provision of a public utility service or the operation of a
240 utility business;

241 (E) Tangible personal property or services used immedi-
242 ately in pollution control or environmental quality or

243 protection activity or community safety or security
244 directly relating to the activities of gas storage, generation
245 or production or sale of electric power, the provision of a
246 public utility service or the operation of a utility business.

247 (3) Uses of property or services which would not consti-
248 tute direct use or consumption in the activities of gas
249 storage, generation or production or sale of electric power,
250 the provision of a public utility service or the operation of
251 a utility business include, but are not limited to:

252 (A) Heating and illumination of office buildings;

253 (B) Janitorial or general cleaning activities;

254 (C) Personal comfort of personnel;

255 (D) Production planning, scheduling of work or inven-
256 tory control;

257 (E) Marketing, general management, supervision, fin-
258 ance, training, accounting and administration; or

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

263 (f) "Drugs" includes all sales of drugs or appliances to a
264 purchaser upon prescription of a physician or dentist and
265 any other professional person licensed to prescribe.

266 (g) "Gas storage" means the injection of gas into a
267 storage reservoir or the storage of gas for any period of
268 time in a storage reservoir or the withdrawal of gas from
269 a storage reservoir engaged in by businesses subject to the
270 business and occupation tax imposed by sections two and
271 two-e, article thirteen of this chapter.

272 (h) "Generating or producing or selling of electric
273 power" means the generation, production or sale of
274 electric power engaged in by businesses subject to the

275 business and occupation tax imposed by section two,
276 two-d, two-m or two-n, article thirteen of this chapter.

277 (i) "Gross proceeds" means the amount received in
278 money, credits, property or other consideration from sales
279 and services within this state, without deduction on
280 account of the cost of property sold, amounts paid for
281 interest or discounts or other expenses whatsoever. Losses
282 may not be deducted, but any credit or refund made for
283 goods returned may be deducted.

284 (j) "Management information services" means, and is
285 limited to, data processing, data storage, data recovery
286 and backup, programming recovery and backup, telecom-
287 munications, computation and computer processing,
288 computer programming, electronic information and data
289 management activities, or any combination of these
290 activities, when such activity, or activities, is not subject
291 to regulation by the West Virginia public service commis-
292 sion and the activity, or activities, is for the purpose of
293 managing, planning for, organizing or operating, any
294 industrial or commercial business, or any enterprise,
295 facility or facilities of an industrial or commercial busi-
296 ness, whether the industrial or commercial business or
297 enterprise, facility or facilities of an industrial or commer-
298 cial business is located within or without this state and
299 without regard to whether the industrial or commercial
300 business, or enterprise, facility or facilities of an industrial
301 or commercial business is owned by the provider of the
302 management information services or by a "related per-
303 son", as defined in Section 267(b) of the Internal Revenue
304 Code of 1986, as amended.

305 (k) "Management information services facility" means
306 a building, or any part thereof, or a complex of buildings,
307 or any part thereof, including the machinery and equip-
308 ment located therein, that is exclusively dedicated to
309 providing management information services to the owner
310 or operator thereof or to another person.

311 (l) "Manufacturing" means a systematic operation or
312 integrated series of systematic operations engaged in as a
313 business or segment of a business which transforms or
314 converts tangible personal property by physical, chemical
315 or other means into a different form, composition or
316 character from that in which it originally existed.

317 (m) "Personal service" includes those:

318 (1) Compensated by the payment of wages in the ordi-
319 nary course of employment; and

320 (2) Rendered to the person of an individual without, at
321 the same time, selling tangible personal property, such as
322 nursing, barbering, shoe shining, manicuring and similar
323 services.

324 (n) "Persons" means any individual, partnership, asso-
325 ciation, corporation, state or its political subdivisions or
326 agency of either, guardian, trustee, committee, executor or
327 administrator.

