# WEST VIRGINIA

# SECRETARY OF STATE

**KEN HECHLER**

# ADMINISTRATIVE LAW DIVISION

Form #6

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.**

AGENCY: State Tax Division TITLE NUMBER: 110

AMENDMENT TO AN EXISTING RULE: YES X, NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 15

TITLE OF RULE BEING AMENDED: Consumers Sales and Service Tax and Use Tax

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) HB100

SECTION 64-7-6(tt), PASSED ON May 26, 1993.

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE FOLLOWING DATE: July 15, 1993

James H. Paige III
State Tax Commissioner

On page one hundred forty-three, subsection 86.4, by striking out the first sentence and inserting, in lieu thereof, the following sentence: "An auctioneer is taxable on all of his or her purchases except purchases for resale."

(ss) The legislative rules filed in the state register on the eighteenth day of September, one thousand nine hundred ninety-two, relating to the division of tax (bingo), are authorized.

Title 110-15

(tt) The Legislature hereby authorizes and directs the division of tax to amend its rule relating to consumers sales and service tax and use tax which were filed in the code of state regulations (110 CSR 15) on the twenty-seventy day of April, one thousand nine hundred ninety-two, with the following amendment:

'On page fifty-eight, by striking out all of subparagraph 9.3.4.3.d and by renumbering the remaining subparagraph,'"; and,

Adm.

On page one hundred eight, section 38.1, after the words "daily charge." by striking out the words "The daily charge subject to the consumer sales and service tax does not include complimentary items such as shampoo, coffee and newspapers given to guests by hotels and motels." and inserting in lieu thereof the following:

"Notwithstanding the fact that persons engaged in the rendering of a service are required to pay tax on their purchases for use and/or consumption in rendering such services, the purchase by hotels, motels, tourist homes and rooming houses of complimentary items such as shampoos, coffee and newspapers given to guests by such hotels, motels, tourist homes and rooming houses are not taxable."

## ARTICLE 8. AUTHORIZATION FOR DEPARTMENT OF TRANSPORTATION TO PROMULGATE LEGISLATIVE RULES.

### §64-8-2. Division of motor vehicles.

(a) The legislative rules filed in the state register on the second day of December, one thousand nine hundred

**WEST VIRGINIA LEGISLATIVE REGULATIONS**
**DEPARTMENT OF TAX AND REVENUE**
**TITLE 110**
**SERIES 15**
**APRIL 27, 1992**
**CONSUMERS SALES AND SERVICE AND USE TAX**

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**§ 110-15-1. General.**

1.1 Type of Regulation. - These regulations are legislative regulations as defined in W. Va. Code § 29A-3-1 et seq.

1.2 Scope. - These legislative regulations explain and clarify both the West Virginia consumers sales and service tax, in W. Va. Code § 11-15-1 et seq., and the West Virginia Use Tax, in W. Va. Code § 11-15A-1 et seq. in light of the legislative intent that such tax laws be construed and applied, whenever possible, as complementary laws.

1.3 Authority. - These legislative regulations are issued under the authority of W. Va. Code § 11-10-5.

1.4 Filing Date. - April 27, 1992.

1.5 Effective Date. - May 1, 1992.

**§ 110-15-2. Definitions.** - As used in these regulations and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and shall apply in the singular or in the plural.

2.1 "Air pollution" - See Section 2.27.1.13.c of these regulations.

2.2 "Aircraft," for purposes of the tax on gasoline and special fuel, means and includes any airplane or helicopter that lands in this State on a regular or routine basis, and transports passengers or freight.

2.3 "Aircraft fuel," for purposes of the tax on gasoline and special fuel, means gasoline and special fuel suitable for use in any aircraft engine.

2.4 "Alteration" - See Section 2.24.3.1 of these regulations.

2.5 "Another state" means any state, as defined in Section 2.86 of this rule except the State of West Virginia.

2.6 "Aquaculture" means the raising of fish or the growing of plants in water for commercial purposes.

2.7 "Auxiliary personnel" - See Section 2.81.2 of these regulations.

2.8 "Bona fide dues or membership fees" - See Section 2.48 of these regulations.

2.9 "Business" or "doing business" includes any purposeful revenue generating activity in this State and includes all activities engaged in or

caused to be engaged in with the object of gain or economic benefit, direct or indirect, and all activities of the State and its political subdivisions which involve sales of tangible personal property or the rendering of services when those service activities compete with or may compete with the activities of other persons.

2.10 "Capital improvement" - See Section 2.24.3.2 of these regulations.

2.11 "Casual and occasional sales not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character" means sales of tangible personal property or services ("fund raisers"), when such fund raisers are of limited duration and are held no more than six (6) times during any twelve (12) month period. For purposes of this definition, the term "limited duration" means that a fund raiser may last no longer than eighty-four (84) consecutive hours.

2.11.1 Any person qualifying for an exemption from or relating to casual and occasional sales shall have the exemption available for up to a total of six (6) fund raisers in a twelve (12) month period. The seventh (7th) fund raiser and any purported sale or fund raiser thereafter in any twelve (12) month period shall not constitute a casual and occasional sale or fund raiser for purposes of these regulations. Any purported fund raiser having a duration longer than eighty-four (84) hours shall be treated as two (2) or more successive fund raisers. If the number of total aggregate fund raisers is greater than six (6) for any twelve (12) month period, any purported fund raiser beyond six (6) is taxable activity.

2.12 "Charitable contribution" means a contribution or gift to or for the use of a corporation or organization, described in Section 170(c)(2) of the Internal Revenue Code of 1986, as amended.

2.13 "Charitable organization" means and includes any corporation or organization which is organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the providing of athletic facilities or equipment), or for the prevention of cruelty to children or animals, provided that no part of the net earnings of the organization inures to the benefit of any private shareholder or individual, that no substantial part of the activities of the organization is carrying on propaganda or otherwise attempting to influence legislation and that it does not participate in any political campaign on behalf of any candidate for public office. For purposes of this Section, such participation would include publishing or distribution of political statements.

2.14 "Church" means an individual parish, congregation or like subgroup of an organized religion, denomination, sect or religious society, or a convention or association of churches as defined in Section 170 of the Internal Revenue Code of 1986, as amended, which is exempt from federal income tax under Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code of 1986, as amended; but the term "church" shall not include an affiliated religious school.

2.15 "Civic organization" means a nonprofit organization or corporation that is operated exclusively for the promotion of social welfare.

2.16 "Commercial production of an agricultural product" means the production of food, fiber, or woodland products (but not timbering activity) by means of cultivation, tillage of the soil or by the conduct of animal, livestock, dairy, apiary, equine or poultry husbandry, aquacultural activity, horticultural activity, or any other plant or animal production activity and all farm practices related, usual or incidental thereto, including the storage, packing, shipping and marketing of agricultural or farm products, but not including any manufacturing, milling or processing of such products by persons other than the producer thereof, such production being measured by annual sales of at least one thousand dollars ($1,000) of such agricultural products: Provided, That for the first twelve (12) months after the occurrence of a catastrophe, such as fire, drought or flood, which substantially destroyed the agricultural product being produced or the means for harvesting such product other than merely mechanical breakdowns, or for the first twelve (12) months after the commercial producer of an agricultural product has first commenced such production activity, the requirement of annual sales of at least one thousand dollars ($1,000) of agricultural products need not be satisfied in order for the activity to be the commercial production of an agricultural product.

2.17 "Communication" means all telephone, radio, light, light wave, radio-telephone, telegraph and other communication or means of communication, whether used for voice communication, computer data transmission or other encoded symbolic information transfers and shall include commercial broadcast radio, commercial broadcast television, cable television and motion picture theaters.

2.18 "Conditional sale" means an agreement for the sale of tangible personal property pursuant to which possession is delivered to the buyer, but title is retained by the seller until the performance of some condition, usually the payment of the purchase price, has occurred.

2.19 "Consumer" or "ultimate consumer" means any person who uses or consumes taxable services or tangible personal property.

2.20 "Consumers sales and service tax," "consumers sales tax" and "sales tax" mean the tax imposed by W. Va. Code § 11-15-1 et seq.

2.21 "Contract" or "contracts" means, for purposes of the transition rules set forth in W. Va. Code § 11-15-8a for contracting activities, written agreements reciting or setting forth a fixed price consideration, or a consideration based upon cost plus a stated percentage or a stated monetary increment. This term does not mean or include ongoing sales contracts, contracts whereby any element of the consideration or the property or services sold or to be rendered in performance of the contract are undefined, or determined, as to either nature or quantity, subsequent to the making of the contract, or any open-ended contract.

2.21.1 The term "contract" or "contracts" does not include for purposes of the transition rules set forth in W. Va. Code §§ 11-15-8a and

11-15-8c, change orders wherein the scope of work contained in the original contract is exceeded to a degree sufficiently significant to require additional charges to the customer. Purchases by a contractor for use in contracting activities performed under such change orders may be subject to the consumer sales and service tax.

2.22 "Contract basis" means, for purposes of determining the exemption of certain charges for room and meals, the circumstance where a fixed price is paid for consumption of food products during a specific period of time without regard to the amount of food product actually consumed by the particular student contracting for the purchase and no money is paid at the time the food product is served or consumed. The term "specific period of time" means a fixed time period of not less than thirty (30) consecutive days.

2.23 "Contract renewal" or "renewal" means, for purposes of contracting activities, a covenant or agreement entered into or assumed by parties which have a current contractual relation or which have had a past contractual relation, whereby the parties agree to incur obligations beyond those which they were, or would have been, required, at the minimum, to carry out under their current or past contractual relation.

2.24 "Contracting" or "contracting activity" means and includes the furnishing of work, or both materials and work, for another (by a sole contractor, general contractor, prime contractor or subcontractor) in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for removal or demolition of a building or structure, or any part thereof, or for the alteration, improvement or development of real property.

2.24.1 Contracting does not include the furnishing of work, or both materials and work, in the nature of hook-up, connection, installation or other services if such service is incidental to the retail sale of tangible personal property from the service provider's inventory: Provided, That such hook-up, connection or installation of the foregoing is incidental to the sale of the same when performed by the seller thereof or performed in accordance with arrangements made by the seller thereof.

2.24.1.1 Examples of transactions that are excluded from the definition of contracting pursuant hereto include, but are not limited to, the sale of wall-to-wall carpeting and the installation of wall-to-wall carpeting, the sale, hook-up and connection of mobile homes, window air conditioning units, dishwashers, clothing washing machines or dryers, other household appliances, drapery rods, window shades, venetian blinds, canvas awnings, free-standing industrial or commercial equipment and other similar items of tangible personal property.

2.24.2 Form of Contract Not Controlling. - Any activity that falls within the definition of contracting under this Section 2.24 of these regulations shall constitute contracting regardless of whether the contract governing the activity is written or oral and regardless of whether it is in substance or form a lump sum contract, a cost-plus contract, a time and materials contract (whether or not open-ended), or any other kind of construction contract.

2.24.3 Special Rules. - For purposes of this definition:

2.24.3.1 The term "alteration" means and is limited to alterations which are capital improvements to a building or structure or to real property.

2.24.3.2 The term "capital improvement" means improvements that are affixed to or attached to and become a part of a building or structure or the real property or which add utility to real property or any part thereof and that last, or are intended to be relatively permanent.

2.24.3.2.a The term "relatively permanent" means lasting at least a year or longer in duration without the necessity for regularly scheduled recurring service to maintain such capital improvement.

2.24.3.2.b The term "regular recurring service" means regularly scheduled service intervals of less than one year.

2.24.3.3 The term "decoration" means and is limited to decorations which are capital improvements to a building or structure or to real property.

2.24.3.4 The term "improvement" means and is limited to improvements which are capital improvements to a building or structure or to real property.

2.24.3.5 The term "repair" means and is limited to repairs which are capital improvements to a building or structure or to real property. "Repairs" does not include ordinary maintenance and repairs which tend to restore and repair the effects of normal wear and tear which occurred in the past or ordinary repairs which do not materially add to the economic value of the asset.

2.24.3.6 The term "structure" includes, but is not limited to, everything built up or composed of parts joined together in some definite manner and attached or affixed to real property, or which adds utility to real property or any part thereof, or which adds utility to a particular parcel of property and is intended to remain there for an indefinite period of time.

2.25 "Day care center" or "licensed or registered day care center" means a facility licensed in accordance with W. Va. Code § 49-2B-1 et seq. and operated by a child welfare agency for the care of seven (7) or more children on a non-residential basis or registered in accordance with W. Va. Code § 49-2B-1 et seq. and operated to care for four (4) to six (6) children, including those living in the household, who are under six (6) years of age: Provided, That the term does not include:

2.25.1 a kindergarten, pre-school or school education program which is operated by a public school or which is accredited by the State Department of Education, or any other kindergartens, pre-school or school programs which operate with sessions not exceeding four (4) hours per day for any child;

2.25.2 summer recreation camps or educational summer camps operated for children attending sessions for periods not exceeding thirty (30) days;

2.25.3 See Section 9.2.8 of these regulations for additional information.

2.26 "Decoration" - See Section 2.24.3.3 of these regulations.

2.27 "Directly used or consumed" in manufacturing, transportation, transmission, communication or the production of natural resources shall mean used or consumed in those activities or operations which constitute an integral and essential part of such activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to such activities.

2.27.1 Uses of property or consumption of services which constitute direct use or consumption in the activities of manufacturing, transportation, transmission, communication or the production of natural resources shall include only:

2.27.1.1 In the case of tangible personal property, physical incorporation of property into a finished product resulting from manufacturing production or the production of natural resources;

2.27.1.2 Causing a direct physical, chemical or other change upon property undergoing manufacturing production or production of natural resources;

2.27.1.3 Transporting or storing property undergoing transportation, communication, transmission, manufacturing production, or production of natural resources;

2.27.1.4 Measuring or verifying a change in property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

2.27.1.5 Physically controlling or directing the physical movement or operation of property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

2.27.1.6 Directly and physically recording the flow of property undergoing transportation, communication, transmission, manufacturing production or production of natural resources;

2.27.1.7 Producing energy for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

2.27.1.8 Facilitating the transmission of gas, water, steam or electricity from the point of its diversion to property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

2.27.1.9 Controlling or otherwise regulating atmospheric conditions required for transportation, communication, transmission, manufacturing production or production of natural resources;

2.27.1.10 Serving as an operating supply for property undergoing transmission, manufacturing production or production of natural resources or for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

2.27.1.11 Maintaining or repairing property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

2.27.1.12 Storing, removing or transporting economic waste directly resulting from the activities of transportation, communication, transmission, manufacturing or production of natural resources;

2.27.1.13 Pollution control or environmental quality or protection activity directly relating to the activities of manufacturing, transportation, communication, transmission or the production of natural resources.

2.27.1.13.a "Pollution control" means any service, system, method, construction, device or appliance appurtenant thereto used or intended for the primary purpose of eliminating, preventing, or reducing air, noise or water pollution, or for the primary purpose of treating, pretreating, modifying or disposing of any potential solid, liquid or gaseous pollutant which, if released without such treatment, pretreatment, modification or disposal, might be harmful, detrimental or offensive to the public and the public interest.

2.27.1.13.b "Environmental quality or protection activity or facility" means services, devices (including identifiable parts of devices), systems or facilities used or intended for use primarily for the protection of the public and the public interest through the control, reduction or elimination of air, water or noise pollution immediately caused by and directly related to the activities of manufacturing, transportation, communication, transmission or the production of natural resources.

2.27.1.13.c "Air pollution" means the presence in the outdoor atmosphere of one or more air contaminants or combinations thereof in such quantities and of such characteristics, location and duration as to be injurious to the public and the public interest, or to unreasonably interfere with the comfortable enjoyment of life or property or the conduct of business within such areas of the State as shall be affected thereby.

2.27.1.13.d "Water pollution" means the discharge or deposit of sewage, industrial wastes, or other wastes of such condition, in such manner, or in such quantity as to cause ground or surface water to be contaminated, unclean, or impure to such an extent to make said waters detrimental to the public and the public interest.

2.27.1.13.e "Noise pollution" means sound which has intensity, duration or character which exceeds standards developed by the State environmental protection agency.

2.27.1.14 Personnel, plant, product or community safety or security activity directly relating to the activities of transportation, communication, transmission, manufacturing production or production of natural resources; or

2.27.1.15 Property or services otherwise used as an integral and essential part of transportation, communication, transmission, manufacturing production or production of natural resources.

2.27.2 Uses of property or services which would not constitute direct use or consumption in the activities of manufacturing, transportation, transmission, communication or the production of natural resources shall include, but is not be limited to:

2.27.2.1 Heating and illumination of office buildings;

2.27.2.2 Janitorial or general cleaning activities;

2.27.2.3 Personal comfort of personnel;

2.27.2.4 Production planning, scheduling of work, or inventory control;

2.27.2.5 Marketing, general management, supervision, finance, training, accounting and administration; or

2.27.2.6 An activity or function incidental or convenient to transportation, communication, transmission, manufacturing production or production of natural resources, rather than an integral and essential part of such activity.

2.27.3 For a more detailed discussion of the direct use concept, See Section 123 of these regulations.

2.28 "Distributor" means and includes, for purposes of the tax on gasoline and special fuel, every person:

2.28.1 Who produces, manufactures, processes or otherwise alters gasoline or special fuel in this State for use or for sale; or

2.28.2 Who engages in this State in the sale of gasoline or special fuel for the purpose of resale or for distribution; or

2.28.3 Who receives gasoline or special fuel into the cargo tank of a tank wagon in this State for use or sale by such person.

2.29 "Drugs" includes all drugs or appliances, which cannot otherwise be acquired over-the-counter but must be dispensed upon written prescription of a physician, dentist and any other professional person licensed to prescribe.

2.30 "Educational summer camp" means a program and facility providing courses of instruction in activities such as art,science, music, computers, foreign languages, forestry, religious study, etc., such courses of instruction occupying a substantial amount of time during which participants are in attendance at the camp.

2.30.1 For the purpose of this regulation, the term "educational" means: dedicated to providing instruction or learning for the intellectual, physical and moral development and betterment of the recipient thereof, and the improvement of his knowledge, skill and character. For purposes of these regulations, those courses of study traditionally provided through formal schooling may be presumed to be educational.

2.30.2 Training in athletics, sports training, or physical conditioning shall not be considered "educational" for purposes of these regulations unless the primary scope or purpose of the summer camp is not training in athletics, sports training, or physical conditioning.

2.30.3 Specifically excluded from the definition of educational summer camps are those programs and facilities primarily related to paramilitary training, nudist camping or those related to animal training.

2.30.4 For purposes of this regulation, the term "summer" means that portion of the year during which West Virginia elementary and secondary public schools have summer recess. This period shall begin with the earliest cessation of the regular school year occurring for any such West Virginia public school among all such schools in all counties of the State of West Virginia, and shall end with the latest beginning of the next regular school year occurring for any such West Virginia public school among all such schools in all counties of the State of West Virginia.

2.31 "Environmental quality or protection activity or facility" - See Section 2.27.1.13.b of these regulations.

2.32 "Farm products" means products grown on a farm, generally for consumption, and includes, but is not necessarily limited to, apples, cherries, strawberries, natural honey and corn; however, farm products do not include that which is made or pressed on a farm such as, but not limited to, jams, preserves, apple cider or quilts.

2.33 "Food" and "food for meals" means and includes edible foodstuffs intended for human consumption and items commonly thought of as food, including, by way of illustration and not by limitation, cereals and cereal products, meat and meat products, fish and fish products, poultry and poultry products, fresh and salt water animal products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, flour and flour products, sugar and sugar products, milk and milk products, cocoa and cocoa products, coffee and coffee substitutes, tea, herbs, spices, salt and salt substitutes, condiments, candy and confections, soft drinks, soft drink mixes and syrups, tenderizers, food coloring, bottled drinking water, sugar substitutes, oleomargarine, shortening, gelatins, baking and cooking ingredients, mushrooms, spreads, relishes, desserts, flavorings, edible seeds, nuts and berries: Provided, That the term "food" and "food for meals" does not include medicines, vitamins and dietary

supplements whether in liquid, powdered, granular, tablet, capsule, lozenge, or pill form; spirituous, malt or vinous liquors or beer; ice; tobacco or tobacco products; chewing gum; cake letters; breath mints; or food sold through a vending machine.

2.33.1 Tests for Determining Whether "Food is Intended for Human Consumption". - Occasionally a question may arise concerning whether a particular food or food product is intended for human consumption. This question is to be answered by application of the following two tests. If either question is answered in the negative (no), the item may not be considered as "food intended for human consumption," and consumers sales and service tax must be collected.

2.33.1.1 Test One. - Is the product generally regarded by the public as being food intended for human consumption?

2.33.1.2 Test Two. - Do the words or statements on the label or package, if any, suggest that the product is food intended for human consumption?

2.33.2 The burden of proving that a particular food or product is purchased as "food intended for human consumption" rests on the vendor. In case of any doubt as to whether the product is intended for human consumption, the tax shall be collected. Any person claiming to be aggrieved by having to pay the consumers sales and service tax shall pay the amount of tax to the retail merchant (vendor) and file a claim for refund with the Tax Commissioner.

2.33.3 See Appendix 1 of these regulations, "Condiments considered to be food" which is an illustrative list of items which are included in the definition of "food."

2.34 "Gasoline" means and includes, for purposes of the tax on gasoline and special fuel, any product commonly or commercially known as gasoline, regardless of classification, suitable for use as fuel in an internal combustion engine, except special fuel as defined in Section 2.85 of these regulations, including any product obtained by blending together any one or more products, with or without other products, if the resultant product is capable of the same use.

2.35 "Gross proceeds" means the amount received in money, credits, property or other consideration from sales and services within this State, without deduction on account of the cost of property sold, amounts paid for interest or discounts or any other expenses whatsoever. Gross proceeds shall be reduced by the value of an item of tangible personal property which is traded-in for the purpose of reducing the purchase price of the item purchased or the amount of a discount allowed by the vendor for the item at the time the item is purchased. Losses shall not be deducted, but any credit or refund made for goods returned may be deducted.

2.35.1 Gross proceeds shall include the amount of any excise tax or other tax imposed upon the tangible personal property or taxable service sold or used, or the sale thereof, prior to the imposition of the West Virginia consumers sales and service tax or use tax on such property or taxable service.

2.35.2 Gross proceeds shall include any increase in the amount paid by the ultimate consumer or end user of tangible personal property or a taxable service by reason of shipping charges, postage, handling charges, costs of travel or transportation or any similar cost or charge.

2.35.3 For purposes of these regulations the terms "charge," "gross sales price," "sales price," "purchase price," "monetary consideration" and "gross receipts" shall be synonymous with the term "gross proceeds."

2.35.4 Gross proceeds shall not include the amount of federal, state or local tax simultaneously imposed upon the tangible personal property or service purchased.

2.36 "Importer" means and includes, for purposes of the tax on gasoline and special fuel, every person, resident or nonresident, other than a distributor, who receives gasoline or special fuel outside this State for use, sale or consumption within this State, but shall not include the fuel in the supply tank of a motor vehicle that is not a motor carrier. See definition of motor carrier in Section 2.52 of these regulations.

2.37 "Improvement" - See Section 2.24.3.4 of these regulations.

2.38 "Intangible personal property" means chattel interests, real and personal, money, credits, investments and the evidences thereof.

2.39 "Isolated transaction" means a transaction or event in which tangible personal property or a taxable service is sold, transferred, offered for sale or delivered by the owner thereof or by his representative. In order to qualify as an isolated transaction, the seller may not be in the business of selling the type of tangible personal property or rendering the service which is the subject of the transaction. The isolated transaction may be in the form of a single transaction, or a series of individual transactions which would be an event. An example of a single transaction would be the sale of a boat. An example of a series of transactions comprising an event would be a yard sale. An event may not be longer than forty-eight (48) hours in duration. A person qualifying for the exemption shall have the isolated transaction exemption available for up to a total of four (4) "isolated transactions" (whether they be "transactions" or "events," as herein described,) in any twelve (12) month period. The fifth (5th) transaction or event and any transaction or event thereafter in any such twelve (12) month period is taxable. Any purported "event" having a duration longer than forty-eight (48) hours shall be treated as two (2) or more successive "events." If the number of total aggregate events is greater than four (4) for any twelve (12) month period, any purported event beyond four (4) is a taxable activity.

2.39.1 The isolated transaction exemption shall be available for persons selling their tangible personal property through an auctioneer, if the requirements of this definition are met with relation to the person whose property is being sold. For sales by an auctioneer, See Section 86 of these regulations.

2.41 "Lease" includes rental, hire and license.

2.42 "Livestock" means farm animals raised for profit but does not include cats, rabbits, dogs, rats, mice, raccoons, groundhogs, deer, squirrels, crows, bears, exotic animals, parrots, parakeets, swans, peafowl, tropical or wild or exotic birds or fish or any animal commonly kept as, or thought of as a pet, or any game animal or wild animal unless raised for profit: Provided, That such profit is not obtained through the sale of such animal, fowl or fish being sold as a pet.

2.43 "Management information services facility" means a building, or any part thereof, or a complex of buildings, or any part thereof, including the machinery and equipment located therein, that is exclusively dedicated to providing management information services to the owner or operator thereof or to another person.

2.44 "Management information services" means, and is limited to, data processing, data storage, data recovery and backup, programming recovery and backup, telecommunications, computation and computer processing, computer programming, electronic information, and data management activities, or any combination of such activities, when such activity, or activities, is not subject to regulation by the West Virginia public service commission and such activity, or activities, is for the purpose of managing, planning for, organizing, or operating, any industrial or commercial business, or any enterprise, facility or facilities of an industrial or commercial business, whether such industrial or commercial business or enterprise, facility or facilities of an industrial or commercial business is located within or without this state and without regard to whether such industrial or commercial business, or enterprise, facility or facilities of an industrial or commercial business is owned by the provider of the management information services or by a "related person," as defined in Section 267(b) of the Internal Revenue Code of 1986, as amended.

2.45 "Manufactured home" means a structure, transportable in one (1) or more sections, which in the traveling mode is eight (8) body feet or more in width or forty (40) body feet or more in length or, when erected on site, is three hundred twenty (320) or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning and electrical systems contained therein; except that such term includes any structure which meets all the requirements of this definition except the size requirements and with respect to which the manufacturer voluntarily files a certificate which complies with the applicable federal standard as set forth in the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. § 5401, et seq.) and the federal manufactured home construction and safety standards and regulations promulgated by the Secretary of the United States Department of Housing and Urban Development to implement such act. Calculations used to determine the number of square feet in a structure will be based on the structure's exterior dimensions measured at the largest horizontal projections when entered on site. The term "manufactured home" includes:

2.45.1 units containing parts that may be folded, collapsed or telescoped when being towed and that may be expanded to provide additional cubic capacity.

2.45.2 units composed of two (2) or more separately towable components designed to be joined into one (1) integral unit capable of being separated again into the components for repeated towing.

2.45.3 units designed to be used for residential, commercial, educational or industrial purposes, excluding, however, recreational vehicles, as defined in Section 2.71 of these regulations.

2.46 "Manufacturing" means a systematic operation or integrated series of systematic operations engaged in as a business or segment of a business which transforms or converts tangible personal property by physical, chemical or other means into a different form, composition or character from that in which it originally existed. Manufacturing production begins with the arrival of raw materials and ends when the property has reached that point where no further chemical, physical or other changes are to be made to the resultant property in the production process.

2.46.1 A person may be engaged in a manufacturing activity although such person does not have legal title to or any economic interest in the tangible personal property so transformed or converted.

2.47 "Member of the producer's immediate family" means the producer's spouse, son, step-son, daughter, step-daughter and any other person related by blood or marriage residing with the producer.

2.48 "Membership fees or bona fide dues" mean those amounts paid by members which entitle such persons to continued membership in a corporation, organization or association. Membership fees or bona fide dues do not include any amounts paid for tangible personal property or specific services rendered to members by a corporation, organization or association. For related material See Sections 52.4 and 70.3 of these regulations.

2.49 "Mobile home" means a "manufactured home" as defined in Section 2.45 of these regulations.

2.50 "Modular home" means a "manufactured home" as defined in Section 2.45 of these regulations.

2.51 "Monetary consideration" means the actual cost to the purchaser of tangible personal property or a service purchased after deduction for the value of any item traded-in as part of the consideration paid for the tangible personal property or service purchased. Monetary consideration shall not include the amount of federal, state or local tax simultaneously imposed upon the tangible personal property or service purchased.

2.52 "Motor carrier" means and includes, for purposes of the tax on gasoline and special fuel, (A) any passenger vehicle which has seats for more than nine passengers in addition to the driver, any road tractor, tractor truck or any truck having more than two axles, which is operated or caused to be operated, by any person on any highway in this State using gasoline or special fuel; and (B) any aircraft, barge or other watercraft, or locomotive transporting passengers or freight in or through this State.

2.53 "Motor vehicle" means and includes, for purposes of the tax on gasoline and special fuel, automobiles, motor carriers, motor trucks, motorcycles and all other vehicles or equipment, engines or machines which are operated or propelled by combustion of gasoline or special fuel. See this Section 2 for the definition of "vehicle."

2.54 "Natural Resources." - See Section 123 of these regulations.

2.55 "Nonprofit organization" means a corporation or organization no part of the income or profit of which is distributed to its shareholders, members, directors or officers.

2.56 "Noise pollution" - See Section 2.27.1.113.e of these regulations.

2.57 "Occasional sale of food" means a casual and occasional sale, as defined in Section 2.11 of these regulations, of food, as defined in Section 2.33 of these regulations.

2.58 "Person" includes any state, and its political subdivisions or an agency of either, the State of West Virginia and its political subdivisions or an agency of either, and any individual, firm, partnership, joint venture, joint stock company, the government of the United States and its agencies, any public or private corporation, municipal corporation, cooperative, estate, trust, business trust, receiver, executor, administrator, any other fiduciary, any representative appointed by order of any court or otherwise acting on behalf of others, or any other group or combination acting as a unit, and the plural as well as the singular number of the entities here enumerated.

2.59 "Personal service" includes those services:

2.59.1 Compensated by the payment of wages in the ordinary course of employment;

2.59.2 Rendered to the person of an individual without, at the same time, selling tangible personal property, such as nursing, barbering, shoe shining, manicuring and similar services. See Section 8.1.2 of these regulations.

2.60 "Pollution control" - See Section 2.27.1.13.a of these regulations.

2.61 "Poultry" means domestic fowl raised for meat or eggs and includes, but is not necessarily limited to, chickens, turkeys, ducks and geese; not included in this definition are crows, parrots, parakeets, swans, peafowl, exotic or wild birds not raised for meat or eggs.

2.62 "Poultry house" means a structure used solely for the purpose of sheltering domesticated birds which are kept for the production of meat or eggs, and not used for sheltering any other animals or humans.

2.63 "Private school" means an institution of learning, providing elementary or secondary educational instruction and falling within Exemption A or K of West Virginia Code § 18-8-1 as a State approved alternative to compulsory public school attendance. Such schools may include parochial

schools, church schools, schools operated by a religious order or other nonpublic schools.

2.64 "Production of natural resources" means the performance, by either the owner of the natural resources or another, of the act or process of exploring, developing, severing, extracting, reducing to possession and loading for shipment for sale, profit or commercial use of any natural resource products and any reclamation, waste disposal or environmental activities associated therewith.

2.64.1 Persons engaged in the construction, alteration, repair or improvement of facilities to be used by others to produce natural resources are engaged in the business of contracting and are not considered to be exploring, developing, severing, extracting, reducing to possession and loading natural resources as required by the definition of "production of natural resources" set forth in Section 2 of these regulations. See Section 107 of these regulations for information concerning the taxation of contractors.

2.65 "Professional service" means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in W. Va. Code § 11-15-1 et seq. to be professional. See Section 8.1.1 of these regulations.

2.66 "Public school" means an institution of learning established, maintained and funded by the State of West Virginia which is operated by a governmental unit of this State for the purpose of providing free elementary or secondary educational instruction to children residing in West Virginia.

2.67 "Purchase" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property or a taxable service, for a consideration.

2.68 "Purchase price" means the total amount for which tangible personal property or a taxable service is sold, valued in money, whether paid in money or otherwise: Provided, That cash discounts allowed and taken on sales shall not be included. However, the purchase price includes the amount of any term discount allowed by the vendor, such discount being the reduction in the purchase price if the total amount of the purchase price is paid within a specified period of time. The value of business stimulants, gifts or promotions given to induce consumers to patronize a particular establishment are not considered cash discounts. Purchase price shall not include the amount of federal, state or local tax simultaneously imposed upon the tangible personal property or service purchased.

2.69 "Purchaser" means a person who purchases tangible personal property or a taxable service.

2.70 "Real property" means lands, tenements and hereditaments, all rights thereto and interest therein except chattel interests. See W. Va. Code § 2-2-10(p) (1973).

2.71 "Recreational vehicles" - See Section 2.105 of these regulations.

2.72 "Regular recurring service" - See Section 2.24.3.2b of these regulations.

2.73 "Relatively permanent" - See Section 2.24.3.2a of these regulations.

2.74 "Religious organization" means any organization whose major activity is the furtherance of religious ideals and whose real and personal property is exempt from ad valorem property taxation under W. Va. Code § 11-3-9 and Article X, Section 1 of the West Virginia Constitution.

2.75 "Repair" - See Section 2.24.3.5 of these regulations.

2.76 "Retail dealer of gasoline or special fuel" means and includes, for purposes of the tax on gasoline and special fuel, any person not a distributor who sells gasoline or special fuel from a fixed location in this State to users.

2.77 "Retailer" means and includes every person engaging in the business of selling, leasing or renting tangible personal property or dispensing taxable services for use within the meaning of the use tax statute, regardless of whether the purchaser is a member of the general public or a person engaged in business, and every person engaging in the business of selling, at auction, tangible personal property owned by the person or others for use in this State: Provided, That when in the opinion of the Tax Commissioner it is necessary for the efficient administration of the use tax to regard any salesmen, representatives, truckers, peddlers or canvassers as the agents of the dealers, distributors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers or persons, the Tax Commissioner may so regard them and may regard the dealers, distributors, supervisors, employers, or persons as retailers.

2.78 "Retailer engaging in business in this State" or any like term, unless otherwise limited by federal statute, means and includes but is not limited to any of the following:

2.78.1 Any retailer having or maintaining, occupying or using, within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent (by whatever name called) operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this State pursuant to W. Va. Code § 31-1-49.

2.78.2 Any retailer soliciting orders from persons located in this State for the sale of tangible personal property or taxable services by means of a telecommunication or television shopping system which utilizes a telephone or mail ordering system, including toll free telephone numbers, reverse charge telephone systems or other telephone ordering systems and which is intended by the retailer to be broadcast by cable television or other means of broadcasting, to consumers located in this State.

2.78.3 Any retailer who solicits orders from persons located in this State for the sale of tangible personal property or taxable services by means of advertising that is broadcast from, printed at, or distributed from, a location in this State if the advertising is primarily intended to be disseminated to consumers located in this State and is only secondarily or incidentally disseminated to bordering jurisdictions. For purposes of this paragraph, advertising which is broadcast from a radio or television station located in this State or is printed in or distributed by a newspaper published in this State is rebuttably presumed to be primarily intended for dissemination to consumers located in this State.

2.78.4 Any retailer soliciting orders from persons located in this State for the sale of tangible personal property or taxable services by mail if the solicitations are substantial and recurring and if the retailer economically benefits from any banking, financing, debt collection, telecommunication or marketing activities occurring in this State or economically benefits from the location in this State of an authorized installation, servicing or repair facility, regardless of whether such facility is owned or operated by such retailer or by a related or unrelated person.

2.78.5 Any retailer having a franchisee or licensee operating in this State under the retailer's trade name, if the franchisee or licensee is required to collect the tax imposed by W. Va. Code § 11-15-1 et seq. or W. Va. Code § 11-15A-1 et seq.

2.78.6 Any retailer who, pursuant to a contract with a cable television operator located in this State, solicits from persons located in this State orders for the sale of tangible personal property or taxable services by means of advertising which is transmitted or distributed over a cable television system in this State.

2.78.7 A retailer without the necessary minimum contacts for a constitutionally sufficient nexus for West Virginia to require such retailer to collect and remit use tax shall not be considered a "retailer engaging in business in this State."

2.79 "Sale," "sales" or "selling" means for purposes of the use tax any transaction resulting in the purchase of tangible personal property or taxable services from a retailer or vendor, and for purposes of the consumers sales and service tax includes any transfer of the possession or ownership of tangible personal property for a consideration, including a lease or rental, when the transfer or delivery is made in the ordinary course of the transferor's business and is made to the transferee or his agent for consumption or use or any other purpose. This term embraces renting or leasing, conditional sales contracts, leases with options to purchase, and contracts under which possession of property is given to the purchaser but title is retained by the vendor or retailer as security for payment of purchase price.

2.80 "Sales tax" - See Section 2.20 of these regulations.

2.81 "School employee" means and includes all personnel employed by a school or by a county board of education whether employed on a regular full-time

basis, an hourly basis or otherwise. This includes all teachers, auxiliary personnel and service personnel defined as follows:

2.81.1 "Teacher" means any teacher, supervisor, principal, superintendent, school librarian or any other person who meets the educational and other requirements set by the State for the issuance of certification to teach in a public school and who holds such certification and who is regularly employed for instructional purposes in a school in this State.

2.81.2 "Auxiliary personnel" means those persons selected and trained as a monitor aide, clerical aide, classroom aide, or general aide and who act in or assist in instructional activity, but who do not hold certifications to teach in a public school in this State.

2.81.3 "Service personnel" means those persons who serve the school in a nonprofessional or noninstructional capacity. This includes secretarial personnel, custodial personnel, maintenance personnel, transportation personnel, school lunch workers, etc.

2.82 "Seller" means a retailer and vendor and includes every person selling or leasing tangible personal property or dispensing taxable services.

2.83 "Service" or "selected service" includes all activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal property, but does not include contracting services, personal services, professional services, the services rendered by an employee to his employer, services furnished by corporations subject to the control of the West Virginia Public Service Commission or any service rendered for resale.

2.84 "Service personnel" - See Section 2.81.3 of these regulations.

2.85 "Special fuel" means and includes, for purposes of the tax on gasoline and special fuel, any gas or liquid, other than gasoline, used or suitable for use as fuel in an internal combustion engine. The term "special fuel" includes products commonly known as natural or casing-head gasoline and includes special fuel for heating any private residential dwelling, building or other premises; but does not include any petroleum product or chemical compound such as alcohol, industrial solvent, heavy furnace oil, lubricant, etc., not commonly used nor practicably suited for use as fuel in an internal combustion engine.

2.86 "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

2.87 "Subject to the control of the Public Service Commission" means a person which is subjected to regulation by such Commission, regardless of whether said Commission actually regulates such person.

2.88 "Successor" or "successor in business" means any person who directly or indirectly purchases, acquires, or succeeds to the business or the stock of goods of any person quitting, selling or otherwise disposing of a business or stock of goods.

2.89 "Structure" - See Section 2.24.3.6 of these regulations.

2.90 "Support," for purposes of determining whether an organization or corporation is exempt on its purchases, means and includes, but is not limited to:

2.90.1 Gifts, grants, contributions or membership fees;

2.90.2 Gross receipts from fund raisers which include receipts from admissions, sales of merchandise, performance of services or furnishing of facilities in any activity which is not an unrelated trade or business (within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended);

2.90.3 Net income from unrelated business activities, whether or not such activities are carried on regularly as a trade or business;

2.90.4 Gross investment income as defined in Section 509(e) of the Internal Revenue Code of 1986, as amended;

2.90.5 Tax revenues levied for the benefit of a corporation or organization either paid to or expended on behalf of such organization; and

2.90.6 The value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge. This term does not include any gain from the sale or other disposition of property which would be considered as gain from the sale or exchange of a capital asset, or the value of an exemption from any federal, state or local tax or any similar benefit.

2.91 "Supply tank" means, for purposes of the tax on gasoline and special fuel, any receptacle on a motor vehicle from which gasoline or special fuel is supplied for the propulsion of the vehicle or equipment located thereon, exclusive of a cargo tank. A supply tank includes a separate compartment of a cargo tank used as a supply tank, and any auxiliary tank or receptacle of any kind or cargo tank, from which gasoline or special fuel is supplied for the propulsion of the vehicle, whether or not such tank or receptacle is directly connected to the fuel supply line of the vehicle.

2.92 "Tangible personal property" means personal property which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses, and includes tangible goods, wares and merchandise.

2.92.1 Wherever the words "tangible personal property" or "property" appear, the same shall include the words "or taxable services," where the context so requires, in accordance with W. Va. Code § 11-15A-2(a).

2.93 "Tank wagon" means and includes, for purposes of the tax on gasoline and special fuel any motor vehicle or vessel with a cargo tank or cargo tanks ordinarily used for making deliveries of gasoline or special fuel, or both, for sale or use.

2.94 "Tax" includes the consumers sales and service tax imposed by W. Va. Code § 11-15-1 et seq., the use tax imposed by W. Va. Code § 11-15A-1 et seq., and additions to tax, interest and penalties imposed by W. Va. Code § 11-10-1 et seq.

2.95 "Tax Commissioner" or "Commissioner" means the State Tax Commissioner of West Virginia or his delegate.

2.96 "Taxable services" means all services other than those services which are subject to the per se exemptions provided in Section 9.2 of these regulations, or which are otherwise exempted by law.

2.97 "Taxpayer" includes any person who is liable for the consumers sales and service tax imposed by W. Va. Code § 11-15-1 et seq., or who is subject to the use tax imposed by W. Va. Code § 11-15A-1 et seq., whether acting for himself or as an agent or fiduciary.

2.98 "Teacher" - See Section 2.81.1 of these regulations.

2.99 "Textbook" means a book or manual of instruction containing a presentation of the principles of a subject and which is used as a basis of instruction.

2.100 "This State" means the State of West Virginia.

2.101 "Transportation" means the act or process of conveying for consideration, as a commercial enterprise, passengers or goods from one place or geographical location to another place or geographical location.

2.102 "Transmission" means the act or process of causing liquid, natural gas or electricity to pass or be conveyed for consideration from one place or geographical location to another place or geographical location through a pipeline or other medium for commercial purposes. For purposes of this definition, the word "medium" refers to the stationary mode by which liquid, natural gas or electricity moves from one location to another; the term includes such modes as pipelines and wires, but it specifically excludes such modes of transportation as tank trucks and barges.

2.103 "Use" means and includes the exercise by any person of any right or power over tangible personal property or taxable services which is incident to the ownership, possession or enjoyment of such property or services, or by any transaction in which possession of or the exercise of any right or power over tangible personal property or taxable services is acquired for a consideration, including any lease, rental or conditional sale of tangible personal property. As used in this definition, "enjoyment" includes a purchaser's right to direct the disposition of the property or services, whether or not the purchaser has possession of the property. The term "use" does not include the keeping, retaining or exercising of any right or power over tangible personal property solely for the purpose of subsequently transporting it outside the State for use thereafter solely outside this State.

2.104 "Use tax" means the tax imposed by Section 11-15A-1 et seq. of the West Virginia Code.

2.105 "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks and includes recreational vehicles. For purposes of these regulations, "recreational vehicle" means a motorboat, motorboat trailer, all-terrain vehicle, travel trailer, fold down camping trailer, motor home, snowmobile or any other vehicle included within the definition of recreational vehicle as defined in W. Va. Code § 17A-1-1.

2.106 "Vendor" means any person, whether selling at retail to the general public or otherwise selling to a person engaged in any business, who is engaged in this State in furnishing or rendering services or making sales of tangible personal property.

2.107 "Water pollution" - See Section 2.27.1.13.d of these regulations.

2.108 "Weight loss program" means and includes the various activities engaged in for the purpose of assisting, directing or guiding an individual in losing weight primarily through diet regulation, but may include a physical exercise regimen. A weight loss program may occur totally at a weight loss center or it may include activities occurring elsewhere. See Section 110-15-75 of these regulations for further information.

2.109 "Weight loss center" means a primary location where weight loss programs occur.

**§ 110-15-3. Imposition of Tax; Rates; Tax Base.**

3.1 Consumers Sales and Service Tax. - The consumers sales and service tax is levied and imposed upon sales of tangible personal property and upon the dispensing of certain selected services. The amount of consumers sales and service tax shall be computed as follows:

3.1.1 On each sale where the monetary consideration is five cents or less, no tax.

3.1.2 On each sale where the monetary consideration is from six cents to sixteen cents, both inclusive, one cent.

3.1.3 On each sale where the monetary consideration is from seventeen cents to thirty-three cents, both inclusive, two cents.

3.1.4 On each sale where the monetary consideration is from thirty-four cents to fifty cents, both inclusive, three cents.

3.1.5 On each sale where the monetary consideration is from fifty-one cents to sixty-seven cents, both inclusive, four cents.

3.1.6 On each sale where the monetary consideration is from sixty-eight cents to eighty-four cents both inclusive, five cents.

3.1.7 On each sale where the monetary consideration is from eighty-five cents to one dollar, both inclusive, six cents.

3.1.8 If the monetary consideration on a sale is in excess of one dollar, six cents on each whole dollar of sale price, and upon any fractional part of a dollar in excess of whole dollars, as follows: one cent on the fractional part of the dollar if less than seventeen cents; two cents on the fractional part of the dollar if in excess of sixteen cents but less than thirty-four cents; three cents on the fractional part of the dollar if in excess of thirty-three cents but less than fifty-one cents; four cents on the fractional part of the dollar if in excess of fifty cents but less than sixty-eight cents; and five cents on the fractional part of the dollar if in excess of sixty-seven cents but less than eighty-five cents; and six cents on the fractional part of the dollar if in excess of eighty-four cents. For example, the tax on sales from one dollar and one cent to one dollar and sixteen cents, both inclusive, seven cents; on sales from one dollar and seventeen cents to one dollar and thirty-four cents, both inclusive, eight cents; on sales from one dollar and thirty-four cents to one dollar and fifty cents, both inclusive, nine cents; on sales from one dollar and fifty-one cents to one dollar and sixty-seven cents, both inclusive, ten cents; on sales from one dollar and sixty-eight cents to one dollar and eighty-four cents, both inclusive, eleven cents; and on sales from one dollar and eighty-five cents to two dollars, both inclusive, twelve cents.

