

1 COMMITTEE SUBSTITUTE

2 FOR

3 **Senate Bill No. 247**

4 (By Senators Kessler (Acting President) and Hall,

5 By Request of the Executive)

6 _____
7 [Originating in the Committee on Economic Development;
8 reported February 8, 2011.]
9 _____

10
11 A BILL to amend and reenact §11-15-8d of the Code of West Virginia,
12 1931, as amended; and to amend code by adding thereto a new
13 section, designated §11-15-9n, all relating to consumers sales
14 and service tax and use tax; specifying that effective on July
15 1, 2011, restrictions on exemptions by a construction
16 contractor do not apply for certain purchases of primary
17 material handling equipment, racking and racking systems and
18 their components nor do these restrictions on exemptions apply
19 to purchases of building materials and certain tangible
20 personal property if the purchaser of contracting services
21 would be entitled to claim a newly created exemption;
22 specifying exemption for certain purchases of primary material
23 handling equipment, racking and racking systems and their
24 components, building materials and certain tangible personal
25 property; specifying the application for certification of
26 exemption and plan describing investment to be made;

1 specifying application and plan filing date; specifying
2 treatment of late filings and untimely filings of application
3 and plan; specifying loss of exemption if investment is not
4 made within the expansion period; defining terms; specifying
5 exclusions and limitations for qualified warehouses and
6 distribution facilities; specifying exclusions and
7 disqualifications for failure to meet statutory criteria and
8 requirements; specifying over-the-counter sales restrictions;
9 specifying manufacturing, fabrication and assembly
10 restrictions; specifying statute of limitations; specifying
11 issuance of assessments against the purchaser of contracting
12 services entitled to the newly created exemption and not
13 against a contractor who relied in good faith upon validity of
14 an exemption; specifying that the taxpayer first pay to the
15 vendor the tax and then apply to the State Tax Commissioner
16 for a refund or credit; and alternative use of the direct pay
17 permit number.

18 *Be it enacted by the Legislature of West Virginia:*

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

23 **ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.**

24 **§11-15-8d. Limitations on right to assert exemptions.**

25 (a) Persons who perform "contracting" as defined in section
26 two of this article, or persons acting in an agency capacity, may

1 not assert any exemption to which the purchaser of such contracting
2 services or the principal is entitled. Any statutory exemption to
3 which a taxpayer may be entitled shall be invalid unless the
4 tangible personal property or taxable service is actually purchased
5 by such taxpayer and is directly invoiced to and paid by such
6 taxpayer. This section shall not apply to purchases by an employee
7 for his or her employer; purchases by a partner for his or her
8 partnership; or purchases by a duly authorized officer of a
9 corporation, or unincorporated organization, for his or her
10 corporation or unincorporated organization so long as the purchase
11 is invoiced to and paid by the employer, partnership, corporation
12 or unincorporated organization.

13 (b) *Transition rule.* -- This section shall not apply to
14 purchases of tangible personal property or taxable services in
15 fulfillment of a purchasing agent or procurement agent contract
16 executed and legally binding on the parties thereto prior to
17 September 15, 1999: *Provided,* That this transition rule shall not
18 apply to any purchases of tangible personal property or taxable
19 services made under such a contract after August 31, 1991; and this
20 transition rule shall not apply if the primary purpose of the
21 purchasing agent or procurement agent contract was to avoid payment
22 of consumers sales and use taxes. However, effective July 1, 2007,
23 this section shall not apply to purchases of services, machinery,
24 supplies or materials, except gasoline and special fuel, to be
25 directly used or consumed in the construction, alteration, repair
26 or improvement of a new or existing building or structure by a

1 person performing "contracting", as defined in section two of this
2 article, if the purchaser of the "contracting" services would be
3 entitled to claim the refundable exemption under subdivision (2),
4 subsection (b), section nine of this article had it purchased the
5 services, machinery, supplies or materials. Effective July 1,
6 2009, this section shall not apply to purchases of services,
7 computers, servers, building materials and tangible personal
8 property, except purchases of gasoline and special fuel, to be
9 installed into a building or facility or directly used or consumed
10 in the construction, alteration, repair or improvement of a new or
11 existing building or structure by a person performing
12 "contracting", as defined in section two of this article, if the
13 purchaser of the "contracting" services would be entitled to claim
14 the exemption under subdivision (7), subsection (a), section nine-h
15 of this article. Effective July 1, 2011, this section shall not
16 apply to qualified purchases of primary material handling
17 equipment, racking and racking systems, and their components, or to
18 qualified purchases of building materials and certain tangible
19 personal property, as those terms are defined in section nine-n of
20 this article, by a person performing "contracting," as defined in
21 section two of this article, if the purchaser of the "contracting"
22 services would be entitled to claim the refundable exemption under
23 section nine-n of this article. Purchases of gasoline and special
24 fuel shall not be treated as exempt pursuant to this section.

