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WEST VIRGINIA LEGISLATURE

Regular Session, 2003

ENROLLED

SENATE BILL NO. 531

(By Senator Pass, et al)

PASSED March 8, 2003

In Effect 90 days from **Passage**

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SENATE

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Senate Bill No. 531

(BY SENATORS ROSS, EDGELL, WHITE, UNGER, LOVE,
PLYMALE, MINEAR, HELMICK, PREZIOSO, MCCABE,
DEMPSEY, BOLEY, CALDWELL, WEEKS AND MINARD)

[Passed March 8, 2003; in effect ninety days from passage.]

AN ACT to amend and reenact sections two and nine, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to the consumers sales and services tax; clarifying that 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, distributor or other third-party marketing support program, sales incentive program, cooperative advertising agreement or similar type of program or agreement are excepted from the tax; providing an expansion of the current exemption for casual and occasional sales by volunteer fire departments and volunteer school support groups from six to eighteen sales per year; and providing an exemption for certain lodging franchise assessed fees from the consumers sales and service tax.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.

§11-15-2. Definitions.

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

8 (b) *Definitions.* —

9 (1) “Business” includes all activities engaged in or
10 caused to be engaged in with the object of gain or eco-
11 nomic benefit, direct or indirect, and all activities of the
12 state and its political subdivisions which involve sales of
13 tangible personal property or the rendering of services
14 when those service activities compete with or may compete
15 with the activities of other persons.

16 (2) “Communication” means all telephone, radio, light,
17 light wave, radio telephone, telegraph and other communi-
18 cation or means of communication, whether used for voice
19 communication, computer data transmission or other
20 encoded symbolic information transfers and includes
21 commercial broadcast radio, commercial broadcast
22 television and cable television.

23 (3) “Contracting”:

24 (A) *In general.* — “Contracting” means and includes the
25 furnishing of work, or both materials and work, for
26 another (by a sole contractor, general contractor, prime
27 contractor, subcontractor or construction manager) in

28 fulfillment of a contract for the construction, alteration,
29 repair, decoration or improvement of a new or existing
30 building or structure, or any part thereof, or for removal
31 or demolition of a building or structure, or any part
32 thereof, or for the alteration, improvement or development
33 of real property. Contracting also includes services
34 provided by a construction manager so long as the project
35 for which the construction manager provides the services
36 results in a capital improvement to a building or structure
37 or to real property.

38 (B) *Form of contract not controlling.* – An activity that
39 falls within the scope of the definition of contracting
40 constitutes contracting regardless of whether the contract
41 governing the activity is written or verbal and regardless
42 of whether it is in substance or form a lump sum contract,
43 a cost-plus contract, a time and materials contract,
44 whether or not open-ended, or any other kind of construc-
45 tion contract.

46 (C) *Special rules.* – For purposes of this definition:

47 (i) The term “structure” includes, but is not limited to,
48 everything built up or composed of parts joined together
49 in some definite manner and attached or affixed to real
50 property or which adds utility to real property or any part
51 thereof or which adds utility to a particular parcel of
52 property and is intended to remain there for an indefinite
53 period of time;

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

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

60 (iv) The term “decoration” means, and is limited to,
61 decorations which are capital improvements to a building
62 or structure or to real property;

63 (v) The term "improvement" means, and is limited to,
64 improvements which are capital improvements to a
65 building or structure or to real property;

66 (vi) The term "capital improvement" means improve-
67 ments that are affixed to or attached to and become a part
68 of a building or structure or the real property or which add
69 utility to real property, or any part thereof, and that last
70 or are intended to be relatively permanent. As used herein,
71 "relatively permanent" means lasting at least a year in
72 duration without the necessity for regularly scheduled
73 recurring service to maintain the capital improvement.
74 "Regular recurring service" means regularly scheduled
75 service intervals of less than one year;

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

101 (viii) The term “construction manager” means a person
102 who enters into an agreement to employ, direct, coordinate
103 or manage design professionals and contractors who are
104 hired and paid directly by the owner or the construction
105 manager. The business activities of a “construction
106 manager” as defined in this subdivision constitute con-
107 tracting, so long as the project for which the construction
108 manager provides the services results in a capital improve-
109 ment to a building or structure or to real property.

110 (4) “Directly used or consumed” in the activities of
111 manufacturing, transportation, transmission, communica-
112 tion or the production of natural resources means used or
113 consumed in those activities or operations which consti-
114 tute an integral and essential part of the activities, as
115 contrasted with and distinguished from those activities or
116 operations which are simply incidental, convenient or
117 remote to the activities.

118 (A) Uses of property or consumption of services which
119 constitute direct use or consumption in the activities of
120 manufacturing, transportation, transmission, communica-
121 tion or the production of natural resources include only:

122 (i) In the case of tangible personal property, physical
123 incorporation of property into a finished product resulting
124 from manufacturing production or the production of
125 natural resources;

126 (ii) Causing a direct physical, chemical or other change
127 upon property undergoing manufacturing production or
128 production of natural resources;

129 (iii) Transporting or storing property undergoing trans-
130 portation, communication, transmission, manufacturing
131 production or production of natural resources;

132 (iv) Measuring or verifying a change in property directly
133 used in transportation, communication, transmission,
134 manufacturing production or production of natural
135 resources;

136 (v) Physically controlling or directing the physical
137 movement or operation of property directly used in
138 transportation, communication, transmission, manufactur-
139 ing production or production of natural resources;