3.2 Separate Sales. - Separate sales, such as daily or weekly deliveries, shall not be aggregated for the purpose of computation of the consumers sales and service tax even though such sales are aggregated in the billing or payment therefor. However, when several items are purchased by the same vendee simultaneously, the consumers sales and service tax may be computed upon the total monetary consideration of the items so purchased. Notwithstanding any other provision of these regulations, coin-operated amusement and vending machine sales shall be aggregated for the purpose of computation of the consumers sales and service tax.

3.2.1 Example: If merchandise is purchased at a West Virginia department store's cosmetic counter, delivered to the purchaser and monetary consideration of sixty cents is paid, this is a complete sale and four cents tax must be collected. If the same purchaser goes to the candy counter and makes a ten-cent purchase, there is a new sale and one cent tax must be collected thereon. The cosmetic sale and the candy sale may not be aggregated so as to decrease the amount of tax otherwise due. However, if the cosmetic item and candy were purchased simultaneously by the same purchaser at the same counter, the consumers sales and service tax may be computed upon the aggregate monetary consideration of both items.

3.3 Use Tax. - The use tax is levied and imposed upon the use in this State of tangible personal property or taxable services at a rate of six percent (6%) of the purchase price of such tangible personal property and taxable services. The amount of use tax imposed is reduced, but not below zero with respect to a particular item, by the amount (if any) of sales tax lawfully paid to another state for the acquisition of that particular item of property or service.

3.4 Tax Base.

3.4.1 In General. - The consumers sales and service tax is based upon "monetary consideration" and the use tax is based upon "purchase price." See Section 2 of these regulations for definitions. In certain circumstances where a natural resource producer or manufacturer uses or consumes natural resources produced or items manufactured, the tax is based upon the gross value of the product used or consumed. The following provisions in this Section 3.4 illustrate the application of these terms.

3.4.1.1 Apportionment of sales price. - In instances where a transaction involves the sale of taxable personal property or taxable services, and the sale of nontaxable property or services, and the method of billing does not delineate what portion of the sales price is taxable, the Tax Commissioner may establish safe harbors which will assist in the development of uniform apportionment calculations for similarly situated taxpayers. The Tax Commissioner must file appropriate administrative filed in the State Register at least thirty (30) days prior to the effective date of the subject matter of the safe harbor being established.

3.4.2 Finance and Carrying Charges. - Monetary consideration or purchase price upon which the consumers sales and service tax or use tax is imposed shall not include carrying charges, late payment charges, finance charges or similar items. Example: a sewing machine priced at $80.00 is sold under a conditional sales contract which provides for deferred monthly payments. A separate charge of $5.00 is added to the sale price to cover finance charges, thus making the total cost to the purchaser $85.00. The tax is to be computed upon $80.00.

3.4.3 Discounts. - Any cash discount allowed at the time of delivery which establishes the final selling price for the article at that time shall not be included in arriving at the monetary consideration or purchase price subject to the tax. Discounts which are allowed after delivery or upon conditions or events happening at some future time, such as a certain percentage discount being allowed if paid within a specified period, are not deductible in determining the tax base for the consumers sales and service tax or use tax liability.

3.4.4 Exchanged Merchandise. - When merchandise, the sale of which has been taxed under the consumers sales and service tax or use tax, is exchanged, the purchase price plus applicable tax paid for the merchandise exchanged shall not be included in determining monetary consideration or purchase price of the article purchased in exchange.

3.4.5 Rebates and Trade-ins. - When merchandise is taken as a trade-in for the purpose of reducing the price the purchaser must pay, the value of the trade-in shall not be included in the monetary consideration or purchase price. However, the amount of any manufacturer's rebate available to entice the purchase of the item shall not decrease or otherwise affect monetary consideration or purchase price. In other words, the monetary consideration or purchase price shall not include the value of any item traded-in but monetary consideration or purchase price shall not be reduced by the amount of any manufacturer's rebate.

3.4.5.1 Example 1: A person owns a diamond ring with a value of $2,500.00, and seeks to purchase a second diamond ring which will sell for $10,000.00. The $2,500.00 value of the trade-in may be applied to reduce the amount of the monetary consideration upon which consumers sales and service tax is based. Therefore, $7,500.00 will be subject to tax.

3.4.5.2 Example 2. - In order to increase sales, a manufacturer offers a $10.00 rebate on the purchase of a $50.00 power saw. Customer purchases a saw and applies for the rebate. The entire $50.00 will be subject to tax. However, a rebate offered by a retailer to his customer is treated as a cash discount under Section 3.4.3 of these regulations.

3.4.6 Sales of Products Produced by Persons Producing Natural Resources, Products or Manufactured Products. - Commercial producers of natural resources, products or manufactured products who sell such resources or products in circumstances where no exception or exemption from the consumers sales and service tax or use tax applies, shall constitute sellers or vendors of such products, and shall collect the tax and make returns of such tax on the basis of the gross proceeds of such sales. Upon failure of the seller to collect or remit such tax, the seller shall be liable, in accordance with W. Va. Code §§ 11-15-7 and 11-15A-2a, for payment of such tax and any applicable interest, additions to tax and penalties and shall be subject to applicable criminal sanctions for such failure to collect or remit such tax in accordance with the provisions of W. Va. Code §§ 11-9-1 et seq., 11-10-1 et seq., 11-15-1 et seq. and 11-15A-1 et seq. and these regulations, and as otherwise provided by law.

3.4.7 Use of Products Produced by Persons Producing Natural Resources, Products or Manufactured Products. - Effective May 1, 1989, commercial producers of natural resources, products or manufactured products who use or consume such natural resources, products or manufactured products, in circumstances where no exception or exemption from the consumers sales and service tax or use tax applies, shall pay and make returns of such tax as applicable based upon the gross value of the natural resource product or manufactured product so used or consumed in accordance with W. Va. Code § 11-15-7 or 11-15A-2a. Upon failure of the natural resource producer or manufacturer to pay or remit such tax, the natural resource producer or manufacturer shall be liable for payment of such tax and any applicable interest, additions to tax and penalties and shall be subject to applicable criminal sanctions for such failure to pay or remit tax, interest, additions or penalties in accordance with the provisions of W. Va. Code §§ 11-9-1 et seq., 11-10-1 et seq., 11-15-1 et seq. and 11-15A-1 et seq. and these regulations, and as otherwise provided by law.

3.4.7.1 Gross Value of Natural Resources, Products or Manufactured Products Used or Consumed by the Producer Thereof.

3.4.7.1.a General Rule. - Gross value shall correspond as nearly as possible to the gross proceeds which would have been received from the sale of such natural resources, products or manufactured products to another person in an arms-length transaction, as that term is generally defined. There shall not be allowed a deduction or credit for production expenses when determining such gross proceeds.

3.4.7.1.b Natural Resource Products. - Whenever natural resource products produced within or without this State are used or consumed by the producer in his business, within this State, the value of such products shall be determined by the following rules in the order stated. In all instances where natural resources are consumed by the producer at a point distant from the place of production, no freight charges paid by the producer will be allowed as a deduction in determining value under these rules, unless due consideration has been given such charges in the method by which the values were determined.

3.4.7.1.b.1 The value of the natural resource product consumed or used shall be equal to the selling price at the place of use or consumption of similar products of like quality and character offered for sale in similar quantities by persons unrelated to the taxpayer.

3.4.7.1.b.2 In the absence of sales of similar natural resource products by other persons as a guide to value, value shall be equal to the average price at which sales of the same or a similar product are made during the taxable year to customers of the producer.

3.4.7.1.b.3 In the absence of sales to customers of the taxpayer as a guide to value, such value may be determined upon cost basis, in which case there shall be included every item of cost attributable to that particular natural resource product, including all direct or indirect overhead costs and by adding thereto the average markup realized by the producer on his natural resource products.

3.4.7.1.c Manufactured Products. - In those cases where a person partially or wholly consumes or makes use of his final completed manufactured, compounded or prepared products, a value must be placed on such products, in accordance with the following rules in the order stated. In all instances where products or articles are consumed by the manufacturer and are consumed at a point distant from the place of manufacturing, no freight charges paid by the manufacturer will be allowed as a deduction in determining value under these rules, unless consideration has been given such charges in the method by which the values were determined.

3.4.7.1.c.1 The value of the article consumed or used shall be equal to the selling price at the place of use or consumption of similar products of like quality or character offered for sale in similar quantities by persons unrelated to the taxpayer.

3.4.7.1.c.2 In absence of sales of similar products by other persons as a guide to value, value shall be equal to the average price at which sales of the same or a similar product are made during the taxable year to customers of the manufacturer.

3.4.7.1.c.3 In the absence of sales to customers of the taxpayer as a guide to value, such value may be determined upon a cost basis, in which case there shall be included every item of cost attributable to that particular article, including all direct and indirect overhead costs and by adding thereto the average markup realized by the manufacturer on his products.

## § 110-15-4. Collection of Tax; Accrual; Liabilities.

4.1 Collection by Vendor. - Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price. The vendor shall keep the amount of tax collected separate from the proceeds of sale exclusive of the tax unless authorized in writing by the Tax Commissioner to keep such amount of tax in a different manner. Where such authorization is given, the State's claim shall be enforceable against and shall take precedence over all other claims against the moneys commingled.

4.1.1 Persistent failure by any vendor to keep the amount of tax collected separate from the proceeds of sale exclusive of the tax shall be reason for, and good cause for, the Tax Commissioner at his discretion to revoke the business registration certificate of such vendor issued under W. Va. Code § 11-12-1 et seq. or to refuse to renew the said business registration certificate, or both.

4.2 Collection by Retailer. - Every retailer engaging in business in this State and making sales of tangible personal property or taxable services for delivery into this State, or with knowledge, directly or indirectly, that the property or services are intended for use in this State, shall at the time of making such sales, whether within or without the State, collect the use tax before or at the time such tax accrues from the purchaser and give to the purchaser a receipt therefor with the tax separately stated thereon.

4.2.1 Foreign Retailers. - The Tax Commissioner may, in his discretion and upon application, authorize the collection of the use tax by any retailer not engaging in business within this State, who, to the satisfaction of the Tax Commissioner, furnishes adequate security to insure collection and payment of the tax. Such retailer may then be issued, without charge, a permit to collect the tax in the manner prescribed by the Tax Commissioner. When so authorized, it shall be the duty of such retailer to collect the use tax upon all tangible personal property or taxable service sold to his knowledge for use within this State, in the same manner and subject to the same requirements as a retailer engaging in business within this State. Such authority and permit may be canceled when, at any time, the Tax Commissioner considers the security inadequate, or that such tax can more effectively be collected from the person using such property in this State.

4.3 Exceptions to Collection Requirements. - Notwithstanding Sections 4.1 and 4.2 of these regulations, no consumers sales and service tax and no use tax need be collected by the vendor or retailer with respect to a transaction if any one of the following conditions is satisfied:

4.3.1 The transaction is exempt per se from tax pursuant to Section 9.2 of these regulations.

4.3.2 The purchaser signs and presents to the vendor or retailer a current and complete exemption certificate or material purchase certificate issued by the Tax Commissioner and the vendor or retailer accepts such certificate in good faith.

4.3.3 The purchaser gives to the vendor or retailer a current direct pay permit number: Provided, That the transaction is not a sale of food.

4.4 Accrual of Tax Liability Respecting Certain Sales and Services. - This Section specifies the time at which the consumers sales and service tax and use tax liability with respect to the sale of tangible personal property or rendering taxable services becomes a legal liability of the vendee.

4.4.1 Cash, Credit, Conditional Sales. - On cash sales, the tax accrues at the consummation of the sale. On credit sales, the tax accrues upon transfer of possession of the property sold, but is payable by the vendee on or before the thirtieth (30th) day subsequent thereto. On conditional sales, where possession is delivered to the purchaser and title is retained by the seller, the tax accrues upon transfer of possession of the property sold, but is payable by the vendee on or before the thirtieth (30th) day subsequent thereto. When tangible personal property is held or laid away by the vendor or retailer pending payment of all or part of the purchase price, the tax accrues upon delivery of the property sold to the purchaser or, if an unpaid balance remains at such time, the sale shall be treated as a credit sale.

4.4.2 Leases. - Notwithstanding Section 4.4.1 of these regulations, if the sale is a lease, each rental payment is the "monetary consideration" or "purchase price" and constitutes a separate sale transaction upon which the tax is imposed. The tax upon such payment accrues on the date such rental payment is actually received. Where the lessee exercises an option to purchase the leased tangible personal property, the tax accrues at the time of the payment of the remaining portion of the purchase price.

4.4.3 Services. - The tax on sales of taxable services accrues upon the payment of the consideration for performance of the service, without regard to the actual time of such performance.

4.5 Liability of Seller. - The amount of consumers sales and service tax and use tax required to be collected by any vendor or retailer is deemed to be held in trust for the State of West Virginia, and any such tax required to be collected shall constitute a debt owed to this State. If any vendor or retailer fails to collect the consumers sales and service tax or use tax required to be collected, such vendor or retailer shall be personally liable for the amount it failed to collect. If any vendor or retailer fails to remit to the Tax Commissioner any consumers sales and service tax or use tax collected in accordance with Section 5 of these regulations, such vendor or retailer shall be personally liable for the amount it so failed to remit and applicable interest, additions to tax and penalties, and shall be subject to applicable criminal sanctions as provided by law.

4.6 Absorbing Tax; Criminal Penalty. - It shall be unlawful for any vendor or retailer engaging in business in this State to advertise, hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the consumers sales and service tax or the use tax or any part thereof will be assumed or absorbed by the vendor or retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this Section

within this State shall be guilty of a misdemeanor and subject to the penalties provided in W. Va. Code § 11-9-7.

4.6.1 There are transactions where the sales price includes the consumers sales and service tax: such as movie tickets, admission fees or food at a ball game. The following rules apply in such situations.

4.6.1.1 The ticket must have printed on it either the sales price, with the amount of tax indicated, or the phrase "West Virginia consumers sales and service tax included in the price of this ticket," or a substantively similar phrase. Tickets may be sold under Section 4.6.1.2 of these regulations with permission of the Tax Department.

4.6.1.2 In those instances where food or other items are sold, a sign of sufficient size to allow a person of normal vision to read it from a distance of twenty (20) feet must be posted in plain view, such sign to have printed upon it the following phrase: "West Virginia consumers sales and service tax is included in the sales price of these goods and services," or a substantively similar phrase.

4.6.2 In those instances where the sales price includes the consumers sales and service tax, the vendor or retailer must use the following formula when calculating the amount of consumers sales and service tax due on each sale, and he must then remit the amount so calculated.

4.6.2.1 The method for determining the amount of consumers sales and service tax to be collected is to divide the total amount received by 1.06 and multiply that amount by .06 with the resulting amount rounded to the next higher cent being the amount collected on the sale.

4.6.2.2 Example: A hot dog sells for $1.00 at the ballpark.

$$\frac{\text{Total amount received (\$1.00)}}{1.06} = \text{purchase price (\$.94)}$$

Purchase price ($.94) X .06 = sales tax ($.056 carried to the next higher number - $.06)

4.7 Accrual of Tax Respecting Certain Uses. - This section specifies the time at which tax "accrues" with respect to the use of tangible personal property or taxable services in West Virginia in situations where the tax did not accrue pursuant to Section 4.4 of these regulations.

4.7.1 Out-of-State Purchase. - Where a person uses in this State tangible personal property or taxable services purchased outside this State and the tax has not yet accrued, the use tax accrues when the purchaser first uses such property or service in this State when such use or consumption is not exempt from tax pursuant to Section 9 of these regulations.

4.7.2 Integrated Manufacturer or Natural Resources Producer. - Where a person exercising the privilege of producing for sale, profit or commercial use, any natural resources, product or manufactured product and engages in a business or activity in which such natural resource, product or

manufactured product is used or consumed by such person and such use or consumption is not exempt from tax under Section 9 of these regulations, the use tax accrues when such person first uses or consumes such product in this State in such a manner that is not exempt from tax under said Section 9.

4.8 Liability of Purchaser or User. - Every purchaser is and remains personally liable for the consumers sales and service tax levied and imposed and every person using tangible personal property or taxable services in West Virginia is and remains personally liable for use tax levied, imposed and accrued until and unless any one of the following conditions is satisfied:

4.8.1 The purchaser pays the full amount of tax to the vendor or retailer at the time the liability accrues.

4.8.2 The transaction pursuant to which the tax accrued is exempt per se from tax pursuant to Section 9.2 of these regulations.

4.8.3 The purchaser signs and presents to the vendor or retailer a current and complete exemption certificate or material purchase certificate issued by the Tax Commissioner and the purchaser uses the tangible personal property or services in a manner consistent with the exemption asserted on such certificate and such exemption is found in Section 9.3 of these regulations.

4.8.4 The purchaser or user holds a current direct pay permit number issued by the Tax Commissioner to the purchaser or user and the purchaser or user complies with Section 9c of these regulations by timely and accurately filing, reporting and remitting the amount of tax accrued for such purchase or use after taking into account exemptions from tax specified in Section 9 of these regulations.

4.8.5 The person using tangible personal property or taxable services in West Virginia complies with Section 5 by timely and accurately filing, reporting and remitting the amount of tax accrued for such use after taking into account exemptions from tax specified in Section 9 of these regulations.

4.9 Liability of Successor. - If any person sells out his or its business or stock of goods, or ceases doing business, any tax, additions to tax, penalties and interest shall become due and payable immediately and such person shall, within thirty days after selling out his or its business or stock of goods or ceasing to do business, make a final return or returns and pay any tax or taxes which may be due; and, the unpaid amount of any such tax shall be a lien upon the property of such person. The successor in business of any person who sells out a business or stock of goods, or ceases doing business, shall be personally liable for the payment of tax, additions to tax, penalties and interest unpaid after expiration of the thirty (30) day period allowed for payment by the predecessor.

4.9.1 The term "successor" is defined in Section 2 of these regulations to mean any person who directly or indirectly purchases, acquires, or succeeds to the business or the stock of goods of any person quitting, selling, or otherwise disposing of a business or stock of goods. The purchase or acquisition of a business may give rise to successor liability whether the

consideration is money, property, assumption of liabilities or cancellation of indebtedness.

4.9.2 The liability of a successor arises from any sale, transfer, assignment or other acquisition of a business or stock of goods. A person who purchases or acquires a portion of a business or stock of goods may become liable as a successor where he purchases or acquires substantially all of the business assets or stock of goods of such business. If two or more persons purchase or acquire a business or stock of goods, their liability as successor is in proportion to the value of the business assets or stock of goods acquired by each person.

4.9.3 The business assets include all assets of a business pertaining directly to the conduct of the business. Business assets include real property or any interest therein; tangible personal property, including fixtures, equipment, machinery, furniture and vehicles; and intangible property, including accounts receivable, contracts, business name, business goodwill, customer lists, delivery routes, patents, trademarks or copyrights. Any asset owned by a corporation is a business asset. "Stock of goods" means the inventory or merchandise that the taxpayer is in the business of selling, but does not include fixtures, equipment, machinery or vehicles used in connection with such business.

4.9.4 If any taxpayer operates more than one business, each at separate locations, and each location being required to have a separate business registration certificate, each business location is a separate business and has a separate stock of goods and separate business assets for purposes of determining successor liability. The cessation of business at any one location, or the sale of the business assets or stock of goods of any one location, may result in successor liability. A successor of the business or stock of goods of any business location is subject to liability as a successor with respect to the tax attributable to that location even if he does not purchase the business or stock of goods of all the locations.

4.9.5 The change in the form of a business will generally give rise to successor liability. A change in the form of a business would include changes such as the incorporation of a sole proprietorship or partnership, the voluntary or involuntary dissolution of a corporation, the merger or consolidation of two or more corporations, the formation of a partnership from one or more sole proprietorships or corporations.

4.9.6 Successor liability does not arise in connection with sales or transfers pursuant to: assignments for the benefit of creditors, deeds of trust, security interests, conditional sales, statutory liens, or judgment liens; or sales or transfers by personal representatives, executors, administrators, receivers, trustees, or any public officer in the course of his official duties, unless the previous owner receives purchase money from the transfer or sale. Any business operated under Title 11 of the United States Code, which is purchased or acquired by another person, shall not give rise to successor liability.

4.9.6.1 If a business or stock of goods is voluntarily sold or transferred to a creditor, and the creditor operates the business, the creditor

is a successor. If the creditor does not operate the business or operates the business in liquidation with the sole purpose to recover its debt, the creditor is not a successor.

4.9.7 The purchaser of the business or stock of goods in an arms-length transaction will be released from liability if he withholds from the purchase price an amount sufficient to cover the tax liability of the seller or former owner, and pays such liability in full, including all applicable penalties, additions to tax and interest or if the seller obtains a certificate from the Tax Department stating that no taxes are due from the seller or former owner. Purchase price is not limited to cash transferred to the seller, but includes any consideration flowing directly or indirectly to a seller.

4.9.7.1 The requirement to withhold does not necessarily mean to retain or hold physical assets, but means dealing with the purchase consideration in such a manner as to deny the seller the benefit of the purchase consideration and to make it available to the State for the satisfaction of the tax liability.

4.9.8 The liability of a successor extends to taxes incurred in the course of operation of the business by the former owner and any successor liability of the former owner. The liability may include any liability of the former owner for tax, interest, additions to tax, and penalties that is due and payable, and any such liability that is not due and payable because the former owner has not filed tax returns at the time required by law. The liability includes all taxes, penalties, interest, and additions to tax, whether assessed or unassessed against the former owner, without regard to whether a tax lien has been issued or perfected against the former owner. If any former owner is given a certificate from the Tax Department stating that no taxes are due from his former owner, then the successor shall only be liable for the tax liability of the successors' former owner not covered by the said certificate.

4.9.8.1 The liability of a successor includes taxes that are required by law to be paid prior to the sale or transfer of the business or stock of goods, even if the liability of the former owner is not determined at the time of the sale or transfer. If an audit conducted after the sale or transfer shows a deficiency for periods prior to the sale or transfer, the deficiency is a liability of the former owner and a liability of the successor.

4.9.9 The liability of a successor in business is not limited to the amount of purchase money, or consideration received by the former owner, unless the successor avoids liability or limits liability by one or more of the following methods. If the purchase of a business or stock of goods is an arms-length transaction, the purchaser may avoid any successor liability by requiring the seller to produce a receipt from the Tax Commissioner showing all taxes of the seller have been paid. If the purchase of a business is an arms-length transaction, the purchaser may limit successor liability by withholding enough of the purchase money to satisfy the tax liability of the seller. If the purchase or transfer of a business or stock of goods is not an arms-length transaction, the purchaser or transferee may avoid any successor liability by requiring the seller or transferor to produce a receipt from the Tax Commissioner showing all taxes of the seller or transferor have been paid.

4.9.10 The liability of a successor is determined by law and cannot be avoided or altered by contracts or agreements between the former owner and successor. Thus, a contract or other agreement, providing that the purchaser, transferee, seller, or transferor is or is not responsible for the tax liability of the former owner, or that the former owner has no tax liability, does not alter the liability of the successor.

4.9.11 The liability of a successor may be determined or estimated and an assessment made against such successor. An assessment against a successor is considered to be a proceeding for the collection of the tax liability of the former owner. If the liability of the former owner is determined to be due by an assessment which has become final, an assessment against a successor must be made within five years after the date on which the former owner filed its annual return, or if no annual return is required, five years after the latest periodical return required to be filed in any year is filed.

**§ 110-15-4a. <u>Liability of Officers of Corporation.</u>**

4a.1 If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the consumers sales and service tax and any additions to tax, penalties and interest thereon imposed by W. Va. Code § 11-10-1 **et seq.** may be enforced against them as against the association or corporation which they represent.

4a.2 A corporation, the officers of which are liable for payment of the tax, is any corporation incorporated under the laws of this State, and any foreign corporation authorized to do business in this State or doing business in this State without such authorization.

4a.2.1 A corporation whose charter has been forfeited by decree of court for nonpayment of corporate charter license tax ceases to exist as a legal entity and has no power to engage in business after such forfeiture. The tax liability of a corporation incurred prior to such forfeiture is a debt of the corporation and a liability of its officers. The tax liability incurred after such forfeiture is not incurred by the corporation but by the individuals doing business, and such liability may be assessed against and collected from the individuals, directly and not as officers of the corporation, even if the charter of the corporation is subsequently reinstated.

4a.3 An association is any two or more persons who have voluntarily joined together to transact or engage in business activity, and who are not a corporation or partnership, whether or not the association is authorized or qualified to do business in this State and whether for profit or not for profit. An association includes but is not limited to any business, charitable, fraternal, beneficial, historic, veterans, or labor organization, society, foundation, federation, lodge, club or order, or any subordinate association or auxiliary thereof, that is not incorporated.

4a.4 There is a default by the corporation or association resulting in officer liability when: (a) the tax is shown on a tax return and the corporation or association neglects or fails to pay the tax within 15 days after notice and

demand for payment; (b) the liability of the corporation is determined by an assessment and such assessment is final and not subject to administrative or judicial review and the corporation neglects or fails to pay the tax within 15 days after notice and demand for payment; or (c) when an assessment has not been made against the corporation or association and the corporation or association has not filed any return at the time required by law and has failed to file such return after notice of such failure.

4a.4.1 A default occurs whether or not a notice of tax lien has been filed against the corporation or association and whether or not the State has attempted to collect or failed to collect the tax from the corporation or association, and whether or not the corporation or association is defunct, dissolved, or insolvent.

4a.4.2 The filing of a petition in bankruptcy by a corporation does not stay or preclude the assessment of officers of the corporation, since the tax is not dischargeable in bankruptcy.

4a.5 The officers of a corporation or association that are personally liable for consumer sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or by-laws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who performs duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and its trustees. A person such as an incorporator, shareholder, member or employee of a corporation or association is not considered to be an officer subject to personal liability.

4a.5.1 A person who acts as an officer or assumes the character, duties or responsibilities of an officer, is presumed to be an officer, and such person cannot avoid personal liability by alleging he was not properly elected. A person who is elected or appointed as an officer without his knowledge or consent, or who does not act as an officer and does not assume the character, duties, or responsibilities of an officer, is not liable as an officer.

4a.5.2 An officer may be liable whether or not the officer was under a duty to pay the tax or was responsible for the payment of the tax, for or on behalf of the corporation or association, and whether or not the officer acted willfully, or with the intent to evade the tax or payment thereof.

4a.5.3 The liability of a corporation, that is owned or controlled by a parent or other corporation, may be imposed on an officer of the other corporation, if such officer performs duties or responsibilities in the management of the taxpayer corporation.

4a.6 An officer is liable for the tax, interest, additions to tax, and penalties for which the corporation or association is liable.

4a.6.1 An officer is liable for all amounts which were required to be paid or which became due and payable during the time the person was an officer. An officer is also liable for all amounts which were required to be paid or which became due and payable prior to the time the person became an officer, if the officer had the ability and authority to pay the amount due from

the available unencumbered funds of the corporation or association after such person became an officer.

4a.6.2 If the amount of tax due for the corporation or association has been determined by tax returns or determined by an assessment which was the subject of a petition for reassessment, the officer shall be liable for such amount.

4a.6.3 The liability of officers of a corporation or association is joint and several, so that more than one officer may be liable for the entire amount of tax for the same period. The total amount of tax collected from all officers shall not be greater than the total liability of the corporation or association.

4a.6.4 In determining the consumer sales and service tax liability of a corporation or association, the application of payments or partial payments against the multiple tax debts may be in issue. Any voluntary payment, made by or on behalf of the corporation, that the taxpayer has directed to be applied in a particular manner should be applied in the manner directed by the taxpayer, i.e., specific tax, period, interest, etc. Any involuntary payment, when the taxpayer has no immediate control over the source, such as would result from a levy or offset, and any voluntary payment for which the taxpayer has not directed the application, may be applied in such a manner as to attain the maximum benefit for the State.

EXAMPLE: A corporation owes $5,000 consumer sales tax and $5,000 corporation net income tax. The corporation remits a check for $1,000 and does not direct that it be applied in a particular manner. The corporation remits a second check for $3,000 and directs, on the check or in a letter, that it be applied to consumers sales tax. A bank levy results in payment of $2,000. The State may apply the $2,000 and $1,000 to the corporation net income tax, and must apply the $3,000 to the consumer sales and service tax, and may assess the officers for $2,000 consumer sales tax.

4a.7 The liability of an officer may be determined or estimated and an assessment made against such officer or officers. The assessment may include any liability of the corporation or association for tax, interest, additions to tax, and penalties that is due and payable, and any such liability that is not due and payable because the corporation or association has not filed tax returns at the time required by law.

4a.7.1 An assessment against officers is considered to be a proceeding for the collection of the tax liability of the corporation or association. If the liability of the corporation or association is determined to be due by an assessment which has become final, an assessment against an officer must be made within five years after the assessment against the corporation or association has become final. If the liability of the corporation is determined to be due by methods provided by law other than an assessment, an assessment against an officer must be made within five years after the date on which the corporation or association filed its annual return, or if no annual return is required, five years after the latest periodical return required to be filed in any year is filed.

**§ 11-15-4b. Priority of Tax in Distributions of Property and Estates.**

4b.1 In the distribution, voluntary or compulsory, in receivership, bankruptcy or otherwise, of the property or estate of any person, all taxes due and unpaid under W. Va. Code § 11-15-1 **et seq.** shall be paid from the first money available for distribution in priority to all claims and liens except taxes and debts due the United States which under federal law are given priority over the debts and liens created by this article. Any person charged with the administration or distribution of any such property or estate who shall violate the provisions of this section shall be personally liable for any taxes accrued and unpaid under this article which are chargeable against the person whose property or estate is in administration or distribution.

4b.2 There is a priority for all unpaid consumers sales and service tax in distributions of the property or estate of any person, and the tax must be paid from the first money available for distribution in priority to all other claims and liens, except taxes and debts due the United States.

4b.2.1 The distribution of property subject to federal tax liens is subject to the priority of such liens provided in the Internal Revenue Code.

4b.2.2 The distribution of property in federal bankruptcy proceedings is subject to the priorities of debts and liens provided in the United States Bankruptcy Code (11 U.S.C. § 101 **et seq.**).

4b.2.3 This priority applies to the amount of tax, interest, additions to tax, and penalties.

4b.3 The priority applies to all distributions of the property or estate of any person. A "distribution" of property or an estate is the sale or transfer of the property, or the disbursement of money resulting from the sale or transfer of the property or estate of any person. Distributions include, but are not limited to, the transfer of property or disbursement of proceeds of sales of property by any executor, administrator, receiver, trustee, fiduciary, special commissioner, or any public officer under judicial process; and distributions in any proceedings such as bulk sale, liquidation sale, estate sale, assignment for the benefit of creditors, interpleader action, and administrative or judicial proceeding for the dissolution of a partnership or corporation.

4b.4 The priority does not apply to transactions that do not constitute distributions of property. These transactions include the sale or transfer of property in the ordinary course of the business of the owner of the property; sales or transfers of any property by the owner or for consideration payable to the owner by the purchaser or transferee.

4b.5 This priority applies to the distribution of all property, including but not limited to real property or any interest therein; tangible personal property, including fixtures, equipment, machinery, furniture and vehicles; intangible property, including accounts receivable, contract rights, bank accounts, stocks, bonds; and the proceeds from the sale or liquidation of any such property.

4b.6 This priority requires payment of the tax from the first money that is available for distribution to lienors, creditors, beneficiaries, or any other person, after payment of costs, commissions, fees and reasonable expenses incurred in the preservation, storage, liquidation, or transportation of the property or estate.

4b.7 The debt or claim for taxes has priority over all claims and liens, except debts due the United States.

4b.7.1 Claims subject to this priority include any debt or obligation, liquidated or unliquidated, that does not constitute a lien upon the property or estate.

4b.7.2 Liens subject to this priority include any charge or encumbrance on the property or estate for payment of any claim, debt or obligation, such as a deed of trust, judgment lien, security interest, vendors lien, execution lien, tax lien, mechanics lien, landlords lien and municipal lien.

4b.7.3 The priority of the consumer sales and service tax debt in such distributions is determined by W. Va. Code § 11-15-18a, and is not determined by the presence or absence of a perfected notice of tax lien, by the presence or absence of a perfected lien securing any competing claim or debt, or by the order in which any such competing liens were perfected.

**§ 110-15-5. <u>Remittance of Tax</u>.**

5.1 No profit shall accrue to any person as a result of the collection of the consumers sales and service tax regardless of the fact that the total amount of such taxes collected may be in excess of the amount for which such person would be liable by the application of the levy of six percent (6%) to the gross proceeds of his sales. The total of all consumers sales and service taxes collected by any such person shall be returned and remitted to the Tax Commissioner.

5.2 Any person who is required to collect and remit the consumers sales and service tax or the use tax and who was also required to pay such taxes on purchases of tangible personal property or services for use or consumption in his business may utilize one of the following procedures when paying the tax collected to the Tax Commissioner.

5.2.1 Such person may separately remit the amount collected and pay the amount due and owing on his purchases made using the direct pay permit procedure.

5.2.2 Such person may credit the amount of tax paid on his purchases for which an exemption is claimed against the amount of tax collected and:

5.2.2.1 if the amount collected is greater than the amount of tax paid on his exempt purchases, he shall remit the difference to the Tax Commissioner; or

5.2.2.2 if the amount of tax paid on his exempt purchases is greater than the amount collected, he may seek a refund or credit for the difference as provided in Section 9a of these regulations.

5.3 Sales and Service Tax Return and Payment; Exception. - Except as otherwise required under Sections 5.3.2, 5.3.3, 9c.7, and 11.6 of these regulations, the consumers sales and service taxes levied shall be due and payable in monthly installments, on or before the fifteenth (15th) day of the month next succeeding the month in which the tax accrued. The taxpayer shall, on or before the fifteenth (15th) day of each month, complete and mail to the Tax Commissioner the prescribed return, WV/CST-200, for the preceding month showing: (a) The total gross proceeds of business for that month; (b) the gross proceeds of business upon which the tax is based; (c) the amount of the tax for which he is liable; and (d) any further information necessary in the computation and collection of the tax which the Tax Commissioner may require. Remittance of the amount of tax due, if any, shall accompany the return: Provided, That notwithstanding the provisions of W. Va. Code § 11-15-30, any such tax collected by the Alcohol Beverage Control Commissioner from persons or organizations licensed under authority of W. Va. Code § 60-7-1 et seq., shall be paid into a revolving fund account in the State Treasury, designated the "Drunk Driving Prevention Fund."

A monthly or quarterly return shall be signed by the taxpayer or his duly authorized agent. An unsigned return will be deemed incomplete and may be returned to the taxpayer as improperly filed.

5.3.1 Other Times for Filing Returns. - The Tax Commissioner may, upon written request, authorize a taxpayer whose books and records are not kept on a monthly basis to file returns at times other than those specified in the foregoing Section 5.3, but in no event shall a taxpayer make less than one return a calendar month, except as provided in the following Section 5.3.2 or as may be authorized in writing by the Tax Commissioner. In order to receive such permission or authorization, the taxpayer must show that the monthly filing otherwise required will impose an undue hardship.

5.3.2 Quarterly Return. - Except as otherwise required under Sections 5.3.3, 9c.7, and 11.6 of these regulations, when the total tax for which a person is liable does not exceed $50.00 for any month, he may make a quarterly return on or before the fifteenth (15th) day of the first month in the next succeeding quarter in lieu of monthly returns on the return WV/CST-200. Quarterly returns are due on or before April 15, July 15, and October 15.

5.3.3 Annual Return; Extension of Time. - On or before the end of the calendar year, each person liable for the payment of consumers sales and service tax shall file an annual return. The annual return shall consist of the final monthly or quarterly return for the year and is due on or before January 31. The form of such return shall be as follows:

5.3.3.1 For taxpayers filing on a monthly basis, such annual return shall show the total gross proceeds of business and the gross proceeds of business upon which the tax is based for the month of December together with any other information which the Tax Commissioner may require.

5.3.3.2 For taxpayers filing on a quarterly basis, such annual return shall show the total gross proceeds of business and the gross proceeds of business upon which the tax is based for the calendar quarter ending December 31st together with any other information which the Tax Commissioner may require.

5.3.3.3 A person operating two or more places of business of like character from which are made or dispensed sales or services which are subject to the consumers sales and service tax may file returns covering all such sales or services.

5.3.3.4 Payment. - The taxpayer shall forward the annual return along with payment of any remaining consumers sales and service tax, due for the preceding tax year, to the Tax Commissioner. The taxpayer or his duly authorized agent shall verify the return under oath.

5.3.3.5 Extension of Time. - The Tax Commissioner for good cause shown and on written application of a taxpayer, may extend the time for making any return required by the provisions of W. Va. Code § 11-15-1 et seq., but no extension of time may be granted for payment of tax.

5.3.3.5.a Requests for extensions of time will not be considered if received after the due date of the return. No extension will be granted for a period in excess of thirty (30) days.

5.3.4 Accelerated payment. - For calendar years beginning after December 31, 1990, taxpayers whose average monthly installments for the previous calendar year exceeds $100,000.00, shall remit the tax attributable to the first fifteen days of June each year on or before the twenty-third day of said month of June.

5.3.4.1 For the foregoing purpose, the taxpayer shall remit an amount equal to the amount of tax imposed by W. Va. Code § 11-15-1 et seq. on actual taxable sales of tangible personal property and sales of taxable services during the first fifteen days of June or, at the taxpayer's election, the taxpayer may remit an amount equal to fifty percent of taxpayer's liability for sales and service tax on taxable sales of tangible personal property and sales of taxable services made during the preceding month of May.

5.3.4.2 For a business which has not been in existence for a full calendar year, the total tax due from the business during such prior calendar year shall be divided by the number of months, including fractions of a month, that it was in business during such prior calendar year; and if that amount exceeds one hundred thousand dollars, the tax attributable to the first fifteen days of June each year shall be remitted on or before the twenty-third day of said month of June.

5.3.4.3 When a taxpayer required to make an advanced payment of tax the foregoing subsection 5.3.4 makes out its return for the month of June, which is due on the fifteenth day of July, such taxpayer may claim as a credit against its sales and service tax for the month of June, the amount of the advanced payment of tax made under subsection 5.3.4.

5.5 Retailer's Use Tax Return and Payment; Exception. - Except as otherwise required under Sections 9c.7 and 11.6 of these regulations, each retailer required or authorized by W. Va. Code §§ 11-15A-6, 11-15A-6a or 11-15A-7 to collect the use tax, shall be required to pay to the Tax Commissioner the amount of such tax collected, with that amount being due and payable on or before the fifteenth (15th) day of the month next succeeding the end of each quarterly period. At such time, each retailer shall file with the Tax Commissioner a return, WV/CST-220, for the preceding quarterly period in such form as may be prescribed by the Tax Commissioner. The form shall show the sales price of any or all tangible personal property and taxable services sold by the retailer during such preceding quarterly period, the use of which is subject to the use tax, and such other information as the Tax Commissioner may deem necessary. The return shall be accompanied by a remittance of the amount of such tax for the period covered by the return: Provided, That where tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof is extended over a period longer than sixty (60) days from the date of the sale, the retailer shall collect and remit the use tax in accordance with the requirements of Section 4 of these regulations. The Tax Commissioner, if he deems it necessary in order to insure payment to the State of the amount of such use tax, may in any or all cases require returns and payments of such amount to be made for other than quarterly periods. The Tax Commissioner may, upon request and a proper showing of the necessity therefor, grant an extension of time not to exceed thirty (30) days for making any return and payment: Provided, such request is received by the Tax Department prior to the due date of the return. Returns shall be signed by the retailer or his duly authorized agent, and must be certified by him to be correct. An unsigned return will be deemed incomplete, and may be returned to the taxpayer as improperly filed.

5.5.1 User's or Purchaser's Use Tax Return and Payment; Exception. - Except as otherwise required under Sections 9c.7 and 11.6 of these regulations, any person who uses any tangible personal property or taxable services upon which the West Virginia use tax has not been paid either to a retailer or directly to the Tax Commissioner shall be liable therefor, and shall on or before the fifteenth (15th) day of the month next succeeding each quarterly period pay the use tax imposed upon all such property or taxable services used by him during the preceding quarterly period and shall file with his remittance of such tax a return, Form WV/CST-220, properly setting forth the information required thereon and signed by the taxpayer or his agent. The form must be certified by the taxpayer as correct. An unsigned return will be deemed incomplete, and may be returned to the taxpayer as improperly filed.

5.5.2 Special Annual User's or Purchaser's Use Tax Return and Payment; Exception. - Except as otherwise required under Sections 9c.7 and 11.6 of these regulations, any natural person who does not hold a West Virginia business registration certificate, who uses any tangible personal property or taxable service upon which the West Virginia use tax has not been paid either to a retailer or directly to the Tax Commissioner shall be liable for the West Virginia use tax upon such property or taxable services, and shall as the Tax Commissioner may authorize or require on or before the fifteenth (15th) day of April of the taxpayer's next succeeding tax year for federal income tax purposes, pay the use tax imposed upon all such property or taxable services used by him during the taxpayer's preceding federal taxable year. The taxpayer

shall file with his remittance of such use tax a return, form WV/CST-220A, properly setting forth the information required thereon and signed by the taxpayer or his agent. The form must be certified by the taxpayer as correct. An unsigned return will be deemed incomplete, and may be returned to the taxpayer as improperly filed.

**§ 110-15-6. Taking Exemption Certificate, Material Purchase Certificate Number or Direct Pay Permit Number.**

6.1 Vendor Must Show Sale or Service Exempt; Presumption. - In the case of sales subject to Section 8a or 9.3.4.4 of these regulations or Section 9.3 of these regulations, the burden of proving that a sale or service was exempt from the tax shall be upon the vendor, unless he in good faith takes from the purchaser his direct pay permit number, a properly completed material purchase certificate number or a properly completed exemption certificate signed by and bearing the address of the purchaser and setting forth the reason for the exemption: Provided, That effective July 1, 1990, a contractor or subcontractor may only claim the exemption authorized by Section 9.3.4.4 of these regulations by issuing his material purchase certificate number to his vendor. In order to assure maintenance of appropriate records, the vendor should take during his taxable year one completed exemption certificate from each of his purchasers who are authorized to issue an exemption certificate for exempt purchases. However, for purposes of the contracting exemption provided under Section 9.3.4.4.a of these regulations, the vendor should take one completed material purchase certificate number for each exempt contracting project or direct pay permit number. The completed exemption certificate, material purchase certificate number or direct pay permit number may be used for the exempt purchases by the respective purchaser. Except as otherwise provided in this Section or Section 9.3.4.4 of these regulations, the direct pay permit, or the material purchase certificate issued by the Tax Commissioner for the specific contracting activity, may be used for exempt purchases of tangible personal property to be incorporated in the exempt contracting activity. If a contractor decides to use a material purchase certificate when claiming an exemption, he must obtain the application from the entity which awarded the contract. As of October 1, 1990, the contracting exemption provided in Section 9.3.4.4.a was generally repealed and use of the material purchase certificates became very limited. The material purchase certificate may only be used in the manner specified in Section 9.3.4.4.a and Section 109 of these regulations. See Section 109 of these regulations for additional information on the taxation of materials for use in governmental contracts. To prevent evasion of the consumers sales and service tax, it shall be presumed that all sales and services are subject to tax until the contrary is clearly established.

6.1.1 Liability of Purchaser for Failure to Pay the Sales or Use Tax or Provide Appropriate Indicia of Tax Exemption. - Except for sales exempt per se under Section 9.2 of these regulations, if any purchaser unlawfully refuses to pay to the vendor the consumers sales and service tax or, where appropriate, the use tax, or in the case of a sale subject to Section 9.3 of these regulations a purchaser unlawfully refuses to sign and present to the vendor a proper exemption certificate or a lawful material purchase certificate number indicating that the sale is not subject to either the consumers sales and service tax or the use tax, or presents to the vendor a false exemption certificate or a false, cancelled, expired or otherwise ineffective or unlawful

material purchase certificate number, or, after presenting an exemption certificate or material purchase certificate number, uses the property or services purchased in such manner that would cause the sale to be subject to the sales or use tax, or presents a direct pay permit number which is false, cancelled, expired or otherwise ineffective or unlawful or uses such direct pay permit in a manner not authorized by the Tax Commissioner, such purchaser shall be personally liable for the amount of tax applicable to the transaction or transactions.

6.1.1.1 In such case, the Tax Commissioner has authority to make an assessment against such purchaser, based upon any information within his possession or that may come into this possession. The assessment and notice thereof shall be made and given in accordance with W. Va. Code § 11-10-1 et seq.

6.1.1.2 Sections 6.1.1 and 6.1.1.1 of these regulations shall not be construed as relieving the vendor from liability for the tax; Provided, That the vendor shall be relieved from liability for the purchaser's refusal to pay the tax or provide appropriate indicia of tax exemption if the vendor notifies the Tax Commissioner in writing of such refusal; and the vendor shall be relieved from liability for the purchaser's presentation of false, expired, cancelled, or otherwise ineffective or unlawful indicia of tax exemption unless the vendor has accepted such indicia in bad faith, or accepted such indicia in complicity with the purchaser or others for the purpose of allowing the purchaser, the vendor or others to unlawfully evade the payment of tax or has otherwise conspired or contrived to cause or assist in unlawful tax evasion. The information provided to the Tax Commissioner must include the name and, if known, address of the purchaser, the date of the purchase and the description of the item or service purchased, the purchase price thereof, and the amount of tax not collected.

6.1.2 Because of the nature of the transactions, purchasers of tangible personal property or taxable services which are specified in Section 9.2 of these regulations are exempt per se are not required to complete an exemption certificate in order to qualify for the exemption. However, an exemption certificate, material purchase certificate where appropriate, or a direct pay permit number is required for an exemption claimed under Section 9.3 of these regulations.

6.2 Retailer Must Show Sale or Service Exempt; Presumption. - The burden of proving that a sale otherwise subject to the use tax was not taxable shall be upon the seller, unless he, in good faith and under the authority provided in W. Va. Code § 11-15A-3c, takes from the purchaser his direct pay permit number, a properly completed material purchase certificate or a properly completed exemption certificate signed by and bearing the address of the purchaser setting forth the reason for exemption of the sale from imposition of the tax. The exemption certificate shall be substantially in the form prescribed by the Tax Commissioner. Such retailer may take from the purchaser the purchaser's direct pay permit number or material purchase certificate number, noting same on the invoice, sales slip or other record of the sale. To prevent evasion, it shall be presumed that all proceeds are subject to the tax until the contrary is clearly established.

