WEST VIRGINIA LEGISLATURE

Regular Session, 2002

ENROLLED

SENATE BILL NO. 285

(By Senators Bailey and Wooton)

PASSED March 6, 2003

In Effect ninety days from Passage
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[Passed March 6, 2002; 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, relating to providing an exemption from the consumers sales tax for the service of providing technical evaluations for compliance with federal and state environmental standards provided by environmental and industrial consultants who have formal certification through the West Virginia department of environmental protection or the West Virginia bureau for public health or both.

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 to read as follows:

ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.

(a) Exemptions for which exemption certificate may be issued. - A person having a right or claim to any exemption set forth in this subsection may, in lieu of paying the tax imposed by this article and filing a claim for refund, execute a certificate of exemption, in the form required by the tax commissioner, and deliver it to the vendor of the property or service, in the manner required by the tax commissioner. However, the tax commissioner may, by rule, specify those exemptions authorized in this subsection for which exemptions certificates are not required.

The following sales of tangible personal property and services are exempt as provided in this subsection:

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

(2) 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, the board of trustees of the university system of West Virginia or the board of directors for colleges located in this state;

(3) Sales of property or services to this state, its institutions or subdivisions, governmental units, institutions or subdivisions of other states: Provided, That the law of the 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;

(4) 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;

(5) Sales of property or services to churches which make no charge whatsoever for the services they render: Provided, That the exemption granted in this subdivision
applies only to services, equipment, supplies, food for
meals and materials directly used or consumed by these
organizations and does not apply to purchases of gasoline
or special fuel;

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

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

(B) 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;

(C) 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;

(D) An organization which has no paid employees and its
gross income from fund raisers, less reasonable and
necessary expenses incurred to raise the gross income (or
the tangible personal property or services purchased with
the 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;

(E) 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 exclu-

sively for charitable purposes and has as its primary
purpose the nonsectarian character development and
citizenship training of its members;

(F) For purposes of this subsection:

(i) 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, perfor-
mance 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 the 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 the
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;

(ii) The term “charitable contribution” means a contri-
bution or gift to or for the use of a corporation or organi-
zation, described in Section 170(c)(2) of the Internal
Revenue Code of 1986, as amended; and
(iii) 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;

(G) The exemption allowed by this subdivision 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 subdivision apply to sales made after the thirtieth day of June, one thousand nine hundred eighty-nine: Provided, That the exemption granted in this subdivision applies only to services, equipment, supplies and materials used or consumed in the activities for which the organizations qualify as tax exempt organizations under the Internal Revenue Code and does not apply to purchases of gasoline or special fuel;

(7) An isolated transaction in which any taxable service or any tangible personal property is sold, transferred, offered for sale or delivered by the owner of the property or by his or her representative for the owner's account, the sale, transfer, offer for sale or delivery not being made in the ordinary course of repeated and successive transactions of like character by the owner or on his or her account by the representative: Provided, That nothing contained in this subdivision 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 in this subdivision, regardless of where the isolated sale takes place. The tax commissioner may propose a legislative rule for promulgation pursuant to article three, chapter twenty-nine-a of this code which he or she considers necessary for the efficient administration of this exemption;
(8) 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 is 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 are not exempt: Provided, however, That nails and fencing may not be considered as improvements to real property;

(9) 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 is 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 that person or his or her agent into any real property, building or structure is not exempt under this subdivision;

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

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

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

(13) Sales and services performed by day care centers;

(14) Casual and occasional sales of property or services not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character by a corporation or organization which is
exempt from tax under subdivision (6) of this subsection on its purchases of tangible personal property or services:

(A) For purposes of this subdivision, the term "casual and occasional sales not conducted in a 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 subdivision (6) of this subsection, from payment of the tax imposed by this article on its purchases, when the 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; and

(B) The provisions of this subdivision apply to sales made after the thirtieth day of June, one thousand nine hundred eighty-nine;

(15) Sales of property or services to a school which has approval from the board of trustees of the university 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 are taxable;

(16) Sales of mobile homes to be used by purchasers as their principal year-round residence and dwelling: Provided, That these mobile homes are subject to tax at the three-percent rate;

(17) 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;

(18) Leases of motor vehicles titled pursuant to the provisions of article three, chapter seventeen-a of this code
This exemption applies 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 that date for months of the lease beginning on or after that date;

(19) Notwithstanding the provisions of section eighteen of this article or any other provision of this article to the contrary, sales of propane to consumers for poultry house heating purposes, with any seller to the consumer who may have prior paid the tax in his or her price, to not pass on the same to the consumer, but to make application and receive refund of the tax from the tax commissioner pursuant to rules which are promulgated after being proposed for legislative approval in accordance with chapter twenty-nine-a of this code by the tax commissioner;

(20) 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 U.S.C. §2011 et seq., as amended, or with drafts issued through the West Virginia special supplement food program for women, infants and children codified in 42 U.S.C. §1786;

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

(22) Sales of electronic data processing services and related software: Provided, That, for the purposes of this subdivision, "electronic data processing services" means:

