

1 **ENROLLED**

2 COMMITTEE SUBSTITUTE

3 FOR

4 **Senate Bill No. 247**

5 (BY SENATORS KESSLER (ACTING PRESIDENT) AND HALL,

6 BY REQUEST OF THE EXECUTIVE)

7 _____
8 [Passed March 12, 2011; in effect from passage.]
9 _____

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

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

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

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

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

25 **§11-15-8d. Limitations on right to assert exemptions.**

26 (a) Persons who perform "contracting" as defined in section

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

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

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

1 §11-15-9n. Exemption of qualified purchases of computers and
2 computer software, primary material handling equipment,
3 racking and racking systems, and components, building
4 materials and certain tangible personal property.

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

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

22 (2) "Computers and computer software" as defined in section
23 two, article fifteen-b of this chapter means computer equipment and
24 related software directly and primarily used to control automated
25 machinery in the facility and the movement of goods within the

1 facility, to facilitate customer delivery operations including
2 shipment, preparation for shipment, order tracking and delivery
3 inventory control, printing of packing lists and labels and any
4 other customer order fulfillment functions.

5 (3) "Distribution facility" means a warehouse, facility,
6 structure, or enclosed area which is used primarily for the
7 storage, shipment, preparation for shipment, or any combination of
8 such activities, of finished goods, consumer ready wares, and
9 consumer ready merchandise.

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

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

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

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

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

13 (A) The following items may be considered primary material
14 handling equipment:

15 (i) Conveyers, carousels, lifts, positioners,
16 pick-up-and-place units, cranes, hoists, mechanical arms and
17 robots;

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

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

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

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

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

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

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

9 (7) "Qualified, new or expanded warehouse or distribution
10 facility" means a new or expanded facility, subject to the
11 following:

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

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

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

1 million or more.

2 (B) Exclusions and disqualifications.

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

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

15 (iii) Subject to the limitations and restrictions set forth in
16 this section, "qualified, new or expanded warehouse or distribution
17 facility" does not include a building or facility where the average
18 monthly full-time employment (determined by including full-time
19 equivalent employees) for each calendar year at the facility is
20 less than three hundred West Virginia domiciled, West Virginia
21 residents. For purposes of determining average monthly employment
22 for the calendar year, the taxpayer shall divide the sum of the
23 twelve monthly averages of qualified full-time and full-time
24 equivalent West Virginia employees at the qualified, new or
25 expanded warehouse or distribution facility by twelve. Each
26 monthly average is computed as the average of West Virginia

1 employment at the beginning of each calendar month and at the end
2 of each calendar month. *Provided*, That the State Tax Commissioner
3 may specify a different method for computation of average monthly
4 full-time employment, on a state-wide basis or on a case-by-case
5 basis, or both, as the State Tax Commissioner may prescribe.

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

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

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

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

25 (b) *Exemption.* -- Qualified purchases of computers and
26 computer software, primary material handling equipment, racking and

1 racking systems, and components thereof, building materials and
2 tangible personal property installed into or directly used or
3 consumed in the construction, addition, alteration or improvement
4 of a qualified, new or expanded warehouse or distribution facility,
5 as such terms are defined in this section, purchased during the
6 expansion period are exempt from the tax imposed by this article
7 and article fifteen-a of this chapter. This exemption may apply
8 either to qualified purchases made by a person or entity which will
9 be the owner and operator of the qualified, new or expanded
10 warehouse or distribution facility or to qualified purchases made
11 by a lessor or lessee of the qualified, new or expanded warehouse
12 or distribution facility. A purchase of computers and computer
13 software, primary material handling equipment, racking and racking
14 systems, and components thereof, building materials and tangible
15 personal property is a qualified purchase if all requirements for
16 exemption set forth in this section are met with relation to the
17 purchase.

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

20 (1) In order to qualify for the exemption authorized by this
21 section, a taxpayer must submit an application for certification of
22 the exemption to the State Tax Commissioner, together with a plan
23 describing the investment to be made in the qualified, new or
24 expanded warehouse or distribution facility. The application and
25 plan shall be submitted on forms prescribed by the State Tax
26 Commissioner. The plan shall demonstrate that the requirements of

1 the law will be met.

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

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

19 (4) Exemption in cases of untimely filing. Notwithstanding
20 the untimely filing of the application for certification of the
21 exemption and plan describing the investment to be made, if
22 certification of the exemption and plan is issued by the State Tax
23 Commissioner of an untimely filed application and plan, the
24 exemption shall be available for qualified purchases of computers
25 and computer software, primary material handling equipment, racking
26 and racking systems, and components thereof, building materials and

1 tangible personal property made subsequent to the filing date of
2 the application and plan and before the end of the expansion
3 period.

4 (5) Exemption limited to expansion period purchases.

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

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

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

25 (e) *Additional Restrictions, Assessments and Statutes of*
26 *Limitations.* --

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

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

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

26 (2) Fabrication and Assembly Restriction.

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

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

23 (3) Minimum employment restriction.

24 (A) Subject to the limitations and restrictions set forth in
25 this section, "qualified, new or expanded warehouse or distribution
26 facility" does not include a building or facility where the average

1 monthly full-time employment (determined including full-time
2 equivalent employees) for each calendar year at the facility is
3 less than three hundred West Virginia domiciled, West Virginia
4 residents. If during any calendar year within ten years after the
5 end of the expansion period, the average monthly full-time
6 employment at the building or facility for which qualification for
7 exemption under this section was originally established, is fewer
8 than three hundred qualified West Virginia employees, then the
9 taxpayer will be disqualified from receiving the exemption under
10 this section as of the close of the first calendar year in which
11 the average monthly full-time employment at the facility is less
12 than three hundred West Virginia domiciled, West Virginia
13 residents, and the taxpayer shall be subject to assessment for any
14 tax, penalty or interest that would otherwise have been due had the
15 exemption set forth in this section never been applied. This
16 restriction against having fewer than three hundred qualified West
17 Virginia employees shall not apply to any year subsequent to the
18 tenth year after the end of the expansion period.

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

26 (f) *Assessments Against Taxpayer.* -- In circumstances where

1 the exemption authorized under this section has been asserted by a
2 contractor pursuant to the provisions of section eight-d of this
3 article for purchases of computers and computer software, primary
4 material handling equipment, racking and racking systems, and
5 components thereof, building materials and tangible personal
6 property, the assessment of such tax, interest and penalties shall
7 issue against, and liability is hereby imposed upon, the purchaser
8 of the contracting services, which is the taxpayer entitled to the
9 exemption set forth in this section, and not against the contractor
10 who relied in good faith upon the validity of the exemption
11 available under this section to the purchaser of the contracting
12 services.