140 (vi) Directly and physically recording the flow of prop-
141 erty undergoing transportation, communication, transmis-
142 sion, manufacturing production or production of natural
143 resources;

144 (vii) Producing energy for property directly used in
145 transportation, communication, transmission, manufactur-
146 ing production or production of natural resources;

147 (viii) Facilitating the transmission of gas, water, steam
148 or electricity from the point of their diversion to property
149 directly used in transportation, communication, transmis-
150 sion, manufacturing production or production of natural
151 resources;

152 (ix) Controlling or otherwise regulating atmospheric
153 conditions required for transportation, communication,
154 transmission, manufacturing production or production of
155 natural resources;

156 (x) Serving as an operating supply for property undergo-
157 ing transmission, manufacturing production or production
158 of natural resources, or for property directly used in
159 transportation, communication, transmission, manufactur-
160 ing production or production of natural resources;

161 (xi) Maintaining or repairing of property, including
162 maintenance equipment, directly used in transportation,
163 communication, transmission, manufacturing production
164 or production of natural resources;

165 (xii) Storing, removal or transportation of economic
166 waste resulting from the activities of manufacturing,
167 transportation, communication, transmission or the
168 production of natural resources;

169 (xiii) Engaging in pollution control or environmental
170 quality or protection activity directly relating to the
171 activities of manufacturing, transportation, communica-
172 tion, transmission or the production of natural resources
173 and personnel, plant, product or community safety or
174 security activity directly relating to the activities of
175 manufacturing, transportation, communication, transmis-
176 sion or the production of natural resources; or

177 (xiv) Otherwise using as an integral and essential part of
178 transportation, communication, transmission, manufactur-
179 ing production or production of natural resources.

180 (B) Uses of property or services which do not constitute
181 direct use or consumption in the activities of manufactur-
182 ing, transportation, transmission, communication or the
183 production of natural resources include, but are not
184 limited to:

185 (i) Heating and illumination of office buildings;

186 (ii) Janitorial or general cleaning activities;

187 (iii) Personal comfort of personnel;

188 (iv) Production planning, scheduling of work or inven-
189 tory control;

190 (v) Marketing, general management, supervision, fi-
191 nance, training, accounting and administration; or

192 (vi) An activity or function incidental or convenient to
193 transportation, communication, transmission, manufactur-
194 ing production or production of natural resources, rather
195 than an integral and essential part of these activities.

196 (5) "Directly used or consumed" in the activities of gas
197 storage, the generation or production or sale of electric
198 power, the provision of a public utility service or the
199 operation of a utility business means used or consumed in
200 those activities or operations which constitute an integral
201 and essential part of those activities or operation, as

202 contrasted with and distinguished from activities or
203 operations which are simply incidental, convenient or
204 remote to those activities.

205 (A) Uses of property or consumption of services which
206 constitute direct use or consumption in the activities of gas
207 storage, the generation or production or sale of electric
208 power, the provision of a public utility service or the
209 operation of a utility business include only:

210 (i) Tangible personal property, custom software or
211 services, including equipment, machinery, apparatus,
212 supplies, fuel and power and appliances, which are used
213 immediately in production or generation activities and
214 equipment, machinery, supplies, tools and repair parts
215 used to keep in operation exempt production or generation
216 devices. For purposes of this subsection, production or
217 generation activities shall commence from the intake,
218 receipt or storage of raw materials at the production plant
219 site;

220 (ii) Tangible personal property, custom software or
221 services, including equipment, machinery, apparatus,
222 supplies, fuel and power, appliances, pipes, wires and
223 mains, which are used immediately in the transmission or
224 distribution of gas, water and electricity to the public, and
225 equipment, machinery, tools, repair parts and supplies
226 used to keep in operation exempt transmission or distribu-
227 tion devices, and these vehicles and their equipment as are
228 specifically designed and equipped for those purposes are
229 exempt from the tax when used to keep a transmission or
230 distribution system in operation or repair. For purposes of
231 this subsection, transmission or distribution activities
232 shall commence from the close of production at a produc-
233 tion plant or wellhead when a product is ready for trans-
234 mission or distribution to the public and shall conclude at
235 the point where the product is received by the public;

236 (iii) Tangible personal property, custom software or
237 services, including equipment, machinery, apparatus,

238 supplies, fuel and power, appliance, pipes, wires and
239 mains, which are used immediately in the storage of gas or
240 water, and equipment, machinery, tools, supplies and
241 repair parts used to keep in operation exempt storage
242 devices;

243 (iv) Tangible personal property, custom software or
244 services used immediately in the storage, removal or
245 transportation of economic waste resulting from the
246 activities of gas storage, the generation or production or
247 sale of electric power, the provision of a public utility
248 service or the operation of a utility business;

249 (v) Tangible personal property, custom software or
250 services used immediately in pollution control or environ-
251 mental quality or protection activity or community safety
252 or security directly relating to the activities of gas storage,
253 generation or production or sale of electric power, the
254 provision of a public utility service or the operation of a
255 utility business.

256 (B) Uses of property or services which would not consti-
257 tute direct use or consumption in the activities of gas
258 storage, generation or production or sale of electric power,
259 the provision of a public utility service or the operation of
260 a utility business include, but are not limited to:

261 (i) Heating and illumination of office buildings;

262 (ii) Janitorial or general cleaning activities;

263 (iii) Personal comfort of personnel;

264 (iv) Production planning, scheduling of work or inven-
265 tory control;

266 (v) Marketing, general management, supervision, fi-
267 nance, training, accounting and administration; or

268 (vi) An activity or function incidental or convenient to
269 the activities of gas storage, generation or production or

270 sale of electric power, the provision of public utility
271 service or the operation of a utility business.