6.3 Acceptance of Exemption Certificate or Material Purchase Certificate. - The acceptance of a properly executed exemption certificate or material purchase certificate relieves the vendor and the retailer from the burden of proof only if accepted in good faith so long as the transaction is one for which an exemption certificate or material purchase certificate may be issued. Any person who gives an exemption certificate or material purchase certificate to a vendor or retailer and knows, at the time of purchase, that the article will be used in a manner other than expressed in the exemption certificate, shall be subject to criminal sanctions as provided in W. Va. Code § 11-9-1 et seq.

6.3.1 A vendor who makes sales to a non-resident purchaser may, under certain circumstances, accept the exemption certificate utilized in the state in which the non-resident is located. Even though an out-of-state exemption certificate is used, the transaction must be one which is exempt in this State. In order for such an exemption certificate to be acceptable, it must provide the same information as that required on the exemption certificate or, where appropriate, the material purchase certificate used in this State: name and address of the purchaser, basis for the claim of exemptions; and the signature of the person authorized to sign such an exemption certificate or use the material purchase certificate for the purchaser.

6.4 Retention of Exemption Certificate and Material Purchase Certificate. - In order that the Tax Department may verify a vendor's or a retailer's taxable and nontaxable sales upon audit, it is necessary that such persons retain executed exemption certificates, material purchase certificates and other appropriate books and records for at least three (3) years or so long as the taxable period remains open for assessment or refund whichever is greater. An exemption certificate or material purchase certificate, to be valid, must be given by the vendee and accepted by the vendor at the time of the sale and not thereafter. If a vendor lists nontaxable sales or services for which he has no exemption certificates or material purchase certificate, the Tax Department will presume such sales were taxable and make an assessment of tax against the vendor. Of course, the preceding sentence is not applicable to sales of articles and types of services enumerated in Section 9.2 of this regulation. A sample exemption certificate will be furnished by the Tax Department to any vendor, retailer or organization upon request, in order that the certificate may be reproduced for the convenience of its customers.

**§ 110-15-7. Tax Computed on Gross Proceeds or Gross Value of Tangible Personal Property Sold to Consumers, or Consumed or Used, by the Manufacturer or Producer Thereof.**

7.1 Sales by Producers and Manufacturers. - A person exercising the privilege of producing for sale, profit or commercial use, any natural resource product or manufactured product and engaged in the business of selling the same at wholesale or retail shall collect consumers sales and service tax on the gross proceeds from such sales unless the transaction is exempt per se from the consumers sales and service tax, or the vendor, in good faith, takes from the purchaser a property executed exemption certificate or the purchaser's direct pay permit number.

7.2 Use by Producer or Manufacturer. - A person exercising the privilege of producing for sale, profit or commercial use, any natural resource product or

manufactured product which he then uses or consumes in a manner which would be taxable had such person purchased the product from another person, such person shall pay consumers sales or use tax on the gross value of such product or products at the time they are first used or consumed by him in this State. "Gross value" shall be determined as provided in Section 7.3 of these regulations.

7.3 Determination of "Gross Value". - Whenever a person partially or wholly consumes or uses tangible personal property in this State which he produced or manufactured in this State or in another state, the gross value thereof for consumers sales and use tax purposes shall correspond as nearly as possible to the gross proceeds which such person would have received from the sale of such natural resource product or manufactured product to another person in an arms-length transaction, as that term is defined for federal income tax purposes. Such value shall be determined by application of the following rules in the order stated:

7.3.1 The value of the natural resource product or the manufactured product consumed or used shall be equal to the selling price, at the place of use or consumption, of similar products of like quality and character offered for sale in similar quantities by persons unrelated to the taxpayer.

7.3.2 In the absence of sales of similar natural resource products or similar manufactured products by other persons as a guide to value, gross value shall be equal to the average price at which sales of the same or a similar product are made during the taxable year to customers of the producer or manufacturer.

7.3.3 In the absence of sales to customers of the taxpayer as a guide to value, gross value shall be determined by first determining the cost of the product and adding thereto the average markup realized by the producer or manufacturer of the product being valued. The cost of the product shall include every item of cost attributable to that particular product, including all direct and indirect overhead costs.

7.4 Examples.

7.4.1 Example 1. - ABC Company is an integrated manufacturer of asphalt and a road contractor. Some of the asphalt ABC Company manufactures is sold to other contractors. ABC Company is exempt from paying consumers sales and use taxes on tangible personal property directly used or consumed in the manufacture of asphalt. Until March 1, 1989, ABC Company was also exempt from paying consumers sales and use taxes on tangible personal property directly used or consumed in his contracting activity. ABC Company must now pay consumers sales and use taxes on all tangible personal property and/or taxable services purchased for use or consumption in his contracting activity unless a specific exemption applies. As a road contractor, ABC Company may be engaged in building or resurfacing roads under contracts with the State of West Virginia or a political subdivision thereof, or with the United States government, or with other persons such as commercial and industrial business and residential property owners. The asphalt which ABC Company manufactures and sells or uses or consumes will be taxed as follows:

1. Consumers sales and service tax must be collected on sales of asphalt to other contractors and persons unless ABC Company accepts in good faith an exemption certificate or a valid direct pay permit number.

2. As of October 1, 1990, asphalt which ABC Company manufactures and uses or consumes in building or resurfacing roads under a single government contract for materials and labor is subject to consumers sales and use tax. See Section 109 of these regulations for transition rules concerning the taxing of materials for use in governmental contracts.

3. Asphalt which ABC Company manufactures and uses or consumes in building or resurfacing roads, parking lots and driveways, etc. in this State for other persons is subject to consumers sales and service tax based on the gross value of the asphalt so used or consumed.

**§ 110-15-8. Furnishing of Services Included; Exceptions.** - The consumers sales and service tax and the use tax shall apply not only to selling tangible personal property, but also to the furnishing of all services, except professional services, personal services, those services furnished by corporations subject to the control of the Public Service Commission, contracting services, and services rendered by an employee to his employer.

8.1 Sales of the following services are excepted from the imposition of the consumers sales and service tax and the use tax.

8.1.1 Professional Services.

8.1.1.1 Professional services, as defined in Section 2 of these regulations, are rendered by physicians, dentists, lawyers, certified public accountants, public accountants, optometrists, architects, professional engineers, registered professional nurses, veterinarians, licensed physical therapists, ophthalmologists, chiropractors, podiatrists, embalmers, osteopathic physicians and surgeons, registered sanitarians, pharmacists, psychiatrists, psychoanalysts, psychologists, landscape architects, registered professional court reporters, licensed social workers, enrolled agents, professional foresters, licensed real estate appraisers and certified real estate appraisers licensed in accordance with W. Va. Code § 37-14-1 et seq., nursing home administrators, licensed professional counselors and licensed real estate brokers. Persons who provide services classified as nonprofessional for consumers sales and service tax purposes include interior decorators, private detectives/investigators, security guards, bookkeepers, forestors, truck driving schools, hearing aid dealers/fitters, contractors, electricians, musicians, and hospital administrators; the foregoing listing is not all-inclusive but intended as containing examples of trades and occupations. The determination as to whether other activities are "professional" in nature will be determined by the State Tax Division on a case-by-case basis unless the Legislature amends W. Va. Code § 11-15-1 et seq. to provide that a specified activity is "professional." When making a determination as to whether other activities fall within the "professional" classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements.

8.1.1.2 Services for which a professional license is required and which are provided by corporations, regardless of whether such corporations are professional or business, are not subject to the consumers sales and service tax. Likewise, non-professional services provided by a professional corporation are subject to the tax.

8.1.1.3 Professional persons who make sales of tangible personal property or who engage in activities which are not professional services shall collect consumers sales and service tax on such sales or services. For example, kennel services provided by a veterinarian are subject to tax.

8.1.1.4 Professional services shall not be related to the quality of performance or expertise of the person performing the service. Professional, when used in these regulations, is not synonymous with excellence. It is the type of service which must be professional, not the quality or manner in which the service is performed. To illustrate: A doctor's services to his patients are professional services whether or not his patients are satisfied with his performance; or, an individual may excel at repairing television sets, but his type of service (repair of television sets) is not considered professional under these regulations even though the manner in which he performs is considered "professional" by his customers or by other television repairmen.

8.1.2 Personal Services.

8.1.2.1 Personal services shall include those services done to or performed on the person of an individual, and such services must be directly from one person to another. Personal services include barbering, massaging, nursing, manicuring, hair setting, hair washing and dyeing, services of dental hygienists, shoe-shining while the shoes are worn by the customer, and similar services. The determination as to whether other services are personal in nature will be determined on a case-by-case basis. For further information See Section 35 of these regulations.

8.1.2.2 As provided in Section 2 of these regulations, personal services are services rendered to the person of an individual without, at the same time, selling tangible personal property: Provided, That the sale of tangible personal property used and consumed in the rendering of the personal service shall be subject to tax only if stated as a separate charge. In order for the service to be personal in nature, it is necessary for there to be physical contact of a continuing nature by the provider of the service to the recipient of such service. Additionally, it is necessary for such contact to directly touch the person or the clothing worn by such person.

8.1.2.3 Many personal physical fitness programs do not qualify as personal services. The issue as to whether a program qualifies as a personal service will be determined by the nature of physical contact, the degree and level of individual supervision, and the degree to which the program is tailored to the requirements of the individual participant. Mere monitoring of performance, especially if by computer or other such impersonal means, is insufficient to qualify; however, individual instruction and close personal performance monitoring in conjunction with an individualized program specifically designed to meet the needs of the particular individual would fall

within the category of activity which would be considered as personal service. This activity should not be confused with courses of instruction in the martial arts, boxing, aerobic dancing, etc., which, while being physical in nature are not personal in nature, and are therefore not personal services.

8.1.2.4 Those services performed by a professional which are neither personal services nor professional services are subject to the consumers sales and service tax.

8.1.3 Services Rendered by Corporations Subject to West Virginia Public Service Commission Control.

8.1.3.1 Regulated services rendered by corporations which are subject to the control of the West Virginia Public Service Commission are not subject to the consumers sales and service tax.

8.1.3.2 To illustrate: Services rendered by taxi companies and bus companies (carrying of passengers) holding a certificate of convenience and necessity issued by the West Virginia Public Service Commission are not subject to the consumers sales and service tax.

8.1.3.3 Any person who performs services which are subject to the control of the West Virginia Public Service Commission may perform such services without charging and collecting consumers sales and service tax.

8.2 On those services which are excepted from the imposition of the sales and services tax, enumerated in Sections 8.1.1 through 8.1.3 above, the Tax Department does not deem it necessary for the vendor to require an exemption certificate from the purchaser of such services. However, the burden of proving that a service is exempt rests upon the vendor. See Section 9.2 of these regulations.

8.3 The purveyors of those services which are excepted from the imposition of the consumers sales and service tax, enumerated in Sections 8.1.1 through 8.1.3 above, are not required to collect the consumers sales and service tax on the sale of services to consumers. As a result, the purveyors of such services are required to pay the consumers sales and service tax on all purchases of tangible personal property and services which are used or consumed in their business: Provided, That purchases which qualify under Sections 9.4.1 or 9.4.4 of these regulations shall be exempt from the sales and service tax.

**§ 110-15-8a. Contracting Services.**

8a.1 Persons engaged in the business of providing contracting services to other persons are providing a service that is generally not subject to the consumers sales and service tax. Such persons are generally considered to be the user or consumer of all tangible personal property and all services which they purchase. Consequently consumers sales and use taxes must be paid on all purchases of tangible personal property or taxable services except as otherwise provided in these regulations.

8a.2 The terms "contracting services" and "contracting" are synonymous. Thus, the term "contracting services" means the furnishing of work or both

materials and work, for another in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure or any part thereof or for the removal or demolition of a building or structure or any part thereof or for the alteration, improvement or development of real property. Beginning July 1, 1989, the form of the contract no longer controls whether a person is providing a tax exempt contracting service or is providing a taxable service. The question in every case will be what is being done, not how is it being billed.

8a.3 Additionally, the definition of "contracting" is narrowed beginning July 1, 1989. For contracts entered into on or after July 1st, the work must result in a capital improvement to a building or other structure or to real property for the work to be contracting. If this condition is not met, the work provided is a taxable service, not contracting. When a taxable service is provided, consumers sales and service tax must be charged to and collected from the customer, but the vendor may purchase materials that will be used or consumed in making the taxable service free from consumers sales and use taxes by presenting a resale exemption certificate to the vendor.

8a.4 Not all activity of a contractor is treated as contracting for consumers sales and use tax purposes. For example:

8a.4.1 Contract miners and other persons engaged by the producer of natural resources (as defined for severance tax purposes) to perform any reclamation, waste disposal or environmental activities associated with the production of natural resources are treated as engaging in the activity of producing natural resources with respect to such activities for consumers sales and service tax and use tax purposes. Purchases directly used or consumed in the production of natural resources are exempt from tax as provided in Section 9.4.1 of these regulations. However, persons engaged in construction, alteration, repair or improvement of facilities to be used by others to produce natural resources are engaged in the activity of contracting and are not considered to be producing natural resources. See Section 107 of these regulations for additional information concerning the taxation of contractors.

8a.4.2 Merchants who sell certain types of tangible personal property and perform incidental installation services with respect thereto are by statute not engaged in contracting. They are selling tangible personal property and rendering taxable services.

8a.4.3 When a contractor sells tangible personal property without installing the property or arranging for its installation, the transaction is a sale of tangible personal property and not contracting.

8a.4.4 When the work which a contractor does pursuant to a contract with another does not result in a capital improvement to a building or other structure or to real property, the work is not contracting. It is the rendering of a taxable service.

8a.5 A capital improvement is an alteration, repair, decoration or improvement of a building or structure or the alteration, improvement or development of real property:

8a.5.1 Which adds utility to the building, structure or real property or any part thereof by substantially adding to the value of the building or structure or real property, or appreciably prolonging or extending the original useful life of the building or structure or real property; and

8a.5.2 Which becomes part of the building or structure or real property or is permanently affixed to or attached to the building or structure or real property so that its removal would cause material damage to the item being removed or to the building or structure or real property to which it is attached or affixed; and

8a.5.3 Which is intended to become a permanent installation or to be relatively permanent.

8a.6 A "retailer dealer" merchant who agrees to sell from the inventory of his general or special store certain types of tangible personal property and to install the same, or to arrange for its installation, is not a contractor with respect to such sale and installation when the installation is merely incidental to the sale of the tangible personal property. See Section 114 of these regulations for detailed information on sales of certain tangible personal property with incidental installation by "retail dealers."

8a.6.1 A "general or special store" as used in these regulations means any store or mercantile establishment having regular business hours during which goods, wares, or merchandise of any kind is offered for sale to consumers or users.

8a.6.2 Installation of the following tangible personal property is always incidental to the sale thereof by a general or special store, regardless of whether the installation is done by the merchant, or his employees, or the merchant arranges for a third party to do the installation:

Wall-to-wall carpeting
Mobile homes
Window air conditioning units
Dishwashers (residential)
Clothing washing machines or dryers (residential)
Drapery rods
Window shades
Venetian blinds
Canvas awnings
Free standing commercial equipment
Free standing industrial equipment

8a.7 For additional information about the tax liability of contractors see Sections 107 through 122 of these regulations.

**§ 110-15-8b. Nonresident Contractors - Registration, Bond, etc. Required.**

8b.1 Every person who engages in this State in any contracting business or contracting activity is required to obtain a business registration certificate from the Tax Commissioner prior to starting work in this State and to have a copy of that certificate available at every construction site in this State

until the contractor's work at that site is completed. These requirements apply to resident as well as nonresident contractors. The business registration certificate is good for a one year period which begins July 1st and ends June 30th of the next calendar year. Civil penalties may be imposed under W. Va. Code § 11-12-1 et seq. and § 11-10-1 et seq. for failure to satisfy these requirements. Additionally, criminal penalties may be imposed under W. Va. Code § 11-9-1 et seq. for noncompliance.

8b.2 Beginning July 1, 1989, every nonresident contractor must also register with the Tax Commissioner under the consumers sales and use tax laws prior to engaging in the performance of a contract in this State. At the time of this registration, the contractor must satisfy one of the following requirements:

8b.2.1 Cash Bond - At the time each contract is registered, the nonresident contractor must deposit with the Tax Commissioner six percent (6%) of the gross value of the contract. The Tax Commissioner will deposit this money into the Contractor's Use Tax Fund where it will remain until after: (1) the contract is completed, (2) the amount of consumers sales and use taxes due this State with respect to such contract are ascertained, and (3) the amount of tax due has been paid directly to the Tax Commissioner, or the contractor submits proof that the amount of tax due but not paid directly to the Tax Commissioner was paid to vendors required to collect this State's consumers sales or use taxes or to out-of-state vendors who voluntarily collect our use tax. Upon submission of proof satisfactory to the Tax Commissioner that these three (3) events have occurred, the Tax Commissioner will promptly refund the nonresident contractor's deposit with respect to such contract.

8b.2.2 Corporate Surety Bond. - In lieu of posting a cash bond for each contract, the nonresident contractor may provide a corporate surety bond for each contract which guarantees payment of consumers sales and use taxes due this State with respect to that contract. The corporate surety must be qualified to do business in this State; and the corporate surety bond must be approved by the Tax Commissioner as to form, sufficiency, value, amount, stability, and other features necessary to guarantee payment of the consumers sales and use taxes due this State with respect to such contract for contracting activity.

8b.2.2.1 Amount of Bond. - The amount of a corporate surety bond will depend upon the gross value of contract or contracts, the ratio which the value of the materials component of the contract bears to the entire gross value of the contract, the extent to which the materials component of the contract is taxable and taxpayer's record with this Department concerning the timely payment of tax liabilities.

8b.2.2.2 Umbrella Corporate Surety Bond. - In lieu of posting a cash bond or a corporate surety bond for each contract, a nonresident contractor may elect to file a corporate surety bond guaranteeing payment of consumers sales and use taxes due this State with respect to several contracts or all contracts executed within a specified period, whether such contracts be present or future contracts. The corporate surety must be qualified to do business in this State; and the corporate surety bond must be approved by the Tax Commissioner as to form, sufficiency, value, amount, stability and other

features necessary to guarantee payment of the consumers sales and use taxes due this State with respect to such contracts. If the taxpayer has no tax payment history or record with this Department, an umbrella bond will not be accepted.

8b.3 The nonresident contractor may not begin performance of any contract until after the nonresident contractor posts with the Tax Commissioner a cash bond or corporate surety bond which is accepted and approved by the Tax Commissioner.

8b.4 Within thirty (30) days after complying with the registration requirements of W. Va. Code § 11-15-8b and Section 8b of these regulations, the contractor shall file with the Tax Commissioner a statement itemizing the machinery, materials, supplies and equipment that he has or will have on hand in this State for performance of the contract. The itemized statement shall include the location outside this State from which such tangible personal property was or will be brought, shipped or transported: Provided, That the itemized statement shall include only the machinery, materials, supplies and equipment upon which neither the West Virginia consumers sales and service tax nor the West Virginia use tax has been paid. The tax due thereon shall be paid at the time of filing the above statement.

8b.5 See Section 110 of these regulations for additional information regarding nonresident contractors.

**§ 110-15-8c. Transition rules for elimination of exemption for materials and supplies incorporated in real property owned by governmental entities.**

8c.1 General rule. - The expired provisions in W. Va. Code § 11-15-9(j), which previously exempted sales of tangible personal property to persons engaging in the activity of contracting, pursuant to a written contract with the United States, this State, or with a political subdivision thereof, or with a public corporation created by the Legislature or by another governmental entity pursuant to an act of the Legislature, for a building or structure, or improvement thereto, or other improvement to real property that is or will be owned and used by the governmental entity for a governmental or proprietary purpose, shall continue in force for:

8c.1.1 Tangible personal property purchased by a contractor on or after October 1, 1990, in fulfillment of a written contract for contracting, as defined in W. Va. Code § 11-15-2, that was executed and legally binding on the parties thereto on or before September 15, 1990; or in fulfillment of a written contract entered into after said September 15, 1990, pursuant to a written bid for contracting that was made on or before said September 15, 1990, that was binding on the contractor, but only to the extent that the bid is subsequently incorporated into a written contract; and

8c.1.2 Tangible personal property purchased by a contractor on or after October 1, 1990, for consumption or use in fulfillment of a written contract for the construction of a new improvement to real property, the construction or operation of which was approved by a federal or state regulatory body prior to September 15, 1990, or pursuant to a federal grant awarded prior to September 15, 1990.

8c.2 Renewals and extensions. - A renewal of any contract shall constitute a new contract for purposes of this Section 110-15-8c, and the date of entry into a contract renewal by the parties, the date or dates of tender of consideration and the time of performance of any contractual obligations under a renewed contract shall be treated as the dates for determining application of this section to the renewed contract. Extensions of time granted or agreed upon by the parties to a contract for performance of the contract or for tender of consideration under the contract shall not be treated as contract renewals. Contracts to which such extensions apply shall be treated under these transition rules as if the original contractual provisions for performance and tender of consideration remain in effect. For purposes of this section, the terms "contract" or "contracts," and "contract renewal" or "renewal" shall have the same meaning as defined in W. Va. Code § 11-15-8a(d).

**§ 110-15-8d. Limitations on right to assert exemptions.**

Persons who perform "contracting" as defined in W. Va. Code § 11-15-2 or persons acting in an agency capacity, may not assert any exemption to which the purchaser of such contracting services or the principal is entitled. Any statutory exemption to which a taxpayer may be entitled shall be invalid unless the tangible personal property or taxable service is actually purchased by such taxpayer and is directly invoiced to and paid by such taxpayer: Provided, That this section shall not apply to purchases by an employee for his or her employer; purchases by a partner for his or her partnership; or purchases by a duly authorized officer of a corporation, or unincorporated organization, for his or her corporation or unincorporated organization so long as the purchase is invoiced to and paid by such employer, partnership, corporation or unincorporated organization.

Transition rule. - This section shall not apply to purchases of tangible personal property or taxable services in fulfillment of a purchasing agent or procurement agent contract executed and legally binding on the parties thereto prior to September 15, 1990: Provided, That this transition rule shall not apply to any purchases of tangible personal property or taxable services made under such a contract after August 31, 1991; and this transition rule shall not apply if the primary purpose of the purchasing agent or procurement agent contract was to avoid payment of consumers sales and use taxes.

**§ 110-15-9. Exemptions.**

9.1 General. - Certain types of transactions are exempt from the consumers sales and service tax and the use tax. The question of whether an exemption is applicable is determined by the nature of the tangible personal property or service being sold, purchased or used; how the property or service is being used; or the status of the vendor, purchaser or user. The exemptions allowed by law are classified in Sections 9.2, 9.3, 9.4 and 9.5 of these regulations; and the words "gasoline and special fuel" are defined in Section 2 of these regulations.

9.2 Per Se Exemptions. - The following sales and purchases of tangible personal property or services are exempt per se from the consumers sales and service tax and the use tax, meaning that no exemption certificate, material

purchase certificate or direct pay permit is required to claim any of the following exemptions:

9.2.1 Sales of gas, steam and water when delivered to consumers through mains or pipes. Therefore, sales of bottled gas, bottled water, etc., do not qualify for this exemption.

9.2.2 Sales of electricity.

9.2.3 Sales of other public services which are subject to regulation by the West Virginia Public Service Commission.

9.2.4 Sales of textbooks required to be used in any of the schools of the State, public or private, or in any institution in this State which qualifies as a nonprofit or educational institution subject to the West Virginia Department of Education or West Virginia Board of Regents, regardless of whether such textbooks are sold directly to such schools or to a student enrolled in such schools: Provided, That the vendor must retain proof that the book is a required textbook and that the purchaser is currently enrolled as a student at the school where the textbook is required.

9.2.5 An isolated transaction (as defined in Section 110-15-2) in which any taxable service or tangible personal property is sold, transferred, offered for sale, or delivered by the owner thereof or by his representative for the owner's account, such sale, transfer, offer for sale or delivery not being made in the ordinary course of repeated and successive transactions of like character by such owner or on his account by such representative: Provided, That an owner who sells, transfers or offers for sale tangible personal property in an isolated transaction through an auctioneer need not collect the tax from either the auctioneer or the purchaser. To illustrate: A person who is not engaged in the business of selling furniture sells his used household furniture. Since such person is not regularly engaged in selling to the public, his sale of used furniture is an isolated transaction upon which no consumers sales and service tax or use tax is imposed. For sales by an auctioneer, See Section 86 of these regulations.

9.2.6 Sales of newspapers when delivered to consumers by route carriers. All other sales of newspapers are taxable, unless the transaction is exempt under some other provision of this Section.

9.2.7 Sales of drugs dispensed upon prescription and sales of insulin to consumers for medical purposes. See Section 92 of these regulations.

9.2.8 Sales of services performed by licensed day care centers or registered day care centers as that phrase is defined in Section 2 of these regulations. This exemption does not include sales of tangible personal property and services to a day care center; such sales are taxable unless exempt under some other provision of this Section. Even though the organizations and activities referenced in subsections 2.25.1, 2.25.2, 2.25.3 and 2.25.4 of these regulations are not classified as "day care centers, the services provided by such organizations may be exempt under another exemption. For example, sales of babysitting services may be exempt as casual and occasional sales or isolated transactions.

9.2.9 Sales of West Virginia lottery tickets and materials by licensed lottery sales agents and lottery retailers authorized by the West Virginia Lottery Commission, under the provisions of W. Va. Code § 29-22-1 et seq., provided the materials sold relate directly to the lottery. Tangible personal property and services sold by a licensed lottery sales agent or a lottery retailer which are not directly related to the operation of the lottery are taxable unless exempt from tax under some other provision of this Section.

9.2.10 Leases of motor vehicles titled pursuant to the provisions of W. Va. Code § 17A-3-1 et seq. to lessees for a period of thirty (30) or more consecutive days. This exemption shall apply to leases executed on or after July 1, 1987, and to payments under long-term leases executed before July 1, 1987, for months beginning on or after such date.

9.2.11 Sales of food intended for human consumption when sold by the following organizations in the manner indicated are exempt:

9.2.11.1 Food sold by public or private schools, school sponsored student organizations, or school sponsored parent-teacher associations to students enrolled in such school or to employees of such school during normal school hours; but not those sales of food made to the general public. See Section 126 of these regulations.

9.2.11.2 Food sold by a public or private college or university or by a student organization officially recognized by such college or university to students enrolled at such college or university when such sales are made on a contract basis so that a fixed price is paid for consumption of food products for a specific period of time without respect to the amount of food product actually consumed by the particular individual contracting for the sale and no money is paid at the time the food product is served or consumed. See Section 70 of these regulations.

9.2.11.3 Food sold by a nonprofit organization or a governmental agency under a program to provide food to low-income persons at or below cost. For further information, See Section 126 of these regulations.

9.2.11.4 Food sold in an occasional sale by a charitable or nonprofit organization, including volunteer fire departments and rescue squads, if the purpose of the sale is to obtain revenue for the functions and activities of the organization and the revenue so obtained is actually expended for that purpose.

9.2.11.5 Food sold by any religious organization at a social or other gathering conducted by it or under its auspices, if the purpose in selling the food is to obtain revenue for the functions and activities of the organization and the revenue obtained from selling the food is actually used in carrying on such functions and activities: Provided, That purchases made by such organizations shall not be exempt as a purchase for resale.

9.2.11.6 Sales of food by little leagues, midget football leagues, youth football or soccer leagues and similar types of organizations including scouting groups and church youth groups if the purpose in selling the food is to obtain revenue for the functions and activities of the organization

and the revenues obtained from selling the food is actually used in supporting or carrying on functions and activities of the groups: Provided, That such purchases made by such organizations shall not be exempt as a purchase for resale.

9.2.11.6.1 This exemption is effective whether the sale of food occurs at the sporting event or through a separate fund-raising event.

9.2.12 Sales of tangible personal property or services purchased after September 30, 1987, and lawfully paid for with food stamps pursuant to the Federal Food Stamp Program codified in 7 U.S.C. § 2011, et seq., as amended, or with drafts issued through the West Virginia special supplemental food program for women, infants and children (WIC) as codified in 42 U.S.C. 1786. Such tangible personal property or services include, but are not necessarily limited to the following:

9.2.12.1 "Food" as defined in Section 2 of these regulations.

9.2.12.2 Seeds and plants for growing in gardens to produce food for personal consumption by eligible households.

9.2.12.3 Deposits on returnable bottles or other returnable containers which are part of the cost of the food contained therein.

9.2.12.4 Distilled water and ice unless specifically labeled for nonfood use.

9.2.13 Sales of tickets for activities sponsored by elementary and secondary schools located within this State. This exemption does not include activities sponsored by other organizations, which merely occur on school property and are not sponsored directly by such school.

9.2.14 Sales of radio or television broadcasting time, and sales of advertisements of goods and services in preprinted advertising circulars, and magazines, newspapers and outdoor advertising space: Provided, That pre-printed advertising circulars shall include purchase of direct-mailing advertising services, and space in home shoppers guides, and newspaper supplements and inserts, but does not include wholesale and retail catalogs through which tangible personal property and services may be directly ordered.

9.2.15 Personal services, as defined in Section 2.

9.2.16 Professional services, as defined in Section 8.

9.2.17 Contracting services, as defined in Section 2.

9.2.18 Services rendered by an employee to his or her employer. See Section 60 of these regulations, Employee or Independent Contractor.

9.2.19 Sales of tangible personal property or taxable services in this State, or the use in this State of tangible personal property or services, which this State is prohibited from taxing under its consumers sales and service tax and use tax laws by the United States Constitution, controlling federal law,

the Constitution of this State or some controlling provision of West Virginia law not found in the consumers sales and service tax and use tax laws, such as, for example, sales by credit unions under W. Va. Code § 31-10-33, the sale of services by owners, trainers or jockeys which are essential to the effective conduct of a horse or dog racing meeting under W. Va. Code § 19-23-12, or the commission of an auctioneer licensed under W. Va. Code § 19-2C-1 et seq.: Provided, That the vendor shall maintain adequate documentation to show the sale is not subject to the consumers sales and service tax and use tax.

9.2.20 Charges for room and meals by fraternities and sororities to their members: Provided, That purchases of food for meals made by a fraternity or sorority shall not be exempt as a purchase for resale. See Section 70 of these regulations for further clarification.

9.2.21 Sales of or charges for the transportation of passengers in interstate commerce.

9.2.22 Casual and occasional sales (as defined in Section 2) of property or services not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character by corporations or organizations which are exempt from the payment of tax under W. Va. Code § 11-15-9(f) and Section 9.3.10 of these regulations on its purchases of tangible personal property or services.

9.2.23 Tuition charged for attending an educational summer camp (as defined in Section 2 of these regulations).

9.2.23.1 Even though the tuition charged for attending an educational summer camp is exempt, that exemption does not extend to charges for services or tangible personal property which is provided by the summer camp.

9.2.23.2 In order for the exemption to be claimed, the tuition charge must be separately identifiable and it may not include other charges for services or tangible personal property provided by the summer camp.

9.2.23.3 For further information, See Section 125 of these regulations.

9.2.24 Sales of vehicles which are titled with the West Virginia Department of Motor Vehicles and which are subject to the vehicle title privilege tax imposed by W. Va. Code § 17A-3-4 or a similar tax imposed by another state. All sales of vehicles are subject to the consumers sales and service tax and the use tax unless two conditions are met: (1) it is titled by the West Virginia Department of Motor Vehicles or a similar agency of another state; and (2) it is subject to the vehicle title privilege tax or a similar tax imposed by another state; or unless the transaction is exempt under some other provision of this Section.

9.2.24.1 Any vehicle which is licensed or titled by the West Virginia Department of Motor Vehicles but which is not subject to the West Virginia vehicle title privilege tax, is subject to the consumers sales and service tax or the use tax.

9.2.24.2 Any vehicle which is licensed or titled by the West Virginia Department of Motor Vehicles, such as a travel trailer or a camping trailer, which is purchased from a person who is not engaged in the business of selling such vehicles or related property is considered to have been the subject of an isolated sale and is exempt from consumers sales and service tax and the use tax.

9.2.24.3 In order to establish the applicability of the consumers sales and service tax or use tax, the Tax Commissioner may require proof that the motor vehicle privilege tax has been paid.

9.2.24.4 Any vehicle which is purchased and delivered in West Virginia and immediately removed from this State is exempt from the consumers sales and service tax and use tax if the vehicle is then titled and registered in another state and is subject to a tax similar to the tax imposed by W. Va. Code § 17A-3-4.

9.2.25 Charges for the services of opening and closing a burial lot or burial vault for the ultimate disposition of human remains.

9.2.26 Sales of livestock, poultry, or other farm products in their original state by the producer thereof (or a member of the producer's immediate family) who is not otherwise engaged in making retail sales of similar tangible personal property. See Section 110-15-2 of these regulations for additional information.

9.2.26.1 This section applies whether the retail sales transaction occurs at a roadside stand or elsewhere; however, such retail sales will not be affected by the normal wholesale sale of the producer's products. For example, if a producer grows apples, such apples may be sold exempt from tax so long as the producer does not operate a retail business in which apples are sold. However, if that same producer operates a commercial produce market and sells the apples he raises as well as other apples and produce grown by others, the sale of all apples is subject to consumers sales and service tax.

9.2.26.2 Neither the producer nor a member of the producer's immediate family claiming entitlement to this exemption may be engaged as an employee, independent contractor, owner or partner of a retail business which sells tangible personal property similar to that being sold by the producer.

9.2.27 Sales of livestock at public sales sponsored by breeder's or registry associations or at livestock auction markets.

9.3 Exemptions for Which Exemption Certificate or Material Purchase Certificate Required. - The following sales of tangible personal property and taxable services shall be exempt from tax but only if the purchaser presents to, and the vendor thereof accepts, in good faith, a properly executed exemption certificate or material purchase certificate, or the purchaser presents his direct pay permit number issued by the Tax Commissioner under W. Va. Code §§ 11-15-9d and 11-15A-3a:

9.3.1 Sales of tangible personal property or taxable services to this State, its institutions or subdivisions, governmental units, institutions

or subdivisions of other states: Provided, That the law of such other state provides the same exemption to governmental units or subdivisions of the state, and to the government of the United States, including agencies of federal, State or local governments for distribution in public welfare or relief work.

9.3.1.1 It is necessary that the vendor acquire a properly executed exemption certificate from all purchasers claiming exemption from tax under this provision. Frequently, governmental entities fail to present such a certificate. In such event, the books and records of the vendor must show that the purchase was billed to and paid by the government agency.

9.3.1.2 Sales to individuals who are employees of this State, its institutions and subdivisions, or of the United States government, are not exempt from tax unless the sale is billed directly to the appropriate government agency or the purchase is by means of a properly completed government purchase order.

9.3.2 Reserved for future use.

9.3.3 Sales of property or services to churches which make no charge whatsoever for the services they render: Provided, That this exemption shall apply only to services, equipment, supplies, food for meals and materials directly used or consumed by these organizations, and shall not apply to purchases of gasoline or special fuel. For example, the purchase of pamphlets relating to drug abuse are not subject to tax if the church makes no charge in rendering services to persons with drug problems. For those purchases which qualify for exemption, the church may issue to the vendor a properly completed exemption certificate.

9.3.4 Sales of tangible personal property for the purpose of resale in the form of tangible personal property: Provided, That sales of gasoline and special fuel by distributors and importers shall be taxable except when the sale is to another distributor for resale.

9.3.4.1 Tangible personal property purchased for resale is taxable when it is withdrawn from inventory for use or consumption by the purchaser unless that consumption or use is exempt under some other provision of this Section. The value subject to tax is the purchase price paid by the purchaser at the time the item was purchased for inclusion in inventory.

9.3.4.1.a Example. - A wholesale office supply company may purchase office supplies from the manufacturer without paying the consumers sales and service tax or the use tax on such purchases. The wholesaler then resells such supplies to a vendor who purchases them for sale to consumers. That vendor purchases supplies from the wholesaler without imposition of the tax, inasmuch as he purchased them for the purpose of resale. When this vendor withdraws office supplies from his inventory held for resale, whether for use or consumption in his office supply business or for his personal use or consumption, he becomes liable for payment of use tax.

9.3.4.2 The exemption allowed by this Section permits vendors of tangible personal property, whether they be wholesalers, distributors, jobbers, retailers, providers of taxable services (but not providers of services

excepted from tax under W. Va. Code § 11-15-8) or others to purchase tangible personal property for the purpose of resale in the form of tangible personal property without paying the consumers sales and service tax or the use tax. However, when such vendors purchase tangible personal property or services for use or consumption in their business of selling tangible personal property, they must pay the consumers sales and service tax or the use tax on such purchases. Therefore, purchases of janitorial services, equipment repairs, adding machines, etc., are taxable. In other words, vendors of tangible personal property are exempt from tax only on purchases of tangible personal property which are purchased for the purpose of resale in the form of tangible personal property, unless the purchases are exempt under some other provision of this Section. For application of this exemption for personal services providers, see Section 35 of these regulations.

9.3.4.3 For providers of taxable services and sellers of tangible personal property subject to the consumers sales and service tax or use tax, property purchased is presumed to be purchased for resale if the final consumer or end user of the property sold will obtain possession of the property upon consummation of the final sale of the property or service sold.

9.3.4.3.a Example: Property sold for resale relating to sales of taxable services would include: sales of plastic dry cleaning bags and hangers to persons in the business of dry cleaning, sales of television picture tubes, solder and wire to television and electronics repair businesses and sales of primers and paint to persons in the automobile body repair business.

9.3.4.3.b Example: Property not sold for resale to such service providers would include: sales of dry cleaning fluid, cash registers or other office equipment or dry cleaning equipment to persons in the business of dry cleaning, and sales of soldering irons, electronic test equipment, office or shop furniture or electronics manuals and technical books to television or electronics repair businesses.

9.3.4.3.c Sales of carpet shampoo to persons in the carpet cleaning business would not constitute sales for resale because, although the shampoo is applied to the customer's carpet in the cleaning process, it is extracted from the carpet, allowed to evaporate or otherwise effectively used up in the process rather than being the subject of a transfer of possession.

9.3.4.3.d Sales of soap, shampoo, disposable shoe shining cloths, disposable shower caps, food and beverages for complimentary meals and snacks, and similar "give away" items to persons in the business of providing hotel or motel accommodations to the public do not constitute sales for resale, because such items are meant to be used by the customer during his stay at the hotel or motel. Although customers may occasionally retain possession of some item of such property subsequent to consummation of the service transaction (the stay at the hotel or motel), the transfer of possession of such items is not a typical, consistent, deliberate result of the providing of the service, but is instead a mere occasional anomaly resulting from the customer's fortuitous failure to completely use up the item during the time the service was being rendered.

9.3.4.3.e Regulations relating to containers can be found in Section 32 of these regulations.

9.3.4.4 Except as otherwise provided in this Section, the exemption allowed by Section 9.3.4 of these rules does not apply to sales of building materials or building supplies or other property to any person engaging in the activity of contracting when the materials, supplies or property are to be installed in, affixed to or incorporated by such person or his agent into any real property, building or structure.

9.3.4.4.a Prior to October 1, 1990, the exemption allowed by Section 9.3.4 of these rules does apply to sales of tangible personal property to a person engaging in the activity of contracting when the contracting activity meets the following requirements. Effective October 1, 1990 and subject to the provisions in W. Va. Code § 11-15-8c and Section 110-15-8c of these regulations, the exemption for the purchase of materials for use in government contracts was generally repealed. See Section 109 of these regulations for additional information on the transition rules relating to the taxation of materials for use in governmental contracts.

9.3.4.4.a.1 The contracting activity must occur pursuant to a written contract with the government of the United States, the State of West Virginia, or a political subdivision thereof, or with a public corporation created by the Legislature, or by another government entity pursuant to an act of the Legislature, or with an agency or instrumentality of the government of the United States.

9.3.4.4.a.2 The written contract must be for the construction or improvement of a building or structure or for the improvement of other real property. The building or structure or improved real property must be or will be owned by the governmental entity and it must be used for a governmental or proprietary purpose.

9.3.4.4.a.3 With the exception of construction waste, the tangible personal property purchased by the person engaging in the contracting activity must be totally incorporated into the building, structure or improved property which is the subject of the written contract. Construction waste shall mean the discarded materials and refuse resulting from the contracting activity.

9.3.4.4.a.4 The person who purchases tangible personal property which is exempt in accordance with Section 9.3.4.4.a of these regulations shall, for the purposes of such purchases, be deemed to be the vendor of such property to the governmental entity.

9.3.4.4.a.5 A subcontractor who, pursuant to a written subcontract with a contractor who qualifies for this exception, provides equipment, or materials, and labor to such a prime contractor shall be treated in the same manner as the contractor is treated with respect to the prime contract under the exemption provided by Section 9.3.4.4.a of these regulations.

9.3.4.4.b In order to claim the exemption allowed by Section 9.3.4.4.a of these regulations, a contractor or subcontractor who has a current

Business Registration Certificate issued in accordance with W. Va. Code § 11-12-1 et seq., may, prior to July 1, 1990, use his direct payment permit as issued by the Tax Commissioner or subsequent to June 30, 1990, apply for and obtain a material purchase certificate from the Tax Commissioner: Provided, That effective July 1, 1990, this exemption may only be claimed by the contractor or subcontractor issuing his material purchase certificate number to the vendor. The entity awarding the contract will provide the contractor with the application for the material purchase certificate if the contractor is to use that method for claiming exemptions. The material purchase certificate will entitle the contractor or subcontractor to purchase materials that are to become a component part of the building, structure or other property which is to be constructed or improved and for which Section 9.3.4.4.a of these regulations authorizes exemption. The material purchase certificate shall expire upon completion of the contract named thereon. As of October 1, 1990, the exemption provided in Section 9.3.4.4.a of these regulations was generally repealed and use of the material purchase certificate became very limited. See Section 109 of these regulations for additional information on the transition rules relating to the taxation of materials for use in governmental contracts.

9.3.4.4.b.1 Component materials are considered to be all materials which become an integral part of the structure being erected.

9.3.4.4.b.2 When applying for the material purchase certificate, the contractor must provide the Tax Commissioner with a list of all work subcontracted to others, indicating the amount of work to be performed, and the names and addresses of each subcontractor.

9.3.4.4.b.3 The contractor, or subcontractor, shall provide his vendor with his material purchase certificate number whenever he purchases tangible personal property which is to become a component part of a structure or improvement to realty pursuant to an exempt contracting activity. So long as the vendor in good faith takes the material purchase certificate number and notes it on the invoice, sales slip or other record of sale, the vendor shall be absolved of all duties and responsibilities imposed for the collection of consumers sales and service tax and use tax with respect to such sales. Failure to take the material purchase certificate number or to collect the amount of tax due shall result in the vendor being liable for the amount of tax not collected.

9.3.4.4.b.4 Any vendor who takes the material purchase certificate number in lieu of the consumers sales and service tax or use tax due and who has received notice in writing that such material purchase certificate has been canceled or surrendered or has expired shall be liable for any such tax he failed to collect.

9.3.4.4.b.5 Upon the expiration, cancellation or surrender of a material purchase certificate, the provisions of W. Va. Code § 11-15-1 et seq. and W. Va. Code § 11-15A-1 et seq., without regard to a material purchase certificate, shall apply to the person who previously held such a certificate. Such person shall promptly notify in writing all vendors from whom he purchases tangible personal property with the use of the material purchase certificate that such certificate has expired, was cancelled or surrendered. The notice required by this Section shall be made within ten (10)

days after the certificate has been cancelled or surrendered or expired. Upon receipt of such notice, the vendor shall be required to collect the consumers sales and service tax and the use tax on all sales or leases of tangible personal property and sales of taxable services, thereafter made to or for such person for the contract covered by the invalid material purchase certificate.

9.3.4.5 Liquors or wines purchased by persons or organizations licensed under the authority of W. Va. Code article 60-7 from retail liquor stores operated in accordance with W. Va. Code article 60-3 or from retail liquor stores licensed under the authority of W. Va. Code article 60-3A are not exempt as purchases for resale.

9.3.5 Sales of property or services to a school which has approval from the Board of Trustees of the University System of West Virginia or the Board of Directors of the State College System to award degrees, which has its principal campus in this State, and which is exempt from federal and state income taxes under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended: Provided, That sales of gasoline and special fuel to such entities shall be taxable.

9.3.6 Sales of mobile homes that will be utilized by the purchasers as their principal year-round residence and dwelling: Provided, That these mobile homes shall be subject to the consumers sales and service tax and the use tax at the three percent (3%) rate. See Section 122 of these regulations for further information.

9.3.7 Sales of propane to consumers for poultry house heating purposes. Any person selling to such consumer who paid the consumers sales and service tax on special fuel in his price, shall not pass it on to the consumer, but may make application and receive refund of such tax from the Tax Commissioner, notwithstanding any provision of W. Va. Code § 11-15-1 et seq. to the contrary.

9.3.7.1 A seller who paid the consumers sales and service tax or the use tax when purchasing the propane for resale is not authorized to pass such tax on to the consumer who purchases such propane for the sole purpose of heating a poultry house. In that instance, it is necessary for the seller to reduce the sales price of the propane sold for the exempt purpose by the amount of the sales or use tax on special fuel included in the consideration he paid for that quantity of propane and claim a refund of such tax from the Tax Commissioner.

9.3.8 Sales of tangible personal property or taxable services purchased for use or consumption in connection with the commercial production of an agricultural product, the ultimate sale of which will be subject to the consumers sales and service tax: Provided, That sales of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property and sales of gasoline and special fuel shall not be exempt.

9.3.8.1 This exemption applies to purchases for use in the commercial production of agricultural products as a business and not to purchases for use or consumption for any other purpose. Therefore, a person in

the business of farming may purchase feed, seed, fertilizer, repairs to a tractor, etc., without payment of the consumers sales and service tax.

9.3.8.2 Sales of tangible personal property or services to a farmer to be used or consumed in the construction or improvement of real property are not exempt from the consumers sales and service tax and the use tax. For example, sales to farmers of building materials to construct barns, sheds or fences are taxable. If, at the time fencing materials are purchased, the purchaser intends to install the fencing at a specific location for a period of time in excess of sixty (60) days, the fence will be considered a permanent improvement to real property and the purchase of the materials will be taxable; however, if the time period for installation is intended to be sixty (60) days or less, the fence will not be considered a permanent improvement to real property and the purchase may be exempt.

