

WEST VIRGINIA LEGISLATURE

2022 REGULAR SESSION

Introduced

Senate Bill 507

BY SENATORS SWOPE AND SYPOLT

[Introduced January 31, 2022; referred
to the Committee on Finance]

1 A BILL to amend and reenact §11-15-9n of the Code of West Virginia, 1931, as amended, relating
 2 to the consumers sales and service tax and use tax exemption for qualified purchases of
 3 computers and computer software, primary material handling equipment, racking and
 4 racking systems and components, building materials, and certain tangible personal
 5 property to be incorporated into a qualified, new, or expanded warehouse or distribution
 6 facility; changing threshold jobs creation number from 300 to 50; and making stylistic
 7 changes.

Be it enacted by the Legislature of West Virginia:

ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.

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

1 (a) Definitions. — For purposes of this section:

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

13 (2) “Computers and computer software” as defined in ~~section two, article fifteen-b of this~~
 14 ~~chapter~~ §11-15B-2 of this code means computer equipment and related software directly and

15 primarily used to control automated machinery in the facility and the movement of goods within
16 the facility, to facilitate customer delivery operations including shipment, preparation for shipment,
17 order tracking and delivery inventory control, printing of packing lists and labels and any other
18 customer order fulfillment functions.

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

22 (4) "Expansion period" means the period of time beginning ~~one~~1 year prior to the start of
23 the construction or expansion of the qualified, new or expanded warehouse or distribution facility,
24 and ending ~~one~~1 year after the substantial completion of the construction or expansion of the
25 facility. In no event shall the expansion period exceed ~~five~~ 5 years.

26 (5) "Full-time employment" for purposes of determining a full-time employee or a full-time
27 equivalent employee, means employment for at least ~~one hundred forty~~ 140 hours per month at
28 a wage not less than the prevailing state or federal minimum wage, depending on which minimum
29 wage provision is applicable to the business.

30 (A) For purposes of this definition, any employee paid less than state or federal minimum
31 wage, depending on which minimum wage provision is applicable, shall be excluded from the
32 count of employees for the purpose of determining the ~~three hundred~~ 50 jobs requirement of this
33 section.

34 (B) For purposes of this definition, seasonal employees and part-time employees may be
35 converted into full-time equivalent employees if the part-time or seasonal employee is customarily
36 performing job duties not less than ~~twenty~~ 20 hours per week for at least ~~six~~ 6 months during the
37 tax year. Persons who have worked less than ~~twenty~~ 20 hours per week or who have worked less
38 than ~~six~~ 6 months during the tax year do not qualify as part-time employees or as seasonal
39 employees.

40 (6) "Primary material handling equipment" means the principal machinery and equipment

41 used directly and primarily for the handling and movement of tangible personal property in a
42 qualified, new or expanded warehouse or distribution facility.

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

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

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

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

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

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

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

55 (ii) Parts or equipment used to repair, refurbish, or recondition other equipment; or

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

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

59 (A) Qualification criteria. "Qualified, new or expanded warehouse or distribution facility"
60 means a new or expanded facility located in this state, that is a warehouse or distribution facility
61 that will employ ~~three hundred~~ 50 or more West Virginia domiciled, West Virginia residents, as
62 full-time employees in the warehouse or distribution facility once the expansion period is complete
63 and which is either:

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

67 (ii) A new warehouse or distribution facility where the total value of all real and personal
68 property purchased or acquired over the expansion period as direct investment in the facility is
69 \$50 million or more.

70 (B) Exclusions and disqualifications.

71 (i) Subject to the limitations and restrictions set forth in this section, “qualified, new or
72 expanded warehouse or distribution facility” does not include a building or facility where tangible
73 personal property is manufactured, fabricated or assembled.

74 (ii) Subject to the limitations and restrictions set forth in this section, “qualified, new or
75 expanded warehouse or distribution facility” does not include a building or facility where annual
76 calendar year retail sales of tangible personal property are made over-the-counter from such
77 building or facility to the general public, if such sales exceed ~~five percent~~ 5% of the total annual
78 calendar year revenues of the warehouse or distribution facility during the same calendar year.

79 (iii) Subject to the limitations and restrictions set forth in this section, “qualified, new or
80 expanded warehouse or distribution facility” does not include a building or facility where the
81 average monthly full-time employment (determined by including full-time equivalent employees)
82 for each calendar year at the facility is less than ~~three hundred~~ 50 West Virginia domiciled, West
83 Virginia residents. For purposes of determining average monthly employment for the calendar
84 year, the taxpayer shall divide the sum of the ~~twelve~~ 12 monthly averages of qualified full-time
85 and full-time equivalent West Virginia employees at the qualified, new or expanded warehouse or
86 distribution facility by ~~twelve~~ 12. Each monthly average is computed as the average of West
87 Virginia employment at the beginning of each calendar month and at the end of each calendar
88 month. *Provided*, That the State Tax Commissioner may specify a different method for
89 computation of average monthly full-time employment, on a state-wide basis or on a case-by-
90 case basis, or both, as the State Tax Commissioner may prescribe.

