WEST VIRGINIA LEGISLATURE
FOURTH EXTRAORDINARY SESSION, 2005

ENROLLED

House Bill No. 401

(By By Mr. Speaker, Mr. Kiss, and Delegate Trump)
[By Request of the Executive]

Passed September 13, 2005

In Effect from Passage
AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §11-15-3a; and to amend and reenact §11-15B-2 and §11-15B-2a of said code, all relating generally to consumers sales and use taxes on food and food ingredients intended for human consumption; reducing rate of tax on sales, purchases and uses of food and food ingredients to five percent beginning on specified date; defining food and food ingredients and certain other terms; providing that lower rate does not apply to sales, purchases and uses of prepared food; authorizing legislative and emergency rules; and specifying internal effective dates.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new section, designated §11-15-3a; and that §11-15B-2 and §11-15B-2a of said code be amended and reenacted, all to read as follows:

ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.
§11-15-3a. Rate of tax on food and food ingredients intended for human consumption; reduction of tax beginning January 1, 2006; exceptions; legislative, emergency and other rules.

(a) Rate of tax on food and food ingredients. — Notwithstanding any provision of this article or article fifteen-a of this chapter to the contrary, the rate of tax on sales, purchases and uses of food and food ingredients intended for human consumption after the thirty-first day of December, two thousand five, shall be five percent of its sales price, as defined in section two, article fifteen-b of this chapter.

(b) Calculation of tax on fractional parts of a dollar. — The tax computation under this section shall be carried to the third decimal place, and the tax rounded up to the next whole cent whenever the third decimal place is greater than four and rounded down to the lower whole cent whenever the third decimal place is four or less. The seller may elect to compute the tax due on a transaction on a per item basis or on an invoice basis provided the method used is consistently used during the reporting period.

(c) Exceptions. — The reduced rate of tax provided in this section shall not apply to sales, purchases and uses by consumers of “Prepared food,” as defined in article fifteen-b of this chapter, which shall remain taxable at the general rate of tax specified in section three of this article and section two, article fifteen-a of this chapter.

(d) Federal food stamp and women, infants and children programs, other exemptions.— Nothing in this section shall affect application of the exemption from tax provided in section nine of this article for food purchased by an eligible person using food stamps, electronic benefits transfer cards or vouchers issued by or pursuant to authorization of the United States Department of Agriculture to individuals participating in the federal food stamp program, by whatever name called, or the
women, infants, and children (WIC) program, or application of any other exemption from tax set forth in this article or article fifteen-a of this chapter.

(e) "Legislative rules; emergency rules."—The Tax Commissioner may promulgate legislative rules and emergency rules explaining and implementing this section, which rules shall be promulgated in accordance with the provisions of article three, chapter twenty-nine-a of this code. The authority to promulgate rules includes authority to amend or repeal those rules. If proposed legislative rules for this section are filed in the State Register before the fifteenth day of December, two thousand five, those rules may be promulgated as emergency legislative rules, as provided in article three of said chapter twenty-nine-a.

ARTICLE 15B. STREAMLINED SALES AND USE TAXES.


(a) "General."—When used in this article and articles fifteen and fifteen-a of this chapter, words defined in subsection (b) of this section shall have the meanings ascribed to them in this section, except in those instances where a different meaning is distinctly expressed or the context in which the term is used clearly indicates that a different meaning is intended by the Legislature.

(b) "Terms defined."—

(1) "Agent" means a person appointed by a seller to represent the seller before the member states.

(2) "Agreement" means the streamlined sales and use tax agreement as defined in section two-a of this article.

(3) "Alcoholic beverages" means beverages that are suitable for human consumption and contain one half of one percent or more of alcohol by volume.
(4) "Bundled transaction" means the retail sale of two or more products, except real property and services to real property, where: (i) The products are otherwise distinct and identifiable; and (ii) the products are sold for one nonitemized price. A "bundled transaction" does not include the sale of any products in which the "sales price" varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction.

(A) "Distinct and identifiable products" does not include:

(i) Packaging – such as containers, boxes, sacks, bags, and bottles – or other materials – such as wrapping, labels, tags, and instruction guides – that accompany the "retail sale" of the products and are incidental or immaterial to the "retail sale" thereof. Examples of packaging that are incidental or immaterial include grocery sacks, shoeboxes, dry cleaning garment bags and express delivery envelopes and boxes;

(ii) A product provided free of charge with the required purchase of another product. A product is "provided free of charge" if the "sales price" of the product purchased does not vary depending on the inclusion of the product "provided free of charge"; or

(iii) Items included in the member state’s definition of "sales price," as defined in this section.

