WEST VIRGINIA LEGISLATURE
EIGHTIETH LEGISLATURE
REGULAR SESSION, 2011

ENROLLED
COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 247
(By Senators Kessler (Acting President) and Hall,
By Request of the Executive)

[Passed March 12, 2011; in effect from passage.]
AN ACT to amend and reenact §11-15-Bd of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §11-15-9n, all relating to consumers sales and service tax and use tax; specifying that restrictions on exemptions by a construction contractor do not apply for certain purchases of computers and computer software, primary material handling equipment, racking and racking systems and their components nor do these restrictions on exemptions apply to purchases of building materials and certain tangible personal property if the purchaser of computers and computer software and contracting services would be entitled to claim a newly created exemption; specifying exemption for certain purchases of computers and computer software, primary material handling equipment, racking and racking systems and their components, building materials and certain tangible personal property; specifying the application for certification of exemption and plan describing investment to be made; specifying application and plan filing date; specifying treatment of late filings and untimely filings of
application and plan; specifying loss of exemption if investment is not made within the expansion period; defining terms; specifying exclusions and limitations for qualified warehouses and distribution facilities; specifying exclusions and disqualifications for failure to meet statutory criteria and requirements; specifying over-the-counter sales restrictions; specifying manufacturing, fabrication and assembly restrictions; specifying statute of limitations; specifying issuance of assessments against the purchaser of contracting services entitled to the newly created exemption and not against a contractor who relied in good faith upon validity of an exemption; specifying that the taxpayer first pay to the vendor the tax and then apply to the State Tax Commissioner for a refund or credit; and alternative use of the direct pay permit number.

Be it enacted by the Legislature of West Virginia:

That §11-15-8d of the Code of West Virginia, 1931, as amended be amended and reenacted; and that said code be amended by adding thereto a new section, designated §11-15-9n, all to read as follows:

ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.

§11-15-8d. Limitations on right to assert exemptions.

1. (a) Persons who perform “contracting” as defined in section two of this article, or persons acting in an agency capacity, may not assert any exemption to which the purchaser of such contracting services or the principal is entitled. Any statutory exemption to which a taxpayer may be entitled shall be invalid unless the tangible personal property or taxable service is actually purchased by such taxpayer and is directly invoiced to and paid by such taxpayer. This section shall not apply to purchases by an employee for his or her employer; purchases by a partner for his or her partnership; or purchases by a duly authorized officer of a corporation, or unincorporated organization, for his or her corporation or unincorporated organization so long as the purchase is invoiced to and paid by the employer, partnership, corporation or unincorporated organization.
(b) Transition rule. — This section shall not apply to purchases of tangible personal property or taxable services in fulfillment of a purchasing agent or procurement agent contract executed and legally binding on the parties thereto prior to September 15, 1999: Provided, That this transition rule shall not apply to any purchases of tangible personal property or taxable services made under such a contract after August 31, 1991; and this transition rule shall not apply if the primary purpose of the purchasing agent or procurement agent contract was to avoid payment of consumers sales and use taxes. However, effective July 1, 2007, this section shall not apply to purchases of services, machinery, supplies or materials, except gasoline and special fuel, to be directly used or consumed in the construction, alteration, repair or improvement of a new or existing building or structure by a person performing “contracting”, as defined in section two of this article, if the purchaser of the “contracting” services would be entitled to claim the refundable exemption under subdivision (2), subsection (b), section nine of this article had it purchased the services, machinery, supplies or materials. Effective July 1, 2009, this section shall not apply to purchases of services, computers, servers, building materials and tangible personal property, except purchases of gasoline and special fuel, to be installed into a building or facility or directly used or consumed in the construction, alteration, repair or improvement of a new or existing building or structure by a person performing “contracting”, as defined in section two of this article, if the purchaser of the “contracting” services would be entitled to claim the exemption under subdivision (7), subsection (a), section nine-h of this article. This section shall not apply to qualified purchases of computers and computer software, primary material handling equipment, racking and racking systems, and their components, or to qualified purchases of building materials and certain tangible personal property, as those terms are defined in section nine-n of this article, by a person performing “contracting,” as defined in section two of this article, if the purchaser of the “contracting” services would be entitled to claim the refundable exemption under section nine-n of this article. Purchases of gasoline and
56 special fuel shall not be treated as exempt pursuant to this
57 section.

§11-15-9n. Exemption of qualified purchases of computers and
computer software, primary material handling
equipment, racking and racking systems, and
components, building materials and certain tangi-
ble personal property.