25 **§11-15-9n. Exemption of qualified purchases of primary material**
26 **handling equipment, racking and racking systems, and**

1 **components, building materials and certain tangible**
2 **personal property.**

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

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

20 (2) "Distribution facility" means a warehouse, facility,
21 structure, or enclosed area which is used primarily for the
22 storage, shipment, preparation for shipment, or any combination of
23 such activities, of finished goods, consumer ready wares, and
24 consumer ready merchandise.

25 (3) "Expansion period" means the period of time beginning one
26 year prior to the start of the construction or expansion of the

1 qualified, new or expanded warehouse or distribution facility, and
2 ending one year after the substantial completion of the
3 construction or expansion of the facility. In no event shall the
4 expansion period exceed five years.

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

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

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

24 (5) "Primary material handling equipment" means the principal
25 machinery and equipment used directly and primarily for the
26 handling and movement of tangible personal property in a qualified,

1 new or expanded warehouse or distribution facility.

2 (A) The following items may be considered primary material
3 handling equipment:

4 (i) Conveyers, carousels, lifts, positioners,
5 pick-up-and-place units, cranes, hoists, mechanical arms and
6 robots;

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

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

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

16 (B) "Primary material handling equipment" does not include:

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

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

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

24 (6) "Qualified, new or expanded warehouse or distribution
25 facility" means a new or expanded facility, subject to the
26 following:

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

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

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

17 (B) Exclusions and disqualifications.

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

22 (ii) Subject to the limitations and restrictions set forth in
23 this section, "qualified, new or expanded warehouse or distribution
24 facility" does not include a building or facility where annual
25 calendar year retail sales of tangible personal property are made
26 over-the-counter from such building or facility to the general

1 public, if such sales exceed five percent of the total annual
2 calendar year revenues of the warehouse or distribution facility
3 during the same calendar year.

4 (iii) Subject to the limitations and restrictions set forth in
5 this section, "qualified, new or expanded warehouse or distribution
6 facility" does not include a building or facility where the average
7 monthly full-time employment (determined by including full-time
8 equivalent employees) for each calendar year at the facility is
9 less than three hundred West Virginia domiciled, West Virginia
10 residents. For purposes of determining average monthly employment
11 for the calendar year, the taxpayer shall divide the sum of the
12 twelve monthly averages of qualified full-time and full-time
13 equivalent West Virginia employees at the qualified, new or
14 expanded warehouse or distribution facility by twelve. Each
15 monthly average is computed as the average of West Virginia
16 employment at the beginning of each calendar month and at the end
17 of each calendar month. *Provided*, That the State Tax Commissioner
18 may specify a different method for computation of average monthly
19 full-time employment, on a state-wide basis or on a case-by-case
20 basis, or both, as the State Tax Commissioner may prescribe.

21 (7) "Qualified West Virginia employee" means a full-time
22 employee or full-time equivalent employee who is a West Virginia
23 domiciled West Virginia resident.

24 (8) "Racking and racking systems" means any system of
25 machinery, equipment, fixtures, or portable devices whose function
26 is to store, organize, or move tangible personal property within a

1 warehouse or distribution facility, including, but not limited to,
2 conveying systems, chutes, shelves, racks, bins, drawers, pallets,
3 and other containers and storage devices which form a necessary
4 part of the facility's storage system, and which is used directly
5 and primarily for the storage, handling and movement of tangible
6 personal property in a qualified, new or expanded warehouse or
7 distribution facility.

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

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

14 (b) *Exemption.* -- Qualified purchases of primary material
15 handling equipment, racking and racking systems, and components
16 thereof, building materials and tangible personal property
17 installed into or directly used or consumed in the construction,
18 addition, alteration or improvement of a qualified, new or expanded
19 warehouse or distribution facility, as such terms are defined in
20 this section, purchased during the expansion period are exempt from
21 the tax imposed by this article and article fifteen-a of this
22 chapter. This exemption may apply either to qualified purchases
23 made by a person or entity which will be the owner and operator of
24 the qualified, new or expanded warehouse or distribution facility
25 or to qualified purchases made by a lessor or lessee of the
26 qualified, new or expanded warehouse or distribution facility. A

1 purchase of primary material handling equipment, racking and
2 racking systems, and components thereof, building materials and
3 tangible personal property is a qualified purchase if all
4 requirements for exemption set forth in this section are met with
5 relation to the purchase.