272 (6) "Gas storage" means the injection of gas into a
273 storage reservoir or the storage of gas for any period of
274 time in a storage reservoir or the withdrawal of gas from
275 a storage reservoir engaged in by businesses subject to the
276 business and occupation tax imposed by sections two and
277 two-e, article thirteen of this chapter.

278 (7) "Generating or producing or selling of electric
279 power" means the generation, production or sale of
280 electric power engaged in by businesses subject to the
281 business and occupation tax imposed by section two,
282 two-d, two-m or two-n, article thirteen of this chapter.

283 (8) "Gross proceeds" means the amount received in
284 money, credits, property or other consideration from sales
285 and services within this state, without deduction on
286 account of the cost of property sold, amounts paid for
287 interest or discounts or other expenses whatsoever. Losses
288 may not be deducted, but any credit or refund made for
289 goods returned may be deducted.

290 (9) "Includes" and "including", when used in a definition
291 contained in this article, does not exclude other things
292 otherwise within the meaning of the term being defined.

293 (10) "Manufacturing" means a systematic operation or
294 integrated series of systematic operations engaged in as a
295 business or segment of a business which transforms or
296 converts tangible personal property by physical, chemical
297 or other means into a different form, composition or
298 character from that in which it originally existed.

299 (11) "Person" means any individual, partnership,
300 association, corporation, limited liability company, limited
301 liability partnership or any other legal entity, including
302 this state or its political subdivisions or an agency of
303 either, or the guardian, trustee, committee, executor or
304 administrator of any person.

305 (12) "Personal service" includes those: (A) Compensated
306 by the payment of wages in the ordinary course of employ-
307 ment; and (B) Rendered to the person of an individual
308 without, at the same time, selling tangible personal
309 property, such as nursing, barbering, shoe shining, mani-
310 cing and similar services.

311 (13) Production of natural resource.

312 (A) "Production of natural resources" means, except for
313 oil and gas, the performance, by either the owner of the
314 natural resources or another, of the act or process of
315 exploring, developing, severing, extracting, reducing to
316 possession and loading for shipment and shipment for sale,
317 profit or commercial use of any natural resource products
318 and any reclamation, waste disposal or environmental
319 activities associated therewith and the construction,
320 installation or fabrication of ventilation structures, mine
321 shafts, slopes, boreholes, dewatering structures, including
322 associated facilities and apparatus, by the producer or
323 others, including contractors and subcontractors, at a coal
324 mine or coal production facility.

325 (B) For the natural resources oil and gas, "production of
326 natural resources" means the performance, by either the
327 owner of the natural resources, a contractor or a subcon-
328 tractor, of the act or process of exploring, developing,
329 drilling, well-stimulation activities such as logging,
330 perforating or fracturing, well-completion activities such
331 as the installation of the casing, tubing and other machin-
332 ery and equipment and any reclamation, waste disposal or
333 environmental activities associated therewith, including
334 the installation of the gathering system or other pipeline
335 to transport the oil and gas produced or environmental
336 activities associated therewith and any service work
337 performed on the well or well site after production of the
338 well has initially commenced.

339 (C) All work performed to install or maintain facilities
340 up to the point of sale for severance tax purposes is

341 included in the “production of natural resources” and
342 subject to the direct use concept.

343 (D) “Production of natural resources” does not include
344 the performance or furnishing of work, or materials or
345 work, in fulfillment of a contract for the construction,
346 alteration, repair, decoration or improvement of a new or
347 existing building or structure, or any part thereof, or for
348 the alteration, improvement or development of real
349 property, by persons other than those otherwise directly
350 engaged in the activities specifically set forth in this
351 subdivision (13) as “production of natural resources”.

352 (14) “Providing a public service or the operating of a
353 utility business” means the providing of a public service or
354 the operating of a utility by businesses subject to the
355 business and occupation tax imposed by sections two and
356 two-d, article thirteen of this chapter.

357 (15) “Purchaser” means a person who purchases tangible
358 personal property, custom software or a service taxed by
359 this article.

360 (16) “Sale”, “sales” or “selling” includes any transfer of
361 the possession or ownership of tangible personal property
362 or custom software for a consideration, including a lease
363 or rental, when the transfer or delivery is made in the
364 ordinary course of the transferor’s business and is made to
365 the transferee or his or her agent for consumption or use or
366 any other purpose. “Sale” also includes the furnishing of
367 a service for consideration.

368 (17) “Service” or “selected service” includes all nonpro-
369 fessional activities engaged in for other persons for a
370 consideration, which involve the rendering of a service as
371 distinguished from the sale of tangible personal property
372 or custom software, but does not include contracting,
373 personal services or the services rendered by an employee
374 to his or her employer or any service rendered for resale:
375 *Provided*, That the term “service” or “selected service”

376 does not include payments received by a vendor of tangible
377 personal property as an incentive to sell a greater volume
378 of such tangible personal property under a manufacturer's,
379 distributor's or other third-party's marketing support
380 program, sales incentive program, cooperative advertising
381 agreement or similar type of program or agreement, and
382 these payments are not considered to be payments for a
383 "service" or "selected service" rendered, even though the
384 vendor may engage in attendant or ancillary activities
385 associated with the sales of tangible personal property as
386 required under the programs or agreements.