1 (a) Definitions. - For purposes of this section:

2 (1) "Building materials" means all tangible personal
3 property, including any device or appliance used by builders,
4 contractors or landowners in making improvements, addi-
5 tions, or alterations to a building or other structure or to real
6 property in such a way that such tangible personal property
7 becomes a part of the building or other structure or the
8 realty, which is installed into or directly used or consumed
9 in the construction, addition, alteration, repair or improve-
10 ment of a qualified, new or expanded warehouse or distribu-
11 tion facility. "Building materials" does not include tools,
12 construction equipment or any property or device which does
13 not become a permanent part of the realty when construction
14 is completed. A device or appliance becomes a fixture and a
15 part of the building or other structure or the real property to
16 which it is connected when it is built into or is attached to
17 the property in such a way that its removal would substan-
18 tially damage or deface such property.

19 (2) "Computers and computer software" as defined in
20 section two, article fifteen-b of this chapter means computer
21 equipment and related software directly and primarily used
22 to control automated machinery in the facility and the
23 movement of goods within the facility, to facilitate customer
24 delivery operations including shipment, preparation for
25 shipment, order tracking and delivery inventory control,
26 printing of packing lists and labels and any other customer
27 order fulfillment functions.

28 (3) "Distribution facility" means a warehouse, facility,
29 structure, or enclosed area which is used primarily for the
storage, shipment, preparation for shipment, or any combi-
nation of such activities, of finished goods, consumer ready
wares, and consumer ready merchandise.

(4) "Expansion period" means the period of time beginning
one year prior to the start of the construction or expansion
of the qualified, new or expanded warehouse or distribution
facility, and ending one year after the substantial completion
of the construction or expansion of the facility. In no event
shall the expansion period exceed five years.

(5) "Full-time employment" for purposes of determining a
full-time employee or a full-time equivalent employee, means
employment for at least one hundred forty hours per month
at a wage not less than the prevailing state or federal
minimum wage, depending on which minimum wage provi-
sion is applicable to the business.

(A) For purposes of this definition, any employee paid less
than state or federal minimum wage, depending on which
minimum wage provision is applicable, shall be excluded
from the count of employees for the purpose of determining
the three hundred jobs requirement of this section.

(B) For purposes of this definition, seasonal employees and
part-time employees may be converted into full-time equiva-
lent employees if the part-time or seasonal employee is
customarily performing job duties not less than twenty hours
per week for at least six months during the tax year. Persons
who have worked less than twenty hours per week or who
have worked less than six months during the tax year do not
qualify as part-time employees or as seasonal employees.

(6) "Primary material handling equipment" means the
principal machinery and equipment used directly and
primarily for the handling and movement of tangible
personal property in a qualified, new or expanded warehouse
or distribution facility.

(A) The following items may be considered primary
material handling equipment:
(i) Conveyers, carousels, lifts, positioners, pick-up-and-place units, cranes, hoists, mechanical arms and robots;

(ii) Mechanized systems, including containers which are an integral part thereof, whose purpose is to lift or move tangible personal property;

(iii) Automated storage and retrieval systems, including computers and software which control them, whose purpose is to lift or move tangible personal property; and

(iv) Forklifts and other off-the-road vehicles which are used to lift or move tangible personal property and which cannot be legally operated on roads and streets.

(B) “Primary material handling equipment” does not include:

(i) Motor vehicles licensed for operation on the roads and highways of this state or any other state of the United States or any other political jurisdiction;

(ii) Parts or equipment used to repair, refurbish, or recondition other equipment; or

(iii) Equipment which replaces, in whole or in part, primary material handling equipment.

(7) “Qualified, new or expanded warehouse or distribution facility” means a new or expanded facility, subject to the following:

(A) Qualification criteria. “Qualified, new or expanded warehouse or distribution facility” means a new or expanded facility located in this state, that is a warehouse or distribution facility that will employ three hundred or more West Virginia domiciled, West Virginia residents, as full-time employees in the warehouse or distribution facility once the expansion period is complete and which is either:

(i) An existing warehouse or distribution facility that will be expanded over the expansion period where the total value of all real and personal property purchased or acquired over
the expansion period as direct investment in the facility is
$50 million or more; or

(ii) A new warehouse or distribution facility where the
total value of all real and personal property purchased or
acquired over the expansion period as direct investment in
the facility is $50 million or more.

(B) Exclusions and disqualifications.

(i) Subject to the limitations and restrictions set forth in
this section, "qualified, new or expanded warehouse or
distribution facility" does not include a building or facility
where tangible personal property is manufactured, fabri-
cated or assembled.

(ii) Subject to the limitations and restrictions set forth in
this section, "qualified, new or expanded warehouse or
distribution facility" does not include a building or facility
where annual calendar year retail sales of tangible personal
property are made over-the-counter from such building or
facility to the general public, if such sales exceed five
percent of the total annual calendar year revenues of the
warehouse or distribution facility during the same calendar
year.

