

FILED

2005 APR 18 P 5:46

OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 2005



ENROLLED

House Bill No. 3357

(By Delegates Michael, Doyle, Kominar,
Proudfoot, Boggs, Stalnaker and Williams)



Passed April 6, 2005

In Effect Ninety Days from Passage

FILED

2005 APR 18 P 5:46

OFFICE WEST VIRGINIA
SECRETARY OF STATE

E N R O L L E D

H. B. 3357

(BY DELEGATES MICHAEL, DOYLE, KOMINAR,
PROUDFOOT, BOGGS, STALNAKER AND WILLIAMS)

[Passed April 6, 2005; in effect ninety days from passage.]

AN ACT to amend and reenact §11-15B-2 and §11-15B-2a of the code of West Virginia, 1931, as amended; and to further amend said code by adding thereto a new section, designated §11-15B-4a, all relating generally to streamlined sales and use tax administration; defining certain terms; and providing for representation on governing board of streamlined sales and use tax agreement.

Be it enacted by the Legislature of West Virginia:

That §11-15B-2 and §11-15B-2a of the code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be further amended by adding thereto a new section, designated §11-15B-4a, all to read as follows:

**ARTICLE 15B. STREAMLINED SALES AND USE TAX ADMINISTRATION
ACT.**

§11-15B-2. Definitions.

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

8 (b) *Terms defined.*

9 (1) “Agent” means a person appointed by a seller to
10 represent the seller before the member states.

11 (2) “Agreement” means the streamlined sales and use tax
12 agreement, as defined in section two-a of this article.

13 (3) “Alcoholic beverages” means beverages that are
14 suitable for human consumption and contain one half of one
15 percent or more of alcohol by volume.

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

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

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

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

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

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

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

39 (A) Contains one or more of the following dietary ingredi-
40 ents:

41 (i) A vitamin;

42 (ii) A mineral;

43 (iii) A herb or other botanical;

44 (iv) An amino acid;

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

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

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

55 (C) Is required to be labeled as a dietary supplement,
56 identifiable by the “Supplemental Facts” box found on the label

57 as required pursuant to 21 CFR §101.36, or in any successor
58 section of the code of federal regulations.

59 (11) "Direct mail" means printed material delivered or
60 distributed by United States mail or other delivery service to a
61 mass audience or to addressees on a mailing list provided by the
62 purchaser or at the direction of the purchaser when the cost of
63 the items are not billed directly to the recipients. "Direct mail"
64 includes tangible personal property supplied directly or
65 indirectly by the purchaser to the direct mail seller for inclusion
66 in the package containing the printed material. "Direct mail"
67 does not include multiple items of printed material delivered to
68 a single address.

69 (12) "Drug" means a compound, substance or preparation,
70 and any component of a compound, substance or preparation,
71 other than food and food ingredients, dietary supplements or
72 alcoholic beverages:

73 (A) Recognized in the official United States pharmaco-
74 poeia, official homeopathic pharmacopoeia of the United
75 States, or official national formulary, and supplement to any of
76 them;

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

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

81 (13) "Durable medical equipment" means equipment
82 including repair and replacement parts for the equipment, but
83 does not include "mobility-enhancing equipment", which:

84 (A) Can withstand repeated use;

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

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

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

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

93 (15) “Entity-based exemption” means an exemption based
94 on who purchases the product or service or who sells the
95 product or service.

96 (16) “Food and food ingredients” means substances,
97 whether in liquid, concentrated, solid, frozen, dried or dehy-
98 drated form, that are sold for ingestion or chewing by humans
99 and are consumed for their taste or nutritional value. “Food and
100 food ingredients” does not include alcoholic beverages or
101 tobacco.

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

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

109 (A) “Lease” does not include:

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

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

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

124 (B) This definition shall be used for sales and use tax
125 purposes regardless if a transaction is characterized as a lease
126 or rental under generally accepted accounting principles, the
127 Internal Revenue Code, the uniform commercial code, or other
128 provisions of federal, state or local law.

129 (19) "Load and leave" means delivery to the purchaser by
130 use of a tangible storage media where the tangible storage
131 media is not physically transferred to the purchaser.

132 (20) "Mobility enhancing equipment" means equipment,
133 including repair and replacement parts to the equipment, but
134 does not include "durable medical equipment", which:

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

138 (B) Is not generally used by persons with normal mobility;
139 and

140 (C) Does not include any motor vehicle or equipment on a
141 motor vehicle normally provided by a motor vehicle manufac-
142 turer.

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

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

150 (23) “Model III seller” means a seller that has sales in at
151 least five member states, has total annual sales revenue of at
152 least five hundred million dollars, has a proprietary system that
153 calculates the amount of tax due each jurisdiction, and has
154 entered into a performance agreement with the member states
155 that establishes a tax performance standard for the seller. As
156 used in this definition, a seller includes an affiliated group of
157 sellers using the same proprietary system.

158 (24) “Person” means an individual, trust, estate, fiduciary,
159 partnership, limited liability company, limited liability partner-
160 ship, corporation or any other legal entity.

161 (25) “Personal service” includes those:

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

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

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

171 (27) “Prewritten computer software” means “computer
172 software”, including prewritten upgrades, which is not designed
173 and developed by the author or other creator to the specifica-
174 tions of a specific purchaser.