387 (18) "Streamlined sales and use tax agreement" or
388 "agreement," when used in this article, shall have the same
389 meaning as when used in article fifteen-b of this chapter,
390 except when the context in which the word agreement is
391 used clearly indicates that a different meaning is intended
392 by the Legislature.

393 (19) "Tax" includes all taxes, additions to tax, interest
394 and penalties levied under this article or article ten of this
395 chapter.

396 (20) "Tax commissioner" means the state tax commis-
397 sioner or his or her delegate. The term "delegate" in the
398 phrase "or his or her delegate", when used in reference to
399 the tax commissioner, means any officer or employee of
400 the state tax division duly authorized by the tax commis-
401 sioner directly, or indirectly by one or more redelegations
402 of authority, to perform the functions mentioned or
403 described in this article or rules promulgated for this
404 article.

405 (21) "Taxpayer" means any person liable for the tax
406 imposed by this article or additions to tax, penalties and
407 interest imposed by article ten of this chapter.

408 (22) "Transmission" means the act or process of causing
409 liquid, natural gas or electricity to pass or be conveyed
410 from one place or geographical location to another place

411 or geographical location through a pipeline or other
412 medium for commercial purposes.

413 (23) "Transportation" means the act or process of
414 conveying, as a commercial enterprise, passengers or goods
415 from one place or geographical location to another place
416 or geographical location.

417 (24) "Ultimate consumer" or "consumer" means a person
418 who uses or consumes services or personal property.

419 (25) "Vendor" means any person engaged in this state in
420 furnishing services taxed by this article or making sales of
421 tangible personal property or custom software. "Vendor"
422 and "seller" are used interchangeably in this article.

423 (c) *Additional definitions.* – Other terms used in this
424 article are defined in article fifteen-b of this chapter,
425 which definitions are incorporated by reference into
426 article fifteen. Additionally, other sections of this article
427 may define terms primarily used in the section in which
428 the term is defined.

§11-15-9. Exemptions.

1 (a) *Exemptions for which exemption certificate may be*
2 *issued.* – A person having a right or claim to any exemp-
3 tion set forth in this subsection may, in lieu of paying the
4 tax imposed by this article and filing a claim for refund,
5 execute a certificate of exemption, in the form required by
6 the tax commissioner, and deliver it to the vendor of the
7 property or service in the manner required by the tax
8 commissioner. However, the tax commissioner may, by
9 rule, specify those exemptions authorized in this subsec-
10 tion for which exemptions certificates are not required.
11 The following sales of tangible personal property and
12 services are exempt as provided in this subsection:

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

15 (2) Sales of textbooks required to be used in any of the
16 schools of this state or in any institution in this state
17 which qualifies as a nonprofit or educational institution
18 subject to the West Virginia department of education and
19 the arts, the board of trustees of the university system of
20 West Virginia or the board of directors for colleges located
21 in this state;

22 (3) Sales of property or services to this state, its institu-
23 tions or subdivisions, governmental units, institutions or
24 subdivisions of other states: *Provided*, That the law of the
25 other state provides the same exemption to governmental
26 units or subdivisions of this state and to the United States,
27 including agencies of federal, state or local governments
28 for distribution in public welfare or relief work;

29 (4) Sales of vehicles which are titled by the division of
30 motor vehicles and which are subject to the tax imposed
31 by section four, article three, chapter seventeen-a of this
32 code or like tax;

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

40 (6) Sales of tangible personal property or services to a
41 corporation or organization which has a current registra-
42 tion certificate issued under article twelve of this chapter,
43 which is exempt from federal income taxes under Section
44 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as
45 amended, and which is:

46 (A) A church or a convention or association of churches
47 as defined in Section 170 of the Internal Revenue Code of
48 1986, as amended;

49 (B) An elementary or secondary school which maintains
50 a regular faculty and curriculum and has a regularly

51 enrolled body of pupils or students in attendance at the
52 place in this state where its educational activities are
53 regularly carried on;

54 (C) A corporation or organization which annually
55 receives more than one half of its support from any
56 combination of gifts, grants, direct or indirect charitable
57 contributions or membership fees;

58 (D) An organization which has no paid employees and its
59 gross income from fund raisers, less reasonable and
60 necessary expenses incurred to raise the gross income (or
61 the tangible personal property or services purchased with
62 the net income), is donated to an organization which is
63 exempt from income taxes under Section 501(c)(3) or (c)(4)
64 of the Internal Revenue Code of 1986, as amended;

65 (E) A youth organization, such as the girl scouts of the
66 United States of America, the boy scouts of America or the
67 YMCA Indian guide/princess program and the local
68 affiliates thereof, which is organized and operated exclu-
69 sively for charitable purposes and has as its primary
70 purpose the nonsectarian character development and
71 citizenship training of its members;

72 (F) For purposes of this subsection:

73 (i) The term "support" includes, but is not limited to:

74 (I) Gifts, grants, contributions or membership fees;

75 (II) Gross receipts from fund raisers which include
76 receipts from admissions, sales of merchandise, perfor-
77 mance of services or furnishing of facilities in any activity
78 which is not an unrelated trade or business within the
79 meaning of Section 513 of the Internal Revenue Code of
80 1986, as amended;

81 (III) Net income from unrelated business activities,
82 whether or not the activities are carried on regularly as a
83 trade or business;