(B) The term "one nonitemized price" does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form including, but not limited to, an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list.
(C) A transaction that otherwise meets the definition of a "bundled transaction," as defined in this subdivision, is not a "bundled transaction" if it is:

(i) The "retail sale" of tangible personal property and a service where the tangible personal property is essential to the use of the service, and is provided exclusively in connection with the service, and the true object of the transaction is the service; or

(ii) The "retail sale" of services where one service is provided that is essential to the use or receipt of a second service and the first service is provided exclusively in connection with the second service and the true object of the transaction is the second service; or

(iii) A transaction that includes taxable products and nontaxable products and the "purchase price" or "sales price" of the taxable products is de minimis.

(I) "De minimis" means the seller’s "purchase price" or "sales price" of the taxable products is ten percent or less of the total "purchase price" or "sales price" of the bundled products.

(II) Sellers shall use either the "purchase price" or the "sales price" of the products to determine if the taxable products are de minimis. Sellers may not use a combination of the "purchase price" and "sales price" of the products to determine if the taxable products are de minimis.

(III) Sellers shall use the full term of a service contract to determine if the taxable products are de minimis; or

(iv) A transaction that includes products taxable at the general rate of tax and food or food ingredients taxable at a lower rate of tax and the "purchase price" or "sales price" of the products taxable at the general sales tax rate is de minimis.
(I) “De minimis” means the seller’s “purchase price” or “sales price” of the products taxable at the general sales tax rate is ten percent or less of the total “purchase price” or “sales price” of the bundled products.

(II) Sellers shall use either the “purchase price” or the “sales price” of the products to determine if the products taxable at the general rate of tax are de minimis. Sellers may not use a combination of the “purchase price” and “sales price” of the products to determine if the products taxable at the general rate of tax are de minimis.

(III) Sellers shall use the full term of a service contract to determine if the products taxable at the general rate of tax are de minimis; or

(v) The “retail sale” of exempt tangible personal property, or food and food ingredients taxable at a lower rate of tax, and tangible personal property taxable at the general rate of tax where:

(I) The transaction includes “food and food ingredients”, “drugs”, “durable medical equipment”, “mobility enhancing equipment”, “prosthetic devices” all as defined in article fifteen-b of this chapter; and

(II) Where the seller’s “purchase price” or “sales price” of the taxable tangible personal property taxable at the general rate of tax is fifty percent or less of the total “purchase price” or “sales price” of the bundled tangible personal property. Sellers may not use a combination of the “purchase price” and “sales price” of the tangible personal property when making the fifty percent determination for a transaction.

(5) “Candy” means a preparation of sugar, honey or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars,
drops or pieces. “Candy” shall not include any preparation containing flour and shall require no refrigeration.

(6) “Certified automated system” or “CAS” means software certified under the agreement to calculate the tax imposed by each jurisdiction on a transaction, determine the amount of tax to remit to the appropriate state, and maintain a record of the transaction.

(7) “Certified service provider” or “CSP” means an agent certified under the agreement to perform all of the seller’s sales tax functions.

(8) “Computer” means an electronic device that accepts information in digital or similar form and manipulates the information for a result based on a sequence of instructions.

(9) “Computer software” means a set of coded instructions designed to cause a “computer” or automatic data processing equipment to perform a task.

(10) “Delivered electronically” means delivered to the purchaser by means other than tangible storage media.

(11) “Delivery charges” means charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing.

(12) “Dietary supplement” means any product, other than “tobacco”, intended to supplement the diet that:

(A) Contains one or more of the following dietary ingredients:

(i) A vitamin;
(ii) A mineral;

(iii) A herb or other botanical;

(iv) An amino acid;

(v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or

(vi) A concentrate, metabolite, constituent, extract or combination of any ingredient described in subparagraph (i) through (v) of this subdivision;

(B) Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and

(C) Is required to be labeled as a dietary supplement, identifiable by the “Supplemental Facts” box found on the label as required pursuant to 21 CFR §101.36, or in any successor section of the code of federal regulations.

(13) “Direct mail” means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items are not billed directly to the recipients. “Direct mail” includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. “Direct mail” does not include multiple items of printed material delivered to a single address.

(14) “Drug” means a compound, substance or preparation, and any component of a compound, substance or preparation, other than food and food ingredients, dietary supplements or alcoholic beverages:
(A) Recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, and supplement to any of them;

(B) Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans; or

(C) Intended to affect the structure or any function of the human body.