91 (8) “Qualified West Virginia employee” means a full-time employee or full-time equivalent
92 employee who is a West Virginia domiciled West Virginia resident.

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

100 (10) "Tangible personal property" means tangible personal property as defined in ~~section~~
101 ~~two, article fifteen-b~~ §11-15B-2 et seq. of this chapter.

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

104 (b) Exemption. — Qualified purchases of computers and computer software, primary
105 material handling equipment, racking and racking systems, and components thereof, building
106 materials and tangible personal property installed into or directly used or consumed in the
107 construction, addition, alteration or improvement of a qualified, new or expanded warehouse or
108 distribution facility, as such terms are defined in this section, purchased during the expansion
109 period are exempt from the tax imposed by this article and ~~article fifteen-a of this chapter~~ §11-
110 15A-1 et seq. of this code. This exemption may apply either to qualified purchases made by a
111 person or entity which will be the owner and operator of the qualified, new or expanded warehouse
112 or distribution facility or to qualified purchases made by a lessor or lessee of the qualified, new or
113 expanded warehouse or distribution facility. A purchase of computers and computer software,
114 primary material handling equipment, racking and racking systems, and components thereof,
115 building materials and tangible personal property is a qualified purchase if all requirements for
116 exemption set forth in this section are met with relation to the purchase.

117 (c) Application for certification of exemption and plan describing investment to be made.

118 (1) In order to qualify for the exemption authorized by this section, a taxpayer must submit

119 an application for certification of the exemption to the State Tax Commissioner, together with a
120 plan describing the investment to be made in the qualified, new or expanded warehouse or
121 distribution facility. The application and plan shall be submitted on forms prescribed by the State
122 Tax Commissioner. The plan shall demonstrate that the requirements of the law will be met.

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

126 (3) Late filing. If the taxpayer fails to timely file the application for certification of the
127 exemption with the State Tax Commissioner, together with a plan describing the investment to be
128 made, on or before the start of the construction or expansion of the proposed qualified, new or
129 expanded warehouse or distribution facility, the exemption allowed by this section shall not be
130 available for any purchases of computer and computer software, primary material handling
131 equipment, racking and racking systems, and components thereof, building materials and tangible
132 personal property otherwise exempt under this section that were made prior to the filing date of
133 the application for certification of the exemption, and no refund shall be issued for any such
134 purchase.

135 (4) Exemption in cases of untimely filing. Notwithstanding the untimely filing of the
136 application for certification of the exemption and plan describing the investment to be made, if
137 certification of the exemption and plan is issued by the State Tax Commissioner of an untimely
138 filed application and plan, the exemption shall be available for qualified purchases of computers
139 and computer software, primary material handling equipment, racking and racking systems, and
140 components thereof, building materials and tangible personal property made subsequent to the
141 filing date of the application and plan and before the end of the expansion period.

142 (5) Exemption limited to expansion period purchases.

143 (A) Upon approval of the application and certification of the exemption, qualified
144 purchases of computers and computer software, primary material handling equipment, racking

145 and racking systems, and components thereof, building materials and tangible personal property
146 shall be exempt from the tax imposed by this article and article fifteen-a of this chapter. However,
147 if the requisite investment is not made within the expansion period, or if the terms and
148 requirements of this section are not satisfied, the taxpayer shall be subject to assessment for any
149 tax, penalty or interest that would otherwise have been due.

150 (B) Limitations. Any statute of limitations set forth in ~~article ten of this chapter~~ §11-10-1 et
151 seq. of this code for assessment made under this subsection for any such tax, penalty or interest
152 shall not close until five years subsequent to the end of the expansion period.

153 (d) Any person having a right or claim to any exemption set forth in this section shall first
154 pay to the vendor the tax imposed by this article and then apply to the State Tax Commissioner
155 for a refund or credit or, as provided in ~~section nine-d~~ §11-15-9d of this article, give to the vendor
156 his or her West Virginia direct pay permit number.