84 (IV) Gross investment income as defined in Section
85 509(e) of the Internal Revenue Code of 1986, as amended;

86 (V) Tax revenues levied for the benefit of a corporation
87 or organization either paid to or expended on behalf of the
88 organization; and

89 (VI) The value of services or facilities (exclusive of
90 services or facilities generally furnished to the public
91 without charge) furnished by a governmental unit referred
92 to in Section 170(c)(1) of the Internal Revenue Code of
93 1986, as amended, to an organization without charge. This
94 term does not include any gain from the sale or other
95 disposition of property which would be considered as gain
96 from the sale or exchange of a capital asset or the value of
97 an exemption from any federal, state or local tax or any
98 similar benefit;

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

103 (iii) The term "membership fee" does not include any
104 amounts paid for tangible personal property or specific
105 services rendered to members by the corporation or
106 organization;

107 (G) The exemption allowed by this subdivision does not
108 apply to sales of gasoline or special fuel or to sales of
109 tangible personal property or services to be used or
110 consumed in the generation of unrelated business income
111 as defined in Section 513 of the Internal Revenue Code of
112 1986, as amended. The provisions of this subdivision
113 apply to sales made after the thirtieth day of June, one
114 thousand nine hundred eighty-nine: *Provided*, That the
115 exemption granted in this subdivision applies only to
116 services, equipment, supplies and materials used or
117 consumed in the activities for which the organizations
118 qualify as tax-exempt organizations under the Internal

119 Revenue Code and does not apply to purchases of gasoline
120 or special fuel;

121 (7) An isolated transaction in which any taxable service
122 or any tangible personal property is sold, transferred,
123 offered for sale or delivered by the owner of the property
124 or by his or her representative for the owner's account, the
125 sale, transfer, offer for sale or delivery not being made in
126 the ordinary course of repeated and successive transac-
127 tions of like character by the owner or on his or her
128 account by the representative: *Provided*, That nothing
129 contained in this subdivision may be construed to prevent
130 an owner who sells, transfers or offers for sale tangible
131 personal property in an isolated transaction through an
132 auctioneer from availing himself or herself of the exemp-
133 tion provided in this subdivision, regardless of where the
134 isolated sale takes place. The tax commissioner may
135 propose a legislative rule for promulgation pursuant to
136 article three, chapter twenty-nine-a of this code which he
137 or she considers necessary for the efficient administration
138 of this exemption;

139 (8) Sales of tangible personal property or of any taxable
140 services rendered for use or consumption in connection
141 with the commercial production of an agricultural product
142 the ultimate sale of which is subject to the tax imposed by
143 this article or which would have been subject to tax under
144 this article: *Provided*, That sales of tangible personal
145 property and services to be used or consumed in the
146 construction of or permanent improvement to real prop-
147 erty and sales of gasoline and special fuel are not exempt:
148 *Provided, however*, That nails and fencing may not be
149 considered as improvements to real property;

150 (9) Sales of tangible personal property to a person for the
151 purpose of resale in the form of tangible personal property:
152 *Provided*, That sales of gasoline and special fuel by
153 distributors and importers is taxable except when the sale
154 is to another distributor for resale: *Provided, however*,
155 That sales of building materials or building supplies or

156 other property to any person engaging in the activity of
157 contracting, as defined in this article, which is to be
158 installed in, affixed to or incorporated by that person or
159 his or her agent into any real property, building or struc-
160 ture is not exempt under this subdivision;

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

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

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

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

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

176 (A) For purposes of this subdivision, the term “casual
177 and occasional sales not conducted in a repeated manner
178 or in the ordinary course of repetitive and successive
179 transactions of like character” means sales of tangible
180 personal property or services at fund raisers sponsored by
181 a corporation or organization which is exempt, under
182 subdivision (6) of this subsection, from payment of the tax
183 imposed by this article on its purchases when the fund
184 raisers are of limited duration and are held no more than
185 six times during any twelve-month period and “limited
186 duration” means no more than eighty-four consecutive
187 hours: *Provided*, That sales for volunteer fire departments
188 and volunteer school support groups, with duration of
189 events being no more than eighty-four consecutive hours
190 at a time, which are held no more than eighteen times in a

191 twelve-month period for the purposes of this subdivision
192 are considered "casual and occasional sales not conducted
193 in a repeated manner or in the ordinary course of repeti-
194 tive and successive transactions of a like character; and

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

198 (15) Sales of property or services to a school which has
199 approval from the board of trustees of the university
200 system of West Virginia or the board of directors of the
201 state college system to award degrees, which has its
202 principal campus in this state and which is exempt from
203 federal and state income taxes under Section 501(c)(3) of
204 the Internal Revenue Code of 1986, as amended: *Provided*,
205 That sales of gasoline and special fuel are taxable;

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

210 (17) Sales of lottery tickets and materials by licensed
211 lottery sales agents and lottery retailers authorized by the
212 state lottery commission, under the provisions of article
213 twenty-two, chapter twenty-nine of this code;

214 (18) Leases of motor vehicles titled pursuant to the
215 provisions of article three, chapter seventeen-a of this code
216 to lessees for a period of thirty or more consecutive days.
217 This exemption applies to leases executed on or after the
218 first day of July, one thousand nine hundred eighty-seven,
219 and to payments under long-term leases executed before
220 that date for months of the lease beginning on or after that
221 date;

222 (19) Notwithstanding the provisions of section eighteen
223 of this article or any other provision of this article to the
224 contrary, sales of propane to consumers for poultry house
225 heating purposes, with any seller to the consumer who may