6 (c) *Application for certification of exemption and plan*
7 *describing investment to be made. --*

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

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

21 (3) Late filing. If the taxpayer fails to timely file the
22 application for certification of the exemption with the State Tax
23 Commissioner, together with a plan describing the investment to be
24 made, on or before the start of the construction or expansion of
25 the proposed qualified, new or expanded warehouse or distribution
26 facility, the exemption allowed by this section shall not be

1 available for any purchases of primary material handling equipment,
2 racking and racking systems, and components thereof, building
3 materials and tangible personal property otherwise exempt under
4 this section that were made prior to the filing date of the
5 application for certification of the exemption, and no refund shall
6 be issued for any such purchase.

7 (4) Exemption in cases of untimely filing. Notwithstanding
8 the untimely filing of the application for certification of the
9 exemption and plan describing the investment to be made, if
10 certification of the exemption and plan is issued by the State Tax
11 Commissioner of an untimely filed application and plan, the
12 exemption shall be available for qualified purchases and primary
13 material handling equipment, racking and racking systems, and
14 components thereof, building materials and tangible personal
15 property made subsequent to the filing date of the application and
16 plan and before the end of the expansion period.

17 (5) Exemption limited to expansion period purchases.

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

1 have been due.

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

6 (d) Any person having a right or claim to any exemption set
7 forth in this section shall first pay to the vendor the tax imposed
8 by this article and then apply to the State Tax Commissioner for a
9 refund or credit or, as provided in section nine-d of this article,
10 give to the vendor his or her West Virginia direct pay permit
11 number.

12 (e) *Additional Restrictions, Assessments and Statutes of*
13 *Limitations.* --

14 (1) Over-the-counter sales restrictions.

15 (A) If within ten years after the end of the expansion period,
16 over-the-counter sales are made in any one calendar year, from a
17 warehouse or distribution facility for which qualification for
18 exemption under this section was originally established, which
19 over-the-counter sales, in the aggregate, exceed five percent of
20 the total revenues of the warehouse or distribution facility during
21 the same calendar year, the taxpayer will be disqualified from
22 receiving the exemption under this section as of the close of the
23 calendar year in which over-the-counter sales first exceed five
24 percent of the total revenues of the warehouse or distribution
25 facility during the same calendar year; and the taxpayer shall be
26 subject to assessment for any tax, penalty or interest that would

1 otherwise have been due had the exemption set forth in this section
2 never been applied. This over-the-counter sales restriction shall
3 not apply to any year subsequent to the end of the tenth year after
4 the end of the expansion period.

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

13 (2) Fabrication and Assembly Restriction.

14 (A) Subject to the restriction and limitations set forth in
15 this subsection, a qualified new or expanded warehouse or
16 distribution facility does not include a building or facility where
17 tangible personal property is manufactured, fabricated or
18 assembled. If during any calendar year within ten years after the
19 end of the expansion period, the building or facility for which
20 qualification for exemption under this section was originally
21 established, is used for manufacturing, fabrication or assembly of
22 tangible personal property, the taxpayer will be disqualified from
23 receiving the exemption set forth in this section as of the date
24 such manufacturing, fabrication or assembly first occurs, and the
25 taxpayer shall be subject to assessment for any tax, penalty or
26 interest that would otherwise have been due had the exemption set

1 forth in this section never been applied. This restriction against
2 manufacturing, fabrication and assembly shall not apply to any year
3 subsequent to the tenth year after the end of the expansion period.

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

10 (3) Minimum employment restriction.

11 (A) Subject to the limitations and restrictions set forth in
12 this section, "qualified, new or expanded warehouse or distribution
13 facility" does not include a building or facility where the average
14 monthly full-time employment (determined including full-time
15 equivalent employees) for each calendar year at the facility is
16 less than three hundred West Virginia domiciled, West Virginia
17 residents. If during any calendar year within ten years after the
18 end of the expansion period, the average monthly full-time
19 employment at the building or facility for which qualification for
20 exemption under this section was originally established, is fewer
21 than three hundred qualified West Virginia employees, then the
22 taxpayer will be disqualified from receiving the exemption under
23 this section as of the close of the first calendar year in which
24 the average monthly full-time employment at the facility is less
25 than three hundred West Virginia domiciled, West Virginia
26 residents, and the taxpayer shall be subject to assessment for any

1 tax, penalty or interest that would otherwise have been due had the
2 exemption set forth in this section never been applied. This
3 restriction against having fewer than three hundred qualified West
4 Virginia employees shall not apply to any year subsequent to the
5 tenth year after the end of the expansion period.

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

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

25 (g) *Effective date.* -- This section is effective on and after
26 July 1, 2011.

(NOTE: The purpose of this bill is to authorize an exemption from the consumers sales and service tax and use tax for qualified purchases of primary material handling equipment, racking and racking systems and components thereof, building materials and tangible personal property installed into a new or expanded warehouse or distribution facility which entails at least a \$50 million investment and creates at least three hundred full-time equivalent West Virginia jobs.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

§11-15-9n is new; therefore, strike-throughs and underscoring have been omitted.)