(15) “Durable medical equipment” means equipment including repair and replacement parts for the equipment, but does not include “mobility-enhancing equipment”, which:

(A) Can withstand repeated use;

(B) Is primarily and customarily used to serve a medical purpose;

(C) Generally is not useful to a person in the absence of illness or injury; and

(D) Is not worn in or on the body.

(16) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(17) “Entity-based exemption” means an exemption based on who purchases the product or service or who sells the product or service.

(18) “Food and food ingredients” means substances, whether in liquid, concentrated, solid, frozen, dried or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. “Food and food ingredients” does not include alcoholic beverages, prepared food, or tobacco.
(19) “Food sold through vending machines” means food dispensed from a machine or other mechanical device that accepts payment.

(20) “Includes” and “including” when used in a definition contained in this article is not considered to exclude other things otherwise within the meaning of the term being defined.

(21) “Lease” includes rental, hire and license. “Lease” means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. A lease or rental may include future options to purchase or extend.

(A) “Lease” does not include:

(i) A transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments;

(ii) A transfer or possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price does not exceed the greater of one hundred dollars or one percent of the total required payments; or

(iii) Providing tangible personal property along with an operator for a fixed or indeterminate period of time. A condition of this exclusion is that the operator is necessary for the equipment to perform as designed. For the purpose of this subparagraph, an operator must do more than maintain, inspect, or set-up the tangible personal property.

(B) This definition shall be used for sales and use tax purposes regardless if a transaction is characterized as a lease or rental under generally accepted accounting principles, the Internal Revenue Code, the Uniform Commercial Code, or other provisions of federal, state or local law.
(22) “Load and leave” means delivery to the purchaser by use of a tangible storage media where the tangible storage media is not physically transferred to the purchaser.

(23) “Mobility enhancing equipment” means equipment, including repair and replacement parts to the equipment, but does not include “durable medical equipment”, which:

(A) is primarily and customarily used to provide or increase the ability to move from one place to another and which is appropriate for use either in a home or a motor vehicle;

(B) is not generally used by persons with normal mobility;

and

(C) does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer.

(24) “Model I seller” means a seller that has selected a certified service provider as its agent to perform all the seller’s sales and use tax functions, other than the seller’s obligation to remit tax on its own purchases.

(25) “Model II seller” means a seller that has selected a certified automated system to perform part of its sales and use tax functions, but retains responsibility for remitting the tax.

(26) “Model III seller” means a seller that has sales in at least five member states, has total annual sales revenue of at least five hundred million dollars, has a proprietary system that calculates the amount of tax due each jurisdiction, and has entered into a performance agreement with the member states that establishes a tax performance standard for the seller. As used in this definition, a seller includes an affiliated group of sellers using the same proprietary system.
"Person" means an individual, trust, estate, fiduciary, partnership, limited liability company, limited liability partnership, corporation or any other legal entity.

(28) “Personal service” includes those:

(A) Compensated by the payment of wages in the ordinary course of employment; and

(B) Rendered to the person of an individual without, at the same time, selling tangible personal property, such as nursing, barbering, manicuring and similar services.

(29)(A) “Prepared food” means:

(i) Food sold in a heated state or heated by the seller;

(ii) Two or more food ingredients mixed or combined by the seller for sale as a single item; or

(iii) Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food.

(B) “Prepared food” in subparagraph (ii), paragraph (A) of this subdivision (29) does not include food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration in chapter 3, part 401.11 of its Food Code of 2001 so as to prevent food borne illnesses.

C) Additionally, “prepared food,” as defined in this subdivision does not include:

(i) Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsection 3118 (bakeries);
(ii) Food sold in an unheated state by weight or volume as a single item; or

(iii) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, tortillas.

(30) “Prescription” means an order, formula or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to issue prescriptions.

(31) “Prewritten computer software” means “computer software”, including prewritten upgrades, which is not designed and developed by the author or other creator to the specifications of a specific purchaser.

(A) The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to be other than prewritten computer software.

(B) “Prewritten computer software” includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser. Where a person modifies or enhances computer software of which the person is not the author or creator, the person is considered to be the author or creator only of the person’s modifications or enhancements.

(C) “Prewritten computer software” or a prewritten portion thereof that is modified or enhanced to any degree, where the modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software: Provided, That where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, the modification or enhancement does not constitute prewritten computer software.
(32) “Product-based exemption” means an exemption based on the description of the product or service and not based on who purchases the product or service or how the purchaser intends to use the product or service.

(33) “Prosthetic device” means a replacement, corrective, or supportive device, including repair and replacement parts for the device worn on or in the body, to:

(A) Artificially replace a missing portion of the body;

(B) Prevent or correct physical deformity or malfunction of the body; or

(C) Support a weak or deformed portion of the body.