226 have prior paid the tax in his or her price, to not pass on
227 the same to the consumer, but to make application and
228 receive refund of the tax from the tax commissioner
229 pursuant to rules which are promulgated after being
230 proposed for legislative approval in accordance with
231 chapter twenty-nine-a of this code by the tax commis-
232 sioner;

233 (20) Any sales of tangible personal property or services
234 purchased after the thirtieth day of September, one
235 thousand nine hundred eighty-seven, and lawfully paid for
236 with food stamps pursuant to the federal food stamp
237 program codified in 7 U. S. C. §2011, *et seq.*, as amended,
238 or with drafts issued through the West Virginia special
239 supplement food program for women, infants and children
240 codified in 42 U. S. C. §1786;

241 (21) Sales of tickets for activities sponsored by elemen-
242 tary and secondary schools located within this state;

243 (22) Sales of electronic data processing services and
244 related software: *Provided*, That, for the purposes of this
245 subdivision, "electronic data processing services" means:
246 (A) The processing of another's data, including all pro-
247 cesses incident to processing of data such as keypunching,
248 keystroke verification, rearranging or sorting of previously
249 documented data for the purpose of data entry or auto-
250 matic processing and changing the medium on which data
251 is sorted, whether these processes are done by the same
252 person or several persons; and (B) providing access to
253 computer equipment for the purpose of processing data or
254 examining or acquiring data stored in or accessible to the
255 computer equipment;

256 (23) Tuition charged for attending educational summer
257 camps;

258 (24) Dispensing of services performed by one corpora-
259 tion, partnership or limited liability company for another
260 corporation, partnership or limited liability company

261 when the entities are members of the same controlled
262 group or are related taxpayers as defined in Section 267 of
263 the Internal Revenue Code. "Control" means ownership,
264 directly or indirectly, of stock, equity interests or member-
265 ship interests possessing fifty percent or more of the total
266 combined voting power of all classes of the stock of a
267 corporation, equity interests of a partnership or member-
268 ship interests of a limited liability company entitled to
269 vote or ownership, directly or indirectly, of stock, equity
270 interests or membership interests possessing fifty percent
271 or more of the value of the corporation, partnership or
272 limited liability company;

273 (25) Food for the following are exempt:

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

280 (B) Food purchased or sold by a public or private college
281 or university or by a student organization officially
282 recognized by the college or university to students enrolled
283 at the college or university when the sales are made on a
284 contract basis so that a fixed price is paid for consumption
285 of food products for a specific period of time without
286 respect to the amount of food product actually consumed
287 by the particular individual contracting for the sale and no
288 money is paid at the time the food product is served or
289 consumed;

290 (C) Food purchased or sold by a charitable or private
291 nonprofit organization, a nonprofit organization or a
292 governmental agency under a program to provide food to
293 low-income persons at or below cost;

294 (D) Food sold by a charitable or private nonprofit
295 organization, a nonprofit organization or a governmental

296 agency under a program operating in West Virginia for a
297 minimum of five years to provide food at or below cost to
298 individuals who perform a minimum of two hours of
299 community service for each unit of food purchased from
300 the organization;

301 (E) Food sold in an occasional sale by a charitable or
302 nonprofit organization, including volunteer fire depart-
303 ments and rescue squads, if the purpose of the sale is to
304 obtain revenue for the functions and activities of the
305 organization and the revenue obtained is actually ex-
306 pended for that purpose;

307 (F) Food sold by any religious organization at a social or
308 other gathering conducted by it or under its auspices, if
309 the purpose in selling the food is to obtain revenue for the
310 functions and activities of the organization and the
311 revenue obtained from selling the food is actually used in
312 carrying out those functions and activities: *Provided*, That
313 purchases made by the organizations are not exempt as a
314 purchase for resale;

315 (G) Food sold after the thirty-first day of July, two
316 thousand two, by volunteer fire departments and rescue
317 squads that are exempt from federal income taxes under
318 section 501(c)(3) or (c)(4) of the Internal Revenue Code of
319 1986, as amended, when the purpose of the sale is to obtain
320 revenue for the functions and activities of the organization
321 and the revenue obtained is exempt from federal income
322 tax and actually expended for that purpose;

323 (26) Sales of food by little leagues, midget football
324 leagues, youth football or soccer leagues, band boosters or
325 other school or athletic booster organizations supporting
326 activities for grades kindergarten through twelve and
327 similar types of organizations, including scouting groups
328 and church youth groups, if the purpose in selling the food
329 is to obtain revenue for the functions and activities of the
330 organization and the revenues obtained from selling the
331 food is actually used in supporting or carrying on func-

332 tions and activities of the groups: *Provided*, That the
333 purchases made by the organizations are not exempt as a
334 purchase for resale;

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

339 (28) Sales of or charges for the transportation of passen-
340 gers in interstate commerce;

341 (29) Sales of tangible personal property or services to
342 any person which this state is prohibited from taxing
343 under the laws of the United States or under the constitu-
344 tion of this state;

345 (30) Sales of tangible personal property or services to
346 any person who claims exemption from the tax imposed by
347 this article or article fifteen-a of this chapter pursuant to
348 the provision of any other chapter of this code;