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

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

185 (C) “Prewritten computer software” or a prewritten portion
186 thereof that is modified or enhanced to any degree, where the
187 modification or enhancement is designed and developed to the
188 specifications of a specific purchaser, remains prewritten
189 computer software: Provided, That where there is a reasonable,
190 separately stated charge or an invoice or other statement of the
191 price given to the purchaser for the modification or enhance-
192 ment, the modification or enhancement does not constitute
193 prewritten computer software.

194 (28) “Product-based exemption” means an exemption based
195 on the description of the product or service and not based on
196 who purchases the product or service or how the purchaser
197 intends to use the product or service.

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

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

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

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

205 (30) "Protective equipment" means items for human wear
206 and designed as protection of the wearer against injury or
207 disease or as protections against damage or injury of other
208 persons or property but not suitable for general use.

209 (31) "Purchase price" means the measure subject to the tax
210 imposed by article fifteen or article fifteen-a of this chapter and
211 has the same meaning as sales price.

212 (32) "Purchaser" means a person to whom a sale of
213 personal property is made or to whom a service is furnished.

214 (33) "Registered under this agreement" means registration
215 by a seller with the member states under the central registration
216 system provided in article four of the agreement.

217 (34) "Retail sale" or "sale at retail" means:

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

220 (B) Any sale of a service other than a service purchased for
221 resale.

222 (35)(A) "Sales price" means the measure subject to the tax
223 levied by this article and includes the total amount of consider-
224 ation, including cash, credit, property and services, for which
225 personal property or services are sold, leased or rented, valued
226 in money, whether received in money or otherwise, without any
227 deduction for the following:

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

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

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

234 (iv) Delivery charges;

235 (v) Installation charges;

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

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

241 (B) "Sales price" does not include:

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

245 (ii) Interest, financing, and carrying charges from credit
246 extended on the sale of personal property, goods or services, if
247 the amount is separately stated on the invoice, bill of sale or
248 similar document given to the purchaser; and

249 (iii) Any taxes legally imposed directly on the consumer
250 that are separately stated on the invoice, bill of sale or similar
251 document given to the purchaser.

252 (36) "Sales tax" means the tax levied under article fifteen
253 of this chapter.

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

256 (38) “Service” or “selected service” includes all nonprofes-
257 sional activities engaged in for other persons for a consider-
258 ation, which involve the rendering of a service as distinguished
259 from the sale of tangible personal property, but does not include
260 contracting, personal services, services rendered by an em-
261 ployee to his or her employer, any service rendered for resale,
262 or any service furnished by a business that is subject to the
263 control of the public service commission when the service or
264 the manner in which it is delivered is subject to regulation by
265 the public service commission of this state. The term “service”
266 or “selected service” does not include payments received by a
267 vendor of tangible personal property as an incentive to sell a
268 greater volume of such tangible personal property under a
269 manufacturer’s, distributor’s or other third-party’s marketing
270 support program, sales incentive program, cooperative advertis-
271 ing agreement or similar type of program or agreement, and
272 these payments are not considered to be payments for a “ser-
273 vice” or “selected service” rendered, even though the vendor
274 may engage in attendant or ancillary activities associated with
275 the sales of tangible personal property as required under the
276 programs or agreements.

277 (39) “State” means any state of the United States and the
278 District of Columbia.

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

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

287 (42) “Tax commissioner” means the state tax commissioner
288 or his or her delegate. The term “delegate” in the phrase “or his
289 or her delegate”, when used in reference to the tax commis-
290 sioner, means any officer or employee of the state tax division
291 duly authorized by the tax commissioner directly, or indirectly
292 by one or more redelegations of authority, to perform the
293 functions mentioned or described in this article or rules
294 promulgated for this article.

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

298 (44) “Tobacco” means cigarettes, cigars, chewing or pipe
299 tobacco, or any other item that contains tobacco

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

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

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

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

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

1 As used in this article and articles fifteen and fifteen-a of
2 this chapter, the term “streamlined sales and use tax agreement”
3 or “agreement” means the agreement adopted the twelfth day of
4 November, two thousand two, by states that enacted authority
5 to engage in multistate discussions similar to that provided in
6 section four of this article, except when the context in which the
7 term is used clearly indicates that a different meaning is
8 intended by the Legislature. “Agreement” includes amendments
9 to the agreement adopted by the implementing states in
10 calendar years two thousand three and two thousand four but
11 does not include any substantive changes in the agreement
12 adopted after the first day of January, two thousand five.

**§11-15B-4a. Representatives to governing board of streamlined
sales and use tax agreement.**

1 Upon implementation of the streamlined sales and use tax
2 agreement and this state becoming a party to the agreement,
3 West Virginia shall have four representatives to the governing
4 board of the agreement. Two representatives shall be the
5 secretary of revenue and the tax commissioner, or their respec-
6 tive designees; and two representatives shall be appointed by
7 the president of the Senate and the speaker of the House of
8 Delegates.

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

Clayton White

Chairman Senate Committee

D. Ruler Bury
Chairman House Committee

Originating in the House.

In effect ninety days from passage.

Darrell Stephens

Clerk of the Senate

Bryce D. Bury

Clerk of the House of Delegates

Carl Ray Tomblin

President of the Senate

Robert Skiss

Speaker of the House of Delegates

The within is approved this the 18th
day of April, 2005.

[Signature]
Governor

PRESENTED TO THE
GOVERNOR

Date 4/12/05

Time 3:10 pm