(A) The processing of another's data, including all processes incident to processing of data such as keypunching, keystroke verification, rearranging or sorting of previously documented data for the purpose of data entry or automatic processing and changing the medium on which data is sorted, whether these processes are done by the same
person or several persons; and (B) providing access to
computer equipment for the purpose of processing data or
examining or acquiring data stored in or accessible to the
computer equipment;

(23) Tuition charged for attending educational summer
camps;

(24) Dispensing of services performed by one corpora-
tion, partnership or limited liability company for another
corporation, partnership or limited liability company
when the entities are members of the same controlled
group or are related taxpayers as defined in Section 267 of
the Internal Revenue Code. "Control" means ownership,
directly or indirectly, of stock, equity interests or member-
ship interests possessing fifty percent or more of the total
combined voting power of all classes of the stock of a
corporation, equity interests of a partnership or member-
ship interests of a limited liability company entitled to
vote or ownership, directly or indirectly, of stock, equity
interests or membership interests possessing fifty percent
or more of the value of the corporation, partnership or
limited liability company;

(25) Food for the following are exempt:

(A) Food purchased or sold by a public or private school,
school-sponsored student organizations or school-spon-
sored parent-teacher associations to students enrolled in
the school or to employees of the school during normal
school hours; but not those sales of food made to the
general public;

(B) Food purchased or sold by a public or private college
or university or by a student organization officially
recognized by the college or university to students enrolled
at the college or university when the 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;

(C) 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;

(D) Food sold by a charitable or private nonprofit
organization, a nonprofit organization or a governmental
agency under a program operating in West Virginia for a
minimum of five years to provide food at or below cost to
individuals who perform a minimum of two hours of
community service for each unit of food purchased from
the organization;

(E) 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 obtained is actually ex-
pended for that purpose;

(F) 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 organization and the
revenue obtained from selling the food is actually used in
carrying on those functions and activities: Provided, That
purchases made by the organizations are not exempt as a
purchase for resale;

(26) Sales of food by little leagues, midget football
leagues, youth football or soccer leagues, band boosters or
other school or athletic booster organizations supporting
activities for grades kindergarten through twelve 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 the purchases made by the organizations are not exempt as a purchase for resale;

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

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

(29) 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;

(30) 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 provision of any other chapter of this code;

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

(32) Sales of livestock, poultry or other farm products in their original state by the producer of the livestock, poultry or other farm products 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 breeders or registry associations or livestock auction markets: Provided, That the exemptions allowed by this subdivision 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;
(33) 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 the 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 subdivision applies 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;

(34) Sales of aircraft repair, remodeling and maintenance services when the 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 certificate 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 certificate 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 certificate or licensed carrier of persons or property, or for a governmental entity;

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

(36) 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 do not exceed five thousand dollars in a taxable year;
(37) Sales of services after the thirtieth day of June, one thousand nine hundred ninety-seven, by public libraries or by libraries at academic institutions or by libraries at institutions of higher learning;

(38) Commissions received after the thirtieth day of June, one thousand nine hundred ninety-seven, by a manufacturer's representative;

(39) Sales of primary opinion research services after the thirtieth day of June, one thousand nine hundred ninety-seven, when:

(A) The services are provided to an out-of-state client;

(B) The results of the service activities, including, but not limited to, reports, lists of focus group recruits and compilation of data are transferred to the client across state lines by mail, wire or other means of interstate commerce, for use by the client outside the state of West Virginia; and

(C) The transfer of the results of the service activities is an indispensable part of the overall service.

For the purpose of this subdivision, the term "primary opinion research" means original research in the form of telephone surveys, mall intercept surveys, focus group research, direct mail surveys, personal interviews and other data collection methods commonly used for quantitative and qualitative opinion research studies;

(40) Sales of property or services after the thirtieth day of June, one thousand nine hundred ninety-seven, to persons within the state when those sales are for the purposes of the production of value-added products: Provided, That the exemption granted in this subdivision applies only to services, equipment, supplies and materials directly used or consumed by those persons engaged solely in the production of value-added products: Provided, however, That this exemption may not be claimed by any
one purchaser for more than five consecutive years, except as otherwise permitted in this section.

For the purpose of this subdivision, the term "value-added product" means the following products derived from processing a raw agricultural product, whether for human consumption or for other use: For purposes of this subdivision, the following enterprises qualify as processing raw agricultural products into value-added products:

Those engaged in the conversion of:

(A) Lumber into furniture, toys, collectibles and home furnishings;

(B) Fruits into wine;

(C) Honey into wine;

(D) Wool into fabric;

(E) Raw hides into semifinished or finished leather products;

(F) Milk into cheese;

(G) Fruits or vegetables into a dried, canned or frozen product;

(H) Feeder cattle into commonly accepted slaughter weights;

(I) Aquatic animals into a dried, canned, cooked or frozen product; and

(J) Poultry into a dried, canned, cooked or frozen product;