9.3.8.3 Prior to July 1, 1989, a farmer or person in an agricultural business was not required to hold a business registration certificate in order to issue an exemption certificate. Effective July 1, 1989, in order to claim this exemption, the purchaser, whether a farmer or person in an agricultural business, may either present the vendor with a properly completed exemption certificate, or pay the tax due and claim a refund or credit from the Tax Department. Furthermore, such purchaser must hold a valid business registration certificate issued under the authority of W. Va. Code § 11-12-1 et seq. in order to issue an exemption certificate.

9.3.9 Sales of building materials for use in remodeling, rehabilitation, or new construction in an enterprise zone, and the sale of new or used equipment and machinery when purchased by a qualified business for use in an enterprise zone: Provided, That the terms "qualified business" and "enterprise zone" are determined and designated in accordance with W. Va. Code § 5B-2B-1 et seq. In order to claim this exemption when purchasing building materials for use in remodeling, rehabilitation, or new construction in an enterprise zone, the purchaser must provide the vendor with his material purchase certificate number. For purposes of these regulations, the materials purchase certificate is to be the exemption certificate required to obtain the exemption set forth in W. Va. Code § 5B-2B-1.

9.3.9.1 The owner of such facility, or a lessee making leasehold improvements in the facility which inure to the benefit of the owner of the facility, shall obtain from the Tax Commissioner and furnish to the contractor a material purchase certificate for the project involved, and the contractor may purchase materials, machinery and equipment for incorporation in such project.

9.3.9.2 The contractor shall furnish the number on such certificate to all suppliers from whom such purchases are made, and such suppliers shall execute invoices covering the same and bearing the number of such certificate.

9.3.9.3 Upon completion of the project, the contractor shall furnish to the owner of the qualified business facility a sworn statement, on a form to be prescribed by the Tax Commissioner, that all purchases so made were

entitled to exemption. All invoices shall be retained by the contractor for a period of five (5) years and shall be subject to audit by the Tax Commissioner.

9.3.9.4 Any contractor or any agent, employee or subcontractor thereof, who shall use or otherwise dispose of any materials, machinery or equipment purchased under such a material purchase certificate for any purpose other than that for which the certificate is issued without paying the tax imposed by W. Va. Code § 11-15-1 et seq. or W. Va. Code § 11-15A-1 et seq. shall be liable for payment of such taxes including interest, any applicable additions to tax plus any penalty and applicable criminal sanctions.

9.3.10 Sales of tangible personal property or taxable services to a corporation or organization which has a current Business Registration Certificate issued under W. Va. Code § 11-12-1 et seq., which is exempt from federal income taxes under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended, and which satisfies one of the following requirements:

9.3.10.1 The corporation or organization is a church or a convention or association of churches as defined in Section 170 of the Internal Revenue Code of 1986, as amended.

9.3.10.2 The corporation or organization is an elementary or secondary school, whether public or private, which maintains a regular faculty and curriculum and has a regularly enrolled body of pupils or students in attendance at the place in this State where its educational activities are regularly carried on.

9.3.10.3 A corporation or organization which annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions, or membership fees as defined in Section 2 of these regulations.

9.3.10.4 An organization which has no paid employees and its gross income from fund raisers, less reasonable and necessary expenses incurred to raise such gross income (or the tangible personal property or services purchased with such net income), is donated to an organization which is exempt from income taxes under Section 501(c)(3) or (4) of the Internal Revenue Code of 1986, as amended.

9.3.10.5 A youth organization, such as the Girl Scouts of the United States of America, or the Boy Scouts of America, or the YMCA Indian Guide/Princess Program, and the local affiliates thereof, which is organized and operated exclusively for charitable purposes and has as its primary purpose the nonsectarian character development and citizenship training of its members.

9.3.10.6 The exemption allowed by W. Va. Code § 11-15-9(f) and this Section 9.3.10 does not apply to sales of gasoline or special fuel or to sales of tangible personal property or services to be used or consumed in the generation of unrelated business income as defined in Section 513 of the Internal Revenue Code of 1986, as amended.

9.3.10.7 The exemption authorized by W. Va. Code § 11-15-9(f) and this Section 9.3.10 shall apply only to services, equipment, supplies and

materials used or consumed in the activities for which such organizations qualify as tax exempt organizations under the Internal Revenue Code by these organizations and shall not apply to purchases of gasoline or special fuel.

9.3.10.8 A corporation or organization which fails to satisfy the requirements in the foregoing Section 9.3.10, such requirements being necessary to claim an exemption, must pay the tax but may not claim a refund unless some other exemption is available.

9.3.11 Sales of electronic data processing services and related software: Provided, That for the purposes of this Section, "electric data processing services" means (1) the processing of another's data, including all processes incident to processing of data such as keypunching, keystroke verification, rearranging, or sorting of previously documented data for the purpose of data entry or automatic processing, and changing the medium on which data is sorted, whether these processes are done by the same person or several persons; and (2) providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment. So long as the electronic data processing service is performed for another person who is in no manner a part of the entity performing the service, and provided that the charge is actually and only for the sale of electronic data processing services and does not include any charges for other activities, the exemption will apply.

9.3.11.1 This exemption does not apply to the sale of computer software, whether of canned or custom design, if such software is not to be used for the processing another's data. In other words, the purchase of software for a person's own computer is not exempt unless that person is in the business of processing data for others and the software is to be utilized for that purpose.

9.3.11.2 This exemption does not apply to any purchase of computer hardware.

9.3.12 Dispensing of services performed by one corporation for another corporation when both corporations are members of the same controlled group. Control means ownership, directly or indirectly, of stock possessing fifty percent or more of the total combined voting power of all classes of the stock of a corporation entitled to vote or ownership, directly or indirectly, of stock possessing fifty percent or more of the value of the corporation. Purchases of taxable services from an entity outside the controlled group by a member of the controlled group for use by other members of the controlled group are not exempt from consumers sales and service tax or use tax as a purchase for resale under W. Va. Code § 11-15-9(j) or Section 9.3.4.2 of these regulations.

9.3.13 Food, as defined in Section 2.30 of these regulations, when purchased by the following organizations shall be exempt:

9.3.13.1 Food purchased by public or private schools, school sponsored student organizations, or school sponsored parent-teacher associations and sold to students enrolled in such school or to employees of such school during normal school hours, but not those sales of food made to the general public. For further information about this exemption, See Section 126 of these regulations.

9.3.13.2 Food purchased by a public or private college or university or by a student organization officially recognized by such college or university to students enrolled at such college or university when such sales are made on a contract basis so that a fixed price is paid for consumption of food products for a specific period of time without respect to the amount of food product actually consumed by the particular individual contracting for the sales and no money is paid at the time the food product is serviced or consumed. For additional information about this exemption, See Section 126 of these regulations.

9.3.13.3 Food purchased by a charitable or private nonprofit organization, a nonprofit organization or a governmental agency under a program to provide food to low-income persons at or below cost.

9.3.13.3.a For additional information about this exemption, See Section 126 of these regulations.

9.3.14 Sales of motion picture films to motion picture exhibitors for exhibition if the sale of tickets or the charge for admission to the exhibition of the film is subject to the sales and service tax.

9.3.15 Sales of coin-operated video arcade machines, or video arcade games to a person engaged in the business of providing such machines or games to the public for a charge upon which the sales and service tax is imposed and which is remitted to the Commissioner.

9.4 Refundable Exemptions. - The vendor liable for collection of the consumers sales and service tax or use tax shall collect such taxes when making the following sales of tangible personal property or taxable services (unless the purchaser presents his direct pay permit number issued by the Tax Commissioner under W. Va. Code §§ 11-15-9d and 11-15A-3d and provided that the sales are not exempt under paragraph 9.2 of these regulations); and such taxes, after payment, shall, upon proper application therefor, be refunded or credited to the purchaser as provided in W. Va. Code §§ 11-15-9b and 11-15A-3b:

9.4.1 Sales of property or services to persons engaged in this State in the business of manufacturing, transportation, transmission, communication or in the production of natural resources (as such terms are defined in Section 2): Provided, That the exemption provided in this Section shall only apply to services, machinery, supplies and materials directly used or consumed in the activities of manufacturing, transportation, transmission, communication or the production of natural resources in the businesses or organizations named above and shall not apply to purchases of gasoline or special fuel. For further information See Section 123 of these regulations.

9.4.1.1 For example:

9.4.1.1.a Sales of janitorial services and supplies to a person who manufactures chemicals are not exempt but the sale of raw materials utilized in a chemical manufacturing process would be exempt.

9.4.1.1.b Sales of telephone poles and wires to a telephone or telegraph company are generally exempt; however, purchases of telephone poles

and wires or other goods and services used in activities not subject to the Telecommunications Tax, W. Va. Code § 11-13B-1 et seq., are not exempt unless directly used in communications activities as defined in Section 2.16 of these regulations.

9.4.1.1.c Charges for the transportation of a product between different locations of the same manufacturer where subsequent steps in the manufacturing process occur are exempt.

9.4.1.1.d Sales to contract miners to be directly used in the extraction of natural resources would be exempt while those purchases not directly used in that activity would be taxable. However, if a contract miner is subject to the Severance Tax, W. Va. Code § 11-13A-1 et seq., all purchases whether directly or not directly used in the conduct of privileges which are subject to the Severance Tax are exempt. See Section 9.4.4 of these regulations for additional information.

9.4.1.2 The sale, to be exempt, must be of tangible personal property or taxable services directly used or consumed (as defined in Section 2 of these regulations) in the business activity of manufacturing, transportation, transmission, communication or in the production of natural resources.

9.4.2 Sales of tangible personal property or services to nationally chartered fraternal or social organizations when such property or services are purchased for the sole purpose of free distribution in public welfare or relief work: Provided, That sales of gasoline and special fuel shall be taxable. This exemption is applicable to only those purchases of property or services which will be distributed free in public welfare or relief work. All other purchases will be subject to the consumers sales and service tax or the use tax unless such purchases are exempt under some other provision of these regulations.

9.4.3 Sales and services of fire fighting or station house equipment, including construction and automotive equipment, made to any volunteer fire department organized and incorporated under the laws of the State of West Virginia: Provided, That sales of gasoline and special fuel shall be taxable.

9.4.4 Sales of property and services to persons subject to the Business and Occupation Tax, W. Va. Code § 11-13-1 et seq., the Severance Tax or the Telecommunications Tax after June 30, 1987: Provided, That this exemption shall apply only to tangible personal property or services used or consumed in the conduct of privileges which are subject to one of the above-referenced taxes and shall not apply to purchases of gasoline or special fuel.

9.4.4.2 It should be noted that some entities may be engaged in many activities, some of which are subject to the B & O, severance or telecommunications tax and some of which are not subject to such taxes. If a purchaser will use the purchase in more than one activity, the purchaser must apportion the purchase price in accordance with Section 9d of these regulations.

9.4.5 Sales of building materials or building supplies or other property to an organization qualified under Section 501(c)(3) or (c)(4) of the

Internal Revenue Code of 1986, as amended, which are to be installed in, affixed to or incorporated by such organization or its agent into real property, or into a building or structure which is or will be used as permanent low-income housing, transitional housing, emergency homeless shelter, domestic violence shelter or emergency children and youth shelter if such shelter is owned, managed, developed or operated by an organization qualified under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended.

9.4.5.1 The qualified organization must purchase the materials or property in order to claim this exemption.

9.4.5.2 The materials or property must be installed in, affixed to or incorporated into real property or a structure which will be used for the purposes stated in Section 9.4.5 of these regulations.

9.4.5.2.a Either the qualified organization or its agent must install, affix or incorporate the property or materials into the qualified structure or real property.

9.4.5.2.b For purposes of this exemption, agent is defined as being a person employed by the qualified organization for the purpose of installing, affixing or incorporating the materials or property into the qualified real property, building or structure.

9.4.6 Sales of property or services to bona fide charitable organizations which make no charge whatsoever for the services they render: Provided, That this exemption shall apply only to services, equipment, supplies, food for meals and materials directly used or consumed by those organizations, and shall not apply to purchases of gasoline or special fuel.

9.4.6.1 For purposes of this exemption, a bona fide charitable organization is an organization which qualifies or is qualified under I.R.C. § 501(c)(3) or under Section 2.12 of these regulations.

9.4.7 Sales of aircraft repair, remodeling and maintenance services when such services are to an aircraft operated by a certificated or licensed carrier of persons or property, or by a governmental entity or to an engine or other component part of an aircraft operated by a certificated or licensed carrier of persons or property, or by a governmental entity.

9.4.7.1 Sales of tangible personal property that is permanently attached as a component part of an aircraft owned or operated by a certificated or licensed carrier of persons or property, or by a governmental entity, as part of the repair, remodeling or maintenance service.

9.4.7.2 Sales of machinery, tools, or equipment, directly used or consumed exclusively in the repair, remodeling, or maintenance of aircraft, aircraft engines, or aircraft component parts, for a certificated or licensed carrier of persons or property, or for a governmental entity.

9.4.8 Sales of tangible personal property and services to a person entitled to claim the tax credit for investment in certain management information services facilities allowed under W. Va. Code § 11-13D-3c, pursuant

to the issuance of a management information services tax credit certification by the Tax Commissioner in accordance with W. Va. Code § 11-13D-3c(e), when such property or services are directly used or consumed by the purchaser in the operation of the management information services facility, as defined in Section 2 of these regulations for which credit is allowed under W. Va. Code § 11-13D-3c. Tangible personal property, or services, directly used or consumed in the operation of a management information services facility includes only: (1) computer processing and telecommunications equipment; (2) data storage and input/output devices; (3) disaster recovery services; (4) supplies; (5) application, telecommunication and operating system software; (6) repair and maintenance of any of the aforesaid items; and (7) other tangible personal property or services directly used or consumed in the operation of a management information services facility: Provided, That the property is purchased or leased after March 31, 1991. This exemption shall not apply to tangible personal property, or services, that are not directly used or consumed in the operation of a management information services facility, or to gasoline or special fuel: Provided, however, that nothing in this paragraph shall be construed to limit, exclude or preclude the application or availability of any other exemption set forth in this W. Va. Code § 11-15-9, elsewhere in the Code or in these regulations, which might otherwise apply to any sale of tangible personal property or services.

9.5 Specific Use Tax Exemptions. - The use in this State of the following tangible personal property and taxable services is specifically exempted from the use tax:

9.5.1 All articles of tangible personal property brought into the State of West Virginia by a nonresident individual thereof for his or her use or enjoyment while temporarily within this State or while passing through this State, except gasoline and special fuel: Provided, That fuel contained in the supply tank of a motor vehicle that is not a motor carrier shall not be taxable. In other words, vacationers, visitors or other nonresident individuals may bring tangible personal property, including gasoline in their personal vehicles, into this State for their own use without imposition of use tax.

9.5.1.1 All tangible personal property brought into this State for use or consumption in this State by a nonresident contractor is subject to W. Va. Code § 11-15-8b and Section 8b of these regulations. See Section 110 of these regulations for further information.

9.5.2 Tangible personal property or services, the gross receipts from the sale of which in this State are exempt from the consumers sales and service tax by the terms of W. Va. Code § 11-15-1 et seq. and provided that the property or services are being used for the purpose for which it was exempted.

9.5.3 Tangible personal property or services, the gross receipts from the sale of which in this State are required to be included in the measure of the consumers sales and service tax, and upon which such tax has been paid. It is necessary for the purchaser to provide a receipt showing that the consumers sales and service tax has been paid.

9.5.4 Tangible personal property or services, the sale of which in this State is not subject to the consumers sales and service tax. The exemption

contained herein is related directly to the purchase or use of a taxable service or a particular item of tangible personal property and not to the status of the vendee. In other words, it is use or sale of the particular article or property or service which is exempt. For example, X, a resident of West Virginia, has his federal and state income tax returns prepared by an Ohio certified public accountant. X will pay no use tax thereon because the purchase within West Virginia of professional services is not subject to consumers sales and use tax.

9.6 Exemptions; Exception for Liquors and Wines Purchased for Resale. - The exemption provided for sales of tangible personal property purchased for resale does not apply to purchases of alcoholic liquor, wines or fortified wines, as defined in Chapter 60 of the Code, from the Alcohol Beverage Control Commissioner or retail liquor licenses licensed under the authority of W. Va. Code § 60-3A-1 et seq. for resale by persons or organizations licensed under authority of W. Va. Code § 60-7-1 et seq.

9.7 Moving Residence or Business Into State. - The use tax shall not apply to tangible personal property purchased outside this State for use outside this State by a person who at that time was a nonresident natural person, or a business entity not actually doing business within this State, who or which later brings such tangible personal property into this State in connection with his establishment of a permanent residence or business in this State: Provided, That such property was purchased more than six (6) months prior to the date it was first brought into this State, or six (6) months prior to the establishment of such residence or business, whichever first occurs.

9.7.1 Tangible personal property used out-of-state for six (6) or more months by a nonresident individual, or a business entity not actually doing business in this State, that is brought into this State for use by such individual or business in this State in connection with moving the person's residence or business into this State is exempt regardless of how it was brought into this State.

9.7.2 Property purchased and used out-of-state for less than six (6) months by a nonresident individual, or by a business not actually doing business in this State, will be subject to use tax when such property is relocated in this State in connection with moving the person's residence or business into this State unless:

9.7.2.1 One of the exemptions in this Section 9 specifically applies; or

9.7.2.2 If the amount of sales or use taxes lawfully paid to another State with respect to such property is equal to or greater than the amount of this State's use tax otherwise due on the original purchase price of the property at the time it is brought into this State, then no West Virginia use tax is due. However, if the amount of West Virginia use tax exceeds the amount of tax lawfully paid in another state, the difference must be remitted to the Tax Commissioner.

**§ 110-15-9a. Method for Claiming Exemptions, Refunds of Tax, Credit Against Other Taxes.**

9a.1 General. - Any person having a right or claim to an exemption from the consumers sales and service tax or the use tax by reason of any of the foregoing exemptions in Section 9 of these regulations, except those exemptions set forth in Sections 9.2, 9.3, 9.5, 9.6 and 9.7 of these regulations, and who is not utilizing the direct pay permit procedure authorized in Section 9c of these regulations, shall pay to the vendor the consumers sales and service tax and use tax imposed and may exercise or assert such exemption only in accordance with the following Section 9a.2 or Section 9a.3 of these regulations.

9a.2 No refund shall be due and no credit shall be allowed unless the taxpayer or assignee shall have filed a claim for refund or a claim for credit, as appropriate, with the Tax Commissioner in accordance with this Section.

9a.3 Any claim for a refund of consumers sales and service tax or use tax overpayments or a tax credit for consumers sales and service tax or use tax overpayments which is not timely filed or not filed in proper form or in accordance with the requirements of this Section shall not be construed to constitute an obligation of the State of West Virginia for payment. No overpayment of consumers sales and service tax or use tax shall be subject to either W. Va. Code § 11-10-17(d) or 11-10-17(e)(1).

9a.4 Filing Claim for Refund. - Any person who has paid the consumers sales and service tax or the use tax imposed and who may lawfully claim any exemption set forth under Section 9.1 of these regulations which is not enumerated in the foregoing Section 9a.1 of these regulations, may exercise or assert such claim by filing a claim for refund of the consumers sales and service tax or the use tax overpayments on such form and in such manner as the Tax Commissioner may require and in accordance with the requirements of this Section.

9a.5 Filing Claim for Credit. - In lieu of filing a claim for refund of consumers sales and service tax and use tax overpayments, the taxpayer may, at his option and within one year from the date of payment of the tax, file a claim for credit on such form and in such manner as the Tax Commissioner may require and credit the amount of consumers sales and service tax and use tax overpayments against certain payments of other taxes due, so long as such credit is applied in accordance with the requirements in Sections 9a.3.1 through 9a.3.10 of these regulations.

9a.5.1 This procedure may not be utilized unless the purchaser has submitted a properly completed application for credit to the Tax Commissioner.

9a.5.1.1 An application for credit is required each time a purchaser seeks to utilize this procedure.

9a.5.1.2 Any credit may be disallowed as a result of Tax Department audits of the taxpayer's records.

9a.5.2 Method of Applying Credit.

9a.5.2.1 If the taxpayer is a vendor who is subject to consumers sales and service tax on certain purchases, he may credit the amount of consumers sales and service tax and use tax overpayments made against the consumers sales and service tax liability accrued through the use of his direct

pay permit and apply any remaining tax liability against his quarterly or monthly remittance of the consumers sales and service tax imposed and otherwise due; or

9a.5.2.2 If the taxpayer is a vendor who is subject to the use tax on certain purchases, he may credit the amount of consumers sales and service tax and use tax overpayments remaining after application of the foregoing Section 9a.3.2.1 of these regulations against the use tax liability accrued through the use of his direct pay permit and apply the remaining tax liability against his monthly remittance of the use tax imposed and otherwise due; or

9a.5.2.3 If the taxpayer is subject to the consumers sales and service tax, he may credit the amount of consumers sales and service tax and use tax overpayments remaining after application of the foregoing Section 9a.3.2.1 and 9a.3.2.2 of these regulations against his quarterly or monthly remittance of the consumers sales and service tax imposed and otherwise due; or

9a.5.2.4 If the taxpayer is subject to the use tax, he may credit the amount of consumers sales and service tax and use tax overpayments remaining after application of the foregoing Sections 9a.3.2.1 through 9a.3.2.3 of these regulations against his quarterly remittance of the use tax imposed and otherwise due; or

9a.5.2.5 If the taxpayer is subject to the business and occupation tax, W. Va. Code § 110-13-1 et seq., he may credit the amount of consumers sales and service tax and use tax overpayments after application of the foregoing Sections 9a.3.2.1 through 9a.3.2.4 of these regulations against his quarterly or monthly remittance of the Business and Occupation Tax imposed and otherwise due; or

9a.5.2.6 If the taxpayer is subject to the Annual Tax On Incomes Of Certain Carriers imposed by W. Va. Code § 11-12A-1 et seq., he may credit the amount of consumers sales and service tax and use tax overpayments remaining after application of the foregoing Sections 9a.3.2.1 through 9a.3.2.5 of these regulations against his annual or semiannual remittance of the tax imposed under W. Va. Code § 11-12A-1 et seq. and otherwise due; or

9a.5.2.7 If the taxpayer is subject to the Severance Tax imposed under W. Va. Code § 11-13A-1 et seq., the taxpayer may credit the amount of consumers sales and service tax and use tax overpayments remaining after application of the foregoing Sections 9a.3.2.1 through 9a.3.2.6 of these regulations against the taxpayer's quarterly or monthly remittance of the Severance Tax imposed and otherwise due; or

9a.5.2.8 If the taxpayer is subject to the Telecommunications Tax imposed under W. Va. Code § 11-13B-1 et seq., the taxpayer may credit the amount of consumers sales and service tax and use tax overpayments remaining after application of the foregoing Sections 9a.3.2.1 through 9a.3.2.7 of these regulations against the taxpayer's quarterly or monthly remittance of the Telecommunications Tax imposed and otherwise due; or

9a.5.2.9 If the taxpayer is subject to the Corporation Net Income Tax imposed under W. Va. Code § 11-24-1 et seq., the taxpayer may credit the amount of consumers sales and service tax and use tax overpayments remaining after application of the foregoing Sections 9a.3.2.1 through 9a.3.2.8 of these regulations against the taxpayer's installment of estimated tax for the Corporation Net Income Tax imposed and otherwise due under W. Va. Code § 11-24-17; or

9a.5.2.10 If the taxpayer is subject to the Personal Income Tax imposed under W. Va. Code § 11-21-1 et seq., the taxpayer may credit the amount of use tax overpayments remaining after application of the foregoing Sections 9a.3.2.1 through 9a.3.2.9 of these regulations against the taxpayer's installment of estimated tax for the Personal Income Tax imposed and otherwise due under W. Va. Code § 11-21-56; or

9a.5.2.11 If the taxpayer is subject to the Business Franchise Tax imposed under W. Va. Code § 11-23-1 et seq., the taxpayer may credit the amount of consumers sales and service tax and use tax overpayments remaining after application of the foregoing Sections 9a.3.2.1 through 9a.3.2.10 of these regulations against the taxpayer's annual remittance of the Business Franchise Tax imposed and otherwise due; or

9a.5.2.12 If the taxpayer is required to deduct and withhold personal income tax under W. Va. Code § 11-21-1 et seq., the taxpayer may credit the amount of consumers sales and service tax and use tax overpayments remaining after application of the foregoing Sections 9a.3.2.1 through 9a.3.2.11 of these regulations against the taxpayer's monthly remittance of the personal income tax withheld under said W. Va. Code § 11-21-1 et seq. and otherwise due.

9a.6 Documents Supporting Claim for Exemption. - Any person asserting or exercising a claim of exemption from the consumers sales and service tax and use tax under the foregoing Sections 9a.2 or 9a.3 of these regulations shall file with the Tax Commissioner an application for exemption and shall file such affidavits, invoices, sales slips, records or documents as the Tax Commissioner may require to prove or verify the taxpayer's right and entitlement to such exemption. The Tax Commissioner may inspect or examine the records, books, papers, documents, affidavits, sales slips and invoices of a taxpayer or any other person to verify the truth and accuracy of any report or return or to ascertain whether the consumers sales and service tax or the use tax has been paid.

9a.6.1 In addition to the powers of the Tax Commissioner set forth in W. Va. Code § 11-10-1 et seq., as a further means of obtaining the records, books, papers, documents, affidavits, sales slips or invoices of a taxpayer or any other person and ascertaining the amount of sales and services taxes or use taxes paid or due under W. Va. Code § 11-15-1 et seq. or W. Va. Code § 11-15A-1 et seq. or under any report, form, document or affidavit required, the Tax Commissioner shall have the power to examine witnesses under oath; and if any witness shall fail or refuse at the request of the Tax Commissioner to grant access to the books, records, papers, documents, affidavits, sales slips or invoices requested by the Tax Commissioner, the Tax Commissioner shall certify the facts and the names to the circuit court of the county having jurisdiction over the party, and such court shall thereupon issue a subpoena duces tecum to

such party to appear before the Tax Commissioner, at a place designated within the jurisdiction of such court, on a day fixed.

9a.7 Time Limit for Filing Claim for Refund. - All claims for refund of consumers sales and service tax or use tax overpayments, including applications from vendors for authorizations to apply the amounts of consumers sales and service tax and use tax paid for business purchases against the amounts of such consumers sales and service tax collected from consumers, under Section 9a.2 of these regulations shall be filed within the time limitation for filing claims for refund set forth in W. Va. Code § 11-10-14. Any claim for such refund or claim of entitlement to such refund made or asserted after the said time limitation shall be null and void, and if the consumers sales and service tax or use tax overpayment has not otherwise been credited against tax remittances in accordance with this Section, such claims shall be forfeited.

9a.8 Time Limit for Filing Claim for Credit. - Any credit of consumers sales and service tax or use tax overpayments against taxes under Section 9a.3 of these regulations shall be taken within one (1) year after the payment of the tax by the taxpayer to the vendor. Any such credit or claim of entitlement to such credit made or asserted more than one year after the payment of such tax by the taxpayer to the vendor shall be null and void, and such tax overpayments shall be forfeited.

9a.9 Assignment of Right to Refund or Credit. - Any assignment of the right or entitlement to a refund or credit arising under either W. Va. Code § 11-15-9b or W. Va. Code § 11-15A-3b shall be subject to strict proof. Any assignee claiming a right or entitlement to an assigned refund or credit shall submit to the Tax Commissioner and in the form prescribed or approved by him, an affidavit signed by the assignor and acknowledging the assignment. The assignee shall attest to the assignment and the terms thereof in his signed application for refund or credit. The assignee will be subject to the penalties provided under West Virginia law for perjury for any falsehood set forth in his signed application. The assignee also will be subject to the penalties set forth in W. Va. Code § 11-9-1 et seq. Except as provided in Section 9a.8 of these regulations, no payment of a refund arising under this Section shall be made to any person other than the taxpayer or assignee of the taxpayer making the original overpayment of consumers sales and service tax or use tax.

**§ 110-15-9b. Reserved for Future Use.**

**§ 110-15-9c. Direct Pay Permits.**

9c.1 Eligibility for Permit. - A person may apply for a direct pay permit if such person (i) has a current business registration certificate and (ii) is not delinquent on the payment of any taxes imposed by Chapter 11 of the West Virginia Code and (iii) satisfies any one of the following conditions:

9c.1.1 Is engaged in the business of manufacturing, transportation, transmission, communication or the production of natural resources.

9c.1.2 Is subject to tax under §§ 11-13-1 et seq. (Business and Occupation Tax), W. Va. Code §§ 11-13A-1 et seq. (Severance Tax) or W. Va. Code § 11-13B-1 et seq. (Telecommunications Tax).

9c.1.3 Is a bona fide charitable organization that makes no charge whatsoever for services it renders.

9c.1.4 Is a nationally chartered fraternal or social organization, the purchases of which are used for the sole purpose of free distribution in public welfare or relief work.

9c.1.5 Is a volunteer fire department organized and incorporated under the laws of the State of West Virginia.

9c.1.6 Makes purchases of tangible personal property or services, the use of which is unknown to him at the time of the purchase and one of the reasonably foreseeable uses would render the purchase exempt from consumers sales and service tax and use tax.

9c.1.7 Makes purchases of tangible personal property or services which are used in both exempt and taxable manners and who must pay tax on an apportionment basis.

9c.2 Applying for a Permit, Form. - A person seeking a direct pay permit must file a properly completed Application for Direct Pay Permit (Form WV/CST-250) with the West Virginia State Tax Department, Accounting Division, P. O. Drawer 425, Charleston, West Virginia 25322-0425. Applications may be obtained by mail from the West Virginia Tax Department, P. O. Drawer 2389, Charleston, West Virginia 25328, or may be picked up during regular business hours at the West Virginia State Revenue Center, 1001 Lee Street, East, Charleston, West Virginia, at the Taxpayer Services Division of the State Tax Department, Room W-417, State Capitol Building, Charleston, West Virginia or at any State Tax Department local field office.

9c.3 Issuance. - The Tax Commissioner, upon review of the application filed, has the sole discretion to issue a direct pay permit. If the application is approved, a numbered direct pay permit will be mailed to the applicant. Should the application be disapproved or rejected, the applicant will be so notified in writing.

9c.4 Validity; Renewal of Permit. - A direct pay permit shall continue to be valid until (i) surrendered by the holder or (ii) cancelled for cause or (iii) the expiration of the business' registration year under W. Va. Code § 11-12-1 et seq. A direct pay permit that expires by reason of the expiration of the business' registration year shall be renewed automatically when the business' business registration certificate is issued for the next succeeding fiscal year unless cancelled for cause or surrendered by the holder thereof.

9c.5 Cancellation of Permit.

9c.5.1 Cause. - A direct pay permit may be cancelled or not renewed for cause. Cause shall include any one of the following:

9c.5.1.1 The direct pay permit holder is delinquent by more than thirty (30) days in the payment of any tax imposed by Chapter 11 of the West Virginia Code.

9c.5.1.2 The direct pay permit holder utilizes the permit in any unauthorized manner, including but not limited to making purchases of items for personal use or consumption of an individual officer, employee or proprietor of a business or organization when the permit is issued to the business or organization.

9c.5.1.3 The direct pay permit holder fails to file a direct pay return for any period in accordance with Section 9c.7 of these regulations within five (5) days after the due date thereof.

9c.5.1.4 Effective July 1, 1990, an applicant for a direct pay permit or an applicant for renewal of a direct pay permit shall not be issued a direct pay permit or direct pay permit renewal if the applicant is not, or is no longer, authorized to receive or use a direct pay permit under Section 9c.1 of these regulations, or under any other provision of these regulations, or under any provision of the West Virginia Code.

9c.5.2 Procedure. - The Tax Commissioner shall give the direct pay permit holder written notice of the Tax Commissioner's intent to cancel or not renew a direct pay permit.

9c.5.2.1 The notice shall contain the reason for the cancellation or nonrenewal, the date when the cancellation or nonrenewal becomes effective, and the date, time and place where the taxpayer may appear and show cause why the intended action should not occur.

9c.5.2.2 The written notice shall be served upon the taxpayer in the same manner as a notice of assessment is served under W. Va. Code § 11-10-5e and the notice shall be served not less than twenty (20) days prior to the date of the informal show cause hearing.

9c.5.2.3 Failure to appear at a show cause hearing shall result in the direct pay permit holder's forfeiture of its right to such hearing and shall render the cancellation or nonrenewal final and not subject to administrative or judicial review. Should the direct pay permit holder be dissatisfied with the administrative decision resulting from the show cause hearing, an appeal may be taken to circuit court in accordance with the appeal procedure provided in W. Va. Code § 11-10-10.

9c.5.2.4 The cancellation or nonrenewal of a direct pay permit shall not be stayed unless directed by a circuit court or the Tax Commissioner.

9c.5.3 Effect. - Upon the expiration, non-renewal, cancellation or surrender of a direct pay permit, the provisions of W. Va. Code § 11-15-1 et seq. and W. Va. Code § 11-15A-1 et seq., without regard to direct pay permits, shall apply to the person who previously held such permit. Each person who held a direct pay permit that has expired, not been renewed, been cancelled or surrendered shall promptly notify in writing all vendors from whom he purchases or leases tangible personal property or purchases taxable services with the use of direct pay permits that such permit was cancelled or surrendered. The notice required by this Section shall be made within ten (10) days after the permit has been cancelled or surrendered. Upon receipt of such notice, the vendor or retailer shall not be relieved pursuant to Section 4.3.3 (relating to acceptance

of direct pay number in lieu of collecting tax) of these regulations from its requirement to collect the consumers sales and service tax and the use tax on all sales or leases of tangible personal property and sales of taxable services thereafter made to or for such person.

9c.6 Use of Direct Pay Permit.

9c.6.1 In General. - A direct pay permit may be used when the holder thereof notifies a vendor or retailer of his direct pay permit number in accordance with Section 9c.6.2 of these regulations. Upon receipt of such notice, the vendor or retailer shall be absolved from its responsibility to collect and remit consumers sales and service tax and use tax with respect to the transaction governed by the notice and such direct pay permit holder shall report the taxes to the Tax Commissioner in accordance with Section 9c.7 of these regulations.

9c.6.2 Notice. - The notice by the direct pay permit holder to the vendor or retailer may relate to a particular transaction or may apply such to present and future transactions as specified in such notice.

9c.6.3 Notwithstanding anything to the contrary, a direct pay permit may not be used in the following situations:

9c.6.3.1 If the direct pay permit has been cancelled, surrendered or has expired.

9c.6.3.2 For the purchase of food.

9c.6.3.3 Effective on and after July 1, 1990, as a device to defer payment of consumers sales and service tax or use tax.

9c.6.3.4 Effective on and after July 1, 1990, as a substitute for an exemption certificate or material purchase certificate.

9c.6.3.5 For the purchase of gasoline or special fuel. See Section 11.8 of these regulations.

9c.7 Reporting and Payment of Tax by Permit Holder.

9c.7.1 Determination of Taxable Status. - Each direct pay permit holder is required to determine the taxable status of each purchase and report it on the return covering the period in which the purchase occurred. If the holder cannot at the time of the purchase reasonably determine whether the use of the tangible personal property or services so purchased will be exempt from tax, the holder may report the purchase as exempt on the return covering the period in which the purchase occurred: Provided, that if the holder later uses the property in a manner that is not exempt from use tax, the holder must report such use and pay tax thereon on a quarterly use tax return Form WV/CST-220.

9c.7.2 Return. - A direct pay return shall show for the reporting period the value (monetary consideration or purchase price) of the direct pay permit holder's total purchases of tangible personal property and services for which a direct pay permit was used, the amount of purchases exempt from tax, and

the amount of tax due from the permit holder, which amount shall accompany the return.

9c.7.3 Due Dates of Returns.

9c.7.3.1 On or before the fifteenth (15th) day of each month, every direct pay permit holder shall make and file with the Tax Commissioner a direct pay permit tax return for the preceding month on the Form WV/CST-210 or WV/CST-230.

9c.7.3.2 Returns Made on or After July 1, 1990.

9c.7.3.2.1 After June 30, 1990, if the amount of consumers sales and service tax and use tax in total due from the taxpayer averages less than $100 per month for the taxable year or for the taxpayer's immediately preceding taxable year, the taxpayer may file a combined consumers sales and service tax and use tax direct pay permit return quarterly, in lieu of monthly returns. The tax shown thereon to be due shall be remitted on or before the fifteenth (15th) day following the close of the calendar quarter.

9c.7.3.2.2 After June 30, 1990, if the amount of consumers sales and service tax and use tax in total due from the taxpayer averages less than $50 per calendar quarter or averaged less than $50 per calendar quarter during the taxpayer's immediately preceding taxable year, the taxpayer may file a combined consumers sales and service tax and use tax annual direct pay permit return. The amount of tax shown thereon to be due shall be remitted on or before the last day of January of the next succeeding calendar year after the calendar year during which the tax accrued.

9c.7.4 The Tax Department, upon written request by a direct pay permit holder, may grant a reasonable extension of time for the making and filing of direct pay permit returns, and paying the tax due. Interest on such tax shall be chargeable on every extended payment at the rate specified in W. Va. Code § 11-10-17.

9c.8 Recordkeeping Requirements.

9c.8.1 If the direct payment permit holder does not timely file the appropriate return for tangible personal property or taxable services purchased through the use of the direct payment permit, the permit holder has not claimed exemption for such purchases; in this situation, "timely filing" means to claim the exemption for the purchase on the next return required to be filed after the purchase transaction is completed. Failure to properly claim the exemption on the direct pay permit return will result in loss of the exemption on the transaction with tax therefore due on the purchase.

9c.8.2 Failure to pay the tax at the time of the sale and failure to properly claim the exemption will result in the taxpayer being classified as being delinquent in the payment of the consumers sales and service tax or use tax. As a result, the taxpayer will be subject to the payment of the delinquent tax, interest, additions to tax and penalties as authorized by W. Va. Code § 11-9-1 et seq. and W. Va. Code § 11-10-1 et seq.

## § 110-15-9d. Apportionment of Purchase Price.

9d.1 Whenever a purchaser will use tangible personal property or a service or the results of a service for both exempt and nonexempt purposes, the gross proceeds paid to the vendor of such property or service shall be apportioned between the exempt and nonexempt uses in a reasonable manner acceptable to the Tax Commissioner. In the absence of books and records documenting how gross proceeds were apportioned and how the property or service or the results of a service were actually used by the purchaser, that portion of the gross proceeds for which exemption is claimed shall be disallowed and the tax due thereon shall be paid by the purchaser. In those instances where apportionment of the purchase price is difficult to calculate and therefore assure taxpayer compliance, the Tax Commissioner may establish safe harbors which will assist in the development of uniform apportionment calculations for similarly situated taxpayers. Appropriate administrative notice must be filed in the State Register at least thirty (30) days prior to the effective date of the subject matter of the safe harbor being established.

9d.1.1 Persons engaged in multiple business activities will pay tax on their purchases for use in their overall business operation on an apportionment basis.

9d.1.1.1 A person engaged in the business of selling tangible personal property is subject to tax on all purchases except purchases for resale in the form of tangible personal property. A person engaged in the business of manufacturing is subject to tax on all purchases except purchases of tangible personal property and services directly used in the manufacturing activity. Therefore, a person engaged in both business activities who purchases equipment which is used in the sale of such property and directly used in the manufacturing activity may exempt from tax the amount of the purchase price apportioned to manufacturing activity use.

9d.1.1.2 If purchases for use in business can be identified as being used exclusively in one or the other business activities, the purchase price may be totally taxable or totally exempt. Any method of apportionment may be used as long as it is appropriate and reasonable for the situation.

9d.1.2 Persons who must pay tax on their purchases on an apportionment basis must either pay the total tax on the purchase (and claim a refund or credit) or use a direct pay permit under rules set forth in Section 9c of these rules. A direct pay permit may be used to purchase goods for resale without imposition of the tax, at the time of sale. By the fifteenth (15th) of each month, or as otherwise provided in Section 9c.7 of these regulations, a direct pay permit consumers sales and service tax and use tax return must be filed by the direct pay permit user, together with the tax due on taxable purchases made using the direct pay permit during the previous month.

9d.2 Whenever the vendor and purchaser are related persons or the sale is under other circumstances where the relation between the vendor and purchaser is such that the gross proceeds may not be indicative of the true value of the tangible personal property or services purchased, the Tax Commissioner shall revalue the transaction whenever he believes that the gross proceeds thereof are not indicative of the true value of the transaction. Adjusted gross proceeds

shall correspond as nearly as possible to the gross proceeds derived in this State from the sale of similar tangible personal property or services of like quality or character where no common interest exists between the vendor and purchaser but the circumstances and conditions are otherwise similar.

**§ 110-15-10. Material Purchase Certificate.**

10.1 Material Purchase Certificates are issued only by the State Tax Department.

10.1.1 Only entities specifically designated by these regulations may apply to the Tax Commissioner for a Material Purchase Certificate for a specified construction project. As of October 1, 1990, the exemption for materials purchased by contractors for use in governmental contracts was generally repealed and except for those contracts subject to the transition rules in Section 109 of these regulations, the use of the material purchase certificate was repealed. See Section 109 of these regulations for additional information concerning the taxation of materials for use in governmental contracts. Upon approval by the Tax Commissioner, each Material Purchase Certificate shall be issued directly to the governmental entity instead of the contractor, and the governmental entity shall give the contractor the Material Purchase Certificate.

10.2 Each contractor or subcontractor may use a Material Purchase Certificate to purchase exempt from tax material which will be annexed to, incorporated in or become part of a qualifying project. Each vendor selling materials to contractors under this exemption shall execute invoices bearing the Material Purchase Certificate number. Each Material Purchase Certificate shall be valid from the date of issuance by the Department. A Material Purchase Certificate may not be used for any project other than the project noted on the certificate.

10.3 If an entity qualifies for a material purchase certificate, but fails to secure a Materials Purchase Certificate from the Tax Commissioner, all contractors or subcontractors purchasing materials for use in a construction project for that entity shall pay consumers sales and service and use tax on the total cost of the materials even though the entity for whom the project is being performed could directly purchase the same materials without consumers sales and service tax.

10.4 Leases of construction equipment by a contractor and the purchase of fuel, form lumber, and other material used in an exempt construction project, but not incorporated into the project, shall be taxable.

10.5 Each contractor or subcontractor must issue a copy of the Material Purchase Certificate or the Material Purchase Certificate number to each supplier. If a Material Purchase Certificate has not been secured by the entity for whom the project is being performed the contractor shall pay consumers sales and service tax on the purchase of materials even though the entity for whom the project is being performed could directly purchase the same items without consumers sales and service and use tax liability.

10.6 Material Purchase Certificates shall be prospective in nature. A Material Purchase Certificate shall not be granted after the construction project is completed to secure a deduction, exclusion, credit or refund of consumers sales and service tax previously paid on the purchase of materials used by the contractor in the construction project.

10.7 Upon completion of an exempt project with a governmental entity, each contractor shall furnish a sworn statement to the exempt entity on forms supplied by the Tax Commissioner that all purchases made under the certificate were entitled to exemption from consumers sales and service and use taxes.

10.8 Any material purchased under a Material Purchase Certificate which has not been incorporated into, annexed to or become part of the exempt project, or which has not been returned to the supplier for credit, shall be subject to tax. Each contractor shall remit consumers sales and service tax on the material directly to the Tax Commissioner.

**§ 110-15-11. Imposition of Tax on Gasoline and Special Fuels.**

11.1 General. - All sales of gasoline or special fuel by distributors or importers, except when to another distributor for resale in this State or when it is a bulk sale qualified under Section 11.5 of these regulations, and all gasoline or special fuel furnished or delivered within this State to consumers or users shall be subject to the consumers sales and service tax and use tax. Sales of gasoline or special fuel by a person who paid the consumers sales and service tax or use tax on his purchases of fuel, shall not thereafter again be subject to such tax. This Section shall be construed so that all gallons of gasoline or special fuel sold and delivered, or delivered, in this State shall be subject to the consumers sales and service tax or the use tax, and tax on such gallonage shall be imposed only once.

11.1.1 On Purchase Out-Of-State. - An excise tax is imposed on the use or consumption in this State of gasoline or special fuel which was purchased outside this State. The rate of this tax is five percent (5%) of the average wholesale price of such gasoline or special fuel, as such wholesale price is defined and determined under Section 11.4 of these regulations, notwithstanding any provision of W. Va. Code § 11-15A-1 et seq. to the contrary. The gasoline or special fuel contained in the supply tank of a motor vehicle that is not a motor carrier shall not be subject to this tax; however, the gasoline or special fuel which is in the supply tank or auxiliary tank of construction equipment, mining equipment, track maintenance equipment or other similar equipment, when such equipment is brought into this State, shall be taxed in the same manner as the gasoline or special fuel which is in the supply tank of a motor carrier.

11.1.2 Upon Whom Tax Imposed. - The consumers sales and service tax and use tax imposed on the sale or use of gasoline and special fuel within this State shall be collected on the actual metered gallons delivered at the first point of delivery within this State to a person not excepted from tax under the sale for resale exception set forth in Section 11.1 of these regulations. For periods beginning on or after October 1, 1987, the quantity delivered shall be either the actual metered gallons delivered or the quantity delivered being calculated by converting to 60° Fahrenheit the quantity transferred by means of either temperature compensating meters approved by the West Virginia Department

of Labor, Weights and Measures Division, or by mathematical conversion using American Petroleum Institute (API) ASTM-IP Petroleum Measurement Tables for specific gravity and temperature. This measure shall be the same as that required for calculation of the Gasoline and Special Fuel Excise Tax imposed by W. Va. Code § 11-14-1 et seq. and § 11-14A-1 et seq. If the metered quantity delivered is not determined by temperature compensating meter, as aforesaid, and the taxpayer does not convert said gallons delivered to temperature adjusted gallons or, after making a mathematical conversion fails to keep and maintain records to support and substantiate the conversion, then the amount of tax due shall be determined by the number of metered gallons of gasoline or special fuel delivered without adjustment for temperature. Use of the conversion method for determining the quantity of gasoline or special fuel delivered necessitates that the conversion adjustment be made on each invoice and must continue to use that method for the entire tax year for the consumers sales and service tax and the use tax.

Example. - What is the volume at 60°F of 10,000 U.S. gallons of oil measured at 34°F when the gravity of the oil is 64.80 API at 60°F?

