

Senate Bill No. 247

(By Senators Kessler (Acting President) and Hall,

By Request of the Executive)

[Introduced January 25, 2011; referred to the Committee on
Economic Development; and then to the Committee on Finance.]

**FISCAL
NOTE**

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

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

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

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

1 fuel shall not be treated as exempt pursuant to this section.

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

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

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

23 (2) "Distribution facility" means a warehouse, facility,
24 structure, or enclosed area which is used primarily for the

1 storage, shipment, preparation for shipment, or any combination of
2 such activities, of finished goods, consumer ready wares, and
3 consumer ready merchandise.

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

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

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

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

1 than twenty hours per week or who have worked less than six months
2 during the tax year do not qualify as part-time employees or as
3 seasonal employees.

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

8 (A) The following items may be considered primary material
9 handling equipment:

10 (i) Conveyers, carousels, lifts, positioners,
11 pick-up-and-place units, cranes, hoists, mechanical arms and
12 robots;

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

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

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

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

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

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

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

5 (6) "Qualified, new or expanded warehouse or distribution
6 facility" means a new or expanded facility, subject to the
7 following:

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

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

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

24 (B) Exclusions and disqualifications.

25 (i) Subject to the limitations and restrictions set forth in

1 this section, "qualified, new or expanded warehouse or distribution
2 facility" does not include a building or facility where tangible
3 personal property is manufactured, fabricated or assembled.

4 (ii) 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 annual
7 calendar year retail sales of tangible personal property are made
8 over-the-counter from such building or facility to the general
9 public, if such sales exceed five percent of the total annual
10 calendar year revenues of the warehouse or distribution facility
11 during the same calendar year.

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

1 may specify a different method for computation of average monthly
2 full-time employment, on a state-wide basis or on a case-by-case
3 basis, or both, as the State Tax Commissioner may prescribe.

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

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

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

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

23 (b) *Exemption.* -- Qualified purchases of primary material
24 handling equipment, racking and racking systems, and components
25 thereof, building materials and tangible personal property

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

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

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

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

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

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

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

3 (5) Exemption limited to expansion period purchases.

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

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

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

24 (e) *Additional Restrictions, Assessments and Statutes of*
25 *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.

1 (2) Fabrication and Assembly Restriction.

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

24 (3) Minimum employment restriction. Subject to the limitations
25 and restrictions set forth in this section, "qualified, new or

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

21 Limitations. Notwithstanding any other provision of this code
22 pertaining to statute of limitations to the contrary, any statute
23 of limitations set forth in article ten of this chapter for
24 assessment for any such tax, penalty or interest shall not close
25 until five years subsequent to the end of the first calendar year

1 in which the average monthly full-time employment at the facility
2 is less than three hundred qualified West Virginia employees.

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

15 (g) *Effective date.* -- This section is effective on and after
16 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.