(41) After the thirtieth day of June, one thousand nine hundred ninety-seven, sales of music instructional services by a music teacher and artistic services or artistic performances of an entertainer or performing artist pursuant to a contract with the owner or operator of a retail establishment, restaurant, inn, bar, tavern, sports or other enter-
tainment facility or any other business location in this state in which the public or a limited portion of the public may assemble to hear or see musical works or other artistic works be performed for the enjoyment of the members of the public there assembled when the amount paid by the owner or operator for the artistic service or artistic performance does not exceed three thousand dollars: Provided, That nothing contained herein may be construed to deprive private social gatherings, weddings or other private parties from asserting the exemption set forth in this subdivision. For the purposes of this exemption, artistic performance or artistic service means and is limited to the conscious use of creative power, imagination and skill in the creation of aesthetic experience for an audience present and in attendance and includes, and is limited to, stage plays, musical performances, poetry recitations and other readings, dance presentation, circuses and similar presentations and does not include the showing of any film or moving picture, gallery presentations of sculptural or pictorial art, nude or strip show presentations, video games, video arcades, carnival rides, radio or television shows or any video or audio taped presentations or the sale or leasing of video or audio tapes, airshows, or any other public meeting, display or show other than those specified herein: Provided, however, That nothing contained herein may be construed to exempt the sales of tickets from the tax imposed in this article. The state tax commissioner shall propose a legislative rule pursuant to article three, chapter twenty-nine-a of this code establishing definitions and eligibility criteria for asserting this exemption which is not inconsistent with the provisions set forth herein: Provided further, That nude dancers or strippers may not be considered as entertainers for the purposes of this exemption;

(42) After the thirtieth day of June, one thousand nine hundred ninety-seven, charges to a member by a membership association or organization which is exempt from paying federal income taxes under Section 501(c)(3) or
(c)(6) of the Internal Revenue Code of 1986, as amended, for membership in the association or organization, including charges to members for newsletters prepared by the association or organization for distribution primarily to its members, charges to members for continuing education seminars, workshops, conventions, lectures or courses put on or sponsored by the association or organization, including charges for related course materials prepared by the association or organization or by the speaker or speakers for use during the continuing education seminar, workshop, convention, lecture or course, but not including any separate charge or separately stated charge for meals, lodging, entertainment or transportation taxable under this article: Provided, That the association or organization pays the tax imposed by this article on its purchases of meals, lodging, entertainment or transportation taxable under this article for which a separate or separately stated charge is not made. A membership association or organization which is exempt from paying federal income taxes under Section 501(c)(3) or (c)(6) of the Internal Revenue Code of 1986, as amended, may elect to pay the tax imposed under this article on the purchases for which a separate charge or separately stated charge could apply and not charge its members the tax imposed by this article or the association or organization may avail itself of the exemption set forth in subdivision (9) of this subsection relating to purchases of tangible personal property for resale and then collect the tax imposed by this article on those items from its member;

(43) Sales of governmental services or governmental materials after the thirtieth day of June, one thousand nine hundred ninety-seven, by county assessors, county sheriffs, county clerks or circuit clerks in the normal course of local government operations;

(44) Direct or subscription sales by the division of natural resources of the magazine currently entitled "Wonderful West Virginia" and by the division of culture
and history of the magazine currently entitled "Goldenseal" and the journal currently entitled "West Virginia History";

(45) Sales of soap to be used at car wash facilities;

(46) Commissions received by a travel agency from an out-of-state vendor; and

(47) The service of providing technical evaluations for compliance with federal and state environmental standards provided by environmental and industrial consultants who have formal certification through the West Virginia department of environmental protection or the West Virginia bureau for public health or both. For purposes of this exemption, the service of providing technical evaluations for compliance with federal and state environmental standards includes those costs of tangible personal property directly used in providing such services that are separately billed to the purchaser of such services and on which the tax imposed by this article has previously been paid by the service provider.

(b) *Refundable exemptions.* – Any person having a right or claim to any exemption set forth in this subsection shall first pay to the vendor the tax imposed by this article and then apply to the 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. The following sales of tangible personal property and services are exempt from tax as provided in this subsection:

(1) Sales of property or services to bona fide charitable organizations who make no charge whatsoever for the services they render: *Provided,* That the exemption granted in this subdivision applies only to services, equipment, supplies, food, meals and materials directly used or consumed by these organizations and does not apply to purchases of gasoline or special fuel;
(2) Sales of services, machinery, supplies and materials directly used or consumed in the activities of manufacturing, transportation, transmission, communication, production of natural resources, gas storage, generation or production or selling electric power, provision of a public utility service or the operation of a utility service or the operation of a utility business, in the businesses or organizations named in this subdivision and does not apply to purchases of gasoline or special fuel;

(3) 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 are taxable;

(4) Sales and services, firefighting 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 are taxable; and

(5) Sales of building materials or building supplies or other property to an organization qualified under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended, which are to be installed in, affixed to or incorporated by the organization or its agent into real property or into a building or structure which is or will be used as permanent low-income housing, transitional housing, an emergency homeless shelter, a domestic violence shelter or an emergency children and youth shelter if the shelter is owned, managed, developed or operated by an organization qualified under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within is approved this the 18th Day of , 2002.

Governor