Enter the table in the column "API Gravity at 60°F," headed 64° API, and note that against an "Observed Temperature of 34°F" the factor is . . . 1.0168

Likewise, from the column headed 65°F API, note that for the observed temperature of 34°F the factor is . . . . . 1.0170

This represents an increase of 0.0002 in the factor for an increase of 1.0° API. Therefore, by simple proportion and increase in gravity from 64.0 to 64.80° API increases the factor by 0.8 x 0.0002 or . . . . . 0.0002

Then, one U.S. gallon of oil having a gravity of 64.80° API at 60°F and measured at 34°F occupies at 60°F a volume of 1.0168 + 0.0002 or . . . . 1.0170 U.S. Gallons

Therefore, 10,000 U.S. gallons measured at 34°F occupy at 60°F a volume of 10,000 x 1.0170 or . . . . . 10,170 U.S. Gallons

11.2 Measure of Tax. - The measure of tax on sales of gasoline or special fuel by distributors or importers shall be the average wholesale price as defined and determined in Section 11.3 of these regulations. It is recognized that the consumers sales and service tax and use tax is generally imposed on gross proceeds from sales to ultimate consumers, while the consumers sales and service tax and use tax on gasoline and special fuel is imposed on the average wholesale price of such gasoline and special fuel; as a result, for the purposes of either the consumers sales and service tax or the use tax, the average wholesale price shall not be less than ninety-seven cents per gallon of gasoline or special fuel for all gallons of gasoline and special fuel sold during the reporting period.

11.3 Determination of Average Wholesale Price.

11.3.1 To simplify determining the average wholesale price of all gasoline and special fuel, the Tax Commissioner shall, effective with the period

beginning April 1, 1983 and annually on each January first thereafter, determine the average wholesale price of gasoline and special fuel for each annual period. The basis for determining the average wholesale price shall be sales data gathered for the immediately preceding period of July 1 through October 31. The Tax Commissioner shall provide the annual notification of the average wholesale price of gasoline and special fuel at least thirty (30) days in advance of each annual period which commences on the first day of January. Such notification shall be accomplished by filing notice of the average wholesale price in the State Register, and by such other means as the Tax Commissioner deems reasonable.

11.3.2 The "average wholesale price" means the single, statewide average per gallon wholesale price, rounded to the third decimal (thousandth of a cent), exclusive of state and federal excise taxes on each gallon of gasoline or diesel fuel, as determined by the Tax Commissioner from information furnished by distributors of gasoline or special fuel in this State, or such other information regarding wholesale selling prices as the Tax Commissioner may gather, or a combination of such information. The Tax Commissioner shall make his determination of average wholesale price by random sample survey: Provided, That in no event shall the average wholesale price be determined to be less than ninety-seven cents per gallon of gasoline or special fuel.

11.3.3 All actions of the Tax Commissioner in acquiring data necessary to establish and determine the average wholesale price of gasoline and special fuel, in providing notification of his determination prior to the effective date of any change in rate, and in establishing and determining the average wholesale price of gasoline and special fuel, may be made by the Tax Commissioner without compliance with the provisions of W. Va. Code § 29A-3-1 et seq.

11.3.4 In any administrative or court proceeding brought to challenge the average wholesale price of gasoline and special fuel as determined by the Tax Commissioner, his determination shall be presumed to be correct and shall not be set aside unless it is clearly erroneous.

11.4 Computation of Tax Due From Motor Carriers. - Every person who operates or causes to be operated a motor carrier in this State shall pay the consumers sales and service tax and use tax on the average wholesale price of all gallons of gasoline or special fuel used in the operation of any such motor carrier within this State, under the following rules:

11.4.1 The total amount of gasoline or special fuel used in the operation of the motor carrier within this State shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this State (whether loaded or not), that the total number of miles traveled within this State bears to the total number of miles traveled within and without this State. Ton miles are not acceptable for mileage calculations. Separate miles must be computed for any motor carrier operated in tandem or in series. Locomotive unit miles shall be used by railroads for calculations. Air carrier operations may be calculated and determined by the use of an hour meter. If the motor carrier(s) are leased thirty (30) days or more, the lessee must report operations of the motor carrier(s). If the lease

is for less than thirty (30) days, the lessor or owner is responsible for reports.

11.4.2 A motor carrier shall first determine the gross amount of tax due under this Section on the average wholesale value, determined under Section 11.3 of these regulations, of all gasoline and special fuel used in the operation of the motor carrier within this State during the preceding quarter, as if all gasoline and special fuel had been purchased outside this State.

11.4.3 Next, the taxpayer shall determine the total tax paid under W. Va. Code § 11-15-1 et seq. on all gasoline and special fuel purchased in this State for use in the operation of the motor carrier.

11.4.4 The difference between amounts determined under the foregoing Section 11.4.2 and Section 11.4.3 is the amount of use tax due when Section 11.4.2 is greater than Section 11.4.3, or the amount to be refunded or credited to the motor carrier when Section 11.4.3 is greater than Section 11.4.2, which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by W. Va. Code § 11-14A-1 et seq.

11.5 Exemption for Bulk Sales to Interstate Motor Carriers. Effective April 1, 1989.

11.5.1 In general. - Effective on and after April 1, 1989, there shall be exempt from the tax imposed by W. Va. Code § 11-15-1 et seq. all gallons of gasoline or special fuel sold by a distributor to an interstate motor carrier having fuel storage tanks in this State which are used solely for the purpose of fueling motor carriers owned, leased or operated by the motor carrier, when the purchase is delivered at one time in bulk quantities of one thousand gallons or more into such fuel storage tanks and is purchased for the motor carrier's exclusive use in motor vehicles registered with the State Tax Department: Provided, That this exemption shall not relieve the person owning or operating a motor carrier from payment of any taxes imposed by W. Va. Code § 11-14A-1 et seq. or W. Va. Code § 11-15A-1 et seq. on gasoline or special fuel used or consumed in this state by the motor carrier.

11.5.1.1 For all qualifying sales, whether cash or otherwise, the supplier shall stamp the invoice for each sale with the following statement - "Bulk Sale - Tax Exempt To Interstate Carriers."

11.5.1.2 The supplier shall provide for each qualifying sale a serially numbered invoice showing the name and address of the seller and the purchaser, point of delivery, the date of delivery, the number of gallons delivered, the kind of fuel delivered and the price of the fuel delivered.

11.5.2 Surety Bond; Release of Surety; New Bond. - The Commissioner may in his discretion require an interstate motor carrier having fuel storage tanks in this state to file a continuous surety bond in an amount to be fixed by the Commissioner, except that the amount thereof shall not be less than one thousand dollars ($1,000.00). Upon completion of the filing of such surety bond, an annual notice of renewal only shall be required thereafter. The surety must be authorized to engage in business within this State. This bond shall be

conditioned upon the motor carrier's faithful compliance with the provisions of W. Va. Code § 11-14A-1 et seq., W. Va. Code § 11-15-1 et seq., and W. Va. Code § 11-15A-1 et seq. with respect to such gasoline or special fuel, including the filing of the returns and payment of all tax due with respect to such gasoline or special fuel. Such bond shall be approved by the Commissioner as to sufficiency and by the Attorney General as to form, and shall indemnify the State against any loss arising from the failure of the taxpayer for whatever reason to pay any tax imposed by W. Va. Code § 11-14A-1 et seq. or W. Va. Code § 11-15A-1 et seq. on gasoline or special fuel purchased as provided in this Section 5a which was used or consumed in operation of the motor carrier in this State: Provided, That a noninterest bearing cash deposit may be accepted by the Commissioner in lieu of such bond. The cash deposit shall be in an amount to be fixed by the Tax Commissioner, except the amount thereof may not be less than one thousand dollars.

11.5.3 Revocation or suspension of exemption.

11.5.3.1 The Tax Commissioner may revoke or suspend application of this exemption to a motor carrier if:

11.5.3.1.a The motor carrier filed a false or fraudulent return for the tax or willfully failed to report information required by the Tax Commissioner, concerning gasoline or special fuel which it used or consumed in this State, on or before the date specified for filing the return or report.

11.5.3.1.b The motor carrier willfully refused or willfully neglected to file a tax return or willfully failed to report information required by the Tax Commissioner, concerning gasoline or special fuel which it used or consumed in this State, on or before the date specified for filing the return or report.

11.5.3.1.c The motor carrier willfully refused or willfully neglected to pay any tax, additions to tax, penalties or interest, or any part thereof, with respect to gasoline or special fuel used or consumed in this State when they became due and payable, determined with regard to any authorized extension of time for payment.

11.5.3.2 Before cancelling or suspending this exemption, the Tax Commissioner shall give written notice to the motor carrier of his intent to suspend or cancel this exemption, the reason for the suspension or cancellation, the effective date of the suspension or cancellation, and the date, time and place where the taxpayer may appear at an informal hearing and show cause why this exemption should not be suspended or canceled. This written notice shall be served on the taxpayer in the same manner as a notice of assessment is served under W. Va. Code § 11-10-1 et seq., not less than twenty (20) days prior to the date of such informal hearing. The taxpayer may appeal suspension or cancellation of its exemption under this Section in the same manner as a notice of assessment is appealed under W. Va. Code § 11-10-1 et seq.: Provided, That the filing of a petition for appeal shall not stay the effective date of the suspension or cancellation. A stay may be granted only after a hearing is held on a motion to stay filed by the motor carrier, upon finding that state revenues will not be jeopardized by the granting of the stay. The Tax Commissioner may,

in his discretion and upon such terms as he may specify, agree to stay the effective date of the suspension or cancellation until another date certain.

11.5.3.3 The Tax Commissioner shall promptly give notice to distributors in this State of the name and mailing address of every motor carrier whose exemption under this Section is suspended or cancelled. The effective date of such suspension or cancellation shall be included, and if this exemption is suspended, the date the suspension expires shall also be provided. The affected motor carrier shall promptly give similar written notice to all distributors from whom he purchases gasoline or special fuel exempt from tax as provided in Section 11.5.1 of these regulations.

11.5.3.4 A motor carrier whose exemption under this Section is cancelled may, after the cancellation has been in effect for twelve (12) months, petition the Tax Commissioner for reinstatement of exemption under this Section. The Tax Commissioner may, in his discretion, and upon such terms as he may require, reinstate this exemption, but only if he reasonably believes that the motor carrier will fully and timely comply with W. Va. Code § 11-15-1 et seq. and the provisions of W. Va. Code § 11-14A-1 et seq. and W. Va. Code § 11-15A-1 et seq. Upon reinstatement, the motor carrier shall provide his distributor with a true copy of the Tax Commissioner's order reinstating the exemption.

11.6 Return and Payment of Tax. - The consumers sales and service tax imposed on the sales of gasoline and special fuel and the use tax imposed on the use or consumption in this State of gasoline or special fuel shall be paid by each taxpayer on or before the twenty-fifth (25th) day of January, April, July and October of each year except that for distributors and importers the tax shall be due on the twenty-fifth (25th) day of each month. Payment shall be by check, bank draft, certified check or money order, payable to the Tax Commissioner, and it shall be for the amount of tax due for the preceding quarter or month, whichever is applicable. Every taxpayer shall make and file a properly completed return as the Tax Commissioner may require and with such return, remit such tax as shown thereon, if any.

11.7 Compliance. - To facilitate ease of administration and compliance by taxpayers, the Tax Commissioner requires distributors, importers and other persons liable for the consumers sales and service tax imposed on sales of gasoline or special fuel and on the Gasoline and Special Fuel Excise Tax imposed by W. Va. Code § 11-14-1 et seq., or motor carriers liable for the use tax imposed on the use of gasoline or special fuel in the operation of motor carriers within this State and on the tax imposed by W. Va. Code § 11-14A-1 et seq. on such gallons of gasoline or special fuel, to file a combined return and make a combined payment of the consumers sales and service tax due and the above-referenced excise tax, or the use tax due and the motor carrier road tax on such fuel. In order to facilitate the use of a combined return and the making of a single payment, the due date for the gasoline and special fuel excise tax and its return and the due date for the motor carrier road tax with its return is changed to the 25th day of January, April, July and October for motor carriers and the twenty-fifth (25th) day of each month for distributors and importers.

11.8 Direct Pay Permits. - A direct pay permit issued under Section 9c of these regulations cannot be used to purchase gasoline and special fuel. See Section 9c.6.3.5 of these regulations.

11.9 Credit Against Use Tax. - A credit will be allowed against a taxpayer's use tax liability for consumers sales and service tax lawfully paid to another state. To show entitlement to this credit, a taxpayer must show that consumers sales and service tax was actually paid to another state and that gallonage on which said consumers sales and service tax was paid was consumed within this State. For fuel subjected to consumers sales and service tax in another state, the First-in, First-out (FIFO) method of accounting shall be employed. In claiming a credit under this Section, a true, certified copy of all invoices shall be required.

11.10 Construction. - The consumers sales and service tax and the use tax imposed on the sale or use of gasoline or special fuel in this State shall not be construed as taxing any gasoline or special fuel which the State is prohibited from taxing under the Constitution of this State or the Constitution or laws of the United States.

**§ 110-15-12. Reserved for Future Use.**

**§ 110-15-13. Reserved for Future Use.**

**§ 110-15-14. Maintenance of Records.**

14.1 Sales and Service Tax Records.

14.1.1 Keeping and Preserving Records. - Each person shall keep complete and accurate records of taxable sales and of charges, together with a record of the tax collected thereon, and shall keep all invoices, bills of lading and such other pertinent documents in such form as the Tax Commissioner may require. Such records and other documents shall be preserved for a period of time not less than three years, unless the Tax Commissioner shall consent in writing to their destruction within that period or by order require that they be kept longer. Records must be kept so long as the period is open to assessment or refund. Any person who fails to maintain appropriate records shall be subject to the provisions of W. Va. Code § 11-9-1 et seq.

14.1.1.1 For those transactions in which the purchaser provides to the vendor the direct payment permit number or material purchase certificate number, the vendor shall retain a record copy of the invoice with the direct payment permit number or material purchase certificate number, as applicable, printed thereon.

14.1.2 When Separate Records of Sales Required. - Any vendor engaged in a business subject to the consumers sales and service tax, who is at the same time engaged in some other kind of business, occupation or profession, not subject to such tax, shall keep records to show separately the transactions used in determining the tax base for the sales and services taxed. In the event such person fails to keep such separate records there shall be levied upon him a tax based upon the entire gross proceeds of both or all of his businesses.

14.1.3 Sales to Affiliated Companies or Persons. - In determining gross proceeds of sales of tangible personal property or services other than services exempt under Section 9.3.12 of these regulations from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from a sale are not indicative of the true value of the subject matter of the sale, the tax shall be based upon the fair market value as if in a transaction involving a willing buyer and a willing seller, with neither buyer nor seller being required to act.

14.1.3.1 In those instances where fair market value is not available, determining value in regard to sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the vendor and vendee is such that gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the following rules shall be applied in the order stated.

14.1.3.1.a Whenever sales are made to affiliates, the value shall correspond to the gross proceeds from the sale of similar products or services of like quality and character and in similar quantities between persons of no common interest.

14.1.3.1.b If there are no sales between parties of no common interest by which the taxpayer may value his sales to affiliates, the value shall correspond to the gross proceeds from sales by the taxpayer to nonrelated purchasers of similar products or services of like quality and character and in similar quantities and shall include all subsidies and bonuses.

14.1.3.1.c In the absence of sales as a guide to value, such value may be determined by a cost basis. In such cases there shall be included every item of cost attributable to the particular article manufactured, including direct and indirect overhead costs. There shall be added to this total manufacturing cost the average markup realized by the taxpayer on all products manufactured, compounded or prepared for sale.

14.1.4 Records of Nonresidents Doing Business in State. - A nonresident person or foreign corporation engaged in a business within this State in the conduct of which the consumers sales and service tax levied becomes due, shall keep within this State adequate records concerning the operation of the business, and all consumers sales and service taxes collected in the course of the business. The amount of the consumers sales and service tax collected shall not be transmitted outside of this State without the written consent of, and in accordance with the conditions prescribed by, the Tax Commissioner.

14.2 Use Tax Records.

14.2.1 Keeping and Preserving Records. - Every retailer required or authorized to collect use taxes and every person using in this State tangible personal property or taxable services shall keep such records, receipts, invoices, and other pertinent papers as the Tax Commissioner shall require and in such form as the Tax Commissioner shall require. For those transactions in which the retailer provides to the vendor the direct payment permit number or material purchase certificate number, the vendor shall retain a record copy of the invoice with the direct payment permit number or material purchase

certificate number, as applicable, entered thereon. Any person who fails to maintain appropriate records shall be subject to the provisions of W. Va. Code § 11-9-1 et seq.

14.2.2 Examination of Records. - In addition to the Tax Commissioner's powers set forth in W. Va. Code § 11-10-1 et seq., the Tax Commissioner is hereby authorized to examine the books, papers, records and equipment of any person who either:

14.2.2.1 Is selling tangible personal property or taxable services; or

14.2.2.2 Is liable for the use tax. The Tax Commissioner may investigate the character of the business of any such person in order to verify the accuracy of any return made, or if no return was made by such person, to ascertain and determine the amount of use tax due. Any such books, papers and records shall be made available within this State for such examination upon reasonable notice. However, where the taxpayer's records must be kept out-of-state, the taxpayer may upon being notified by the Tax Commissioner that an examination is to be made, elect to do one of the following: (1) forthwith transport the required records to a convenient point in West Virginia and notify the Tax Commissioner of the location where such records are available; or (2) pay the reasonable traveling expenses of the Tax Commissioner's representatives from Charleston, West Virginia, to the out-of-state place where the records are kept, and the return of such representative to Charleston, West Virginia, and reasonable living expenses of such representatives while engaged in the examination of such records.

**§ 110-15-14a. Record Keeping of Transactions.**

14a.1 Every person doing business in the State of West Virginia or storing, using, or otherwise consuming tangible personal property purchased from a vendor, and every lessor and lessee of tangible personal property used in this State shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes. Unless the Tax Commissioner authorizes, in writing, an alternative method of record keeping, these records shall show:

14a.1.1 Receipts from sales and leases of tangible personal property and from sales in this State of services, regardless of whether the vendor believes the receipts to be taxable or non-taxable;

14a.1.2 All deductions allowed by law and claimed in filing returns;

14a.1.3 Total purchase price of all tangible personal property purchased for sale, consumption or lease in this State, and the total price of all services purchased for sale or consumption in this State;

14a.1.4 All exemption certificates;

14a.1.5 All direct pay permit numbers and all material purchase certificate numbers;

14a.1.6 A true and complete inventory taken at least once a year.

14a.2 Each record shall consist of the normal books of account ordinarily maintained by the average prudent person engaged in the activity in question, including bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account, and all schedules or working papers used in connection with the preparation of tax returns.

14a.3 Each record may be microfilmed or microfiched, as long as the microfilm or microfiche records are authentic, accessible, and readable and the following requirements are fully satisfied:

14a.3.1 Each taxpayer shall provide transcriptions of any information concerning consumers sales or use tax liability on microfilm or microfiche which may be required to verify liability. The taxpayer shall also provide appropriate facilities for preservation of the microfilm or microfiche for the periods required.

14a.3.2 All microfilmed and microfiched data shall be indexed, cross-referenced and labeled to show beginning and ending alphabetical listing of documents, and beginning and ending numbers. All microfilm and microfiched data shall be systemically filed to permit reasonable access.

14a.3.3 Each taxpayer shall make available upon request of the Tax Commissioner or the Tax Commissioner's authorized agent, a reader-printer in good working order, at the examination site, for reading, locating and reproducing any record concerning consumers sales or use tax liability maintained on microfilm or microfiche.

14a.3.4 Each taxpayer shall set forth in writing the procedures governing the microfilm or microfiche system and the individual or individuals responsible for maintaining and operating the system.

14a.3.5 Each taxpayer shall maintain a complete microfilm or microfiche system and shall consistently use the system in the regular course of business.

14a.3.6 Each taxpayer shall establish appropriate documentation of procedures so that the original document can be followed through the microfilm or microfiche system.

14a.3.7 Each taxpayer shall establish internal procedures for microfilm or microfiche inspection and quality assurance.

14a.3.8 Each taxpayer shall be responsible for the effective identification, processing, storage, and preservation of microfilm or microfiche for a period of at least three (3) years from the last day of the calendar year during which the transaction occurred.

14a.3.9 Each taxpayer shall keep a record identifying the person or business entity that produced the microfilm or microfiche records.

14a.3.10 When displayed on a microfilm or microfiche reader or viewer, or reproduced on paper, the material shall exhibit a high degree of

legibility. For this purpose, legibility is defined as the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters or numerals being recognizable as words or complete numbers.

14a.3.11 All production of microfilm or microfiche and processing duplication, quality control, storage, identification, and inspection shall meet industry standards.

14a.4 An automated data processing tax accounting system may be used by the taxpayer to preserve consumers sales and use tax records required for the verification of tax liability. An automated data processing system shall include a method of producing legible records which will provide the necessary information for verifying tax liability. Each taxpayer maintaining records on an automated data processing system shall satisfy the following requirements:

14a.4.1 Automated data processing records shall provide an opportunity to trace any transaction back to the original source or forward to a final total. If detailed printouts are not made of transactions at the time they are processed, the systems shall have the ability to reconstruct these transactions.

14a.4.2 A general ledger, with source references, shall be written out to coincide with financial reports for tax reporting periods. When subsidiary ledgers are used to support the general ledger accounts, the subsidiary ledgers shall also be written out periodically.

14a.4.3 An audit trail shall be designed so that the details underlying the summary accounting data may be identified and made available to the Tax Commissioner or the Tax Commissioner's authorized agent. The system shall be designed so that supporting documents, such as sales invoices, purchase invoices, and credit memoranda are readily available.

14a.4.4 Each taxpayer shall make available a description of the automated data processing portion of the accounting system. The statements and illustrations as to the scope of operations shall be sufficiently detailed to indicate:

14a.4.4.1 The application being performed;

14a.4.4.2 The procedures employed in each application, such as flowcharts or block diagrams; and

14a.4.4.3 The controls used to ensure accurate and reliable processing. Important changes, together with their effective dates, shall be noted in order to preserve an accurate chronological record.

14a.4.5 Adequate record retention facilities shall be available for storing tapes and printouts, as well as all supporting documents as may be required by the consumers sales and use tax laws and these regulations.

14a.5 All records of a vendor or consumer pertaining to transactions involving consumers sales or use tax liability shall be preserved for a period

of at least three years from the last day of the calendar year during which the transaction occurred.

14a.6 The foregoing records shall be available for and subject to inspection by the Tax Commissioner or the Tax Commissioner's authorized agents and employees, at all times during business hours of the day.

14a.7 If any taxpayer fails to substantially comply with the requirements of this regulation, the Tax Commissioner shall impose the penalty provided for in W. Va. Code § 11-10-18(c) or (d), as appropriate.

§ 110-15-14b. **Auditing Taxpayer Records**.

14b.1 Taxpayer records may be audited by authorized representatives of the Tax Commissioner at any time during regular business hours of the taxpayer at the discretion of the Tax Commissioner or his authorized agent or representative. Any person who maintains such records outside this State shall make such records available for audit where the general records of the taxpayer are kept.

14b.2 The Tax Commissioner may use a detailed auditing procedure or a sample and projection auditing method to determine tax liability.

14b.3 A sample and projection auditing method is appropriate if:

14b.3.1 the taxpayer's records are so detailed, complex, or voluminous that an audit of all detailed records would be impractical or unreasonable;

14b.3.2 the taxpayer's records are inadequate or insufficient, so that a competent audit for the period in question is not otherwise possible; or

14b.3.3 the cost of an audit of all detailed records to the taxpayer or the State will be unreasonable in relation to the benefits derived, and sampling procedures will produce a reasonable result.

14b.4 If records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.

14b.5 Exemption certificates and material purchase certificates.

14b.5.1 Exemption certificates and material purchase certificates should be available at the time of the audit. Certificates acquired by the taxpayer after the audit begins are subject to independent verification of issuance by the purchaser before the deductions will be allowed in an audit.

14b.5.2 If the taxpayer is not in possession of the certificates within sixty (60) days from the date written notice is given by the Tax Commissioner that certificates pertaining to periods or transactions specified in the notice are required, any deductions claimed which require exemption or material purchase certificates will be disallowed. Exemptions claimed by those

certificates acquired during this sixty (60) day period will be subject to independent verification of issuance by the purchaser before the deductions will be allowed. Certificates presented after the sixty (60) day period will not be accepted.

14b.6 Both vendors and vendees are subject to audit and to assessment.

14b.6.1 Vendors will be assessed for any consumers sales or use taxes which that they should have collected but failed to collect from the vendee. A vendor is relieved from this liability only if the vendor has in good faith taken the vendee's direct pay permit number, an exemption certificate or a material purchase certificate number or has notified the Tax Commissioner of a refusal to pay tax or provide indicia of tax exemption in accordance with Section 6.1.1.2 of these regulations.

14b.6.2 Vendees will be assessed consumers sales or use taxes which they should have paid to their vendors or remitted directly to the Tax Commissioner. A vendee is relieved from this liability only if he paid the consumers sales or use tax due on the transaction to the vendor or directly to the Tax Commissioner. If exemption from tax was claimed, the vendee must be able to verify that the tangible personal property or service purchased without paying tax to the vendor or directly to the Tax Commissioner was in fact used for an exempt purpose or used in an exempt manner.

14b.7 The Tax Commissioner may proceed against either the vendor or the vendee, or against both for delinquent tax until the amount of the tax, additions to tax, penalties and interest have been paid.

**§ 110-15-15. Bond to Secure Payment.** - The Tax Commissioner may, when in his judgment it is necessary and advisable in order to secure the collection of the use tax, authorize any person subject to such tax and any retailer required or authorized to collect such tax to file with him a bond issued by a surety company authorized to transact business in this State and approved by the Insurance Commissioner of this State as to solvency and responsibility, in such amount as the Tax Commissioner may fix, to secure the payment of any tax, additions to tax, penalties and interest due or which may become due from such person. In lieu of such bond, securities approved by the Tax Commissioner, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the State Treasurer of West Virginia and may be sold by him at public or private sale, after notice to the depositor thereof, if it becomes necessary in order to recover any tax, additions to tax, penalties and interest due. Upon any such sale, the surplus, if any, above the amounts due under W. Va. Code § 11-15A-1 et seq. and W. Va. Code § 11-10-1 et seq., shall be returned to the person who deposited the securities.

**§ 110-15-16. Canceling or Revoking Permits to Collect Use Tax.** - Whenever any retailer engaging in business in this State, or any retailer authorized to collect the use tax, fails to comply with any of the provisions of W. Va. Code § 11-15A-1 et seq. or any orders or regulations of the Tax Commissioner which are properly prescribed and adopted, the Tax Commissioner may, upon notice, hearing, and issuance of an appropriate order, cancel the business registration certificate, if any, issued to either of such retailers under W. Va. Code § 11-12-1 et seq. If either of such retailers is a corporation authorized to do

business in this State under W. Va. Code § 39-1-49, the Tax Commissioner may certify to the Secretary of State a copy of an order finding that such retailer has failed to comply with certain specified provisions, orders or regulations. The Secretary of State shall, upon receipt of such certified copy, revoke the permit authorizing said corporation to do business in this State, and shall issue a new permit only after such corporation has obtained from the Tax Commissioner an order finding that the corporation has complied with its obligations under W. Va. Code § 11-15A-1 et seq. No order authorized in this Section shall be made until such retailer is given an opportunity to be heard and to show cause why such order should not be made, and he shall be given twenty days notice of the time, place and purpose of such hearing, which shall be heard as provided in W. Va. Code § 11-10-9. The Tax Commissioner shall have the power in his discretion to issue a new business registration certificate after such cancellation.

**§ 110-15-17. Liability and Penalties.**

17.1 Liability of Officers of Corporation. - If the taxpayer or vendor is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default in the reporting or payment of taxes on the part of the association or corporation. Payment of the consumers sales and service tax and any additions to tax, penalties and interest thereon imposed by W. Va. Code § 11-10-1 et seq. may be enforced against such officers as against the association or corporation which they represent.

17.2 Penalties; Jurisdiction. - Any person who is required to file any return or report or to pay any tax, and willfully fails to file such return or report or to pay such tax, or who is required or authorized to collect, account for and pay over any tax and who willfully fails to so collect, account for and pay over such tax, or who knowingly files or delivers a false or fraudulent return, report or other document, or who willfully attempts in any other manner to evade any tax shall be subject to the provisions of W. Va. Code § 11-9-1 et seq.

**§ 110-15-18. Transition Rules for Amendments to Statute or Regulations.** - Except for those transactions addressed under transition rules set forth in W. Va. Code § 11-15-8a and Section 108 of these regulations,

(1) all transactions involving sales or leases of tangible personal property or rendering of taxable services which were not subject to the consumers sales and service tax or the use tax prior to the effective date of any amendment to any provision of the Consumers Sales and Service Tax Act or any amendment to any provision of Series 15, Title 110 of these regulations, but which became subject to such tax on that date by reason of such amendment, and

(2) all transactions involving sales or leases of tangible personal property or rendering of taxable services which were subject to the consumers sales and service tax or the use tax prior to the effective date of any amendment to any provision of the Consumers Sales and Service Tax Act, or any amendment to any provision of Series 15, Title 110 of these regulations, but which became exempt or excepted from such tax on that date by reason of such amendment, shall be subject to the following transition rules:

18.1 Transactions Which Become Taxable.

18.1.1 For transactions which have been completed before the effective date of such amendment, except for billing or payment, or both, of the sale price, such transactions will not be subject to the consumers sales and service tax or the use tax.

18.1.2 For transactions under binding executory contracts which require one payment at commencement of the contract with the contract commencing before and extending beyond the effective date of such amendment, such transactions will not be subject to the consumers sales and service tax or the use tax.

18.1.3 For transactions under contracts which require multiple payments over the length of the contract for sales, leases or services which occur over the length of the contract, such contract performance commencing before and extending beyond the effective date of such amendment, those sales which are completed before the effective date of such amendment, except for billing and payment will not be subject to the consumers sales and service tax or the use tax; moreover, performance under such contracts which is completed on or after the effective date of such amendment, will also not be subject to such tax.

18.1.4 For transactions under contracts with contract performance commencing before and extending beyond the effective date of such amendment, and which require installment type payments over the length of the contract, no payments under the contract shall be subject to the consumers sales and service tax or the use tax.

18.1.5 For transactions which are leases under contracts with contract performance commencing before and extending beyond the effective date of such amendment, and which require monthly, quarterly or annual payments over the length of the contract, those payments made on and after the effective date of such amendment, will not be subject to the consumers sales and service tax and use tax.

18.1.6 For transactions under binding executory contracts, where offer and acceptance have occurred prior to the effective date of such amendment, but where delivery, billing, or payment of the sale price will not occur until subsequent to the effective date of such amendment, such transactions shall not be subject to the consumers sales and service tax or the use tax if delivery, billing, and payment of the sale price occur within sixty (60) days subsequent to the effective date of such amendment.

18.2 Transactions Which Become Exempted or Excepted.

18.2.1 For transactions which have been completed before the effective date of such amendment, except for billing or payment, or both, of the sale price, such transactions will be subject to the consumers sales and service tax or the use tax.

18.2.2 For transactions under binding executory contracts which require one payment at commencement of the contract with the contract commencing

before and extending beyond the effective date of such amendment, such transactions will be subject to the consumers sales and service tax or the use tax.

18.2.3 For transactions under contracts which require multiple payments over the length of the contract for sales, leases or services which occur over the length of the contract, such contract performance commencing before and extending beyond the effective date of such amendment, those sales which are completed before the effective date of such amendment, except for billing and payment will be subject to the consumers sales and service tax or the use tax; moreover, performance under such contracts which is completed on or after the effective date of such amendment will also be subject to such tax.

18.2.4 For transactions under contracts with contract performance commencing before and extending beyond the effective date of such amendment, and which require installment type payments over the length of the contract, all payments made subsequent to such amendment under the contract shall be subject to the consumers sales and service tax or the use tax.

18.2.5 For transactions which are leases under contracts with contract performance commencing before and extending beyond the effective date of such amendment, and which require monthly, quarterly or annual payments over the length of the contract, those payments made on and after the effective date of such amendment, will be subject to the consumers sales and service tax and use tax.

18.2.6 For transactions under binding executory contracts, where offer and acceptance have occurred prior to the effective date of such amendment, but where delivery, billing or payment of the sale price will not occur until subsequent to the effective date of such amendment, such transactions shall be subject to the consumers sales and service tax or the use tax if delivery, billing, and payment of the sale price occur within sixty (60) days subsequent to the effective date of such amendment.

**§ 110-15-19. <u>Agency Relationships; Direct Purchases</u>.**

19.1 Effective August 31, 1990, persons who perform contracting or who are acting in an agency capacity are prohibited from asserting any exemption to which the purchaser of such contracting services or the principal is entitled. Any statutory exemption to which a taxpayer is entitled shall be invalid unless the tangible personal property or service is actually purchased directly by the taxpayer and is directly invoiced to and paid by the taxpayer. Any contractual arrangement or understanding between an agent, employee, or other representative and a principal or employer shall not be recognized by the Tax Commissioner. Each vendor shall charge and collect consumers sales and service tax on the total selling price of tangible personal property or service even though the agent, employee, or other representative:

19.1.1 Is on official business on behalf of the principal or employer; or

19.1.2 Is on a per diem from the principal or employer; or

19.1.3 Is on an expense account or will otherwise be reimbursed by the principal or employer; or

19.1.4 Has or will receive monies, credits or other assets from the principal or employer to pay for the transaction.

19.2 Section 19.1 does not apply to purchases made by an employee for his or her employer, a partner for his or her partnership, or a duly authorized officer of a corporation, or unincorporated organization, for his or her corporation or unincorporated organization, as long as the purchase is invoiced to and paid by such employer, partnership, corporation or unincorporated organization.

19.3 Section 19.1 does not apply to purchases of tangible personal property or taxable services made in fulfillment of a purchasing agent or procurement agent contract executed and legally binding on the parties prior to September 15, 1990, as long as the purchases are made before September 1, 1991. This transition rule does not apply if the primary purpose of the purchasing agent or procurement agent contract was to avoid payment of consumer sales and use taxes.

19.3.1 Purchases of tangible personal property or taxable services made prior to September 1, 1991, in fulfillment of a purchasing agent or procurement agent contract executed and legally binding on the parties prior to September 15, 1990, are taxable unless the bill, invoice, contract, or other evidence of the transaction is made out in the name of the principal which qualifies for an exemption under the consumer sales and use tax laws and the payment is made on that principal's check, warrant or voucher, or on a check drawn on a trust account set up by the agent for the principal. This rule applies even though the same purchase would have been exempt from consumers sales and use taxes had the principal or employer directly purchased the tangible personal property or service in accordance with Section 9 of these regulations.

**§§ 110-15-20 through 110-15-27. - Reserved for Future Use.**

**§ 110-15-28. General Procedure and Administration.** - Each and every provision of the "West Virginia Tax Procedure and Administration Act" set forth in W. Va. Code § 11-10-1 et seq. shall apply to the consumers sales and service tax imposed by W. Va. Code § 11-15-1 et seq. and these regulations and the use tax imposed by W. Va. Code § 11-15A-1 et seq. and these regulations with like effect as if said Act were applicable only to the taxes imposed by and set forth in extenso in such Articles and these regulations.

**§ 110-15-29. Criminal Penalties.** - Each and every provision of the "West Virginia Tax Crimes and Penalties Act" set forth in West Virginia Code § 11-9-1 et seq., shall apply to the taxes imposed by West Virginia Code § 11-15-1 et seq. and these regulations and the use tax imposed by West Virginia Code § 11-15A-1 et seq. and these regulations with like effect as if said Act were applicable only to the taxes imposed by and set forth in extenso in such Articles and these regulations.

**§ 110-15-30. Sales to and Purchases by Nonresident Individuals.**

30.1 Any person who makes sales within this State of tangible personal property or services to nonresident individuals must charge and collect the consumers sales and service tax from such individuals. If the purchaser takes possession of the property at the time of the sale, it is considered prima facie evidence that such sale was consummated within this State and is subject to the consumers sales and service tax. The burden to prove the contrary shall rest upon the vendor. Sales otherwise taxable are not exempt because such are made to nonresidents, except sales of tangible personal property or services that are completed outside this State.

30.2 Any sale of tangible personal property within this State to a nonresident which is delivered by the vendor to such purchaser outside this State shall not relieve the vendor from the responsibility of collecting the consumers sales and service tax unless the vendor's books, records and other evidence show that such delivery was indispensable to the sale and that the sale was consummated outside this State. The fact that a purchaser has an out-of-state address and the property was mailed or delivered to such address is not sufficient to relieve imposition of the consumers sales and service tax; nor does such fact establish consummation of sale outside this State.

30.3 Vendors who complete sales of tangible personal property outside this State to nonresidents of this State are not required to collect West Virginia consumers sales and service tax but may subject themselves to consumers sales and service tax liability to the state of which the purchaser is a resident. Of course, the purchaser may be subjected to use tax in his home state.

30.4 Services performed within West Virginia for nonresidents are subject to the consumers sales and service tax. If a West Virginia serviceman or repairman performs a service outside this State, said person is not required to collect the tax.

30.5 Examples.

Example 1. X, a resident of Ohio, visits a West Virginia furniture store and purchases furniture for $500. X makes payment, and the vendor delivers the goods to the purchaser in Ohio. Said sale is taxable for the consumers sales and service tax and the vendor must collect that tax in the amount of $30.00, unless the vendor can show (via a written sales contract, etc.) that the delivery was not incidental to the sale and was, in fact, indispensable and that the sale was consummated in Ohio.

Example 2. A resident of Virginia takes a toaster into West Virginia and has the same repaired by a serviceman. The person performing the service must collect the consumers sales and service tax. However, if the person performing the services goes to the purchaser's home in Virginia to repair the appliance, no such tax is applicable.

Example 3. A repairman travels to Virginia and takes possession of an appliance which he takes to his shop in West Virginia. After making the repairs at his place of business, the serviceman then delivers the appliance to the owner's residence in Virginia. The serviceman must charge and collect West Virginia consumers sales and service tax on his services, inasmuch as such

services were performed within this State, unless delivery out-of-state was indispensable, not incidental to consummation of the service provided.

§ 110-15-31. Banking Business.

31.1 Generally, banks, state and national, are not exempt from the imposition of the consumers sales and service tax or use tax on their purchases, inasmuch as banks are the ultimate consumers of such purchases. Banks are only exempt on purchases of property and services that are resold, subject to tax, to consumers.

31.1.1 For purposes of this regulation, "banking business" includes any bank, banking association, trust company, industrial loan company, small loan company or licensee, building and loan association, savings and loan association, finance company and any other similar business organization at least ninety percent (90%) of the assets of which consist of intangible personal property and at least ninety percent (90%) of the gross receipts of which consist of dividends, interest and other charges derived from the use of money or credit.

31.2 Any purchases by banks of tangible personal property or services which are used in providing a taxable service are subject to the consumers sales and service tax or use tax; however, purchases of tangible personal property for resale as tangible personal property are exempt.

31.3 Generally, the services rendered to consumers by banks, state and national, are exempt from the consumers sales and service tax because such services constitute professional services, consideration for the extension of credit, charges related to the transfer of intangible property, or electronic data processing services for others. Purchases by banks of tangible personal property or taxable services for use or consumption in providing these exempt services are subject to the consumers sales and service tax and use tax.

31.4 Nevertheless, the sale of some bank services and bank related tangible personal property are taxable. The following constitutes a complete list of items or services on which banks must charge and collect consumers sales and service tax unless the purchaser or transaction is exempt:

31.4.1 Charges made for real estate management unless the service is provided by a licensed real estate broker,

31.4.2 Any payment received for rental of safety deposit boxes regardless of the fact that a rental or lease agreement may have been executed prior to July 1, 1987,

31.4.3 Fees received for collection of notes and accounts of others,

31.4.4 Sales to consumers of promotional items, such as glassware, silverware, appliances, etc.,

31.4.5 Sales to consumers of checks, checkbooks and money bags, and similar items, and

31.4.6 Charges for research and copying.

## § 110-15-32. Containers, Wrapping, Packing and Shipping Materials.

32.1 In General.

32.1.1 The sale to a vendor of boxes, cartons, containers, and wrapping and packaging materials and supplies, and components thereof, for use or consumption by that vendor in packaging or packing tangible personal property for sale, and actually transferred by that vendor to the purchaser, is exempt from consumers sales and service tax and use tax as a purchase for resale.

Example 1. A manufacturer sells goods in bulk and ships them in corrugated cardboard cartons to a retailer. The retailer after using the cartons as temporary storage containers removes the goods and discards the cartons. The manufacturer's purchase of the cartons is exempt from consumers sales and use taxes as a purchase for resale.

Example 2. Wax tissue paper is sold to a bakery which uses it to pick cookies from a tray. The cookies and paper are then placed in bags or boxes. The wax paper and the bags and boxes are exempt from consumers sales and service tax and use tax as a purchase for resale.

Example 3. Purchases of egg cartons by persons engaged in the business of selling eggs are exempt from tax when such cartons become a part of the sale of the eggs to the customer.

32.1.2 The sale to a vendor of boxes, cartons, containers, and wrapping and packaging material and supplies, and components thereof, to a vendor which are actually transferred to a customer in conjunction with the performance of a taxable service are exempt from consumers sales and service tax and use tax as a purchase for resale.

Example 1. A watch repairman packs a watch in a box, with cushioning material, to return it to his customer. His purchase of the box and packing material is exempt as a purchase for resale.

Example 2. Purchases of packaging and packing materials by warehousemen and movers for use in the performance of storage or moving services are exempt if such materials are actually transferred to the customer in conjunction with the service being furnished.

32.1.3 The sale to a vendor of boxes, cartons, containers, and wrapping and packaging materials and supplies, and components thereof, which are not purchased for resale are taxable unless some other exemption applies.

32.2 Definitions.

32.2.1 The term "Packaging materials" includes, but is not limited to: bags, barrels, baskets, bindings, bottles, boxes, cans, carboys, cartons, cellophane, coating and preservative materials, cores, crates, cylinders, drums, excelsior, glue, gummed labels, gummed tape, kegs, lumber used for blocking, pails, pallets, reels, sacks, spools, staples, strapping, string, tape, time,

wax paper, and wrapping paper actually transferred with the product to the purchaser.

32.2.2 "Purchaser" in this section refers to any person who purchases tangible personal property from a vendor, whether or not the purchaser is the ultimate consumer.

32.2.3 "Actually transferred" means that the packaging material is physically transferred to the purchaser, for whatever disposition the purchaser wishes.

Example 1. Returnable soda bottles may be returned for refund of deposits or disposed of otherwise. Such bottle is actually transferred to the purchaser and is a purchase for resale except when sold to the ultimate consumer.

Example 2. If a beer keg is required to be returned to the vendor after its contents are used, ownership of this keg is not actually transferred to the purchaser-consumer of the beer. Kegs purchased by a vendor of kegged beer are taxable.

32.3 Returnable Containers. - Sales of returnable containers, such as drums, barrels, or acid carboys, to a purchaser/vendor who does not transfer ownership of the container, are taxable. Title to the container remains with the purchaser/vendor when possession of the container is transferred to one who purchases commodities contained therein and then returns the container to the seller for refilling.

32.3.1 Returnable Containers; Deposits.

32.3.1.1 Deposits charged by vendors for reusable containers are subject to tax when the purchasers of the property contained therein can, during the period the containers are in their possession, exercise such control over the containers as is ordinarily associated with ownership. Such amounts are a part of the sales price even though designated as a deposit for the containers.

32.3.1.2 When the vendor retains title to such containers and the vendor retains the right to control the use which vendee makes of the containers, the containers are not considered to be a part of the sale of the property. In such cases, amounts charged to the customers as security for the return of the containers are not subject to tax if such charges are shown separately from the sales price of the property on the customers' invoices and the security deposit is refunded to the customer when the container is returned. If such amounts are not separately stated, the total charge is subject to the tax.

32.3.2 Returnable Containers; Demurrage. - When a vendor sells tangible personal property in returnable containers without a charge being made for the use of the containers for a specified time but, at the expiration of the specified time, the containers enter a demurrage period and a penalty charge is made as an inducement for the return of the containers, such charges are not subject to the tax unless the penalty is computed on an hourly, daily or some other periodic basis, or payment of the penalty results in title to the container passing to the customer. When a vendor sells tangible personal

property in returnable containers and a stated charge is made for the use of the containers throughout the period of retention by the customer, such charges are deemed to be rentals and are taxable.

32.4 Other Containers. - Racks, trays or similar devices used to facilitate delivery of the vendor's product, if title to them is not transferred to the purchaser, are taxable.

Example 1. A baking company delivers bread to a grocer in plastic trays. After unloading the trays, the delivery person takes the trays with him. Sale of the trays to the baking company is taxable.

Example 2. A baking company delivers hamburger buns to a restaurant in stackable plastic trays. The filled trays are placed in the kitchen. The next time that buns are delivered, the empty trays are picked up and returned to the bakery. Sale of the trays to the baking company is taxable.

32.5 Gift Wrapping. - When a vendor gift wraps an item which he sells, the paper, ribbon, and bow become a part of the sale of the item notwithstanding that the wrapping of the item may take place at the point of delivery thereof to the vendee or at one of the vendor's wrapping stations or that the vendor may make a charge for gift wrapping the item. The vendor's purchases of paper, ribbon and bows are purchases for resale and exempt from tax. If a separate charge is made for wrapping, it is deemed to be for services performed in wrapping the item rather than a separate sale of wrapping material, and consumers sales and service tax and use tax will be due on the wrapping charge. In this instance, the vendor's purchases of paper, ribbon and bows are exempt because they are used and consumed by the vendor in providing a taxable service.

32.5.1 In a case where an organization, as a means of raising funds, offers to wrap gift items the customer purchased from others, the organization is considered to be performing a wrapping service; and its purchases of paper, ribbon, and bows for use in the performance of the service are exempt from tax as provided in Section 9 of these regulations. Tax is due on the service charges unless the providing of the services is a "casual and occasional sale" or "isolated transaction" as defined in Section 2 and exempt under Section 9 of these regulations.

32.6 Restaurants - Containers. - Containers of paper cups, plates and other nonreturnable containers purchased by restaurants and other food service establishments, for use as containers for food sold to customers are exempt from consumers sales and use taxes as a purchase for resale when the container is actually transferred to the customer in connection with the customer's purchase of food or drink. This includes, but is not limited to, cups, plates and containers for hot or cold drinks or food purchased for resale as a container of food or drink.