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

351 (32) Sales of livestock, poultry or other farm products in
352 their original state by the producer of the livestock,
353 poultry or other farm products or a member of the pro-
354 ducer's immediate family who is not otherwise engaged in
355 making retail sales of tangible personal property; and sales
356 of livestock sold at public sales sponsored by breeders or
357 registry associations or livestock auction markets: *Pro-*
358 *vided*, That the exemptions allowed by this subdivision
359 apply to sales made on or after the first day of July, one
360 thousand nine hundred ninety, and may be claimed
361 without presenting or obtaining exemption certificates:
362 *Provided, however*, That the farmer shall maintain
363 adequate records;

364 (33) Sales of motion picture films to motion picture
365 exhibitors for exhibition if the sale of tickets or the charge

366 for admission to the exhibition of the film is subject to the
367 tax imposed by this article and sales of coin-operated
368 video arcade machines or video arcade games to a person
369 engaged in the business of providing the machines to the
370 public for a charge upon which the tax imposed by this
371 article is remitted to the tax commissioner: *Provided*, That
372 the exemption provided in this subdivision applies to sales
373 made on or after the first day of July, one thousand nine
374 hundred ninety, and may be claimed by presenting to the
375 seller a properly executed exemption certificate;

376 (34) Sales of aircraft repair, remodeling and mainte-
377 nance services when the services are to an aircraft oper-
378 ated by a certified or licensed carrier of persons or prop-
379 erty, or by a governmental entity, or to an engine or other
380 component part of an aircraft operated by a certificated or
381 licensed carrier of persons or property, or by a governmen-
382 tal entity and sales of tangible personal property that is
383 permanently affixed or permanently attached as a compo-
384 nent part of an aircraft owned or operated by a certifi-
385 cated or licensed carrier of persons or property, or by a
386 governmental entity, as part of the repair, remodeling or
387 maintenance service and sales of machinery, tools or
388 equipment, directly used or consumed exclusively in the
389 repair, remodeling or maintenance of aircraft, aircraft
390 engines or aircraft component parts, for a certificated or
391 licensed carrier of persons or property, or for a govern-
392 mental entity;

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

396 (36) Sales of services by individuals who baby-sit for a
397 profit: *Provided*, That the gross receipts of the individual
398 from the performance of baby-sitting services do not
399 exceed five thousand dollars in a taxable year;

400 (37) Sales of services after the thirtieth day of June, one
401 thousand nine hundred ninety-seven, by public libraries or

402 by libraries at academic institutions or by libraries at
403 institutions of higher learning;

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

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

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

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

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

419 For the purpose of this subdivision, the term "primary
420 opinion research" means original research in the form of
421 telephone surveys, mall intercept surveys, focus group
422 research, direct mail surveys, personal interviews and
423 other data collection methods commonly used for quanti-
424 tative and qualitative opinion research studies;

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

436 For the purpose of this subdivision, the term “value-
437 added product” means the following products derived
438 from processing a raw agricultural product, whether for
439 human consumption or for other use: For purposes of this
440 subdivision, the following enterprises qualify as processing
441 raw agricultural products into value-added products:
442 Those engaged in the conversion of:

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

445 (B) Fruits into wine;

446 (C) Honey into wine;

447 (D) Wool into fabric;

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

450 (F) Milk into cheese;

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

453 (H) Feeder cattle into commonly accepted slaughter
454 weights;

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

457 (J) Poultry into a dried, canned, cooked or frozen prod-
458 uct;

459 (41) After the thirtieth day of June, one thousand nine
460 hundred ninety-seven, sales of music instructional services
461 by a music teacher and artistic services or artistic perfor-
462 mances of an entertainer or performing artist pursuant to
463 a contract with the owner or operator of a retail establish-
464 ment, restaurant, inn, bar, tavern, sports or other enter-
465 tainment facility or any other business location in this
466 state in which the public or a limited portion of the public
467 may assemble to hear or see musical works or other artistic

468 works be performed for the enjoyment of the members of
469 the public there assembled when the amount paid by the
470 owner or operator for the artistic service or artistic
471 performance does not exceed three thousand dollars:
472 *Provided*, That nothing contained herein may be construed
473 to deprive private social gatherings, weddings or other
474 private parties from asserting the exemption set forth in
475 this subdivision. For the purposes of this exemption,
476 artistic performance or artistic service means and is
477 limited to the conscious use of creative power, imagination
478 and skill in the creation of aesthetic experience for an
479 audience present and in attendance and includes, and is
480 limited to, stage plays, musical performances, poetry
481 recitations and other readings, dance presentation, cir-
482 cuses and similar presentations and does not include the
483 showing of any film or moving picture, gallery presenta-
484 tions of sculptural or pictorial art, nude or strip show
485 presentations, video games, video arcades, carnival rides,
486 radio or television shows or any video or audio taped
487 presentations or the sale or leasing of video or audio tapes,
488 airshows, or any other public meeting, display or show
489 other than those specified herein: *Provided, however*, That
490 nothing contained herein may be construed to exempt the
491 sales of tickets from the tax imposed in this article. The
492 state tax commissioner shall propose a legislative rule
493 pursuant to article three, chapter twenty-nine-a of this
494 code establishing definitions and eligibility criteria for
495 asserting this exemption which is not inconsistent with the
496 provisions set forth herein: *Provided further*, That nude
497 dancers or strippers may not be considered as entertainers
498 for the purposes of this exemption;

499 (42) After the thirtieth day of June, one thousand nine
500 hundred ninety-seven, charges to a member by a member-
501 ship association or organization which is exempt from
502 paying federal income taxes under Section 501(c)(3) or
503 (c)(6) of the Internal Revenue Code of 1986, as amended,
504 for membership in the association or organization, includ-
505 ing charges to members for newsletters prepared by the