(34) “Protective equipment” means items for human wear and designed as protection of the wearer against injury or disease or as protections against damage or injury of other persons or property but not suitable for general use.

(35) “Purchase price” means the measure subject to the tax imposed by article fifteen or article fifteen-a of this chapter and has the same meaning as sales price.

(36) “Purchaser” means a person to whom a sale of personal property is made or to whom a service is furnished.

(37) “Registered under this agreement” means registration by a seller with the member states under the central registration system provided in article four of the agreement.

(38) “Retail sale” or “sale at retail” means:

(A) Any sale or lease for any purpose other than for resale as tangible personal property, sublease or subrent; and

(B) Any sale of a service other than a service purchased for resale.
"Sales price" means the measure subject to the tax levied by this article and includes the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for the following:

(i) The seller’s cost of the property sold;

(ii) The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;

(iii) Charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;

(iv) Delivery charges;

(v) Installation charges;

(vi) The value of exempt personal property given to the purchaser where taxable and exempt personal property have been bundled together and sold by the seller as a single product or piece of merchandise; and

(vii) Credit for the fair market value of any trade-in.

(39)(B) “Sales price” does not include:

(i) Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale;

(ii) Interest, financing and carrying charges from credit extended on the sale of personal property, goods or services, if the amount is separately stated on the invoice, bill of sale or similar document given to the purchaser; and
(iii) Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale or similar document given to the purchaser.

(40) "Sales tax" means the tax levied under article fifteen of this chapter.

(41) "Seller" means any person making sales, leases or rentals of personal property or services.

(42) "Service" or "selected service" includes all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal property, but does not include contracting, personal services, services rendered by an employee to his or her employer, any service rendered for resale, or any service furnished by a business that is subject to the control of the Public Service Commission when the service or the manner in which it is delivered is subject to regulation by the Public Service Commission of this State. The term "service" or "selected service" does not include payments received by a vendor of tangible personal property as an incentive to sell a greater volume of such tangible personal property under a manufacturer’s, distributor’s or other third-party’s marketing support program, sales incentive program, cooperative advertising agreement or similar type of program or agreement, and these payments are not considered to be payments for a "service" or "selected service" rendered, even though the vendor may engage in attendant or ancillary activities associated with the sales of tangible personal property as required under the programs or agreements.

(43) "Soft drink" means nonalcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" do not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of vegetable or fruit juice by volume.
(44) “State” means any state of the United States and the District of Columbia.

(45) “Tangible personal property” means personal property that can be seen, weighed, measured, felt, or touched, or that is in any manner perceptible to the senses. “Tangible personal property” includes, but is not limited to, electricity, steam, water, gas and prewritten computer software.

(46) “Tax” includes all taxes levied under articles fifteen and fifteen-a of this chapter, and additions to tax, interest and penalties levied under article ten of this chapter.

(47) “Tax Commissioner” means the State Tax Commissioner or his or her delegate. The term “delegate” in the phrase “or his or her delegate”, when used in reference to the Tax Commissioner, means any officer or employee of the State Tax Division duly authorized by the Tax Commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this article or rules promulgated for this article.

(48) “Taxpayer” means any person liable for the taxes levied by articles fifteen and fifteen-a of this chapter or any additions to tax, penalties imposed by article ten of this chapter.

(49) “Tobacco” means cigarettes, cigars, chewing or pipe tobacco or any other item that contains tobacco.

(50) “Use tax” means the tax levied under article fifteen-a of this chapter.

(51) “Use-based exemption” means an exemption based on the purchaser’s use of the product or service.

(52) “Vendor” means any person furnishing services taxed by article fifteen or fifteen-a of this chapter, or making sales of tangible personal property or custom software. “Vendor” and
“seller” are used interchangeably in this article and in article fifteen and fifteen-a of this chapter.

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

**§11-15B-2a. Streamlined sales and use tax agreement defined.**

As used in this article and articles fifteen and fifteen-a of this chapter, the term “streamlined sales and use tax agreement” or “agreement” means the agreement adopted the twelfth day of November, two thousand two, by states that enacted authority to engage in multistate discussions similar to that provided in section four of this article, except when the context in which the term is used clearly indicates that a different meaning is intended by the Legislature. “Agreement” includes amendments to the agreement adopted by the implementing states in calendar years two thousand three, two thousand four, and two thousand five, but does not include any substantive changes in the agreement adopted after the sixteenth day of April, two thousand five.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

In effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 28th day of September, 2005.

Governor
PRESENTED TO THE GOVERNOR

Date  9/10/05
Time  4:25 PM