## § 110-15-33. Persons Rendering Services.

33.1 Persons engaged in this State in the business of dispensing, rendering or providing taxable services are required to collect consumers sales and service tax from their customers on the gross proceeds which they derive from dispensing, rendering or providing such services.

33.1.1 When the service is physically dispensed, rendered or provided in this State, that service is provided by a person engaging in business in this State regardless of whether such person does or does not have a permanent place of business in this State.

33.2 Persons not physically engaged in business in this State who dispense, render or provide taxable services to West Virginia customers are required to collect the use tax imposed by this State when such out of state persons have sufficient nexus with this State. See regulation Section 128 for when out-of-state vendors are required to collect use tax.

33.3 The phrase "persons engaged in business" as used herein means persons who offer a service to the public or to others for a consideration whether such person offers the service continuously, part-time, seasonally or for short periods. The consumer sales and use tax laws apply to all services except those that are exempt from tax.

33.4 Enumerated Services Excepted. - Consumers sales and service tax shall not apply to any of the following services:

33.4.1 Contracting services.

33.4.2 Professional services.

33.4.3 Services rendered by an employee to his employer that fall within the scope of the employee's employment contract.

33.4.4 Public utility services.

Example. ABC Company is engaged in this State in manufacturing silver coffee and tea sets, silverware, silver trays and silver bowls. It will also resilver these items. A customer located in the State of Ohio mails her silver tray to ABC Company for it to be resilvered. As an indispensable part of the transaction, the silver tray is to be returned after the work is done to the customer by mail. The charge for this service is charged to the customer's bank card account number. No West Virginia consumers sales and service tax will be charged to the Ohio customer. If the Ohio customer had taken delivery of the resilvered tray in this State, then the charge to this customer would include West Virginia's consumers sales and service tax.

33.4.5 A service which is purchased for resale. A service is purchased for resale when it is subcontracted by the person who is contracted to perform the service, for example:

Example 1. X is a printer and enters into a contract with Y to print 500 bulletins. X subcontracts the job to Z. Z prints the 500 bulletins for X. There is no tax on the contract between X and Z since X is purchasing the printing service from Z for resale to Y. In this transaction Y provides the paper upon which the bulletins are printed.

Example 2. B owns a used car lot. E purchases an automobile from B. As a condition of such sale B agrees to make repairs to the automobile. However, B subcontracts such repair work to C. E has agreed to pay B for the repair

services and for the sale price of the automobile. Under these circumstances, the repair services furnished by C to B constitute a sale of such service to B for resale to E who is the consumer of the services.

Example 3. B owns an auto repair shop and C brings an automobile in to have the air conditioning fixed. B is unable to fix the unit so the car is sent to G who is an air conditioning specialist. The sale of G's service to B is a sale for resale by B to C.

33.5 Persons engaged in any of the activities set out below or any similar or analogous activities are rendering a service subject to the consumers sales and service tax and use tax unless the transaction is subject to an express exemption:

Alterations of tangible personal property
Armored car service
Automobile repair
Billboards
Billiards, pool
Bowling alleys
Boat repair
Business machine repair

Cleaning, pressing, dyeing
Creosoting
Dance schools
Delivering
Engraving
Foundries
Furniture repair
Hotels, motels, tourist, homes, rooming houses
House moving
Jewelry repair
Laundries
Machine operators
Meat cutting
Motor repair
Motorcycle repair
Painting
Photography
Planing mills
Printing
Recapping
Repairing tangible personal property
Sewing
Shoe repair
Storage warehouse and storage lockers
Termite and pest control
Tin and sheet metal repair shops
Warehouses
Washing cars
Watch repair
Weighing
Welding
Wrapping merchandise

This does not constitute a complete list. Other activities not appearing on the foregoing list are subject to the consumers sales and service tax and use tax unless specifically exempted or excepted by these regulations.

33.6 Repairs: Contracting Service or Taxable Repair.

33.6.1 The tax on services is basically a tax on labor. When such services result in a capital improvement to a building, structure, or real property or are performed "on or connected with" new construction, reconstruction, alteration, expansion or remodeling of real property or structures which work results in a capital improvement thereto, such services are exempt from tax as contracting services. This would not include, however, the repair of the contractor's machinery or equipment on the job site or any other service that does not fall within the definition of contracting.

33.6.2 Repairs that result in a capital improvement to a building or other structure or to real property are tax exempt contracting services. All other repairs are services subject to consumers sales and service tax. The difference between a repair which is not a capital improvement to a building or other structure or to real property (which is a repair subject to the consumers sales and service tax) and a repair which constitutes an improvement to a building or other structure or real property (which is a tax exempt contracting service) can often times be difficult. Therefore, the intent of the parties and the scope of the project may become the factors which determine whether the services are taxable or exempt. See Section 115 of these regulations for detailed information on determining whether repair of tangible personal property constitutes a taxable service or contracting. See Section 116 of these regulations for detailed information on determining whether repair of a structure, building or real property constitutes a taxable service or contracting.

33.6.3 "Repair" is synonymous with mend, restore, maintain, replace and service. A repair contemplates an existing building or structure or thing which has become imperfect and constitutes restoration of the original property which has been lost or destroyed. A repair is generally not a capital improvement when it does not materially add to the value or substantially prolong the original useful life of the property.

33.6.4 A person who makes repairs to a building or entire other structure or to real property that are not capital improvements thereto and also sells tangible personal property in connection with such taxable services must collect and remit consumers sales and service tax on the entire gross receipts from the entire transaction. A person making taxable repairs may purchase tangible personal property for resale when the property used in the repair job is resold to the customer. Non-exclusive examples of taxable repair situations include the following:

Repair of broken or defective glass.

Replacement of broken windowpanes.

Replacing individual or damaged roof shingles.

Replacing or repairing a portion of worn out or broken kitchen cabinets.

Replacement of garage door hinges.

Replacing or repairing a portion of a broken or worn tub, shower, or faucets.

Replacing or repairing a portion of a broken water heater, furnace or central air conditioning compressor.

33.6.5 The following are examples of repairs which constitute capital improvements to a building or other structure or to real property. This list is non-exclusive:

The building of a garage or adding a garage to an existing building is considered a capital improvement.

Adding a redwood deck to an existing structure is considered a capital improvement.

Replacing the entire roof on an existing structure is considered a capital improvement.

Adding a new room to an existing building is considered a capital improvement.

Adding a new room by building interior walls is considered a capital improvement.

Replacing kitchen cabinets with some other modifications is considered a capital improvement.

Paneling existing walls is considered a capital improvement.

Laying a new floor over an existing floor is considered a capital improvement. (See special rules for carpeting and other floor coverings sold and installed by retailers.)

Rebuilding a structure damaged by flood, fire or other uncontrollable disaster or casualty is considered to be a capital improvement.

Building a new wing to an existing building is considered a capital improvement.

Rearranging the interior structure of a building is considered a capital improvement.

In all of these examples, the contractor is responsible for paying consumers sales and service tax to any vendor of the materials.

33.6.6 The term "on or connected with" as used in Section 33.6.1 of these regulations is broad and conveys its generally accepted meaning. Therefore, in a specific situation, the facts relating thereto are controlling in determining whether the service is contracting or is a taxable service. "On or connected with" does not connote that things connected have to be primary or subsidiary to the construction, reconstruction, alteration, expansion or remodeling of the building or other structure or real property. An incidental relationship can qualify the activity as contracting if the relationship forms an immediate connection with the construction activity.

33.6.7 <u>Other Factors</u>.

33.6.7.1 The presence of a time relationship can also be a factor in determining the applicability of the contracting exemption. To illustrate, a repair which ordinarily would be a taxable service is tax exempt contracting when the vendor makes the repair as part of a contract for a capital improvement.

33.6.7.2 The motive behind the activity and the course of events that could reasonably be expected to occur would be another consideration in determining if an exempt contracting service is involved.

33.6.7.3 A physical relationship is also a factor that should be evaluated. If a building is constructed to house machinery, any enumerated services relating to the installation of that machinery would be an exempt contracting service. For example, piping joining two pieces of equipment housed in separate buildings would be treated as tax exempt contracting if the equipment in either building was installed while such new construction, reconstruction, alternation, expansion or remodeling of the structure resulting in a capital improvement was also taking place to house the equipment.

**§ 110-15-34. Sales by the State, Counties and Municipalities.**

34.1 Governmental units which render services which are or may be subject to competition from other persons are required to collect consumers sales and service tax upon rendering such services to consumers. For example, the operation of a municipal parking facility which competes with a parking facility operated by others is providing a service subject to consumers sales and service tax. See Section 69 of these regulations for additional information. Fees received by a municipality from on-street parking meters are not subject to consumers sales and service tax.

34.1.1 Taxable Services Include, but are not Limited to:

Admissions to swimming pools, recreation centers, fitness centers, golf courses, etc.
Catering services for parties, wedding receptions, banquets, etc.
Charges for attending summer camps unless educational summer camps as defined in Section 2 of these regulations.
Charges for classes such as tennis, swimming, golf, aerobics, crafts, etc.
Coin operated amusement devices.
Room rentals, e.g., hotel rooms, ballrooms, meeting rooms.

34.1.2 Nontaxable services include, but are not limited to:

Fire service fees
Inspection fees (other than motor vehicle inspection fees)
License fees
Marriage licenses
Recording fees
Sewage fees
Notary fees

34.2 Governmental units which sell tangible personal property to consumers must collect tax thereon. For example, sales of city maps, sales of gifts and souvenirs, vending machine sales, pro shop sales, sales of food from city operated concessions at stadiums, ballparks, auditoriums, etc., are subject to tax.

34.3 The term "governmental unit" includes, but is not limited to this State, county commissions, county school boards, municipalities and local

government authorities, boards and commissions created by or pursuant to an Act of the West Virginia Legislature. The term "governmental unit" does not include the federal government and sales by the federal government of taxable services and tangible personal property are not subject to the sales and service tax unless the federal government consents to collect and remit such tax. Examples of governmental units include, but are not limited to:

County Airport Authorities
County Building Commissions
County Development Authorities
County or Regional Airport Authorities
County owned and operated hospitals, clinics, long-term care facilities and related facilities
County Parks and Recreation Commissions
County Solid Waste Authorities
Emergency Ambulance Service Authorities
Historic Landmark Commission
Municipal Building Commissions
Municipal Electric Power Systems
Municipal Park and Recreation Boards
Municipal Waterworks
Museum Commissions
Notaries Public
Planning Commissions
Regional Airport Authorities
Regional Planning Councils
Urban Mass Transit Authorities

**§ 110-15-35. Personal Services and Sales to Persons Rendering Such Services.**

35.1 The consumers sales and service tax does not apply to the charge for personal services rendered by barbers, beauticians, manicurists, etc. Personal services include only those rendered to the person of an individual. If, apart from their personal services, such individuals also are engaged in selling to the public such articles as hair tonic, soap, hair nets, and the like, they are vendors of tangible personal property and must collect the consumers sales and service tax on all such sales.

35.2 Barbers, beauticians, manicurists, etc., are the consumers of the various items of tangible personal property and services which they use in the rendition of their personal services, and the consumers sales and service tax and use tax will apply upon their purchases of all such services and property, including equipment. However, articles purchased for resale to consumers may be purchased without imposition of tax by barbers, beauticians, etc. For further information, See Section 8.1.2 of these regulations.

**§ 110-15-36. Hospitals.**

36.1 The serving of meals, rental of rooms, sale of drugs, blood, oxygen, dressings, appliances and other tangible personal property to patients is a part of the services rendered by hospitals. These sales and services are so interrelated with professional and personal services, that such sales and

services rendered to patients by hospitals are not subject to the consumers sales and service tax.

36.2 If hospitals operate cafeterias or restaurants through which meals are sold for cash or credit to nurses, doctors, visitors and others, such sales are subject to the consumers sales and service tax.

36.3 If meals are included in the wage agreement and are not deducted from the earnings of employees, the consumers sales and service tax is not charged to the employee.

36.4 Hospitals are engaged in the business of providing a professional service not subject to the consumers sales and service tax. Therefore, they are taxable on purchases of property and services for use in the conduct of their professional services, and are not considered to be making purchases for resale. See Section 9.3.1 of these regulations for rules governing sales to hospitals owned by state, county or municipal governments.

36.5 Purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement of real property by hospitals shall be subject to the consumers sales and service tax and use tax.

**§ 110-15-37. Nursing and Convalescent Homes.**

37.1 Persons who operate nursing or convalescent homes may be rendering personal services which are not subject to consumers sales and service tax. If such persons make sales of tangible personal property unrelated to their personal services and are strictly for the convenience of the patients, such as, toilet articles, etc., such sales are subject to tax. Also, meals served to residents of the home, if separately billed or invoiced, are subject to tax. A nursing or convalescent home may provide other services which are subject to tax; such services are other than personal services and should be separately billed or invoiced. See Section 8.1.2 of these regulations.

37.2 Purchases of tangible personal property and services for use or consumption in the operation of such homes are subject to the consumers sales and service tax and use tax. However, any item purchased for resale, on which tax is collected on the sale to the patient, may be purchased by such homes without imposition of tax. Purchases by a nursing or convalescent home of tangible personal property or taxable services which are used or consumed in dispensing a taxable service are taxable.

**§ 110-15-38. Hotels, Motels, Tourist Homes and Rooming Houses.**

38.1 Persons engaged in renting rooms in hotels, motels, tourist homes and rooming houses on a daily basis shall compute the consumers sales and service tax upon the daily charge. The daily charge subject to consumers sales and service tax does not include complimentary items such as shampoo, coffee and newspapers given to guests by hotels and motels. The monetary consideration subject to the consumers sales and service tax shall not include any local hotel or motel tax. See "monetary consideration" in Section 2 of these regulations.

38.2 Persons engaged in the business of renting rooms and collecting tax thereon are subject to the consumers sales and service tax and use tax on their purchases of tangible personal property and services for use in the conduct of their business.

38.3 Motels, hotels and rooming houses which rent rooms or apartments on a permanent basis to persons who make such rooms or apartments their permanent place of abode need not collect the consumers sales and service tax on such rentals. However, the lessor of such rooms or apartments must pay consumers sales and service tax on all purchases and services relative to such rooms and apartments.

38.4 For application of the purchase for resale exemption for hotels and motels See Section 9.3.4 of these regulations.

38.5 The term "rooming house," as used in this regulation, means any establishment furnishing rooms to three (3) or more individuals by the day, week or month at a specified rate.

38.6 The term "permanent place of abode," as used in this regulation, means the lessee of such room or apartment shall occupy the premise in excess of thirty (30) consecutive days.

**§ 110-15-39. Camp Grounds and Non-Educational Camps.**

39.1 The amounts charged for attending a non-educational camp, and for the services rendered and tangible personal property sold to campers, whether at such a camp or at a camp ground or similar place, are subject to the consumers sales and service tax.

39.1.1 The operator of such a camp, camp ground or similar place may claim exemption for those purchases of tangible personal property or taxable services which are purchased for resale.

39.1.2 Tangible personal property and taxable services purchased for use or consumption in selling tangible personal property or dispensing a taxable service are subject to the consumers sales and service tax and use tax.

39.2 The temporary leasing of space upon which to park a trailer or camper is an activity which is subject to the consumers sales and service tax. If the lessor renders services for the lessees of such space, the tax applies to such services. If a total charge is made which includes the charge for services, the consumers sales and service tax must be computed on such total charge. Persons who provide services to campers must collect consumers sales and service tax on charges made for such services. Examples of services which may be provided by such persons are electrical hookups, temporary renting of space, etc.

39.3 Persons who lease space in excess of thirty (30) consecutive days, to situate mobile homes, are leasing real estate and are not required to collect consumers sales and service tax on such leases. However, any services rendered by the lessor to the lessee for which a separate charge is made is subject to tax.

39.4 For educational summer camps, See Section 125 of these regulations.

**§ 110-15-40. Elementary and Secondary Schools.**

40.1 All public and private elementary and secondary schools shall collect and pay sales and service and use tax in accordance with this regulation.

40.2 Public Schools.

40.2.1 Purchases by Public Schools.

40.2.1.1 All purchases of tangible personal property and services by public schools are exempt from the consumers sales and service tax and use tax so long as a properly completed exemption certificate is issued to the vendor.

40.2.1.2 For information about purchases of food by public schools, See Section 126 of these regulations.

40.2.2 Sales by Public Schools.

40.2.2.1 Sales of textbooks, workbooks, instructional aids, and standardized examination material which are required to be used in any public elementary or secondary school in this State are exempt from the consumers sales and service tax and use tax. However, sales of other school materials, supplies, books which are not textbooks and textbooks which are not required to be used are taxable.

40.2.2.2 For information about sales of food by public schools, See Section 126 of these regulations.

40.2.2.3 School papers and yearbooks, compiled and edited by students of the school, are taxable when sold to the public. However, such sales to students or employees of the school are exempt. Additionally, the sale of advertisements to be placed in such publications are exempt.

40.2.2.4 Sales of tickets for activities sponsored by elementary and secondary public schools located within this State are exempt.

40.2.2.5 Rentals of locks, lockers, storage space, clothing and other materials and equipment owned by public schools and furnished solely to students of the school are exempt.

40.2.2.6 Class dues and library fines are exempt.

40.2.2.7 Casual and occasional sales as defined in Section 2 of these regulations by a parent-teacher association, or similar organization, are taxable unless the organization has a current registration certificate issued in accordance with W. Va. Code § 11-12-1 et seq., is exempt from federal income taxes as an organization qualified under I.R.C. § 501(c)(3) or § 501(c)(4), is an organization with no paid employees, and the organization's gross income from fund raisers, less reasonable and necessary expenses to raise such gross income

(or the tangible personal property or services purchased with such net income), is donated to the public school.

40.3 Private Schools.

40.3.1 Private schools which are recognized by the State of West Virginia as providing a child with an elementary or secondary school education which substitutes for the requirement of compulsory public school attendance under W. Va. Code § 18-8-1 et seq. are, to the extent of the instruction provided, engaged in the rendering of a professional service. Those entities providing State approved kindergarten programs are likewise treated as rendering professional education services.

40.3.1.1 As professional services are excepted from the consumers sales and service tax and the use tax, private schools which satisfy the requirements of the immediately preceding Section 40.3.1 are not required to collect the consumers sales and service tax on the tuition payments they charge for the provision of their professional education services.

40.3.1.2 Unless the private school also satisfies the requirements of the succeeding Section 40.3.2.1 or another exemption, it must pay the consumers sales and service tax or use tax on all purchases of tangible personal property or taxable services which are used or consumed in the provision of their professional education service.

40.3.2 Purchases by Private Schools.

40.3.2.1 In order for purchases by a private school to be exempt from the consumers sales and service tax and the use tax, it must be:

40.3.2.1.a a corporation or organization which has a current Business Registration Certificate issued in accordance with W. Va. Code § 11-12-1 et seq.;

40.3.2.1.b exempt from federal income taxes under the authority of I.R.C. § 501(c)(3) or § 501(c)(4); and;

40.3.2.1.c an elementary or secondary school which maintains a regular faculty or curriculum and has a regularly enrolled body of pupils or students in attendance at the place in this State where its educational activities are regularly carried on and otherwise satisfies the requirements of the preceding Section 40.3.1.

40.3.2.2 This exemption applies only to services, equipment, supplies and materials used or consumed in the activities which qualify the private school for exemption from federal income taxes under I.R.C. § 501(c)(3) or § 501(c)(4). This exemption does not apply to purchases of gasoline or special fuel or to purchases of tangible personal property or services to be used or consumed in the generation of unrelated business income as defined in I.R.C. § 513. Following are applications of this exemption and other relevant exemptions.

40.3.2.3 Purchases of textbooks, workbooks, instructional aids and standardized examination material required to be used in any school of this State are per se exempt.

40.3.2.4 Purchases of library books, newspapers and magazines are exempt.

40.3.2.5 Tangible personal property and taxable services which are purchased for resale by the school are exempt.

40.3.2.6 Long-term leases of motor vehicles are exempt.

40.3.2.7 Purchases of office or administrative materials, supplies, equipment or services are exempt if used or consumed in activities which qualify the private school as exempt under I.R.C. § 501(c)(3) or § 501(c)(4) are exempt.

40.3.2.8 Purchases of educational supplies and equipment are exempt.

40.3.2.9 Purchases of building materials, supplies or equipment, including janitorial materials, supplies, equipment and services are exempt: Provided, That the building materials, supplies and equipment are to be installed in, affixed to or incorporated into the real property used by the private school for its educational activities.

40.3.2.10 Purchases of repair parts or repair services for tangible personal property are exempt if such tangible personal property is used or consumed in the activities which qualify the private school as exempt under I.R.C. § 501(c)(3) or § 501(c)(4).

40.3.2.11 Purchases of athletic equipment and supplies are exempt.

40.3.2.12 In order to claim the exemption, private schools may issue a properly completed exemption certificate to the vendor.

40.3.3 Sales by Private Schools.

40.3.3.1 Casual and occasional sales of property or services not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character by a private school which is exempt on its purchases under W. Va. Code § 11-15-9(f) and to the extent provided in the foregoing Section 40.3.2 are exempt. Other exemptions may also be applicable to sales by private schools. Following are applications of relevant exemptions.

40.3.3.2 Sales of textbooks, workbooks, instructional aids, and standardized examination material required to be used in any private elementary or secondary school in this State are per se exempt. However, sales of other school materials, supplies, books which are not textbooks and textbooks which are not required to be used are taxable.

40.3.3.3 For information about sales of food by private schools, See Section 126 of these regulations.

40.3.3.4 School papers and yearbooks, compiled and edited by students of the school, are taxable when sold to the public. However, such sales to students or employees of the school are exempt. Additionally, the sale of advertisements to be placed in such publications are exempt.

40.3.3.5 Sales of tickets for activities sponsored by elementary and secondary private schools located in this State are exempt.

40.3.3.6 Rentals of locks, lockers, storage space, clothing and other materials and equipment owned by private schools and furnished solely to students of the school are exempt.

40.3.3.7 Class dues and library fines are exempt.

40.3.3.8 Casual and occasional sales as defined in Section 2 of these regulations by a parent-teacher association, or similar organization, are taxable unless the organization has a current registration certificate issued in accordance with W. Va. Code § 11-12-1 et seq., is exempt from federal income taxes as an organization qualified under I.R.C. § 501(c)(3) or § 501(c)(4), and is an organization with no paid employees, and the organization's gross income from fund raisers, less reasonable and necessary expenses to raise such gross income (or the tangible personal property or services purchased with such net income) is donated to the private school.

## § 110-15-41. Churches and Religious Groups.

41.1 Sales to Churches and Religious Groups.

41.1.1 Sales of tangible personal property or services to a "church," as defined in Section 2 of these regulations, which makes no charge whatsoever for the services it renders are exempt from the consumers sales and service tax and the use tax.

41.1.1.1 This exemption applies only to purchases by a church of services, equipment, supplies, food for meals and materials which are directly used or consumed by such church and which are paid from the church treasury.

41.1.1.2 So long as a religious group falls within the definition of a church and otherwise falls within the requirements of the exemption, the exemption applies. (See Section 72 of these regulations for Bona Fide Charitable Organizations).

41.1.1.3 This exemption does not apply to purchases of gasoline and special fuels.

41.1.2 If a church, as defined in Section 2 of these regulations, makes a charge for any of the services which it renders, it must have a current Business Registration Certificate issued under the authority of W. Va. Code § 11-12-1 et seq. and it must be exempt from federal income taxes under I.R.C.

§ 501(c)(3) or 501(c)(4) in order to claim an exemption on its purchases of tangible personal property or services.

41.1.2.1 In order to be exempt, the purchase price must be paid from the church treasury.

41.1.2.2 This exemption applies only to services, equipment, supplies and materials which are used or consumed in the activities which qualify the church for exemption under the Internal Revenue Code of 1986, as amended.

41.1.2.3 This exemption does not apply to sales of gasoline or special fuels or to sales of tangible personal property or taxable services to be used or consumed in the generation of unrelated business income as that term is defined in Section 513 of the Internal Revenue Code of 1986, as amended.

41.1.3 In order to claim the above exemptions, the church or religious group shall issue to the vendor a properly completed exemption certificate.

41.2 Sales by Churches and Religious Groups.

41.2.1 A church, as defined in Section 2 of these regulations, may make exempt casual and occasional sales of property or services which are not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character, as that phrase is defined in Section 2 of these regulations, if the church has a current registration certificate issued under the authority of W. Va. Code § 11-12-1 et seq. and is exempt from federal income taxes under I.R.C. § 501(c)(3) or 501(c)(4) in order to claim exemption on its purchases of tangible personal property or services.

41.2.2 To the extent a religious group qualifies as a church and meets the requirements set forth in the immediately preceding Section 41.2.1, its sales also are exempt.

41.2.3 Sales by churches and religious groups which are exempt are per se exempt.

**§ 110-15-42. Nonprofit Organizations.**

42.1 Nonprofit organizations and institutions are not, by reason of their nonprofit status alone, exempt from the consumers sales and service tax or use tax unless otherwise exempt. They are required to comply with the provisions of the laws pertaining to the filing of returns and making payments of the taxes due on sales or on purchases. See Section 72 for information on certain specific nonprofit organizations.

**§ 110-15-43. Out-Of-State Purchases.**

43.1 Purchases of tangible personal property and services out of this State for use in this State are subject to the West Virginia use tax. In the computation of the use tax, credit may be taken for sales or use taxes paid in another state up to the amount of tax due this State. The use tax is due even

though sales or use tax has been paid on the purchase or use of the same property in another state if the tax paid is less than the use tax due this State.

43.2 The use tax shall be computed on the sale price of tangible personal property or taxable services, which sale price shall not include any consumers sales and service tax or use tax which may have been added to the cost of such tangible personal property or taxable services.

**§ 110-15-44. Leased Departments.**

44.1 Persons making sales of tangible personal property through the facilities of leased departments are required to collect and remit consumers sales and service tax due on such sales. The lessor of such leased departments is not responsible for collecting the tax on such sales and may not file returns on behalf of his lessee.

44.2 Persons making sales of tangible personal property through the facilities of leased departments can issue an exemption certificate for purchases of property for resale, but must pay tax on other purchases for use in their business.

44.3 Persons who lease departments on a permanent basis are not required to pay consumers sales and service tax on the rental fee. However, should they make any improvements to the real property being leased, they are required to pay the tax on property purchased to make such improvements.

**§ 110-15-45. Rentals, Licenses and Leases of Tangible Personal Property; Generally.**

45.1 The definition of "sale" includes the transfer of possession of tangible personal property for a consideration and includes a lease, or rental or license to use. Thus, renting, leasing, or licensing to use tangible personal property is an activity subject to consumers sales and service tax and use tax. The tax applies, if the rental occurs in West Virginia, irrespective of where the lessee or licensee makes use of the property, unless the rental qualifies under Section 45.5 of this regulation. For example, the rental of an automobile from a lessor within this State is taxable in its entirety even though the lessee may use the vehicle for travel outside this State and regardless of where payment is made.

45.2 When there is an agreement of lease or rental of tangible personal property which grants to the lessee or licensee an option to purchase the property, the tax shall be computed upon each payment. If, at any time during the agreement, the lessee or licensee exercises the option on either a cash or charge basis, the tax must be collected on the remaining portion of the sale price at the time the option is exercised or within thirty (30) days after the option is exercised.

45.2.1 An exception to the preceding is a lease-purchase agreement of an automobile. When the lessee exercises his option to purchase the vehicle, the remaining balance or sale price is not subject to the consumers sales and

service tax but the lessee will be subject to the motor vehicle privilege tax pursuant to W. Va. Code § 17A-3-4.

45.3 The consumers sales and service tax and use tax are not applicable to the rental of apartments, houses, offices or other real estate when such rental exceeds thirty (30) consecutive days. See Section 69 of these regulations for information relative to the rental of parking spaces.

45.4 The renting, leasing or licensing to use of tangible personal property is considered to be a sale of tangible personal property. Thus, purchases for use in the business are taxable, except for purchases for resale, for which an exemption certificate may be issued.

45.5 Leases of motor vehicles for a period of thirty (30) or more consecutive days are exempt from tax.

45.6 For in-depth analysis of leases of tangible personal property, see Section 129 of these regulations.

**§ 110-15-46. Money-Operated Machines and Devices, Vending Machines, etc..**

46.1 Sales of tangible personal property or services through the use of money-operated machines and devices are subject to the consumers sales and service tax. Machines and devices included in this regulation are vending machines, storage lockers, toilet lockers, telescopes, radios, television sets, automatic washers, photographic machines, music machines, amusement machines, and any other coin-operated machines or devices. Machines used in the conduct of a business subject to the control of the Public Service Commission or machines used for the vending of United States postage stamps are not included in the classification of machines which are subject to the consumers sales and service tax.

46.2 The person who has control of the machine, i.e., the one who has the key, fills the machine, etc., is responsible for returning and remitting the consumers sales and service tax. See Section 4.6.2 of these regulations for calculation of tax from money operated machines.

46.3 Merchandise-vending-machine operators are required to maintain accurate records of all of their purchases of merchandise for resale. All persons doing business through money-operated machines are required to maintain accurate records of any commission or percentage paid in connection with the operation of such machines.

46.4 Purchases of parts and machines dispensing tangible personal property are subject to consumers sales and service tax when purchased.

46.5 Purchases of parts and machines dispensing taxable services are subject to consumers sales and service tax at the time of purchase, i.e., washing and drying machines at a laundromat, money or token-operated amusement machines.

**§ 110-15-47. Reserved for Future Use.**

## § 110-15-48. Radio and Television Broadcasting Stations.

48.1 Radio and television broadcasting stations who render advertising services, such as layouts or artwork, which are sold and delivered to customers but not associated with or an integral part of broadcast time at the station providing such services, are for the purpose of such sales engaged in rendering a service subject to the consumers sales and service tax and use tax. However, such transactions which occur in conjunction with the sale of broadcast time at the station rendering such service are exempt. Sales of radio and television broadcasting time are exempt from the consumers sales and service tax and use tax.

48.1.1 "Retailer engaging in business in this State," as defined in Section 2 of these regulations, is sufficiently broad to allow a radio and television broadcasting station, when it receives orders for a retailer or performs necessary recordkeeping, or accepts or receives payment for merchandise which has been ordered, to be considered a retailer's office, distribution house, sales house, warehouse, or other place of business in this State, or as an agent (by whatever named called) operating within this State under the authority of the retailer or its subsidiary. In such a situation, the retailer engaging in business in this State will be required to collect a use tax from the purchaser and remit the use tax collected to the Tax Commissioner.

48.2 Radio and television broadcasting stations are primarily engaged in a communications business. Purchases for direct use in a communications business are exempt from consumers sales and service tax and use tax. Other items which are not integral or essential to the communications activity, but which are instead considered to be incidental, convenient or remote to the communications activity, are taxable. Guidelines for determining what is considered to be "directly used" are given in Sections 2 and 123 of these regulations.

48.3 Persons engaged in a communications activity must either pay the tax and request a refund or credit or use a direct pay permit to obtain exemption on the purchase of goods and services directly used in their communications activity. An exemption certificate, as well as a direct pay permit, may be used to obtain an exemption on purchases of goods and services for resale.

48.4 If a direct pay permit is presented to the vendor, no tax is charged on the sale of tangible personal property or service rendered to the purchaser. The person using the direct pay permit must keep a record of the purchases made using the direct pay permit and whether the items purchased were used in an exempt or taxable manner.

48.5 Radio and television broadcasting stations who also render taxable services such as layouts or artwork are engaged in multiple business activities. Persons engaged in multiple business activities will pay tax on their purchases for use in their overall business operation on an apportionment basis. Some items may be used in both the activities of rendering a taxable service and communications. These items may be totally taxable or exempt or partially taxable or exempt depending on their use. If an item is used in the activity of rendering a taxable service and is also directly used in the communications activity, such items would be partially exempt. However, items which are used in the activity of rendering a taxable service and indirectly used in the

communications activity, such as office furniture or supplies, would be totally taxable. To determine how much tax should be remitted, the purchase price must be apportioned between taxable and nontaxable activities. Any reasonable method of apportionment, such as gross receipts from activities, will be acceptable. Documentation as to the apportionment method used should be retained for audit purposes.

48.6 Pursuant to Section 9c.7 of these regulations, a direct pay permit consumers sales and service tax return and a direct pay use tax return must be filed on a monthly basis by the direct pay permit user, together with the tax due on taxable purchases made using the direct pay permit.

**§ 110-15-49. Printers.**

49.1 Persons engaged in the business of printing, who provide materials and labor to produce printed products are considered to be manufacturers and must collect and remit consumers sales and service tax and use tax on sales of such products, or in lieu of the tax, receive a valid exemption certificate or direct pay number. Persons who provide printing services on materials owned by their customers are considered to be rendering a taxable service and must also collect and remit the tax, or in lieu of the tax, receive a valid exemption certificate or direct pay permit number.

49.2 Persons engaged in the business of printing who provide materials and labor to produce printed products are considered to be manufacturers and must pay consumers sales and service tax on their purchases, except those purchases of goods and services directly used in the manufacturing activity. Other items which are not integral or essential to the manufacturing activity, but which are instead considered to be incidental, convenient or remote to the manufacturing activity, are taxable. Guidelines for determining what is considered to be "directly used" are given in Sections 2 and 123 of these regulations.

49.3 Persons engaged in a manufacturing activity must either pay the tax and request a refund or credit or use a direct pay permit to obtain exemption on goods and services directly used in their manufacturing activity. An exemption certificate, as well as a direct pay permit, may be used to obtain an exemption on purchases of goods and services for resale.

49.4 If a direct pay permit is presented to the vendor, no tax is charged on the sale of tangible personal property or service rendered to the purchaser. The purchaser using the direct pay permit must keep a record of the purchases made using the direct pay permit and whether the items purchased were used in an exempt or taxable manner.

49.5 Pursuant to Section 9c.7 of these regulations, a direct pay permit consumers sales and service tax return and a direct pay use tax return must be filed on a monthly basis by the direct pay permit user, together with the tax due on taxable purchases made using the direct pay permit.

49.6 Persons who provide printing services on materials owned by their customers are considered to be engaged in a service activity. Purchases of tangible personal property and taxable services for use or consumption in rendering a taxable service are taxable.

49.7 Printers who engage in manufacturing and who also render taxable services are engaged in multiple business activities. Persons engaged in multiple business activities will pay tax on their purchases for use in their overall business operation on an apportionment basis. Some items may be used in both the activities of rendering a taxable service and manufacturing. These items may be totally taxable or partially taxable depending on their use. Any reasonable method of apportionment, such as gross receipts from activities, will be acceptable. Documentation as to the apportionment method used should be retained for audit purposes. If an item is used in the activity of rendering a taxable service and is also directly used in the manufacturing activity, such item would be exempt to the extent it is directly used in the manufacturing activity. Items which are used in the activity of rendering a taxable service and indirectly used in the manufacturing activity, such as office furniture or supplies, would be taxable in full. To determine how much tax should be remitted when an item has a dual use, one of which is direct use in the manufacturing activity, the purchase price must be apportioned between taxable and nontaxable activities.

## § 110-15-50. Newspapers and Magazines.

50.1 Persons engaged in this State in the printing and sale of newspapers or magazines must collect and remit consumers sales and service tax on the sale of such newspapers and magazines made to ultimate consumers, such as over the counter sales, sales made through vending boxes and subscription sales made to customers located in West Virginia. Sales made to news dealers for resale or to government agencies such as libraries are also taxable unless a valid exemption certificate is obtained. Sales of newspapers to consumers delivered by route carriers are specifically exempted from the tax. The sale of advertising space by newspapers and magazines is also specifically exempt.

50.1.1 Where the person is engaged in business in another state with the newspapers or magazines being sold in this State on a subscription basis, such person may be classified as a retailer engaging in business in this State and, therefore, be required to collect and remit the use tax. See Section 2 of these regulations for the definition of "retailer engaging in business in this State."

50.2 Persons engaged in the printing and sale of newspapers and magazines are considered to be manufacturers and must pay the tax on purchases for use in their business, except for those purchases of goods and services directly used in the activity of printing or preparing the newspaper or magazine. Other items which are not integral or essential to the manufacturing activity, but which are instead considered to be incidental, convenient or remote to the manufacturing activity, are taxable. Guidelines for determining what is considered to be "directly used" are given in Sections 2 and 123 of these regulations.

50.3 Persons engaged in a manufacturing activity must either pay the tax and request a refund or credit or use a direct pay permit to obtain exemption on goods and services directly used in their manufacturing activity. An exemption certificate, as well as a direct pay permit, may be used to obtain an exemption on purchases of goods and services for resale.

50.4 If a direct pay permit is presented to the vendor, no tax is charged on the sale of tangible personal property or service rendered to the purchaser. The person using the direct pay permit must keep a record of the purchases made using the direct pay permit and whether the items purchased were used in an exempt or taxable manner.

50.5 Pursuant to Section 9c.7 of these regulations, a direct pay permit consumers sales and service tax return and a direct pay use tax return must be filed on a monthly basis by the direct pay permit user, together with the tax due on taxable purchases made using the direct pay permit.

**§ 110-15-51. Florists.**

51.1 Florists are required to collect and remit consumers sales and service tax and use tax upon their gross receipts from sales of flowers, wreaths, soil, etc., and services. Those florists who participate in Florists Telegraph Delivery Association or a similar arrangement shall be governed by the following rules:

51.1.1 The West Virginia florist who takes orders for flowers, etc., shall collect consumers sales and service tax or use tax irrespective of the fact that the flowers may be delivered in another state.

51.1.2 A West Virginia florist who receives an order transmitted from another florist has no consumers sales and service tax or use tax liability on such sale irrespective of the fact that the order may be transmitted from a florist in another state.

51.2 Florists are engaged in the business of selling tangible personal property. Thus, the purchases of items for use in their business are taxable, except for purchases for resale, for which they may issue an exemption certificate.

**§ 110-15-52. Amusement Services and Places of Amusement.**

52.1 All sales of tangible personal property, amusement services and other services rendered in the operation of a place of amusement or entertainment are subject to the consumers sales and service tax, such tax to be collected and remitted by the provider or operator of the place of amusement or entertainment. Such sales include, but are not limited to, receipts from hat-check services, video machines, sales of popcorn, candies, cold drinks, programs, souvenirs and novelties, as well as admission tickets.

52.2 Amusement services and places offering amusement services include, but are not limited to, the following:

52.2.1 Live or Recorded Performances, Whether by Individual Ticket or by Season Ticket:

ballet performances
circuses
ice skating shows
motion pictures

musical concerts
opera performances
outdoor theatres
theatres (movies and plays)

52.2.2 Exhibitions or Displays:

animal shows (contests, exhibitions)
antique shows
aquatic shows
arts and crafts, and art shows or fairs
auto shows
museums (displaying art objects, wax figures, antique autos, etc.)
zoos

52.2.3 Spectator Sports:

dragstrips and drag racing
horse shows (horse riding exhibitions)
motorcycle races
automobile races
rodeos
sporting events such as football, baseball, basketball, hockey, and soccer games
wrestling, boxing, or arm wrestling

52.2.4 Participatory Sports or Games:

athletic clubs
bowling games
court fees - tennis, racketball, handball, etc.
dart games
domino games
go-cart raceways
golf courses
health clubs or spas (admissions and memberships)
miniature golf courses
pool (billiards) games (by the game or by the hour)
skate board "tracks"
skating rinks (roller skating and ice skating)
swimming pools
water slides
physical fitness centers

52.2.5 Fairs or Carnivals:

amusement parks
carnivals
fairs
games of skill (at a circus, carnival, etc.)
shooting galleries or ranges
side shows

52.2.6 Others:

hot tub concessions
parties (such as New Year's Eve) sponsored by radio stations, hotels, etc., where the ticket price includes meal, setups, entertainment, party favors, etc.
rides for pleasure (in hot-air balloons, helicopters, trains, ships, boats, etc.) as opposed to regular transportation
tour trains and buses, whose primary purpose is to show tourists sights along a route as opposed to regular transportation
tours of tourist attractions such as boats, buildings, monuments and natural wonders such as caves and caverns
palm reading, fortune telling, and astrological chart preparation
cover charges for admission to night clubs, dance halls, discos, etc., providing dancing, music or other entertainment
closed circuit televised events

52.2.7 Country clubs and other private clubs and organizations that provide entertainment, recreation, sports, dining, or social facilities to members, but only to the extent charges are not considered "bona fide dues" as defined in Section 2 of these regulations. See the following Sections 52.5 and 52.5.1 for further clarification.

52.3 Nonamusement Services. - Activities which are primarily professional services or personal services are not taxable unless a separate charge is made for any taxable service provided. Services not subject to tax include, but are not limited to:

daycare services
tuition for educational summer camps

52.4 Nonprofit, charitable and religious organizations which sell amusement events, entertainment events, athletic events, lectures, etc., are making sales which may be exempt provided they qualify as "casual and occasional sales" as defined in Section 2 of these regulations. However, merely sponsoring an entertainment event will not make the sales exempt from tax. For example, if a local nonprofit organization sponsors a traveling circus which provides rides and other entertainment for one week, the sale of tickets to such rides and other events would be taxable. Likewise, the sale of food items and novelties at such an event also would be taxable.

52.5 The consumers sales and service tax applies to the receipts from the sale of admissions, by tickets or fixed-fee donations whether by a season subscription or by single ticket purchases, to places at which amusements, entertainment, sports events, seasonal and exhibition games or recreation are provided. The term "admissions" does not include bona fide dues paid solely for the privilege of maintaining membership in a club or other organization. "Bona fide dues," as defined in Section 2 of these regulations, mean only those amounts periodically paid by members which entitle such persons to continued membership in a club, other organization or association and shall not include any amounts paid for goods or specific services rendered to members by the club or other organization. In order to be exempt, bona fide dues must be separately identified and may not include any charge for services, tangible personal

property or for any benefits provided to the members other than membership. The inclusion of such charges in membership dues may render the entire amount of such charge subject to tax.

52.5.1 For example, if persons paying a membership fee to a country club must also pay fees to use the facilities, such as golf courses, tennis courts and swimming pool, then the fee for membership would be bona fide dues and exempt from consumers sales and service tax. If payment of the membership fee entitles the member to utilize such facilities of the club, then the entire fee, is subject to consumers sales and service tax.

52.5.2 Fees paid on an annual basis entitling members of an organization, association or club to services such as the use of swimming pools, tennis courts and other services or facilities, are specifically excluded from the definition of "bona fide dues."

52.5.3 Initiation fees and stock purchased from an organization, association or club as a prerequisite for membership, are not subject to tax so long as they do not entitle members to use such services and facilities without charge.

52.6 Sales of tickets for activities sponsored by elementary and secondary schools located within this State are exempt from consumers sales and service tax. All other receipts from admissions to places of amusement or entertainment conducted by the State of West Virginia or any political subdivision, which are in competition with others, are taxable.

52.6.1 Sales of tickets or admissions to events or amusements by colleges and universities, public or private shall be taxable. This provision shall apply to sales of basketball, football, baseball, track or other tickets or admissions.

52.7 The person who has legal rights or ownership over or the legal right to provide, present, or offer an amusement, entertainment, or recreation that is rendered on a regular basis at a fixed location and for which admissions are sold, such as the owner of the wax figure displays at a wax museum, is classified as the provider or operator of a place of amusement or entertainment. Such an individual is also the person who has legal rights of ownership to an amusement, entertainment, or recreation that will not be rendered on a regular basis at a fixed location and for which amusement service admissions will be sold, such as the provider of a one-night live performance by a singer. A provider or operator of an amusement service may be, but is not always, the owner of the facility.

52.8 Purchases for use in the business of selling tangible personal property or dispensing a taxable service are subject to the consumers sales and service tax. For example, the purchase of a popcorn machine for use in business is taxable.

**§ 110-15-53. <u>Employees' Meals</u>.**

53.1 Meals served by employers as part of the employee's wages are not taxable sales. If, however, a separate charge is made for the meals by the

employer, which is paid by the employee or deducted from his wages, the transaction is a sale and subject to consumers sales and service tax.

**§ 110-15-54. Reserved for Future Use.**

**§ 110-15-55. Reserved for Future Use.**

**§ 110-15-56. Trading Stamps, Coupons and Meal Tickets.**

56.1 The exchange of merchandise or prizes for trading stamps, coupons, etc., shall be considered a sale of those goods. The vendor shall collect the consumers sales and service tax based upon the value of the merchandise or prize, and the tax shall be collected from the recipient of the merchandise or prize at the time of receipt.

56.2 A person who sells meal tickets does not charge consumers sales and service tax on such sale since the sale relates to intangible personal property. However, when such person redeems the meal ticket or portion thereof, the vendor shall charge and collect tax on that particular sale. To illustrate: X purchases a meal ticket with a face value of ten dollars ($10.00) from Y for eight dollars and fifty cents ($8.50). Y charges no tax on the sale of the meal ticket. X purchases a two dollar ($2.00) meal with a portion of his ticket. On this two dollar ($2.00) purchase, Y will collect consumers sales and service tax. If the next day, X purchases an eight dollar ($8.00) meal with the remainder of the ticket, Y will collect tax on the eight dollar ($8.00) sale. Therefore, tax is eventually collected on the full face value or redemption value of the ticket, if and when redeemed.

**§ 110-15-57. Public Assistance.**

57.1 Persons who are the recipients of funds distributed by federal, state or local governments in public welfare or relief work are not exempt from consumers sales and service tax. However, where the purchases are made by the federal, state and local government agencies for a person or persons in need of public assistance, or lawfully paid for with food stamps pursuant to the Federal Food Stamp Program codified in 7 U.S.C. § 2011 et seq., or lawfully paid for with drafts issued through the West Virginia special supplemental food program for women, infants and children (WIC) as codified in 42 U.S.C. 1786, the sales are exempt. For further information on food stamps and WIC purchases, See Section 9.2.12 of these regulations.