157 (e) Additional Restrictions, Assessments and Statutes of Limitations. —

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

159 (A) If within ~~ten~~ 10 years after the end of the expansion period, over-the-counter sales are
160 made in any ~~one~~ 1 calendar year, from a warehouse or distribution facility for which qualification
161 for exemption under this section was originally established, which over-the-counter sales, in the
162 aggregate, exceed ~~five percent~~ 5% of the total revenues of the warehouse or distribution facility
163 during the same calendar year, the taxpayer will be disqualified from receiving the exemption
164 under this section as of the close of the calendar year in which over-the-counter sales first exceed
165 ~~five percent~~ 5% of the total revenues of the warehouse or distribution facility during the same
166 calendar year; and the taxpayer shall be subject to assessment for any tax, penalty or interest
167 that would otherwise have been due had the exemption set forth in this section never been
168 applied. This over-the-counter sales restriction shall not apply to any year subsequent to the end
169 of the ~~tenth~~ 10th year after the end of the expansion period.

170 (B) Limitations. Notwithstanding any other provision of this code pertaining to statute of

171 limitations to the contrary, any statute of limitations set forth in article ten of this chapter for
172 assessment for any such tax, penalty or interest shall not close until ~~five~~ 5 years subsequent to
173 the end of the calendar year in which over-the-counter sales first exceed ~~five percent~~ 5% of the
174 total revenues of the warehouse or distribution facility during the same period.

175 (2) Fabrication and Assembly Restriction.

176 (A) Subject to the restriction and limitations set forth in this subsection, a qualified new or
177 expanded warehouse or distribution facility does not include a building or facility where tangible
178 personal property is manufactured, fabricated or assembled. If during any calendar year within
179 ~~ten~~ 10 years after the end of the expansion period, the building or facility for which qualification
180 for exemption under this section was originally established, is used for manufacturing, fabrication
181 or assembly of tangible personal property, the taxpayer will be disqualified from receiving the
182 exemption set forth in this section as of the date such manufacturing, fabrication or assembly first
183 occurs, and the taxpayer shall be subject to assessment for any tax, penalty or interest that would
184 otherwise have been due had the exemption set forth in this section never been applied. This
185 restriction against manufacturing, fabrication and assembly shall not apply to any year
186 subsequent to the ~~tenth~~ 10th year after the end of the expansion period.

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

191 (3) Minimum employment restriction.

192 (A) Subject to the limitations and restrictions set forth in this section, "qualified, new or
193 expanded warehouse or distribution facility" does not include a building or facility where the
194 average monthly full-time employment (determined including full-time equivalent employees) for
195 each calendar year at the facility is less than ~~three hundred~~ 50 West Virginia domiciled, West
196 Virginia residents. If during any calendar year within ten years after the end of the expansion

197 period, the average monthly full-time employment at the building or facility for which qualification
198 for exemption under this section was originally established, is fewer than ~~three hundred~~ 50
199 qualified West Virginia employees, then the taxpayer will be disqualified from receiving the
200 exemption under this section as of the close of the first calendar year in which the average monthly
201 full-time employment at the facility is less than ~~three hundred~~ 50 West Virginia domiciled, West
202 Virginia residents, and the taxpayer shall be subject to assessment for any tax, penalty or interest
203 that would otherwise have been due had the exemption set forth in this section never been
204 applied. This restriction against having fewer than ~~three hundred~~ 50 qualified West Virginia
205 employees shall not apply to any year subsequent to the tenth year after the end of the expansion
206 period.

207 (B) Limitations. Notwithstanding any other provision of this code pertaining to statute of
208 limitations to the contrary, any statute of limitations set forth in article ten of this chapter for
209 assessment for any such tax, penalty or interest shall not close until ~~five~~ 5 years subsequent to
210 the end of the first calendar year in which the average monthly full-time employment at the facility
211 is less than ~~three hundred~~ 50 qualified West Virginia employees.

212 (f) Assessments Against Taxpayer. — In circumstances where the exemption authorized
213 under this section has been asserted by a contractor pursuant to the provisions of ~~section eight-~~
214 ~~§11-15-8d~~ of this article for purchases of computers and computer software, primary material
215 handling equipment, racking and racking systems, and components thereof, building materials
216 and tangible personal property, the assessment of such tax, interest and penalties shall issue
217 against, and liability is hereby imposed upon, the purchaser of the contracting services, which is
218 the taxpayer entitled to the exemption set forth in this section, and not against the contractor who
219 relied in good faith upon the validity of the exemption available under this section to the purchaser
220 of the contracting services.

221 (g) The amendments made to this section in the 2022 Regular Legislative Session are
222 effective for purchases of tangible personal property and services made in taxable years

223 beginning on and after January 1, 2023.

NOTE: The purpose of this bill is to change the threshold jobs creation number from 300 to 50; and to making stylistic changes to the language of W. Va. Code §11-15-9n, which authorizes an exemption for qualified purchases of computers and computer software, primary material handling equipment, racking and racking systems, and components, building materials and certain tangible personal property to be incorporated into a qualified, new or expanded warehouse or distribution facility.

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