

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

House Bill 4575

**FISCAL
NOTE**

BY DELEGATE HOUSEHOLDER

(BY REQUEST)

[Introduced February 13, 2018; Referred
to the Committee on the Judiciary then Finance.]

1 A BILL to amend and reenact §11-15A-1 and §11-15A-3 of the Code of West Virginia, 1931, as
 2 amended; and to amend said code by adding thereto a new section, designated §11-15A-
 3 3b, all relating to providing an exemption from use tax for sales of tangible personal
 4 property, custom software, or services generated through affiliate marketing by a retailer
 5 who has no other nexus to the state; clarifying affiliate marketing does not create nexus
 6 for the purposes of the imposition and collection of use tax; and defining the term, “affiliate
 7 marketing.”

Be it enacted by the Legislature of West Virginia:

ARTICLE 15A. USE TAX.

§11-15A-1. Definitions.

1 (a) *General.* -- When used in this article and §11-15-1 *et seq.* of this code, terms defined
 2 in this subsection ~~(b) of this section~~ have the meanings ascribed to them in this section, except in
 3 those instances where a different meaning is provided in this article or the context in which the
 4 word is used clearly indicates that a different meaning is intended by the Legislature:

5 ~~(b)(1)~~ “(Affiliate marketing” means a marketing arrangement by which a retailer pays an
 6 external website a commission or fee for sales or traffic generated from referrals by the external
 7 website;

8 “Business” means any activity engaged in by any person, or caused to be engaged in by
 9 any person, with the object of direct or indirect economic gain, benefit or advantage, and includes
 10 any purposeful revenue generating activity in this state;

11 ~~(2)~~ “Consumer” means any person purchasing tangible personal property, custom
 12 software or a taxable service from a retailer as defined in ~~paragraph (7) of this subsection~~ or from
 13 a seller as defined in §11-15B-2 of this code;

14 ~~(3)~~ “Lease” includes rental, hire and license;

15 ~~(4)~~ “Person” includes any individual, firm, partnership, joint venture, joint stock company,
 16 association, public or private corporation, limited liability company, limited liability partnership,

17 cooperative, estate, trust, business trust, receiver, executor, administrator, any other fiduciary,
18 any representative appointed by order of any court or otherwise acting on behalf of others, or any
19 other group or combination acting as a unit, and the plural as well as the singular number;

20 ~~(5)~~ "Purchase" means any transfer, exchange or barter, conditional or otherwise, in any
21 manner or by any means whatsoever, for a consideration;

22 ~~(6)~~ "Purchase price" means the measure subject to the tax imposed by this article and has
23 the same meaning as sales price;

24 ~~(7)~~ "Retailer" means and includes every person engaging in the business of selling, leasing
25 or renting tangible personal property or custom software or furnishing a taxable service for use
26 within the meaning of this article, or in the business of selling, at auction, tangible personal
27 property or custom software owned by the person or others for use in this state: *Provided*, That
28 when in the opinion of the Tax Commissioner it is necessary for the efficient administration of this
29 article to regard any salespersons, representatives, truckers, peddlers or canvassers as the
30 agents of the dealers, distributors, supervisors, employees or persons under whom they operate
31 or from whom they obtain the tangible personal property sold by them, irrespective of whether
32 they are making sales on their own behalf or on behalf of the dealers, distributors, supervisors,
33 employers or persons, the Tax Commissioner may so regard them and may regard the dealers,
34 distributors, supervisors, employers, or persons as retailers for purposes of this article;

35 ~~(8)~~ "Retailer engaging in business in this state" or any like term, unless otherwise limited
36 by federal statute, means and includes, but is not limited to:

37 (A) Any retailer having or maintaining, occupying or using, within this state, directly or by
38 a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or
39 any agent (by whatever name called) operating within this state under the authority of the retailer
40 or its subsidiary, irrespective of whether the place of business or agent is located here
41 permanently or temporarily, or whether the retailer or subsidiary is admitted to do business within
42 this state pursuant to §31D-15-1 *et seq.* or §31E-14-1 *et seq.* of this code; or

43 (B) On and after January 1, 2014, any retailer that is related to, or part of a unitary business
44 with, a person, entity or business that, without regard to whether the retailer is admitted to do
45 business in this state pursuant to §31D-15-1 *et seq.* or §31E-14-1 *et seq.* of this code, is a
46 subsidiary of the retailer, or is related to, or unitary with, the retailer as a related entity, a related
47 member or part of a unitary business, all as defined in §11-24-3a of this code;

48 (i) That, pursuant to an agreement with or in cooperation with the related retailer, maintains
49 an office, distribution house, sales house, warehouse or other place of business in this state;

50 (ii) That performs services in this state in connection with tangible personal property or
51 services sold by the retailer, or any related entity, related member or part of the unitary business;

52 (iii) That, by any agent, or representative (by whatever name called), or employee,
53 performs services in this state in connection with tangible personal property or services sold by
54 the retailer, or any related entity, related member or part of the unitary business; or

55 (iv) That directly, or through or by an agent, representative or employee located in, or
56 present in, this state, solicits business in this state for or on behalf of the retailer, or any related
57 entity, related member or part of the unitary business.