**§ 110-15-58. Collection Agencies.**

58.1 Collection agencies are required to collect consumers sales and service tax on the commissions, fees or other consideration they receive for services rendered on collection transactions which originated within this State. The measure of this tax shall be the amount of consideration received by the agency without deducting any amount paid by the collection agency to other collection agencies which may be involved in the collection process. For example: A doctor who resides and practices medicine in Clarksburg, West Virginia, is owed two hundred dollars ($200.00) by a patient who refuses to pay. The doctor refers the matter to a West Virginia collection agency to collect the debt. They agree that the fee will be fifty percent (50%) of the amount

collected. The agency is successful in its efforts and collects the full two hundred dollars ($200.00); therefore, it must bill the doctor its fee of one hundred dollars ($100.00) plus the consumers sales and service tax on such fee. Thus, the agency will retain or the doctor will pay to the agency one hundred and six dollars ($106.00), and the agency will remit six dollars ($6.00) of that amount to the State Tax Department as consumers sales and service tax. Six dollars ($6.00) would be the amount collected and remitted even if the agency paid another collection agency to assist it in collecting the doctor's fee.

58.2 Any collection transaction originating outside this State will not be taxable even though a West Virginia collection agency may be involved in the collection process, and even though such local agency may receive some consideration for work which it does in the collection of a particular debt. For example, if the doctor in the example above resided in and practiced medicine in Columbus, Ohio instead of Clarksburg, West Virginia, the agency would not collect and remit any tax for its services to the doctor.

**§ 110-15-59. Funeral Directors.**

59.1 Taxable Sales. - The following sales of tangible personal property or services by funeral directors or embalmers are subject to the West Virginia consumers sales and service tax because they are not sufficiently related to or do not constitute exempt professional services:

Sales of caskets
Sales of burial vaults or boxes
Sales of clothing for dressing the deceased
Sales or rentals of folding chairs to be used at funerals or other services
Sales or rentals of tarpaulins for use at funerals or services
Sales or rentals of candelabra for use at funerals or services
Sales or rentals of candles for use at funerals or services
Sales of wreaths or door sprays
Sales or rentals of funeral cars or the providing of funeral car services
Sales or rentals of limousines or the service of providing limousines for transportation to the cemetery or to other memorial or similar services
Sales or rentals of flower cars or the providing of flower car services
Sales of the service of procuring burial permits
Sales of the service of procuring, obtaining or providing certified copies of death certificates
Sales of chapel service or the service of procuring such service
Sales of flowers or the service of providing, procuring or handling of flowers
Rental of tents for use at the funeral or at other memorial or similar services
Rentals of temporary vaults
Rentals of, or sales of the service of providing, lowering devices for use at the grave
Sales of the service of arranging or providing the services of clergymen, singers, organists or other similar services
Billings for reimbursement of out-of-town funeral director's charges
Sales of the service of placing of death notices in newspapers or in other media

59.2 Exempt Sales. - The following sales of tangible personal property or services by funeral directors or embalmers are not subject to the West Virginia consumers sales and service tax either because they are part of or directly related to, or themselves constitute professional services or constitute alterations to realty:

Sales of the service of embalming bodies
Sales of the service of dressing bodies
Sales of the service of providing automobiles for transportation of the deceased to railroads, air carriers or other carriers
Sales of the service of taking the remains to or getting remains from railroads, air carriers or other carriers or transporters of the body
Sales of the service of attendance at coroner's inquests
Removal charges
Sales of the service of cremation
Reimbursement for air, railroad or truck transportation of bodies or reimbursement for tickets for travel by the funeral director or embalmer directly related to and a part of the professional service
Telegram, telephone, cable or radio charge reimbursements to the funeral director or embalmer directly related to and a part of the professional service
Sales of pall bearer service
Sales of the service of opening or closing of graves or tombs
Sales of the service of lining graves
Sales on perpetual care trust fund deposits

## § 110-15-60. Employee or Independent Contractor

60.1 Services rendered by an employee to his or her employer are exempt from the consumers sales and service tax and use tax. On the other hand, services rendered by an employee to his or her employer which do not fall within the scope of the employee-employer relationship or the contract of employment, and services rendered by independent contractors are subject to the consumers sales and service tax and use tax unless some other exemption provision in Section 9 of these regulations applies.

60.2 There may be situations where the issue is whether a person is an employee or an independent contractor. Generally, the relationship is that of employer-employee if the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the result is accomplished.

60.3 Following are factors to be considered when determining the nature of the relationship. The factors are designed to be only guidelines and where appropriate, the Tax Department will look beyond the formal aspects of the relationship to determine its substance.

60.3.1 Instructions. - A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee.

60.3.2 Training. - Requiring a worker to receive training shows that the person or persons for whom the services are performed want the services performed in a particular way.

60.3.3 Integration. - Integrating the worker's services into the business operations generally shows that the worker is subject to direction and control.

60.3.4 Services Rendered Personally. - This shows the person for whom the services are performed is interested in the methods used to accomplish the work as well as the results, and indicates the person exercises control.

60.3.5 Hiring, Supervising, and Paying Assistants. - If a person for whom services are performed hires, supervises, and pays assistants, this generally shows control over the workers on the job. But if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, then this indicates an independent contractor status.

60.3.6 Continuing Relationship. - This indicates an employer-employee relationship. It may exist where work is performed at frequently recurring although irregular intervals.

60.3.7 Set Hours of Work. - This is a factor indicating control.

60.3.8 Full Time Required. - Shows control over the amount of time the worker spends working and impliedly restricts the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.

60.3.9 Doing Work on Employer's Premises. - Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

60.3.10 Order or Sequence Set. - If the person for whom the services are performed has the right to establish the routines and schedules to be followed, that right is a factor indicating control.

60.3.11 Oral or Written Reports. - A requirement that the worker submit regular or written reports to the person for whom services are rendered indicates a degree of control.

60.3.12 Payment by Hour, Week, Month. - This indicates an employer-employee relationship provided it's not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.

60.3.13 Payment of Business and Traveling Expenses. - An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

60.3.14 Furnishing Tools and Materials. - Tends to show an employer-employee relationship.

60.3.15 Significant Investment. - If a worker invests in facilities that he uses in a performing service and that are not typically maintained by employees (such as maintaining an office rented at fair market value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. Special scrutiny is required for certain types of facilities, such as home offices.

60.3.16 Realization of Profit or Loss. - For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor.

60.3.17 Working for More Than One Firm at a Time. - This generally indicates an independent contractor status. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

60.3.18 Making Service Available to General Public. - Doing so on a regular and consistent basis indicates an independent contractor relationship.

60.3.19 Right to Discharge. - This is a factor indicating that the worker is an employee and the person possessing the right to discharge is an employer. An independent contractor cannot be fired so long as he produces a result that meets the contract specifications.

60.3.20 Right to Terminate. - If a worker has the right to quit at any time without incurring liability, this indicates an employer-employee relationship.

60.4 Temporary Employment Agencies. - Persons hired by employers through temporary employment agencies are not considered to be employees within the scope of the exemption. Instead, the temporary employment agency is considered to be rendering services to the employer which are subject to consumers sales and service tax unless some other provision in Section 9 of these regulations applies.

## § 110-15-61. Pawn Brokers.

61.1 Pawnbrokers are primarily engaged in the business of lending money, for the payment of which they accept personal property as security. If the pledgor redeems the merchandise within the allotted amount of time, the charge made by the pawnbroker is considered to be interest and is not subject to sales tax.

61.2 In case the pledgor does not redeem the property pledged or pawned, such property is forfeited to the pawnbroker, to whom the title passes.

61.3 When pawnbrokers thereafter sell such articles, they are making sales subject to the sales and service tax.

§ 110-15-62. Dentists, Dental Laboratories, Optometrists, Opticians.

62.1 Dentists, optometrists and similar professionals, when rendering professional services are engaged in business which is excepted from the imposition of consumers sales and service tax and use tax.

62.2 Purchases for use in the business of rendering a professional service are subject to the consumers sales and service tax and use tax.

62.3 Dentists, optometrists and similar professionals who engage in a manufacturing activity, such as dentists who operate their own dental lab and make their own dentures, crowns, bridges, etc., or optometrists who operate their own optical shop and grind their own lenses, generally are not considered to be engaging in a professional activity. Such persons will be subject to the following rules when engaging in manufacturing activities.

62.3.1 A dentist who operates his own dental lab is exempt from paying tax when he purchases materials to be directly used in manufacturing dentures, crowns, bridges, etc. Those products which are manufactured for another dentist will be subject to the consumers sales and service tax because the other dentist must pay that tax on all materials and services used or consumed in rendering a professional service. The fair market value of the manufactured products which the dentist utilizes in rendering professional services to his own patients will be subject to the imposition of the use tax.

62.3.2 An optometrist who operates his own optical shop is exempt from paying tax when he purchases materials to be directly used in manufacturing eyeglasses. Those products which are manufactured for another optometrist will be subject to the consumers sales and service tax because the other optometrist must pay that tax on all materials and services used or consumed in rendering a professional service. The fair market value of the manufactured products which the optometrist utilizes in rendering professional services to his own patients will be subject to the imposition of the sales and service tax and use tax.

62.3.3 If an outside patient comes to the optometrist's optical shop with a prescription from another optometrist, then the eyeglasses, including frames, are not subject to the sales and service and use tax upon sale because they are dispensed pursuant to a prescription. In this case, the owner of the optical shop, even though he is an optometrist, need not remit use tax on the fair market value of the eyeglasses because he is not using these glasses in the rendition of his professional service.

62.3.4 Persons engaged in a manufacturing activity must either pay the tax and request a refund or credit or use a direct pay permit to obtain exemption on goods and services directly used in their manufacturing activity. Other items which are not integral or essential to the manufacturing activity, but which are instead considered to be incidental, convenient or remote to the manufacturing activity, are taxable. Guidelines for determining what is considered to be "directly used" are given in Sections 2 and 123 of these regulations.

62.3.5 If a direct pay permit is presented to the vendor, no tax is charged on the sale of tangible personal property or service rendered to the purchaser. The person using the direct pay permit must keep a record of the purchases made using the direct pay permit and whether the items purchased were used in an exempt or taxable manner.

62.3.6 Pursuant to Section 9c.7 of these regulations, a direct pay permit, consumers sales and service tax return and a direct pay use tax return must be filed on a monthly basis by the direct pay permit holder, together with the tax due on taxable purchases made using the direct pay permit.

**§ 110-15-63. Warranties.**

63.1 Warranties offered with the sale of tangible personal property where no separate charge is made for the warranty are not subject to consumers sales and service tax or use tax.

63.2 Where a charge is made for the sale of a warranty, whether it is a manufacturer's warranty, an extended warranty or any other type of warranty or service or maintenance contract except a warranty upon which the premium tax is imposed under W. Va. Code Chapter 33 or the title privilege tax imposed under W. Va. Code Chapter 17A, the sale of the warranty is subject to consumers sales and service tax or use tax as the sale of a taxable service.

63.3 Consumers sales and service tax is not required to be collected by a vendor or retailer from a warrantor for repairs, including parts and labor, performed pursuant to a warranty. A warranty represents a prepayment for future services and when services are performed under the warranty, the warrantor is eligible to claim the resale exemption.

63.4 To the extent that the owner of the property upon which repairs were performed under any type of warranty is required to pay a portion of the repair costs (i.e., a deductible), the amount so charged to such owner is taxable unless said owner is eligible to issue and does in fact issue a properly executed exemption certificate or gives to the vendor his direct pay permit number.

**§ 110-15-64. Boat and Aircraft Dealers.**

64.1 The sales and use of boats which are not subject to the tax imposed by West Virginia Code § 17A-3-4 (motor vehicle title privilege tax) and sales of aircraft are not exempt from the consumers sales and service tax and use tax.

64.2 Sales of parts and services to customers are subject to consumers sales and service tax and use tax. Any trade-in value of parts is credited against the price paid.

64.3 Any proceeds derived from storing or docking of a boat is subject to consumers sales and service tax and use tax.

64.4 Repairs of boats and airplanes performed under warranties are taxable in accordance with Section 63 of these regulations.

64.5 When a boat or aircraft dealer repairs boats or planes for individuals, he is engaged in the business of selling tangible personal property and rendering taxable services.

64.6 Purchases of tangible personal property or services (not for resale) that are used in the business of selling tangible personal property or a taxable service are subject to the consumers sales and service tax.

**§ 110-15-65. Motor Vehicle Dealers.**

65.1 Sales of motor vehicles which are titled by the Department of Motor Vehicles and which are subject to the tax imposed by W. Va. Code § 17A-3-4 or a similar tax imposed by another state are exempt from consumers sales and service tax. The term "motor vehicle" includes recreational vehicle.

65.1.1 Any motor vehicle which is purchased and delivered in West Virginia and immediately removed from this State is exempt from the consumers sales and service tax and use tax if the vehicle is then titled and registered in another state and subjected to a tax on the value of the vehicle by such other state.

65.2 Accessories which are purchased from the dealer after the title and possession of the motor vehicle have been transferred to the purchaser are subject to the consumers sales and service tax and use tax.

65.2.1 As a practical application of this rule, the dealer's sales invoice will be accepted as the basis for determining the amount of tax.

65.2.2 Sales of parts and services to customers are subject to consumers sales and service tax and use tax. Any trade-in value of parts is credited against the price paid.

65.3 When a licensed motor vehicle dealer repairs vehicles for individuals, he is engaged in the business of selling tangible personal property and rendering a taxable service.

65.4 A person engaged in the business of selling a taxable service and taxable tangible personal property is taxable on all of his purchases except purchases for resale.

65.5 When a licensed dealer in motor vehicles make purchases of parts and materials to repair or recondition vehicles held in his inventory for sale, the purchases are considered to be purchases for resale and exempt from tax. For example, a used motor vehicle dealer purchases tires and a battery to repair a car that he will later sell. These items are considered to be purchases for resale and are exempt from tax.

65.6 Repairs of motor vehicles performed under warranties are taxable in accordance with Section 63 of these regulations.

65.9 Towing charges, if regulated by the Public Service Commission, are exempt from consumers sales and service tax.

## § 110-15-66. Well Servicing.

66.1 Persons engaged in the business of well servicing are performing a service subject to the consumers sales and service tax and use tax. Tangible personal property consumed in this activity is not considered to be a sale of tangible property, but is deemed to be consumed in the rendition of the well service and is part of the service activity. Sales of tangible personal property apart from the rendering of well services are also subject to the consumers sales and service tax and use tax.

66.2 Purchases of tangible personal property or services for use in the business of selling tangible personal property or a taxable service are taxable.

## § 110-15-67. Laundries, Laundromats and Dry Cleaning.

67.1 Persons engaged in the operation of laundries, dry cleaning, and related activities, are rendering a service subject to the consumers sales and service tax and use tax. Sales of tangible personal property or services through the use of money-operated machines and devices are subject to the consumers sales and service tax.

67.2 Purchases of money-operated devices which dispense tangible personal property are subject to the consumers sales and service tax and use tax.

67.3 Purchases of tangible personal property or services not for resale that are used exclusively in the business of selling tangible personal property or taxable services are subject to the consumer tax.

67.4 See Section 46 of these regulations regarding money operated machines.

## § 110-15-68. Photographers, Film Developers.

68.1 Persons engaged in the business of taking photographs, who do not develop the film are performing a service subject to the consumers sales and service tax and use tax. Tax must be collected unless the purchaser properly executes an exemption certificate or presents a direct pay permit number.

68.2 Purchases of tangible personal property or services for use or consumption in the business of selling tangible personal property or a taxable service are taxable.

68.3 Persons engaged in the business of taking photographs and who also develop the film are engaged in a manufacturing activity to the extent they develop film. For purposes of this regulation, the activity of developing film includes the making of prints.

68.4 Persons engaged in a manufacturing activity are taxable on their purchases except for items directly used in the manufacturing activity. Other items which are not integral or essential to the manufacturing activity, but which are instead considered to be incidental, convenient or remote to the manufacturing activity, are taxable. Guidelines for determining what is considered to be "directly used" are given in Sections 2 and 123 of these regulations.

68.5 Persons engaged in a manufacturing activity must either pay the tax and request a refund or credit or use a direct pay permit to obtain exemption on goods and services directly used in their manufacturing activity. An exemption certificate, as well as a direct pay permit, may be used to obtain an exemption on purchases of goods and services for resale. A person who takes photographs and develops film of others is considered to be engaged in multiple business activities. Such persons may need to apportion purchases between taxable activities and those which are exempt. See Section 9d of these regulations for further information regarding apportionment.

68.6 If a direct pay permit is presented to the vendor, no tax is charged on the sale of tangible personal property or service rendered to the purchaser. The person using the direct pay permit must keep a record of the purchases made using the direct pay permit and whether the items purchased were used in an exempt or taxable manner.

68.7 Pursuant to Section 9c.7 of these regulations, a direct pay permit consumers sales and service tax return and a direct pay use tax return must be filed on a monthly basis by the direct pay permit holder, together with the tax due on taxable purchases made using the direct pay permit.

**§ 110-15-69. Parking.**

69.1 Persons engaged in the business of offering parking spaces to the public for a fee are performing a service subject to the consumers sales and service tax and use tax. Tax must be collected unless the purchaser presents a properly executed exemption certificate or direct pay permit number. Government-owned and operated parking facilities which compete with private businesses are also rendering a service subject to the consumers sales and service tax and use tax. The fee charged for parking spaces which are rented for a period in excess of thirty (30) consecutive days are not subject to the consumers sales and service tax or use tax.

69.2 Purchases of tangible personal property or taxable services for use or consumption in the business of selling a taxable service are taxable.

**§ 110-15-70. Fraternity and Sorority Houses.**

70.1 Food sold by and rooms rented by student fraternities and sororities that are officially recognized by the college or university at which they are located, to a student enrolled at the college or university are exempt if the food is sold or a room is rented on a "contract basis." Food or meals sold to the general public or on any other basis other than a "contract basis" are subject to consumers sales and service tax. For further information, See Section 9.2.11 of these regulations.

Food is sold on a "contract basis" only when a fixed price is paid for consumption of food products during a specific period of time without regard to the amount of food product actually consumed by the particular individual contracting for the purchase and no money is paid at the time the food product is served or consumed. The term "specific period of time" means a time period of not less than thirty (30) consecutive days.

70.2 Charges made by a fraternity or sorority to its members for room rental are exempt from consumers sales and service tax if the rental is for no less than thirty (30) consecutive days.

70.3 "Bona fide dues" paid by members of a fraternity or sorority solely for the privilege of obtaining and maintaining membership in a fraternity or sorority are not subject to the consumers sales and service tax. "Bona fide dues" within the context of this regulation mean only those amounts periodically paid by members which entitle such persons to membership in a fraternity or sorority. "Bona fide dues" do not include any amounts paid for goods, or specific services rendered to members of a fraternity or a sorority. Amounts paid for goods or specific services rendered to members of a fraternity or a sorority are subject to the consumers sales and service tax, unless they are exempted under other provisions of the law or these regulations. The inclusion in bona fide dues of charges for services, tangible personal property or other benefits provided to members may cause the entire charge to be taxable.

70.4 Purchases of tangible personal property or services that are used or consumed in the business of selling tangible personal property or taxable services are subject to the consumers sales and service tax and use tax except for purchases for resale. Purchases by a fraternity or sorority of food for meals is not considered to be a purchase for resale.

**§ 110-15-71. Advertising Agencies.**

71.1 Advertising agencies render services, such as layout and artwork services, which are subject to the consumers sales and service tax and use tax and, in some instances, also engage in the selling of tangible personal property.

71.2 Advertising agencies who purchase items on behalf of their clients, and receive a fee or commission for such services, must collect consumers sales and service tax or use tax on such fee or commission unless the client may issue an exemption certificate or direct pay permit.

71.3 Purchases made by advertising agencies on behalf of a client may or may not be subject to consumers sales and service tax and use tax. Purchases of radio and television broadcasting time, preprinted advertising circulars, newspaper and outdoor advertising space for the advertisement of goods or services are exempt from the consumers sales and service tax and use tax. However, the purchase of other items such as posterboards and signs may be taxable unless the client can issue an exemption certificate or direct pay permit.

**§ 110-15-72. Organizations Which Qualify or are Qualified Under I.R.C. § 501(c)(3) and 501(c)(4) of the Internal Revenue Code.**

72.1 Sales to Section 501(c)(3) or 501 (c)(4) Organizations.

72.1.1 Sales of tangible personal property or services to a bona fide charitable organization which makes no charges for the services it renders are exempt from the consumers sales and service tax and use tax.

72.1.1.1 This exemption applies only to services, equipment, supplies, food for meals and materials which are directly used or consumed by the organization.

72.1.1.2 This exemption does not apply to purchases of gasoline and special fuels.

72.1.1.3 With the exception of purchases of food, this exemption may be claimed by the organization providing its direct payment permit number to the vendor or by the organization paying the tax and claiming a refund from the Tax Department.

72.1.2 Sales of tangible personal property or services to a corporation which charges for its services may be exempt from the consumers sales and service tax and use tax if it has a current registration certificate issued under the authority of W. Va. Code § 11-12-1 et seq., it is exempt from federal income taxation as a corporation qualified under I.R.C. § 501(c)(3) or 501(c)(4), and it satisfies the requirements of either the following Section 71.1.2.1 or Section 72.1.2.2.

72.1.2.1 A corporation or organization which receives more than one-half of its support from any combination of gifts, grants, direct or indirect "charitable contributions" (as defined in Section 2 of these regulations), or "membership fees" (as defined in Section 2 of these regulations). The other items included in the term "support," as defined in Section 2 of these regulations, regardless of how they may be combined must total less than 50% of all support provided to the corporation or organization in order for its purchases to be exempt.

72.1.2.2 An organization which has no paid employees and its gross income from fund raisers, less reasonable and necessary expenses incurred to raise such gross income (or the tangible personal property or services purchased with such net income) is donated to an organization which is exempt from income taxes under I.R.C. § 501(c)(3) or 501(c)(4).

72.1.3 No corporation or organization may avail itself of the exemption in Sections 9.3.10 and 72.1.2 of these regulations unless it has in fact been qualified as a Section 501(c)(3) or Section 501(c)(4) corporation or organization by the Internal Revenue Service however, a corporation which has not been qualified under Section 501(c)(3) or Section 501(c)(4) but which seeks to avail itself of the exemption in Sections 9.4.6 and 72.1.1 of these regulations may seek a written ruling from the Tax Commissioner, as provided in Section 72.1.3.1 of these regulations.

72.1.3.1 If the taxpayer seeking to avail itself of the exemption in Sections 9.4.6 and 72.1.1 of these regulations is not, in fact, qualified by the Internal Revenue Service, but does, in fact, meet the requirements for qualification, then such corporation or organization shall file with the State Tax Commissioner a statement, in writing, verified under oath setting forth such information as the Tax Commissioner shall need to make a determination. Such written statement shall be supported by a copy of the corporation's articles of incorporation and by-laws or similar documents in the case of a non-incorporated organization. If the Tax Commissioner believes such

proof to be sufficient, he will at his discretion, issue a written ruling granting exemption to such corporation or organization.

72.1.3.2 Where the taxpayer has received a determination or ruling from the Internal Revenue Service that it is exempt from tax under either Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code of 1986, as amended, it shall file a copy of such ruling or determination with the West Virginia State Tax Commissioner.

72.1.4 The exemption provided in the foregoing Section 72.1.2 applies only to services, equipment, supplies and materials used or consumed in the activities for which such corporation or organization qualifies as tax exempt under the Internal Revenue Code.

72.1.4.1 This exemption does not apply to sales of gasoline or special fuels.

72.1.4.2 This exemption does not apply to sales of tangible personal property or services to be used or consumed in the generation of unrelated business income as defined in I.R.C. § 513.

72.1.5 The corporation or organization may claim the exemption provided in Section 72.1.2 of these regulations by issuing to the vendor a properly completed exemption certificate as provided in Section 6 of these regulations.

72.2 Sales by Section 501(c)(3) or 501(c)(4) Organizations.

72.2.1 A corporation or organization which is exempt under the authority of W. Va. Code § 11-15-9(f) from the payment of consumers sales and service tax and use tax on its purchases of tangible personal property or taxable services is per se exempt from the collection and remittance of the consumers sales and service tax and use tax on its "casual and occasional sales" as defined in Section 2 of these regulations.

**§ 110-15-73. Distributors of Gasoline and/or Special Fuel.**

73.1 Persons engaged in the business of distributing gasoline and/or special fuel must collect consumers sales and service tax and use tax upon the sale of such products unless they receive an exemption certificate from the purchaser or the purchaser is a purchaser of a bulk sale qualified under Section 11.5 of these regulations; however, if the purchaser is a government entity or is another purchaser purchasing for resale, no exemption certificate is required. Direct pay permits may not be used by a purchaser to obtain an exemption from consumers sales and service tax or use tax on gasoline and/or special fuel.

73.2 Purchases for use in business by a distributor of gasoline or special fuel are taxable except for purchases for resale, for which an exemption certificate may be issued.

**§ 110-15-74. Reserved for Future Use.**

## § 110-15-75. Weight Loss Programs.

75.1 Depending upon the nature of activities which comprise a weight loss program, such program, in whole or in part, may be exempt from the sales and service tax. In general, however, the cost of an individual's participation in a weight reduction program that is not for the purpose of curing any specific ailment or disease, but for the purpose of improving the individual's appearance, general health and sense of well being, is not exempt from the sales and service tax. To the extent that some of the activities incorporated into such a program may be classified as either professional or personal services, the charge for such services will be excepted from the tax if separately stated; those charges not separately stated may be subject to tax.

75.2 The charges by a physician for performing a physical examination on a customer, for interpreting the results of different tests performed on a customer and for otherwise using his professional judgment or knowledge for the purpose of monitoring the progress of a customer are not subject to the sales and service tax. Additionally, the charges rendered for the use of a registered professional nurse in monitoring the customers blood pressure, weight, pulse, etc., are excepted from the tax. However, charges made for counseling customers to continue in the program, sales of dietary products or other tangible personal property are subject to the sales and service tax.

75.3 Charges for performing tests when such tests are performed in a medical laboratory operated under the specific direction of one or more professional physicians are excepted from the sales and service tax; however, charges rendered by any other medical laboratory are subject to the tax. The location of the medical laboratory is irrelevant so long as the laboratory meets the criteria established in this subsection 75.3.

75.4 Only those purchases by a customer of dietary products and other tangible personal property which are classified as medicine and which qualify under Internal Revenue Code § 213 as medicine for purposes of inclusion in medical expenses when calculating itemized deductions for federal income tax are exempt from the sales and service tax. All other sales to customers of tangible personal property are subject to the tax.

75.5 All other charges rendered for some aspect of a weight loss program are subject to the sales and service tax unless exempted by another section of these regulations.

## § 110-15-76. Electronic Data Processing Services and Related Software.

76.1 Sales of electronic data processing services and related software to others are exempt from consumers sales and service tax and/or use tax. For purposes of this exemption, electronic data processing services means (1) the processing of another's data, including all processing such as key punching, keystroke verification, rearranging, or sorting of previously documented data for the purpose of data entry or automatic processing, and changing the medium on which data is sorted; and (2) providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment.

76.1.1 It is necessary to determine the nature of what is being purchased by the customer. For example, where a completely computerized billing service actually prints and mails the bills based on information provided by the client, receives collectibles and records the payments received, the service is taxable. The fact that a computer is utilized does not result in the service being exempt.

76.1.2 The purchase by customers of specialized computer software which allows the customers terminals to communicate directly with a central processing unit of another is exempt if that is the only use of such software.

76.1.3 The purchase of other software which merely provides information to assist the customer in making business decisions is taxable.

76.2 Purchases for use in rendering electronic data processing services for others and the purchase of related software are taxable, except for purchases for resale, for which an exemption certificate may be issued.

**§ 110-15-77. Sales of Data Processing Equipment.**

77.1 Sales of electronic data processing equipment, accessories, related materials, and/or supplies are considered to be sales of tangible personal property and thereby are subject to the consumers sales and service tax and use tax laws, unless the purchaser presents a direct pay permit number or a properly executed exemption certificate.

77.2 A seller of tangible personal property is exempt from consumers sales and service tax and/or use tax only on items purchased for resale for which an exemption certificate may be issued. All other purchases for use in business are taxable unless otherwise exempt.

**§ 110-15-78. Physical Fitness Centers.**

78.1 Physical fitness centers, gymnasiums, and other such programs are engaged in the business of rendering personal services exempt from tax only if they meet all of the requirements set forth in Section 8.1.2.3 of these regulations.

78.2 Even if physical fitness programs are exempt as personal services, they are exempt only for the sale of the personal services. Sales of any other services which are not personal services, as well as sales of any tangible personal property such as sweatshirts, lotions, cassettes or any other items, are taxable.

78.3 Persons who are engaged in providing personal services are taxable on their purchases for use in the personal service portion of their business. Except for items purchased for resale, purchases for use in any portion of the business related to selling taxable services or tangible personal property are also taxable. An exemption certificate may be issued for items purchased for resale.

**§ 110-15-79. Tanning Salons.**

79.1 Persons engaged in the business of selling tanning sessions are licensing for use, tangible personal property. Licenses for use of tangible personal property are considered to be sales of tangible personal property and are subject to the consumers sales and service tax and use tax.

79.2 A tanning session, as commonly performed within the industry, is not a personal service. A tan is provided solely by the tanning bed with no direct physical contact required from the attendant. The actual service is performed by the machine. A service performed solely by a machine is not rendered from one person to another, and, thus is not a personal service.

79.3 Persons engaged in the selling of tanning sessions are taxable on their purchases for use in business, except for any purchases for resale, for which an exemption certificate may be issued.

**§ 110-15-80. Masseuses and Masseurs.**

80.1 Massaging is considered to be a personal service. Therefore, the consumers sales and service tax should not be collected on the activities of kneading, rubbing or manipulating to condition the body. However, should the masseuse or masseur in the course of his or her business sell tangible personal property, such as oils, towels, or sheets to his or her clients, these sales would be subject to consumers sales and service tax.

80.2 Persons engaged in providing massage services are taxable on their purchases for use in the personal service portion of their business. Purchases for use in the portion of the business related to the selling of tangible personal property are also taxable, except for purchases for resale, for which an exemption certificate may be issued.

**§ 110-15-81. Travel Agencies.**

81.1 Charges for services provided by travel agencies (such as arranging for motel accommodations, meal accommodations, reservation of rental cars, booking cruises, reserving airline tickets, arranging bus tours or selling passage on international tours for their clients) are subject to tax. However, sales of or charges for the transportation of passengers in interstate commerce are exempt from the consumers sales and service tax and use tax. This is to be distinguished from charges for intrastate commerce which remains taxable unless otherwise exempt. For example, if a travel agency sells a roundtrip ticket from Charleston, West Virginia to Washington, D.C. and back, that sale would be exempt as a sale of transportation in interstate commerce, but any commission earned by the agency for that sale would not be exempt. But if the agency sells a roundtrip ticket from Charleston, West Virginia to Morgantown, West Virginia, then both the ticket sale and the commission would be taxable, because the transportation was in intrastate commerce.

81.2 A travel agency that arranges group tours should pay tax on items purchased on behalf of their clients at the time of purchase and should collect and remit consumers sales and service tax on any gross profit realized on the package deal. For example, tax should be paid on the purchase of hotel rooms on behalf of clients at the time of purchase, and tax should be collected on the gross profit from the sale of the package deal, including hotel room costs.

"Gross profit" in this situation is the gross receipts from the sale, exclusive of the actual direct costs to the agency of the items in the package deal, but not exclusive of overhead costs and other ordinary costs of doing business.

81.3 Commissions earned by the travel agency from services provided to various businesses such as hotels, airlines, and bus lines are subject to sales and service or use tax. These persons should either collect and remit the tax due on these commissions or obtain a direct pay permit number from the entity for whom the service was rendered.

81.4 Persons engaged in rendering travel agency services are taxable on their purchases for use in their business.

**§ 110-15-82. Barber and Beauty Shops.**

82.1 Barber and beauty shop operators are engaged primarily in a personal service occupation, and thus, are not required to collect consumers sales and service tax on such services. However, barbers, beauticians, manicurists, etc., consume various items of tangible personal property and services, in the rendition of their personal services. The purchases of all such services and property, including equipment, are subject to the consumers sales and service tax.

82.2 If, apart from rendering personal services, barbers, beauticians, manicurists, etc., are engaged in selling to the public such articles as shampoos, conditioners, styling aids and accessories, and the like, they are vendors and must collect the consumers sales and service tax on all such sales. Barbers, beauticians, manicurists, etc., can issue an exemption certificate for purchases of property for resale to customers.

**§ 110-15-83. Reserved For Future Use.**

**§ 110-15-84. Interior Decorating.**

84.1 Persons engaged in the performance of interior decorating are considered to be rendering a service subject to the consumers sales and service tax and use tax and must collect and remit tax on these services. Interior decorators are taxable on their purchases of tangible personal property and services for use in the conduct of their business unless such purchases of tangible personal property qualify as purchases for resale. See Section 9.3.4 of these regulations regarding purchases for resale.

**§ 110-15-85. Bookkeeping.**

85.1 A person who performs general bookkeeping and accounting services for businesses or other individuals, who is neither a certified public accountant or licensed public accountant, is considered to be rendering a service subject to the consumers sales and service tax and use tax.

85.2 Bookkeepers are taxable on their purchases of tangible personal property and services for use in the conduct of their businesses.

**§ 110-15-86. Auctioneers, Auction Sales, Auctions.**

86.1 An auctioneer licensed under W. Va. Code § 19-2C-1 et seq. when commissioned to sell property on behalf of another is not providing a service which is subject to the consumers sales and service tax.

86.2 Auctioneers who, in the conduct of their business, hold repeated auction sales at their place of business are responsible for collection and remittance of consumers sales and service tax on the full price of the sales, irrespective of whether the merchandise sold belongs to them or to another person unless the isolated transactions exemption set forth in Section 9.2.5 of these regulations applies.

86.3 In those instances in which a person hires an auctioneer to auction the furnishings from the owner's farm or home, the sales are exempt if they are an "isolated transaction" as defined in Section 2 of these regulations. (The same is true of sheriffs' sales and sales under chattel deeds of trust.) For example: a person may sell items of tangible personal property on four separate occasions (four isolated transactions) during the year through an auctioneer, notwithstanding the fact that the auctioneer may have made numerous sales for his other clients during the year far in excess of the number allowable under this definition. However, although no consumers sales and service tax would be imposed on the monetary consideration received for the sale of furnishings by an auctioneer in an isolated transaction, consumers sales and service tax would be imposed on the fees or commissions charged for the sale of auctioneering services by an auctioneer not licensed in accordance with W. Va. Code § 19-2C-1 et seq. to the owner of the furnishings sold: Provided, That the auctioneer licensed in accordance with W. Va. Code § 19-2C-1 et seq. is not required to collect sales tax on such fees or commissions.

86.4 An auctioneer is taxable in all of his or her purchases except purchases for resale. See Section 9.3.4 of these regulations regarding purchases for resale.

**§ 110-15-87. Real Estate Brokers and Real Estate Salesmen.**

87.1 Any real estate broker or real estate salesman who is licensed by the West Virginia Real Estate Commission is providing professional services excepted from the imposition of the consumers sales and service tax and use tax when rendering services which require such a license.

87.2 Those persons engaged in the business of appraising real estate who do not hold a valid West Virginia real estate license and cannot therefore render certified appraisals are not providing a professional service. As a result, such persons will continue to be required to collect consumers sales and service tax and use tax on the sale of their services.

87.4 Purchases for use in business made by a person rendering taxable services, regardless of whether such person holds a valid West Virginia Licensed Real Estate Appraiser license or a Certified Real Estate Appraiser license issued in accordance with W. Va. Code § 37-14-1 et seq., are taxable, except for purchases for resale for which an exemption certificate may be issued.

**§ 110-15-88. Commodity Brokers.**

88.1 Fees or commissions earned from transacting business as a commodity broker are services which are subject to the consumers sales and service tax and use tax. The fact that these fees may be computed as a percentage of sales has no bearing on their taxability. These fees or commissions are not considered to be "directly used or consumed" (as defined in Section 2 of these regulations) in the businesses of transportation, production of natural resources, transmission, communication, and manufacturing.

**§ 110-15-89. Delivery Charges.**

89.1 Separately stated delivery charges are subject to the consumers sales and service tax, unless the delivery service is provided by a common carrier subject to regulation by the Public Service Commission and the customer pays the delivery charge directly to the common carrier. However, where the vendor purchases delivery or shipping service from the common carrier and the customer pays to the vendor the cost for shipping and handling, the total amount of all such shipping and handling charges is taxable to the customer because the customer is purchasing such services from the vendor.

**§ 110-15-90. Jewelry, Furniture, Hardware, Dry Goods, Apparel Stores.**

90.1 Jewelry, furniture, hardware, dry goods and apparel stores make sales of tangible personal property that are subject to consumers sales and service tax and use tax.

90.2 Any trade-in given by the customer must be credited against the price paid. To illustrate: The purchase price of a sofa is $800 and the purchaser has a sofa with a trade-in value of $50. The consumers sales and service tax would be computed on $750.

90.3 Purchases for use solely in the business of selling tangible personal property or taxable services are taxable except for purchases for resale, for which an exemption certificate may be issued.

**§ 110-15-91. Restaurants and Bars.**

91.1 All sales of food and beverages, and cover charges made by a restaurant or bar are subject to consumers sales and service tax. Banquet gratuities, which are fully distributed to employees, are not subject to consumers sales and service tax.

91.2 Persons engaged in the business of operating a restaurant or bar are considered to be retailers, and, thus, their purchases for use in business are subject to consumers sales and service tax, except for purchases for resale, for which an exemption certificate may be issued. Purchases for resale include food as defined in Section 2.30 of these regulations as well as items which are primarily intended to be transferred to the customer as part of the sale, such as paper bags, food containers, paper cups, straws, disposable napkins, and plastic forks, knives, and spoons. Purchases for resale exempt from the sales and service tax do not include purchases of alcoholic liquors, wines and fortified wines as defined in Chapter 60 of the Code which are purchased from either the Alcoholic Beverage Control Commissioner or a retail liquor licensee.

Items which are reusable such as cloth napkins, ceramic plates and metal silverware are subject to tax. See Section 32.6 of these regulations.

**§ 110-15-92. Drugs.**

92.1 Sales of drugs dispensed upon written prescription and sales of insulin to consumers for medical purposes are exempt from consumers sales and service tax. The term "drug" shall include all sales of drugs or appliances to a purchaser, upon written prescription of a physician or dentist and any other professional person licensed to prescribe. This is a per se exemption and no exemption certificate or direct pay permit is needed to obtain the exemption.

92.2 Drugs sold to hospitals, licensed physicians, nursing homes, etc., which are to be consumed in the performance of a professional service are subject to consumers sales and service tax.

92.3 Sales to consumers of non-prescription drugs are subject to consumers sales and service tax.

**§ 110-15-93. Farm Equipment.**

93.1 Sales of farm equipment (tractors, tractor implements, combines, seeders, thrashing machines, etc.) to persons engaged in the commercial production of an agricultural product are exempt from consumers sales and service tax. An exemption certificate can be issued by a commercial producer to obtain this exemption.

93.2 The phrase "commercial production of an agricultural product" means a farming operation undertaken for profit by raising crops or livestock. Production of agricultural products begins with the cultivation of land previously cleared for planting of crops or with the purchase or breeding of livestock or domesticated fowl. The production of agricultural products ceases when an agricultural product has been transported to the point where it will be sold by the farmer or processed.

93.3 This exemption does not apply to purchases for use or consumption in the construction of or permanent improvement to real property or to purchases of gasoline or special fuel.

**§ 110-15-94. Service Stations.**

94.1 Persons engaged in the business of operating a gasoline service station and making automotive repairs are making sales of tangible personal property and rendering services subject to consumers sales and service tax and use tax.

94.2 Automotive repairs which include parts and installation labor are subject to tax. Parts sold without installation or labor are also subject to tax. Tax must be collected unless an exemption certificate or direct pay permit is given by the customer.

94.3 A person engaged in the business of selling a taxable service and taxable tangible personal property is taxable on all of his purchases except purchases for resale.

**§ 110-15-95. Grocery Store Coupons.**

95.1 Since a store is reimbursed by the manufacturer for the amount of a manufacturer's coupon, the consumers sales and service tax is computed on the gross sales price without any deduction for the coupon. To illustrate: a box of laundry detergent sells for $2.50 and the purchaser has a manufacturer's coupon worth $.50. The consumers sales and service tax is computed on the gross sales price of $2.50.

95.2 In the case of coupons issued by a grocery-type store for its own product, the amount of the coupon is not subject to consumers sales and service tax. To illustrate: a box of laundry detergent sells for $2.50 and the purchaser has a coupon issued by that store worth $.50. The consumers sales and service tax is computed on the net sales amount of $2.00. This is considered to be a discount given by the store.

**§ 110-15-96. Mineral Royalties.**

96.1 Owners of minerals in place who lease the right to another party to mine the minerals are receiving a royalty, which is payment for intangible personal property and is not subject to the consumers sales and service tax or use tax.

**§ 110-15-97. Trailer Parks.**

97.1 Persons operating trailer parks who lease space on a temporary basis must collect and remit consumers sales and service tax on such rental fees. However, fees charged for the leasing of space on a permanent basis are not subject to the tax. For purposes of this regulation, leasing on a permanent basis is defined as a leasing of space for a period exceeding thirty (30) consecutive days. Where a person leasing space provides other services to the lessees, that person must collect and remit consumers sales and service tax on charges for such services regardless of whether the space is being leased on a temporary or permanent basis.

**§ 110-15-98. Medical Laboratories.**

98.1 Medical laboratories operated under the direction of professional physicians, are deemed to be providing professional services and thus are not required to collect and remit consumers sales and service tax on their fees. However, medical laboratories are required to pay consumers sales and service tax and use tax on purchases for use in their business, except for purchases for resale for which an exemption certificate may be issued.

**§ 110-15-99. Professionals - Lawyers, Doctors, Etc.**

99.1 Persons who are engaged in a business and are deemed to be professionals, such as lawyers, doctors, and any other person considered to be a professional pursuant to Section 110-15-8.1.1 of these regulations, are not

required to collect and remit consumers sales and service tax on their services rendered or on any sales of tangible personal property incidental to such services. However, such professionals must pay consumers sales and service tax on all purchases for use in their business, except for purchases for resale when the resale is a nonprofessional sale subject to the consumers sales and service tax, for which an exemption certificate may be issued.

99.2 Persons who provide continuing professional education and self-study courses leading to satisfactory fulfillment of continuing professional education requirements may be considered to be professionals.

99.2.1 A professional nonprofit organization or other person providing continuing professional education courses to members of a recognized profession is itself engaged in the provision of professional services which are excepted from the consumers sales and service tax. However, the nonprofit professional organization rendering professional services must pay consumers sales and service tax on all sales to it of tangible personal property (including leases thereof) or taxable services unless the transactions are otherwise exempt.

99.2.2 Meals, food and beverages and written materials, provided as an incidental component of a course of continuing professional education the cost of which is included in the registration fee charged the participant or purchaser of the continuing professional education, are excepted from the consumers sales and service tax as an integral part of the professional services.

99.2.3 Written course materials, purchased separately from the professional nonprofit organization, which qualify for continuing professional education credits, also constitute the provision of professional services and are exempt from consumers sales and service tax when the purchaser obtains continuing professional educational credit in conjunction with such purchase through the use of such written materials. If written materials are purchased by a professional primarily for reference, and no professional education credit is provided, such purchase of written materials is subject to consumers sales and service taxes.

99.2.4 If a sale of tangible personal property or taxable services by a West Virginia vendor is exempt from consumers sales and service tax, a sale of the same nature is exempt from West Virginia use taxes when the sale is made by an out-of-state vendor. If the sale by a West Virginia vendor is taxable for consumers sales and service tax purposes, then the sale of the same or similar property or services by an out-of-state vendor will be subject to West Virginia use taxes, with credit being allowed for consumers sales and service taxes lawfully paid on the transaction to another state. Whether the vendee pays use tax to the vendor or remits it directly to the Tax Commissioner depends on: (1) whether the out-of-state vendor is authorized or required to collect West Virginia use taxes; (2) whether the exemption is a refundable exemption or one for which an exemption certificate may be given; and (3) whether the vendee has and uses its West Virginia direct pay permit number.

**§ 110-15-100. <u>Flight Instruction</u>.**

100.1 Instructing students to fly is a service which is exempted from the consumers sales and service tax as a professional service. Sales of textbooks required for the course and furnished by the instructor are incidental to the providing of the course are exempt. However, charges for sales of instructional aids are taxable. Examples of taxable charges are sales of textbooks not required to be used in the course of instruction and sales of navigation plotters, calculators, etc.

100.2 All purchases of property or services including exempt textbooks for use in the conduct of this type of business are taxable, except for purchases for resale (upon which tax is collected from the ultimate consumer), for which an exemption certificate may be issued.

**§ 110-15-101. Dance Instruction.**

101.1 Income received for instruction in dancing is a service subject to the consumers sales and service tax.

101.2 Sales and service tax must be paid on all purchases of tangible personal property and services which are used in this type of business, except for purchases for resale subject to tax upon sale to the ultimate consumer for which an exemption certificate may be issued.

**§ 110-15-102. Consultants.**

102.1 Persons engaged in the business of providing consulting services, who are considered professionals in their fields, such as doctors, lawyers or any other activity deemed to be professional pursuant to Section 8.1.1 of these regulations, are not required to collect and remit consumers sales and service tax on their fees charged for professional consulting services. Consultants not rendering professional services are responsible for collecting and remitting the tax on their services. Services provided by consultants who are deemed professional in accordance with Section 8.1.1 of these regulations, which do not fall within the scope of the consultant's professional expertise, are subject to the tax.

102.2 For example, the service of making copies or conducting survey polls would not require a professional expertise, and would, therefore, be subject to tax.

102.3 Consultants, whether classified as professionals or nonprofessionals, are required to pay consumers sales and service tax and use tax on all purchases of tangible personal property and taxable services for use in their business.

**§ 110-15-103. Exterminators.**

103.1 Persons engaged in the business of exterminating insects, rodents, or other pests are engaged in rendering a service subject to consumers sales and service tax and use tax. When tangible personal property is transferred to the customer in the rendition of such services, the tax must be computed upon the total price or charge.

103.2 Persons engaged in repairing or replacing real property damaged by insects, rodents, etc., may be engaging in contracting activity exempt from the consumers sales and service tax and use tax. Purchases of tangible personal property and taxable services for use or consumption in the contracting activity. See Section 107 of these regulations.

103.3 Purchases of tangible personal property or services used in the business of dispensing a service subject to the consumers sales and service tax are taxable.