(iii) Subject to the limitations and restrictions set forth in
this section, "qualified, new or expanded warehouse or
distribution facility" does not include a building or facility
where the average monthly full-time employment (deter-
mined by including full-time equivalent employees) for each
calendar year at the facility is less than three hundred West
Virginia domiciled, West Virginia residents. For purposes of
determining average monthly employment for the calendar
year, the taxpayer shall divide the sum of the twelve monthly
averages of qualified full-time and full-time equivalent West
Virginia employees at the qualified, new or expanded
warehouse or distribution facility by twelve. Each monthly
average is computed as the average of West Virginia employ-
ment at the beginning of each calendar month and at the end
of each calendar month. Provided, That the State Tax
Commissioner may specify a different method for computation of average monthly full-time employment, on a state-wide basis or on a case-by-case basis, or both, as the State Tax Commissioner may prescribe.

(8) "Qualified West Virginia employee" means a full-time employee or full-time equivalent employee who is a West Virginia domiciled West Virginia resident.

(9) "Racking and racking systems" means any system of machinery, equipment, fixtures, or portable devices whose function is to store, organize, or move tangible personal property within a warehouse or distribution facility, including, but not limited to, conveying systems, chutes, shelves, racks, bins, drawers, pallets, and other containers and storage devices which form a necessary part of the facility’s storage system, and which is used directly and primarily for the storage, handling and movement of tangible personal property in a qualified, new or expanded warehouse or distribution facility.

(10) "Tangible personal property" means tangible personal property as defined in section two, article fifteen-b of this chapter.

(11) "Warehouse" means a facility, structure, or enclosed area which is used primarily for the storage of finished goods, consumer ready wares, and consumer ready merchandise.

(b) Exemption. — Qualified purchases of computers and computer software, primary material handling equipment, racking and racking systems, and components thereof, building materials and tangible personal property installed into or directly used or consumed in the construction, addition, alteration or improvement of a qualified, new or expanded warehouse or distribution facility, as such terms are defined in this section, purchased during the expansion period are exempt from the tax imposed by this article and article fifteen-a of this chapter. This exemption may apply either to qualified purchases made by a person or entity.
which will be the owner and operator of the qualified, new
or expanded warehouse or distribution facility or to quali-
fi ed purchases made by a lessor or lessee of the qualified,
new or expanded warehouse or distribution facility. A
purchase of computers and computer software, primary
material handling equipment, racking and racking systems,
and components thereof, building materials and tangible
personal property is a qualified purchase if all requirements
for exemption set forth in this section are met with relation
to the purchase.

(c) Application for certification of exemption and plan
describing investment to be made. —

(1) In order to qualify for the exemption authorized by this
section, a taxpayer must submit an application for certifica-
tion of the exemption to the State Tax Commissioner,
together with a plan describing the investment to be made in
the qualified, new or expanded warehouse or distribution
facility. The application and plan shall be submitted on
forms prescribed by the State Tax Commissioner. The plan
shall demonstrate that the requirements of the law will be
met.

(2) Filing date. The application for certification of the
exemption and plan describing the investment to be made
must be filed on or before the start of the construction or
expansion of the proposed qualified, new or expanded
warehouse or distribution facility.

(3) Late filing. If the taxpayer fails to timely file the
application for certification of the exemption with the State
Tax Commissioner, together with a plan describing the
investment to be made, on or before the start of the construc-
tion or expansion of the proposed qualified, new or expanded
warehouse or distribution facility, the exemption allowed by
this section shall not be available for any purchases of
computer and computer software, primary material handling
equipment, racking and racking systems, and components
thereof, building materials and tangible personal property
otherwise exempt under this section that were made prior to
the filing date of the application for certification of the
exemption, and no refund shall be issued for any such
purchase.

(4) Exemption in cases of untimely filing. Notwithstanding
the untimely filing of the application for certification of the
exemption and plan describing the investment to be made, if
certification of the exemption and plan is issued by the State
Tax Commissioner of an untimely filed application and plan,
the exemption shall be available for qualified purchases of
computers and computer software, primary material han-
dling equipment, racking and racking systems, and compo-
nents thereof, building materials and tangible personal
property made subsequent to the filing date of the applica-
tion and plan and before the end of the expansion period.

(5) Exemption limited to expansion period purchases.

(A) Upon approval of the application and certification of
the exemption, qualified purchases of computers and
computer software, primary material handling equipment,
racking and racking systems, and components thereof,
building materials and tangible personal property shall be
exempt from the tax imposed by this article and article
fifteen-a of this chapter. However, if the requisite investment
is not made within the expansion period, or if the terms and
requirements of this section are not satisfied, the taxpayer
shall be subject to assessment for any tax, penalty or interest
that would otherwise have been due.