328 (o) "Production of natural resources" means, except for
329 oil and gas, the performance, by either the owner of the
330 natural resources or another, of the act or process of
331 exploring, developing, severing, extracting, reducing to
332 possession and loading for shipment and shipment for sale,
333 profit or commercial use of any natural resource products
334 and any reclamation, waste disposal or environmental
335 activities associated therewith and the construction,
336 installation or fabrication of ventilation structures, mine
337 shafts, slopes, boreholes, dewatering structures, including
338 associated facilities and apparatus, by the producer or
339 others, including contractors and subcontractors, at a coal
340 mine or coal production facility. For the natural resources
341 oil and gas, "production of natural resources" means the
342 performance, by either the owner of the natural resources,
343 a contractor or a subcontractor, of the act or process of
344 exploring, developing, drilling, well-stimulation activities
345 such as logging, perforating or fracturing, well-completion

346 activities such as the installation of the casing, tubing and
347 other machinery and equipment and any reclamation,
348 waste disposal or environmental activities associated
349 therewith, including the installation of the gathering
350 system or other pipeline to transport the oil and gas
351 produced or environmental activities associated therewith
352 and any service work performed on the well or well site
353 after production of the well has initially commenced. All
354 work performed to install or maintain facilities up to the
355 point of sale for severance tax purposes would be included
356 in the "production of natural resources" and subject to the
357 direct use concept. "Production of natural resources" does
358 not include the performance or furnishing of work, or
359 materials or work, in fulfillment of a contract for the
360 construction, alteration, repair, decoration or improve-
361 ment of a new or existing building or structure, or any part
362 thereof, or for the alteration, improvement or development
363 of real property, by persons other than those otherwise
364 directly engaged in the activities specifically set forth in
365 this subsection as "production of natural resources".

366 (p) "Providing a public service or the operating of a
367 utility business" means the providing of a public service or
368 the operating of a utility by businesses subject to the
369 business and occupation tax imposed by sections two and
370 two-d, article thirteen of this chapter.

371 (q) "Purchaser" means a person who purchases tangible
372 personal property or a service taxed by this article.

373 (r) "Sale", "sales" or "selling" includes any transfer of
374 the possession or ownership of tangible personal property
375 for a consideration, including a lease or rental, when the
376 transfer or delivery is made in the ordinary course of the
377 transferor's business and is made to the transferee or his or
378 her agent for consumption or use or any other purpose.

379 (s) "Service" or "selected service" includes all nonpro-
380 fessional activities engaged in for other persons for a
381 consideration, which involve the rendering of a service as

382 distinguished from the sale of tangible personal property,
383 but shall not include contracting, personal services or the
384 services rendered by an employee to his or her employer or
385 any service rendered for resale.

386 (t) "Tax" includes all taxes, interest and penalties levied
387 hereunder.

388 (u) "Tax commissioner" means the state tax commis-
389 sioner.

390 (v) "Taxpayer" means any person liable for the tax
391 imposed by this article.

392 (w) "Transmission" means the act or process of causing
393 liquid, natural gas or electricity to pass or be conveyed
394 from one place or geographical location to another place
395 or geographical location through a pipeline or other
396 medium for commercial purposes.

397 (x) "Transportation" means the act or process of convey-
398 ing, as a commercial enterprise, passengers or goods from
399 one place or geographical location to another place or
400 geographical location.

401 (y) "Ultimate consumer" or "consumer" means a person
402 who uses or consumes services or personal property.

403 (z) "Vendor" means any person engaged in this state in
404 furnishing services taxed by this article or making sales of
405 tangible personal property.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Signature]
.....
Chairman Senate Committee

[Signature]
.....
Chairman House Committee

Originated in the Senate.

To take effect July 1, 2001.

[Signature]
.....
Clerk of the Senate

[Signature]
.....
Clerk of the House of Delegates

[Signature]
.....
President of the Senate

[Signature]
.....
Speaker House of Delegates

The within *is approved* this the *27th*
Day of *April*, 2001.

[Signature]
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 4/24/01

Time 11:20am