506 association or organization for distribution primarily to its
507 members, charges to members for continuing education
508 seminars, workshops, conventions, lectures or courses put
509 on or sponsored by the association or organization,
510 including charges for related course materials prepared by
511 the association or organization or by the speaker or
512 speakers for use during the continuing education seminar,
513 workshop, convention, lecture or course, but not including
514 any separate charge or separately stated charge for meals,
515 lodging, entertainment or transportation taxable under
516 this article: *Provided*, That the association or organization
517 pays the tax imposed by this article on its purchases of
518 meals, lodging, entertainment or transportation taxable
519 under this article for which a separate or separately stated
520 charge is not made. A membership association or organi-
521 zation which is exempt from paying federal income taxes
522 under Section 501(c)(3) or (c)(6) of the Internal Revenue
523 Code of 1986, as amended, may elect to pay the tax
524 imposed under this article on the purchases for which a
525 separate charge or separately stated charge could apply
526 and not charge its members the tax imposed by this article
527 or the association or organization may avail itself of the
528 exemption set forth in subdivision (9) of this subsection
529 relating to purchases of tangible personal property for
530 resale and then collect the tax imposed by this article on
531 those items from its member;

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

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

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

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

546 (47) The service of providing technical evaluations for
547 compliance with federal and state environmental stan-
548 dards provided by environmental and industrial consul-
549 tants who have formal certification through the West
550 Virginia department of environmental protection or the
551 West Virginia bureau for public health or both. For
552 purposes of this exemption, the service of providing
553 technical evaluations for compliance with federal and
554 state environmental standards includes those costs of
555 tangible personal property directly used in providing such
556 services that are separately billed to the purchaser of such
557 services and on which the tax imposed by this article has
558 previously been paid by the service provider; and

559 (48) Sales of tangible personal property and services by
560 volunteer fire departments and rescue squads that are
561 exempt from federal income taxes under Section 501(c)(3)
562 or (c)(4) of the Internal Revenue Code of 1986, as amended,
563 during fund-raising activities held after the thirty-first
564 day of July, two thousand two, if the sole purpose of the
565 sale is to obtain revenue for the functions and activities of
566 the organization and the revenue obtained is exempt from
567 federal income tax and actually expended for that pur-
568 pose;

569 (49) Lodging franchise fees, including royalties, market-
570 ing fees, reservation system fees or other fees assessed
571 after the first day of December, one thousand nine hun-
572 dred ninety-seven, that have been or may be imposed by a
573 lodging franchiser as a condition of the franchise agree-
574 ment; and

575 (50) Sales of the regulation size United States flag and
576 the regulation size West Virginia flag for display.

577 (b) *Refundable exemptions*. – Any person having a right
578 or claim to any exemption set forth in this subsection shall
579 first pay to the vendor the tax imposed by this article and
580 then apply to the tax commissioner for a refund or credit,
581 or as provided in section nine-d of this article, give to the
582 vendor his or her West Virginia direct pay permit number.
583 The following sales of tangible personal property and
584 services are exempt from tax as provided in this subsec-
585 tion:

586 (1) Sales of property or services to bona fide charitable
587 organizations who make no charge whatsoever for the
588 services they render: *Provided*, That the exemption
589 granted in this subdivision applies only to services,
590 equipment, supplies, food, meals and materials directly
591 used or consumed by these organizations and does not
592 apply to purchases of gasoline or special fuel;

593 (2) Sales of services, machinery, supplies and materials
594 directly used or consumed in the activities of manufactur-
595 ing, transportation, transmission, communication, produc-
596 tion of natural resources, gas storage, generation or
597 production or selling electric power, provision of a public
598 utility service or the operation of a utility service or the
599 operation of a utility business, in the businesses or organi-
600 zations named in this subdivision and does not apply to
601 purchases of gasoline or special fuel;

602 (3) Sales of property or services to nationally chartered
603 fraternal or social organizations for the sole purpose of
604 free distribution in public welfare or relief work: *Pro-*
605 *vided*, That sales of gasoline and special fuel are taxable;

606 (4) Sales and services, fire fighting or station house
607 equipment, including construction and automotive, made
608 to any volunteer fire department organized and incorpo-
609 rated under the laws of the state of West Virginia: *Pro-*
610 *vided*, That sales of gasoline and special fuel are taxable;
611 and

612 (5) Sales of building materials or building supplies or
613 other property to an organization qualified under Section
614 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as
615 amended, which are to be installed in, affixed to or
616 incorporated by the organization or its agent into real
617 property or into a building or structure which is or will be
618 used as permanent low-income housing, transitional
619 housing, an emergency homeless shelter, a domestic
620 violence shelter or an emergency children and youth
621 shelter if the shelter is owned, managed, developed or
622 operated by an organization qualified under Section
623 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as
624 amended.

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

Camy Wise
.....
Chairman Senate Committee

Shirley Spence
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Dorrell Holman
.....
Clerk of the Senate

Dwight M. Boy
.....
Clerk of the House of Delegates

Carl Ray Smith
.....
President of the Senate

Arthur B. Biss
.....
Speaker House of Delegates

The within is approved this the 2nd
Day of April, 2003.

Bob Wise
.....
Governor

PRESENTED TO THE
GOVERNOR

Date 3/27/03

Time 10:10am