(B) Limitations. Any statute of limitations set forth in
article ten of this chapter for assessment made under this
subsection for any such tax, penalty or interest shall not
close until five years subsequent to the end of the expansion
period.

(d) Any person having a right or claim to any exemption set
forth in this section shall first pay to the vendor the tax
imposed by this article and then apply to the State 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.

(e) Additional Restrictions, Assessments and Statutes of
Limitations. —

(1) Over-the-counter sales restrictions.

(A) If within ten years after the end of the expansion
period, over-the-counter sales are made in any one calendar
year, from a warehouse or distribution facility for which
qualification for exemption under this section was originally
established, which over-the-counter sales, in the aggregate,
exceed five percent of the total revenues of the warehouse or
distribution facility during the same calendar year, the
taxpayer will be disqualified from receiving the exemption
under this section as of the close of the calendar year in
which over-the-counter sales first exceed five percent of the
total revenues of the warehouse or distribution facility
during the same calendar year; and the taxpayer shall be
subject to assessment for any tax, penalty or interest that
would otherwise have been due had the exemption set forth
in this section never been applied. This over-the-counter
sales restriction shall not apply to any year subsequent to the
end of the tenth year after the end of the expansion period.

(B) Limitations. Notwithstanding any other provision of
this code pertaining to statute of limitations to the contrary,
any statute of limitations set forth in article ten of this
chapter for assessment for any such tax, penalty or interest
shall not close until five years subsequent to the end of the
calendar year in which over-the-counter sales first exceed
five percent of the total revenues of the warehouse or
distribution facility during the same period.

(2) Fabrication and Assembly Restriction.

(A) Subject to the restriction and limitations set forth in
this subsection, a qualified new or expanded warehouse or
distribution facility does not include a building or facility
where tangible personal property is manufactured, fabri-
277 cated or assembled. If during any calendar year within ten years after the end of the expansion period, the building or facility for which qualification for exemption under this section was originally established, is used for manufacturing, fabrication or assembly of tangible personal property, the taxpayer will be disqualified from receiving the exemption set forth in this section as of the date such manufacturing, fabrication or assembly first occurs, and the taxpayer shall be subject to assessment for any tax, penalty or interest that would otherwise have been due had the exemption set forth in this section never been applied. This restriction against manufacturing, fabrication and assembly shall not apply to any year subsequent to the tenth year after the end of the expansion period.

291 (B) Limitations. Notwithstanding any other provision of this code pertaining to statute of limitations to the contrary, any statute of limitations set forth in article ten of this chapter for assessment for any such tax, penalty or interest shall not close until five years subsequent to the end of the calendar year during which such manufacturing, fabrication or assembly first occurs.

299 (3) Minimum employment restriction.

300 (A) Subject to the limitations and restrictions set forth in this section, "qualified, new or expanded warehouse or distribution facility" does not include a building or facility where the average monthly full-time employment (determined including full-time equivalent employees) for each calendar year at the facility is less than three hundred West Virginia domiciled, West Virginia residents. If during any calendar year within ten years after the end of the expansion period, the average monthly full-time employment at the building or facility for which qualification for exemption under this section was originally established, is fewer than three hundred qualified West Virginia employees, then the taxpayer will be disqualified from receiving the exemption under this section as of the close of the first calendar year in
which the average monthly full-time employment at the facility is less than three hundred West Virginia domiciled, West Virginia residents, and the taxpayer shall be subject to assessment for any tax, penalty or interest that would otherwise have been due had the exemption set forth in this section never been applied. This restriction against having fewer than three hundred qualified West Virginia employees shall not apply to any year subsequent to the tenth year after the end of the expansion period.

(B) Limitations. Notwithstanding any other provision of this code pertaining to statute of limitations to the contrary, any statute of limitations set forth in article ten of this chapter for assessment for any such tax, penalty or interest shall not close until five years subsequent to the end of the first calendar year in which the average monthly full-time employment at the facility is less than three hundred qualified West Virginia employees.

(f) Assessments Against Taxpayer. — In circumstances where the exemption authorized under this section has been asserted by a contractor pursuant to the provisions of section eight-d of this article for purchases of computers and computer software, primary material handling equipment, racking and racking systems, and components thereof, building materials and tangible personal property, the assessment of such tax, interest and penalties shall issue against, and liability is hereby imposed upon, the purchaser of the contracting services, which is the taxpayer entitled to the exemption set forth in this section, and not against the contractor who relied in good faith upon the validity of the exemption available under this section to the purchaser of the contracting services.
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 from passage.

Clerk of the Senate

Clerk of the House of Delegates

Acting President of the Senate

Speaker of the House of Delegates

The within is approved this the 24th Day of March, 2011.

Governor
PRESENTED TO THE GOVERNOR

MAR 22 2011

Time 3:45 pm