58 (C) For purposes of paragraph (B) of this subdivision, the term “service” means and
59 includes, but is not limited to, customer support services, help desk services, call center services,
60 repair services, engineering services, installation service, assembly service, delivery service by
61 means other than common carrier or the United States Postal Service, technical assistance
62 services, the service of investigating, handling or otherwise assisting in resolving customer issues
63 or complaints while in this state, the service of operating a mail order business or telephone,
64 Internet or other remote order business from facilities located within this state, the service of
65 operating a website or Internet-based business from a location within the state, or any other
66 service.

67 ~~(9)~~ “Sale” means any transaction resulting in the purchase or lease of tangible personal
68 property, custom software or a taxable service from a retailer;

69 ~~(40)~~ “Seller” means a retailer, and includes every person selling or leasing tangible
70 personal property or custom software or furnishing a taxable service in a transaction that is subject
71 to the tax imposed by this article;

72 ~~(41)~~ “Streamlined sales and use tax agreement” or “agreement,” when used in this article,
73 has the same meaning as when used in §11-15B-1 *et seq.* of this code, except when the context
74 in which the word agreement is used clearly indicates that a different meaning is intended by the
75 Legislature;

76 ~~(42)~~ “Tangible personal property” means personal property that can be seen, weighed,
77 measured, felt, or touched, or that is in any manner perceptible to the senses. “Tangible personal
78 property” includes, but is not limited to, electricity, water, gas, and prewritten computer software;

79 ~~(43)~~ “Tax commissioner” or “commissioner” means the State Tax Commissioner, or his or
80 her delegate. The term “delegate” in the phrase “or his or her delegate,” when used in reference
81 to the Tax Commissioner, means any officer or employee of the State Tax Division duly authorized
82 by the Tax Commissioner directly, or indirectly by one or more redelegations of authority, to
83 perform the functions mentioned or described in this article or rules promulgated for this article;

84 ~~(44)~~ “Taxpayer” includes any person within the meaning of this section, who is subject to
85 a tax imposed by this article, whether acting for himself or herself or as a fiduciary; and

86 ~~(45)~~ “Use” means and includes:

87 (A) The exercise by any person of any right or power over tangible personal property or
88 custom software incident to the ownership, possession or enjoyment of the property, or by any
89 transaction in which possession of or the exercise of any right or power over tangible personal
90 property, custom software or the result of a taxable service is acquired for a consideration,
91 including any lease, rental or conditional sale of tangible personal property or custom software;
92 or

93 (B) The use or enjoyment in this state of the result of a taxable service. As used in this
94 subdivision, “enjoyment” includes a purchaser's right to direct the disposition of the property or

95 the use of the taxable service, whether or not the purchaser has possession of the property.

96 The term “use” does not include the keeping, retaining or exercising any right or power
97 over tangible personal property, custom software or the result of a taxable service for the purpose
98 of subsequently transporting it outside the state for use thereafter solely outside this state.

99 ~~(e)~~ (b) *Additional definitions.* — Other terms used in this article are defined in §11-15-1 *et*
100 *seq.* and §11-15B-1 *et seq.* of this code, which definitions are incorporated by reference into §11-
101 15A-1 *et seq.* of this code. Additionally, other sections of this article may define terms primarily
102 used in the section in which the term is defined.

§11-15A-3. Exemptions.

1 (a) The use in this state of the following tangible personal property, custom software and
2 services is hereby specifically exempted from the tax imposed by this article to the extent
3 specified:

4 (1) All articles of tangible personal property and custom software brought into the State of
5 West Virginia by a nonresident individual thereof for his or her use or enjoyment while temporarily
6 within this state or while passing through this state, except gasoline and special fuel: *Provided,*
7 That fuel contained in the supply tank of a motor vehicle that is not a motor carrier may not be
8 taxable.

9 (2) Tangible personal property, custom software or services, the gross receipts from the
10 sale of which are exempt from the sales tax by the terms of §11-15-1 *et seq.* of this code, and the
11 property or services are being used for the purpose for which it was exempted.

12 (3) Tangible personal property, custom software or services, the gross receipts or the
13 gross proceeds from the sale of which are required to be included in the measure of the tax
14 imposed by §11-15-1 *et seq.* of this code, and upon which the tax imposed by ~~said article fifteen~~
15 that article has been paid.

16 (4) Tangible personal property, custom software or services, the sale of which in this state
17 is not subject to the West Virginia consumers sales tax.

18 (5) Fifty percent of the measure of tax on mobile homes utilized by the owners thereof as
19 their principal year-round residence and dwelling.

20 (6) Tangible personal property, custom software, or services, the gross receipts or gross
21 proceeds of which are generated through affiliate marketing by a retailer who has no other nexus
22 to the State of West Virginia.

23 (b) The provisions of this section, as amended in the year 2003, shall apply on and after
24 January 1, 2004.

§11-15A-3b. Affiliate marketing not to create nexus.

1 Affiliate marketing does not create the nexus required for the collecting and remitting of
2 the tax imposed under this article or under §11-15-1 et seq. of this code.

NOTE: The purpose of this bill is to provide an exemption from use tax for sales of tangible personal property, custom software, or services generated through affiliate marketing by a retailer who has no other nexus to the state. The bill clarifies that affiliate marketing does not create nexus for the purposes of the imposition and collection of use tax. The bill defines the term, "affiliate marketing."

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