103.4 Purchases for use in business made by exterminators, who also engage in an exempt activity such as contracting, may be totally taxable or partially taxable, depending on their use. To determine how much tax should be remitted, the purchase price must be apportioned between taxable and nontaxable activities, as described in Section 9d of these regulations.

**§ 110-15-104. Plane and Boat Rides.**

104.1 Fees charged for the transportation of individuals on excursions, sight-seeing trips, business trips and the like by persons, who are not subject to regulation by the West Virginia Public Service Commission, are subject to the consumers sales and service tax: Provided, That sales for the transportation of passengers in interstate commerce are per se exempt.

104.2 Purchases of tangible personal property or services for use in the business of selling a service subject to the consumers sales and service tax are taxable.

**§ 110-15-105. Insurance Agencies.**

105.1 Sales tax does not apply to sales of insurance by insurance agencies. The sale of insurance is a sale of an intangible and, thus, is not subject to the consumers sales and service tax and use tax.

105.2 All purchases for use in business made by insurance agencies are subject to consumers sales and service tax and use tax unless specifically exempt.

**§ 110-15-106. Natural Resource Brokers.**

106.1 Fees or commissions earned from transacting business as a natural resource broker are subject to the consumers sales and service tax and use tax.

106.2 Tax must be collected on these fees unless an exemption certificate or a direct pay permit is presented by the purchaser.

**§ 110-15-107. Contracting: General Rules.**

107.1 Application. - This regulation prescribes the rules which persons engaged in the business of contracting must follow to comply with this State's consumers sales and use tax laws, W. Va. Code arts. 11-15 and 11-15A. The word "contracting" as used herein is a word of art. It is important for the taxpayer to first determine whether he is engaged in contracting activity as outlined in

these regulations before applying these rules to his activities. A person who provides contracting services does not collect consumers sales or use tax from his customer on the gross proceeds he derives from providing the contracting service. Such persons are generally taxable on all of their purchases of tangible personal property or taxable services for use or consumption in providing the tax exempt contracting service. Leases of tangible personal property are also taxed. For a person engaged solely in the business of contracting, these rules are not difficult. Frequently, however, persons engaged in the business of contracting are also engaged in other business activities which are subject to different rules. A person engaged in two or more business activities or in different types of contracting must learn what the different rules are and when they apply. Otherwise, such person may find that he has overpaid or underpaid his consumers sales and use tax liability. For example, a person engaging in tax exempt contracting activity may also provide taxable repair services or sell tangible personal property. While a person engaging in tax exempt contracting must generally pay consumers sales and use taxes on his purchases of tangible personal property for use or consumption in that activity, a person providing taxable services or selling tangible personal property may purchase tangible personal property for resale and give the supplier an exemption certificate in lieu of paying the tax thereon. Special rules exist for persons who engage in the following activities:

107.1.1 Contractors who are subject to the transition rules. See Section 108 of these regulations for a detailed explanation of these rules.

107.1.2 Contracting for governmental entities. See Section 109 of these regulations for a detailed explanation of these rules.

107.1.3 Installation of certain tangible personal property where the installation thereof is incidental to the sale thereof by a retail dealer. See Section 114 of these regulations for a detailed explanation of these rules.

107.1.4 Contractors who produce or manufacture tangible personal property which is used or consumed in their contracting activity. See Section 112 of these regulations for a detailed explanation of these rules.

107.1.5 Installation of tangible personal property. See Section 111 of these regulations for a detailed explanation of these rules.

107.1.6 Maintaining, servicing or repairing tangible personal property. See Section 115 of these regulations for a detailed explanation of these rules.

107.1.7 Maintaining, servicing, repairing, altering, improving, or decorating of buildings, structures or real property. See Section 116 of these regulations for a detailed explanation of these rules.

107.1.8 Contracting by nonresident persons. See Section 110 of these regulations for a detailed explanation of these rules.

107.1.9 Contractors who engage in producing natural resources or in reclamation, waste disposal or environmental activities associated with the

production of natural resources. See Section 123 of these regulations for a detailed explanation of these rules.

107.2 Basic Rules Relating to Contracting.

107.2.1 "Contracting" Defined. - Effective July 1, 1989, "Contracting" means the furnishing of work, or both material and work, for another by a contractor in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure (or any part of a building or structure), or for the removal or demolition of a building or structure (or any part of a building or structure), or for the alteration, improvement or development of real property, but only when such activity results in a capital improvement to a building or structure or to real property. When such activity does not result in a capital improvement, the activity is a taxable service.

107.2.1.1 By statute, merchants who sell certain types of tangible personal property from their inventory and as part of the sale agree to install the property or to arrange for its installation are not engaged in contracting. See Section 114 of these regulations for further discussion of this rule.

107.2.1.2 Generally, subcontractors who furnish services to prime contractors in fulfillment of the prime contractors contract resulting in a capital improvement to a building or other structure or to real property are treated as contractors. See Section 107.2.7.2. However, subcontractors who are "retail dealers" within the guidelines set forth in Section 114 of these regulations, who furnish tangible personal property with incidental installation, remain retailers and must charge the sales and service tax on these types of sales to prime contractors.

107.2.1.3 Other Definitions. - The definitions of other terms relevant to this regulation may be found in Section 107.3 of these regulations.

107.2.2 "Contractor" Defined. - A contractor is any person who is engaged in the business of contracting. The phrase "person who is engaged in the business of contracting" as used herein means any person who offers contracting service to the public or to others for a consideration, whether such person offers the contracting service continuously, part-time, seasonally or for short periods. A contractor may be a prime contractor, subcontractor, general contractor or specialty contractor.

107.2.2.1 Persons who provide taxable services to contractors in fulfillment of contracts resulting in a capital improvement to a building or structure or to real property are treated as contractors. See Section 107.2.7.2.

107.2.3 Form of Contract Not Controlling. - Beginning July 1, 1989, the form of the contract is no longer controlling. Any activity that falls within the scope of contracting constitutes contracting for purposes of the West Virginia consumers sales and use tax laws regardless of whether the contract governing such activity is written or oral and regardless of whether the contract is in substance or form a lump sum contract, a cost-plus contract, a

time and materials contract (whether or not open ended), or any other kind of contract.

107.2.3.1 Transition Rule for Open-Ended Time and Material Contracts. - Prior to July 1, 1989, certain time and material contracts for contracting type activity were not treated as contracting. The materials component of such a contract was treated as a sale of tangible personal property; and the labor component of the contract was treated as the providing of a taxable service. Prior law continues to apply to contracts entered into prior to July 1, 1989. This transition rule is discussed further in Section 108.1.1.1 of these regulations.

107.2.4 Imposition of Tax. - Unless otherwise noted, the consumers sales and use tax laws treat every contractor as the user or consumer of all tangible personal property or taxable services furnished to him or by him in connection with contracting activity. Since March 1, 1989, a contractor must pay consumers sales and use taxes on his purchases of tangible personal property or taxable services that are or will be directly used or consumed in the activity of contracting unless such purchases fall under one of the transition rules or are of materials used or consumed in contracting for a governmental entity. Contractors have been required, since July 1, 1987, to pay consumers sales and use taxes on all purchases of tangible personal property or taxable services not directly used in contracting unless such purchases fall under one of the transition rules. Contractors who produce or manufacture tangible personal property which they use or consume in their contracting activity must pay consumers sales or use taxes on the gross value of such produced or manufactured tangible personal property. See Section 111 for a detailed explanation of rules pertaining to contractors who produce or manufacture tangible personal property which they use or consume in their contracting activity.

107.2.5 Purchase of Materials and Supplies by Contractors. - For purposes of the consumers sales and use taxes, sales of materials or supplies to contractors for use or consumption in contracting activity are taxable. Except as provided elsewhere in these regulations, contractors purchasing materials or supplies must pay consumers sales and service tax at the time of the purchase. Special rules exist for purchases of materials for use in governmental contracting. See Section 109 for a detailed explanation of these rules.

107.2.6 Purchase or Lease of Tools or Equipment. - A contractor is considered the final user or consumer of all tools, equipment or machinery purchased to perform contracting services. Therefore, sales of tools, equipment or machinery to contractors to perform contracting services are subject to consumers sales and use taxes unless the sale is grandfathered under pre-March 1, 1989 rules contained in Section 108. Leases of tools, machinery or equipment by a contractor to perform contracting services are treated as purchases for consumers sales or use taxes.

107.2.6.1 Leases of tools, equipment or machinery by a contractor are not exempt from consumers sales and use taxes on the theory that the leased tangible personal property is an ingredient or component part of the services performed by the contractor. This result applies regardless of whether the

services are taxable or are exempt from the consumers sales and use taxes because the service is contracting.

107.2.6.1 Nor are leases of tools, equipment or machinery by a contractor exempt from consumers sales and use taxes on the theory that the leased tangible personal property is consumed in the production of the service performed by the contractor, regardless of whether the services are taxable or are exempt from the consumers sales and use taxes because the service is contracting.

107.2.7 Purchases of Taxable Services.

107.2.7.1 Taxable services purchased by a contractor are subject to consumers sales or use taxes, unless such services are purchased by a contractor exclusively for use in fulfilling a contract which is grandfathered under pre-March 1, 1989 rules. Tangible personal property or services that were purchased exempt for use in fulfilling a contract which is grandfathered under pre-March 1, 1989 rules, that are later used in a contract other than a grandfathered contract may be partially taxable. See Section 108.5.2.

107.2.7.2 Generally, taxable services purchased by a contractor from a subcontractor in fulfillment of the prime contractors contract resulting in a capital improvement to a building or other structure or to real property are not subject to consumers sales or use tax. Subcontractors providing such services to a prime contractor are treated as contractors and are subject to consumers sales and use tax on their purchases for use in fulfilling the subcontract. However, subcontractors who are "retail dealers" within the guidelines set forth in Section 114 of these regulations, who furnish tangible personal property with incidental installation, remain retailers and must collect sales tax on these types of sales to prime contractors.

107.2.7.3 Taxable services include, but are not limited to, the following:

107.2.7.3.1 The fabrication of tangible personal property owned by the contractor for incorporation into a building or other structure or other improvement of real property.

107.2.7.3.2 Installation of wall-to-wall carpeting or other floor covering by a retail dealer of the carpeting or other floor covering as part of the sale thereof to the contractor.

107.2.7.3.3 Installing tangible personal property except where such installation is part of a capital improvement to a building or other structure or to real property.

107.2.7.3.4 Maintaining, servicing, or repairing real or tangible personal property owned or leased by the contractor, except when such activity results in a capital improvement to a building or structure or to real property.

107.2.7.3.5 Rental of equipment with an operator.

107.2.7.4 Examples.

Example 1. Homeowner hires ABC Construction to build an addition to his house. As part of the contract, ABC Construction is to paint not only the new addition to the home, but also to repaint existing adjoining rooms. ABC Construction subcontracts the painting to Rainbow Painting Co. Repainting of existing painted walls is normally a taxable service, while initial painting of new walls or structures is contracting because it constitutes a capital improvement. (See Section 117.16 of these regulations for a detailed explanation of the rules pertaining to painting and papering.) Although ABC Construction is a contractor, it does not pay tax on any of the painting services rendered by Rainbow Painting Co. Although the service provided by Rainbow Painting Co. of painting the existing rooms would by itself normally be a taxable service, it will not be taxable because it is performed as part of the prime contract for new construction, reconstruction, alteration, expansion, or remodeling which itself resulted in a capital improvement. Rainbow Painting Co. would be treated as a contractor and must pay tax on its purchase of paint and other tangible personal property used on the job. Rainbow Painting Co. may wish to obtain a prime contractor's certificate of capital improvement from ABC Construction to document why tax was not charged.

Example 2. Homeowner hires Rainbow Painting Co. to return to paint his upstairs rooms. Rainbow Painting Co. is providing a taxable service and should charge the Homeowner tax on both the paint and the labor. Rainbow Painting Co. may purchase the paint exempt from tax as a purchase for resale. The repainting of the upstairs rooms is a taxable service because it is not a capital improvement nor is it performed on or with new construction, alteration, expansion or remodeling which itself resulted in a capital improvement.

Example 3. Homeowner hires ABC Construction to build an addition to his house. During the construction, ABC Construction's truck breaks down. ABC Construction will pay tax to the repairman on the service work to the truck. The purchase of the service work from the repairman is not exempt from sales and use tax, because it is not a purchase of services from a subcontractor in fulfillment of a prime contract resulting in a capital improvement to a building, structure or real property.

107.2.8 Out-of-State Purchases.

107.2.8.1 The use in West Virginia of any materials or other tangible personal property or services purchased outside of West Virginia is taxable, subject to the credit allowed by W. Va. Code § 11-15A-10a for sales or taxes lawfully paid to another state.

107.2.8.2 Nonresident Contractors should See regulation Section § 110 of these regulations.

107.2.9 Purchase of Materials for Use in Performance of Contracts Out-of-State.

107.2.9.1 The purchase of materials in this State for use in erecting a building or other structure or improving real property of others located in another state are subject to West Virginia consumers sales and

service taxes when such materials are picked up by the contractor in West Virginia.

107.2.9.2 Such purchases of materials are not subject to this State's consumers sales and service tax when they are delivered to an out-of-state job site by:

107.2.9.2.a The supplier;

107.2.9.2.b A common carrier; or

107.2.9.2.c An unregulated carrier hired by the supplier.

107.2.10 Subcontractor's purchases and services. - Where a contractor (subcontractor) enters into a contract to perform specified operations for a second contractor (prime contractor):

107.2.10.1 The purchases of the subcontractor shall be treated in the same manner as purchases of a prime contractor.

107.2.10.1.a Taxable services purchased by a subcontractor are subject to the consumers sales and use taxes.

107.2.10.1.b Purchases of materials by subcontractors for use in fulfilling contracts with prime contractors are taxable unless the purchases are exclusively used in fulfilling contracts with a prime contractor fulfilling a contract with a governmental entity, who has authority to issue a government contractor's Materials Purchase exemption certificate or with a prime contractor fulfilling a contract grandfathered under pre March 1, 1989 rules contained in Section 108. Tangible personal property or services that were purchased exempt for use in fulfilling a contract that is grandfathered under pre-March 1, 1989 rules, that are later used in a contract other than a grandfathered contract may be partially taxable. See Section 108.5.2.

107.2.10.1.b.1 Example. - Owner and Contractor entered into a written contract on February 10, 1989 to construct a building. On June 1, 1989, Contractor enters into a written contract with Subcontractor to complete a portion of the building. Purchases of tangible personal property and taxable services directly used by Subcontractor to complete his work on the building would be exempt from payment of consumers sales and service tax and use tax because such purchases are in fulfillment of the contract for contracting executed on February 10, 1989.

107.2.10.3 Services performed by a subcontractor for a prime contractor in fulfillment of the prime contractor's contract resulting in a capital improvement to a building or other structure or to real property are not subject to consumers sale and use taxes. The subcontractor should maintain adequate records or may obtain a certificate of capital improvement from the prime contractor to document that tax was not collected because the services were performed as part of a prime contract resulting in a capital improvement. (See Section 107.2.11 for information on certificates of capital improvement.) In situations where the subcontractor is providing services to a prime contractor in fulfillment of the prime contractor's contract resulting in a

capital improvement to a building, structure or real property, the subcontractor will be treated as a contractor in relation to his purchases. The subcontractor must then pay tax on his purchases for use in providing the service to the prime contractor in a manner similar to other contractors.

107.2.11 Prime Contractor's Certificate of Capital Improvement. - Services performed by a subcontractor for a prime contractor in fulfillment of the prime contractor's contract resulting in a capital improvement to a building or other structure or to real property are not subject to consumers sales and use taxes.

107.2.11.1 However, sometimes a subcontractor doing work for a prime contractor may not know whether the prime contractor's obligation under the contract with his customer is for the providing of a tax exempt contracting service or a service which is taxable. To provide greater certainty for a subcontractors, a subcontractor may obtain a certificate of capital improvement from the contractor.

107.2.11.2 In general, a subcontractor who accepts a certificate of capital improvement in "good faith" is relieved of liability for collection or payment of tax upon transactions covered by the certificate. The question of "good faith" is one of fact and depends upon a consideration of all the conditions surrounding the transaction. Both the prime contractor and the subcontractor are presumed to be familiar with the law and regulations pertinent to the business in which he deals. In order for "good faith" to be established, the following conditions must be met:

107.2.11.2.a The certificate must contain no statement or entry which the subcontractor knows, or has reason to know, if false or misleading.

107.2.11.2.b The certificate must be an officially promulgated certificate form or a substantial and proper reproduction thereof.

107.2.11.2.c The certificate must be dated and executed in accordance with the published instructions, and must be complete and regular in every respect.

107.2.11.3 A subcontractor may under these circumstances, accept this "good faith" certificate of capital improvement as a basis for not collecting consumers sales and service tax with respect to the transaction from the prime contractor.

107.2.12 Customer-Provided Materials. - If the contract calls for the customer to provide the materials, the contractor is not liable for tax on the materials. The customer should pay the consumers sales and use taxes to the supplier at the time the materials are purchased.

107.3 Definitions. - The following words and terms, when used in these regulations, have the following meaning unless the content in which the term is used clearly indicates that a different meaning is intended:

107.3.1 Alteration. - The term "alteration" means and is limited to an alteration which is a capital improvement to a building or structure or to real property.

107.3.2 Building Materials.

107.3.2.1 The term "building materials" means all tangible personal property, including any device or appliance used by builders, contractors, or landowners in making improvements, additions, alterations or repairs to a building or other structure or to real property in such a way that such tangible personal property becomes a part of the building or other structure or the realty.

107.3.2.2 A device or appliance becomes a fixture and a part of the building or other structure or the real property to which it is connected when it is built into or is attached to the property in such a way that its removal would substantially damage or deface such property.

107.3.2.3 Where the removal of the device or appliance would not substantially damage or deface the structure to which it is connected the following factors shall be considered:

107.3.2.3.a Actual Connection with or Attachment. - To become a part of a building or structure or real property, the device the tangible personal property must have some physical connections such as: by bolts, screws, nails, cement, piping, or cable; by contact, where the tangible personal property is necessary to make complete or useable something which is a building or structure or real property; or by attachment to other tangible personal property which has become a part of a building or structure or real property.

107.3.2.3.b Appropriateness to the Use or Purpose of the Building or Structure or Real Property to Which Connected. - The use or purpose of the tangible personal property must become an element of the use or purpose of the building or structure or real property to which it is connected.

107.3.2.4 This rule is not intended to apply to cook stoves, refrigerators, washing machines, and portable heaters, acquired for the personal use of householders or tenants which may be removed without material damage to the buildings in which they are used.

107.3.3 Capital Improvement.

107.3.3.1 The term "capital improvement" means an improvement that is affixed to or attached to and becomes a part of a building or structure or the real property or which adds utility to real property or any part thereof and that lasts, or is intended to be relatively permanent. As used herein, the term "relatively permanent" means lasting at least twelve (12) months or longer in duration without the necessity for regularly scheduled recurring service to maintain such capital improvement. "Regular recurring service" means regularly scheduled intervals of less than one (1) year. As used herein, the term "adds utility" means substantially adding to the value of the building or structure or

real property or appreciably prolonging or extending the useful life of the building, or structure or real property.

107.3.3.2 The term "capital improvement" includes the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, and the alteration, improvement or development of real property, which:

107.3.3.2.a adds utility to the building or structure or real property or any part thereof by substantially adding to the value of the building or structure or real property or appreciably prolonging or extending the useful life of the building or structure or real property, and

107.3.3.2.b becomes part of the building or structure or real property or is permanently affixed to or attached to the building or structure or real property so that its removal would cause material damage to the article being removed or to the building or structure or real property itself, and

107.3.3.2.c is intended to become a permanent installation or to remain for an indefinite period of time.

107.3.3.3 The following examples illustrate the rule outlined in Section 107.3.3.2:

Example 1. A homeowner enters into a contract with Roofing Company to replace the roof on his house with a new roof guaranteed to last twenty years. This is a capital improvement because the new roof appreciably extends the useful life of the house and once attached, the new roof becomes part of the house.

Example 2. A homeowner entered into a contract with Construction Company to build a new garage on the homeowner's property. This is a capital improvement because the new garage substantially adds to the value of the real property, is permanently attached to the real property, adds utility to the real property and is intended to be a permanent installation.

Example 3. A homeowner enters into a contract with Pools R Fun Construction Company to construct an in-ground pool complete with a deck around the pool and appropriate fencing. This is a capital improvement because it adds utility to the real property and is intended to be a permanent installation.

107.3.3.4 The term "capital improvement" does not include:

107.3.3.4.a A contract for the sale and installation of tangible personal property which, when installed, remains tangible personal property, or which, when installed, does not add utility to the building or structure or the real property; or which, when installed, adds utility to the building or structure or to real property but is not intended to remain there for an indefinite period of time; or

107.3.3.4.b The sale of tangible personal property to a customer if under the contract the contractor who sells the tangible personal

property is not responsible for the installation of the tangible personal property furnished and does not arrange for its installation.

107.3.3.5 Example: John Doe enters into an agreement with a supplier to supply all materials necessary for the framing of a home. He enters into a separate and distinct agreement with a contractor for installation of all the materials purchased from the supplier. John Doe must pay consumers sales and service tax on all materials purchased from the supplier because the purchase is of tangible personal property and not of a capital improvement. The installation of the materials results in a capital improvement to real property. However, the installation service is contracting which is exempt from consumers sales and service tax.

107.3.3.6 Example: John Doe hires ACE Roofing Company to replace 10 asphalt shingles on the roof of his home. This is not a capital improvement to a building or structure or to real property.

107.3.4 Contract.

107.3.4.1 The term "contract" means and includes any agreement (written or oral), whether on a lump sum, time and material, cost plus, or other basis, to:

107.3.4.1.a Erect, construct, alter, repair, decorate or improve any building or other structure that results in a capital improvement thereto, or project, development, or

107.3.4.1.b Alter, improve or develop real property that results in a capital improvement thereto, or

107.3.4.1.c Erect, construct, alter, repair, decorate or improve any fixed works such as waterways, electric generating plants, electrical transmission or distribution lines, telephone or telegraph lines, railroads, highways, airports, sewers, sewage disposal plants or systems, waterworks or water distribution systems, gas transmission or distribution systems, pipelines and other systems for the transmission of any other liquid or gas.

107.3.4.1.d Pave surfaces separately or in connection with any other capital improvement to building or structure or other improvement to real property.

107.3.4.1.e Furnish and install the property becoming a part of a central heating, air conditioning, or electrical system of a building or other structure, and furnish and install wires, ducts, pipes, vents, and other conduit imbedded in or securely affixed to the land or a structure thereof.

107.3.4.1.f Demolish an existing building or structure or improvement to real property.

107.3.4.2 The term "contract" does not include:

107.3.4.2.a A contract solely for the sale or for the sale and installation of tangible personal property such as free standing industrial or commercial machinery and equipment which remains tangible personal property after its installation; or

107.3.4.2.b The furnishing of tangible personal property under what is otherwise a construction contract if the person furnishing the property is not responsible under the contract for the final affixation or installation of the property furnished.

107.3.5 Contracting.

107.3.5.1 Beginning July 1, 1989, "contracting" is defined to mean the furnishing of work, or both materials and work, for another by a contractor in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure (or any part of a building or structure), or for the removal or demolition of a building or structure (or any part of a building or structure), or for the alteration, improvement, or development of real property, but only to the extent such activity results in a capital improvement to the building, structure or real property, as defined in Section 107.3.3 of these regulations.

107.3.5.2 Beginning July 1, 1989, "contracting" does not include the furnishing of work, or both materials and work in the nature of hookup, connection, installation or other services if such service is incidental to the retail sale of tangible personal property from the service provider's inventory. In addition, the hookup, connection or installation must be performed by the seller or performed in accordance with arrangements made by the seller. Examples of transactions that are excluded from the definition of contracting pursuant hereto include, but are not limited to:

107.3.5.2.a The sale and installation of wall-to-wall carpeting.

107.3.5.2.b The sale, hookup, and the connection of:

mobile homes
window air conditioning units
dishwashers (residential)
clothing washing machines or dryers (residential)
other household appliances
drapery rods
window shades
venetian blinds
canvas awnings
free standing industrial equipment
free standing commercial equipment

107.3.6 Contractor. - The term contractor means any individual partnership, corporation or other person engaged in the business of contracting for others. The phrase "person engaged in business" as used herein means persons who offer a contracting service to the public or to others for a consideration, whether such person offers the contracting service continuously,

part-time, seasonally or for short periods. A contractor may be a prime contractor, subcontractor, general contractor or specialty contractor.

107.3.7 Construction Equipment. - The term "construction equipment" means any vehicle, machine, tool, implement or other device used by a contractor in erecting buildings or structures for others, or building on, or otherwise improving, altering, or repairing property for others, which does not become a physical component part of the property upon which such work is performed, and which is not necessarily consumed in the performance of such work. Construction equipment includes, but is not limited to, grading, lifting and excavating vehicles, compressors, scaffolds, forms, hand tools and ladders.

107.3.8 Construction Manager. - The term "construction manager" means a person who enters into an agreement on a fee basis to act between the owner of the project and the various contractors who are hired and paid directly by the owner. As to such project, a construction manager is neither a prime contractor, a general contractor, a specialty contractor, a subcontractor nor any other kind of contractor.

107.3.9 Construction Materials. - The term "construction materials" means items of tangible personal property purchased by a contractor for incorporation into property as a physical component part of such property. A non-exclusive list of construction materials includes:

Asphalt
Bricks
Builder's hardware
Caulking Material
Cement
Conduit
Doors
Ducts
Electric wiring and connections
Flooring
Glass
Gravel
Insulation
Lath
Lead
Lime
Linoleum
Lumber
Macadam
Millwork
Mortar
Oil Paint
Paper
Piping, valves, and pipe fittings
Plaster Power poles, towers, and lines
Putty
Reinforcing mesh
Roofing
Sand
Sheetmetal
Steel
Stone
Stucco
Tile
Wall coping
Wallboard
Wallpaper
Wall-to-wall carpeting (when affixed to the floor)
Weather stripping
Windows
Window Screens
Wire netting and screen
Wood preserver

107.3.10 Construction Supplies. - The term "construction supplies" means items of tangible personal property consumed in the fulfillment of a contract, which items do not become a physical component part of the building or structure or real property upon which work is performed. Supplies include, but

are not limited to, lubricants, cleaning compounds, polyethylene covers, rock salt and rope.

107.3.11 Decoration. - The term "decoration" means and is limited to a decoration which is a capital improvement to a building or structure or to real property.

107.3.12 Equipment. - The term "equipment" as used in this rule means any vehicle, machine, tool, implement or other device used by a contractor in erecting structures for others or reconstructing, altering, expanding or remodeling property of others which does not become a physical component part of the property upon which work is performed, and which is not necessarily consumed in the performance of such work. "Equipment" includes, but is not limited to items such as:

Compressors
Drill presses
Electric generators
Forms
Hand tools
Lathes
Replacement parts for equipment
Scaffolds
Tools
Grading, lifting and excavating vehicles

107.3.13 Fabricator. - The term "fabricator" means any person engaged in any business or activity involving manufacturing, processing or assembling property for sale or commercial use which when installed ordinarily becomes a physical component of a building or other structure or real property.

107.3.14 Fixtures. - The term "fixtures" means and includes items which are accessories to a building or other structure which do not lose their identity as accessories when installed.

107.3.14.1 For an item to be a fixture, the items must be attached in some way to the real property; it must be adapted to the use to which the real property is being put at the time the item is attached thereto; and it must be the intention of the party placing it there to make it a permanent part of the real property or to leave it there for an indefinite period of time.

107.3.14.2 A nonexclusive list of typical items regarded as fixtures includes:

Air conditioning units
Awnings
Burglar alarm and fire alarm fixtures
Cabinets, counters, and lockers (prefabricated)
Electric generators (affixed to and accessory to a building, structure or fixed works
Elevators, hoists, and conveying
Lighting fixtures
Plumbing fixtures
Refrigeration units
Signs
Telephone switchboards and instruments
Television antennas
Transformers and switchgear
Vault doors and equipment
Venetian blinds
Furnaces, boilers, and heating units

107.3.15 Freestanding Industrial or Commercial Equipment. - The term "freestanding industrial or commercial equipment" means equipment which is suitable for and is in fact used for commercial or industrial purposes and which is not connected or attached to a building or structure or real property; can easily be removed without doing substantial damage to the building or structure or real property; and is not essential to the basic use or purpose of the building or structure or real property.

107.3.15.1 Actual Connection with or Attachment to. - To become a part of a building or structure or real property, the equipment must have some physical connection such as by bolts, screws, nails, cement, piping, or cable; by contact, where the equipment is necessary to make complete or usable a building or structure or real property; or by attachment to another item of machinery or equipment which has become a part of a building or structure or real property.

107.3.15.2 A refrigerator sold to a restaurant for use in its kitchen is delivered by the seller and installed by plugging it into an existing electrical outlet or by wiring it directly into the existing electrical system. Under these facts, the refrigerator is freestanding commercial equipment.

107.3.16 General Contractor. - The term "general contractor" means a person who enters into an agreement, either written or oral, with the owner of a project to perform contracting services. A natural person may not contract with himself or a partnership in which he is a partner.

107.3.17 Improvement.- The term "improvement" means and is limited to improvements which are capital improvements to a building or structure or to real property. This term includes, but is not limited to, the following:

107.3.17.1 The erection, construction, alteration, repair, decoration or improvement of a building or other structure, project, or development or other permanent improvement on, under or to real property that results in a capital improvement.

107.3.17.2 Furnishing and installing property becoming a part of any building or other structure, project, or development or other capital improvement on or to the realty, including tangible personal property that after installation becomes a structure or becomes real property because it is embedded in a permanently affixed to the land or to a structure constituting realty; or

107.3.17.3 Altering the land surface of real property by creating roads, earthen dams or stock lands. (Mining and timbering operations or reclamation, waste disposal and environmental activities associated with the production of natural resources are treated as the production of natural resources rather than as contracting for purposes of the consumers sales and use taxes.)

107.3.17.4 The intention of the purchaser determines whether a "portable" building other than a mobile home constitutes improvement to realty as a fixture or is tangible personal property. The primary criterion is the mode of annexation. If the building is plumbed, electrified, anchored, or attached to an existing structure in connection with the sale, it is an

improvement to realty. If none of these conditions exist, the building is personal property, even though it might be placed on a particular foundation.

107.3.17.5 A contract for the improvement to realty does not include:

107.3.17.5.a A contract solely for the sale and installation of freestanding tangible personal property, including a contract to furnish and install freestanding machinery and equipment or other tangible personal property not essential to the building or structure nor intended to become a part of the realty, and if temporarily or incidentally attached, is readily removable without substantial damage to the tangible personal property or to the building or structure or real property.

107.3.17.5.b The furnishing of tangible personal property if the person furnishing the property is not responsible for the final affixation or installation of the property; or

107.3.17.5.c The furnishing of tangible personal property if the person furnishing the property is responsible only for supervision or warranty of installation and does not have the contractual responsibilities of installation.

107.3.18 Lump Sum Contract. - The term "lump sum contract" means a contract under which the contractor for a stated lump sum agrees to furnish and install materials or fixtures, or both. A lump sum contract does not become a time and materials contract when the amounts attributable to materials, fixtures, labor, or tax are separately stated in the invoice.

107.3.19 Machinery and Equipment. - The term "machinery and equipment" means and includes property intended to be used in the production, manufacturing or processing of tangible personal property, the performance of services or for other purposes (e.g., research, testing, experimentation) not essential to the fixed works, building, or structure itself, but which property incidentally may, on account of its nature, be attached to the realty without losing its identity as a particular piece of machinery or equipment and, if attached, is readily removable without damage to the unit or to the realty. "Machinery and equipment" does not include junction boxes, switches, conduit, wiring, or valves, pipes, and tubing incorporated into fixed works, buildings, or other structures, whether or not such items are used solely or partially in connection with the operation of machinery and equipment, nor does it include items of tangible personal property such as power shovels, cranes, trucks, and hand or power tools used to perform the construction contract.

107.3.20 Materials. - The term "materials" means and includes building and construction materials and components, machinery and equipment, supplies and other tangible personal property which are directly used or consumed by a contractor in fulfilling a contract for the provision of a contracting service, regardless of whether such property is incorporated into, attached to, affixed to or set upon a building or structure or real property by a contractor in the performance of a contract.

107.3.21 Nonresident Contractor. - The term "nonresident contractor" means any contractor who is not a resident contractor as defined in Section 107.3.24.

107.3.22 Prime Contractor. - The term "prime contractor" means a person who enters into an agreement, either written or oral, with the owner of a project to perform contracting services. A natural person may not contract with himself or a partnership in which he is a partner.

107.3.23 Repair. - The term "repair" means and is limited to repairs which are capital improvements to a building or structure or to real property. See Sections 115 and 116 for a detailed explanation of rules relating to repairs on tangible personal property, buildings, structures, or real property.

107.3.23.1 A repair which adds utility by substantially adding to the value of a building or structure or real property or by appreciably prolonging the original useful life of a building, structure or real property is a capital improvement if:

107.3.23.1.a it becomes a part of the building or structure or real property, or

107.3.23.1.b it is permanently affixed to or attached to a building or structure or real property so that removal of the repair would cause material damage to the materials being removed or to the building or structure or real property itself, or

107.3.23.1.c it is intended to become a permanent installation or to remain for an indefinite period of time.

107.3.23.2 A repair which neither adds to the value of a building or structure or real property nor appreciably prolongs its original life is not a capital improvement. A repair which is not a capital improvement is subject to consumers sales and service tax and tax must be collected from the customer.

107.3.24 Resident Contractor. - A "resident contractor" means any contractor who has a bona fide place of business within the State of West Virginia or is engaged in any manner in carrying on any employment, trade, business, or profession in this State regardless of whether incorporated in this State or in another state or whether the resident contractor may have a place of business or conduct any employment, trade, business or profession outside this State.

107.3.25 Specialty Contractor. - The term "specialty contractor" means a person whose business of contracting is limited to specialty areas such as heating, air conditioning, plumbing and electric wiring, etc.

107.3.26 Structure.- The term "structure" includes, but is not limited to everything built up or composed of parts joined together in some definite manner and attached or affixed to real property, or which adds utility to real property or to any part thereof, or which adds utility to a particular parcel of property and is intended to remain there for an indefinite period of

time. Nonexclusive examples of structures include: buildings; roads, whether paved or otherwise; dikes; drainage ditches; ponds; fences; and sidewalks, etc.

107.3.27 Subcontractor. - The term "subcontractor" means a person who enters into an agreement with a prime contractor, a general contractor, or with another subcontractor to perform work, or provide both materials and work in fulfillment of a contract for contracting services.

107.3.28 Supplies. - The term "supplies" means items of tangible personal property consumed in the fulfillment of a contract, which items do not become a physical component part of the property upon which the work is performed. Supplies include, but are not limited to, lubricants, cleaning compounds, polyethylene covers and ropes.

107.3.29 Tangible Personal Property. - The term "tangible personal property" means personal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses, and includes tangible goods, wares and merchandise.

107.3.30 Time and Materials Contract. - The term "time and materials contract" means a contract under which the contractor agrees to furnish and install materials or fixtures, or both, and which sets forth separately a charge for the materials or fixtures and a charge for their installation or fabrication.

107.4 Tax on Contractor Not to be Passed on as Tax.

107.4.1 A contractor is not allowed to pass the consumers sales or use tax on to his customer as a tax. A contractor may take the amount of these taxes into consideration when preparing his bid.

107.4.2 A contractor, when bidding on a contract, should anticipate that consumers sales or use taxes will increase the cost of materials and taxable services by the amount of the tax. Necessary allowance should be made in figuring the bid, because the contractor will be held responsible for paying the tax on tangible personal property and the results of taxable services used or consumed in the business of contracting regardless. The tax may not be identified as a separate item in the formal bid because the contractor cannot charge consumers sales and service tax.

107.5 Contractor's Records.

107.5.1 Each contractor shall maintain adequate records to support the use of materials purchased with a Material Purchase certificate and to show the disposition of all materials purchased with such a certificate.

107.5.2 In the case of an audit, the auditor will examine a copy of the agreement between the contractor and his customer for a description of the work performed. Because the law presumes that all transactions are taxable, the contractor must maintain adequate records to justify why consumers sales and service tax was not collected from his customer.

107.6 Contractor's Liability.

107.6.1 Generally a contractor must pay consumers sales or use tax on the following:

107.6.1.1 All of the materials, equipment, tools, and supplies which he uses or consumes in the operation of his business; and

107.6.1.2 All materials consumed by him in the fulfillment of a contract for a capital improvement to a building or other structure or to real property except such property as falls within one of the specific exemptions explained in Section 107.6.2.

107.6.2 Prior to October 1, 1990, contractors could claim immunity or exemption from the consumers sales and service tax or use taxes on materials purchased and used or consumed in connection with contracts with the federal government, or with the State of West Virginia, its political subdivisions and corporate entities created by the West Virginia Legislature, provided they have applied for and been granted authority to use a Material Purchase Certificate. As of October 1, 1990, the exemption for materials purchased by contractors for use in governmental contracts was generally repealed and the use of material purchase certificates became very limited. See Section 109 of these regulations for detailed explanation of the transition rules pertaining to governmental contracting. Contractors may claim immunity or exemption from the sales or use taxes on account of purchases directly used in pre-March 1, 1989 contracts. Transition rules for contracts grandfathered under pre-March 1, 1989 rules are contained in Section 108 of these regulations. Tangible personal property or services that were purchased exempt for use in fulfilling a contract which is grandfathered under pre-March 1, 1989 rules that are later used in a contract other than a grandfathered contract may be partially taxable. See Section 108.5.2.

107.6.3 If a vendor of a contractor doing work in West Virginia does not collect the West Virginia tax from the contractor, the contractor shall be liable for payment of the use tax on his purchases of tangible personal property and taxable services from the vendor.

107.7 Sales to Contractors.

107.7.1 Vendors who sell tangible personal property to contractors are required to collect consumers sales and service tax from such contractors based upon the gross proceeds from such sales unless they, in good faith, receive from the contractor a direct pay permit number or a material purchase certificate. Purchase discounts are not part of the sales price and are not part of the base for computing consumer sales and use taxes. (Note, there is a distinction between a purchase discount and a discount for prompt payment. The first is an allowable deduction where as the later is not an allowable deduction.) Materials purchased out-of-state for use in West Virginia are subject to the West Virginia use tax which is payable in the quarter the materials are delivered into this State.

**§ 110-15-108. Contracting: Transition Rules.**

108.1 Transition Rules for the Period on or After March 1, 1989 to June 30, 1989.

108.1.1 Type of Activity. - "Contracting" is defined for the period March 1, 1989 to June 30, 1989 as the furnishing of work, or both materials and work, in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for the alteration, improvement or development of real property. For purposes of this definition, the term structure shall include, but not be limited to, everything built up or composed of parts joined together in some definite manner and attached to real property, or which adds utility to a particular parcel of property and is intended to remain there for an indefinite period of time.

108.1.1.1 Special Rule for Hourly, Open-Ended Contract Involving Minimal Materials. - Prior to July 1, 1989, not all activities relating to the alteration, repair, decoration, or improvement of a building or structure are contracting. Generally, if a person supplies labor on an hourly basis in fulfillment of a truly open-ended contract, they are not contracting, but instead are providing a taxable service. This is true even if the person also provides a minimal amount of materials, as long as the materials are incidental to the service being performed. The following three conditions must be met before such activity is considered to be a taxable service rather than contracting.

108.1.1.1.a Minimal Materials Provided. - The activity must be for labor only, or the value of the materials supplied must be so minimal that they are incidental to the overall activity. Activities where the cost of materials are five percent (5%) or less of the total price will be deemed to involve "minimal" materials. For activities where the cost of materials are more than five percent (5%) of the total price, the issue of whether the materials will be classified as "minimal materials" will be determined on an individual basis, depending on the facts of each situation.

108.1.1.1.b Hourly Basis. - The cost of the activity must be determined on an hourly basis.

108.1.1.1.c Open-Ended Contract. - The contract must be open-ended, so that neither part can determine or agree to the final cost before performance of the contract is commenced.

108.2 Examples:

108.2.1 Lump-Sum Contract. - Prior to July 1, 1989, persons engaged in the providing of labor, or of labor and materials, to a customer for the alteration, repair, decoration or improvement of real estate, or of a building or structure, under a lump-sum contract are engaged in contracting, because they do not meet the three conditions, enumerated in Section 108.1.1.1 of these regulations, necessary to be considered a service activity.

108.2.2 Cost-Plus Percentage Contract. - Prior to July 1, 1989, persons engaged in the providing of labor, or of labor and materials, to a customer for the alteration, repair, decoration or improvement of real estate, or of a building or structure, under a cost-plus percentage contract are engaged in contracting because they do not meet the three conditions enumerated in Section 108.1.1.1 necessary to be considered a service activity.

108.2.3 Contract With "Not to Exceed X Dollars" Clause. - Prior to July 1, 1989, persons engaged in the providing of labor, or of labor and materials, to a customer for the alteration, repair, decoration or improvement of real estate, or of a building or structure, under a time and material type contract that contains a "not to exceed X dollars" clause are engaged in contracting, because they do not meet the three conditions enumerated in Section 108.1.1.1 necessary for the work to be considered a taxable service activity.

108.2.4 Maintenance Contracts. - Prior to July 1, 1989, persons engaged in the providing of labor, or of labor and materials, to a customer for the alteration, repair, decoration or improvement of real estate or of a building or structure, under a maintenance contract which meets all of the following criteria will be considered to be engaged in a taxable service activity so long as the contract also meets the criteria outlined in Section 108.1.1.1 of these regulations (minimal materials, hourly charges, and being open-ended so that neither party can determine the final cost):

108.2.4.1 The work is performed under a retainer contract with a broad rather than specific scope of work, which does not contain a "not to exceed X dollars" clause.

108.2.4.2 The contractor provides a list of types of craftsmen and equipment with a per hour cost.

108.2.4.3 The work is performed as requested by the customer on an open-ended job order basis.

108.3 Taxability of Sales. - To determine whether consumers sales and service tax should be collected from the customer and remitted, it is necessary to first determine whether the type of activity involved is contracting or a taxable service by examining the criteria set forth in Section 108.1 of these regulations.

108.3.1 Sales of Contracting. - A person who engages in the providing of labor, or labor and materials, to a customer for the alteration, repair, decoration or improvement of real estate, or of a building or structure, under a contract which would be classified as contracting according to the criteria outlined in Section 108.1.1 does not charge consumers sales and service tax to the customer. The sale of contracting is exempt from sales and use tax set forth in Section 9.2.17 of these regulations.

108.3.2 Sales of Service. - A person who engages in the providing of labor, or labor and materials, to a customer for the alteration, repair, decoration or improvement of real estate, or of a building or structure under a contract which meets the criteria set forth under the special rule for hourly, open-ended contracts involving minimal materials outlined in Section 108.1.1.1 of these regulations must collect and remit consumers sales and service tax from the customer or obtain an exemption certificate or direct pay permit.

108.4 Taxability of Purchases. - In order to determine whether consumers sales and service tax and use tax should be paid on purchases for use in these types of activities, it is necessary to first determine whether the

type of activity involved is contracting or a taxable service by examining the criteria set forth in the previous Section 108.1.

108.4.1 Taxability of Purchases for Use in Contracting Activity. - Beginning March 1, 1989, except as outlined in Sections 108.5 and 108.6 of these regulations relating to transition rules and Section 109 of these regulations relating to the transition rules for the exemption for material used in government contracts, a person who engages in the providing of labor, or labor and materials, to a customer for the alteration, repair, decoration or improvement of real estate, or of a building or structure, under a contract, which would be classified as contracting according to the criteria outlined in Section 108.1 must pay consumers sales or use tax on his purchases for use in the contracting activity. This includes machinery, equipment, materials, and services used in the contracting activity. It does not include labor provided by employees of the contractor. Transition rules are provided in Sections 108.5, 108.6 and 109 of these regulations.

108.4.2 Taxability of Purchases for use in Service Activity. - Prior to July 1, 1989, a person who engages in the providing of labor, or labor and materials, to a customer for the alteration, repair, decoration, or improvement of real estate, or of a building or structure, whose activity would be classified as service according to the criteria outlined in Section 108.1.1 of these regulations is exempt on purchases for use in his taxable service activity.

108.4.3 Taxability of Purchases for use in Multiple Activities. - If a person is engaged in both contracting and taxable service activities or in multiple business activities of any type, it is possible that he may have to apportion the tax on purchases used in more than one activity. The apportionment must be performed using a reasonable method acceptable to the Tax Commissioner. Additional information on apportionment is provided in Section 9d of these regulations.

108.4.3.1 Example: Company X engages in both contracting and service activities. Of the total $1,000,000 in gross income earned by Company X, $600,000 was from contracting and $400,000 was from service activities. Company X purchases a drill, a ladder, and a backhoe on April 22, 1989. The drill will be used exclusively in service activities, the ladder will be used exclusively in contracting activities, but the backhoe will be used in both contracting and service activities. Since the drill will be used exclusively in service activities and purchases for use in service activities are exempt prior to July 1, 1989, no tax is paid on the purchase of the drill. However, tax is paid on the full price of the ladder, since it will be used exclusively in contracting activity and beginning March 1, 1989, purchases for use in contracting activity are taxable. The purchase price of the backhoe will have to be apportioned between exempt and nonexempt uses. This is necessary because the backhoe is used in both service activities, for which purchases for use are exempt, prior to July 1, 1989, and contracting activities, for which purchases for use are taxable beginning March 1, 1989. The purchase price of the backhoe was $50,000. One method of apportionment would be to use the percentage of gross income derived from each activity to determine the amount of tax due. Since 60% ($600,000 - $1,000,000) of Company X's income was derived from contracting activities, and purchases for use in contracting are taxable, 60% of

the purchase price of the backhoe will be taxable for $30,000. At a rate of 6%, Company X would owe $1,800 in sales and use tax on the backhoe. The method of apportionment used in this example is for illustration purposes only and may or may not be considered reasonable by the Tax Commissioner in certain situations.

108.5 Transition Rules for Purchases for Use in Contracting. - Effective March 1, 1989, purchases made in-state and out-of-state for both indirect and direct use in contracting activity are taxable for consumers sales and use tax purposes. However, in some situations, purchases will continue to be exempt if they are directly used in contracting activity and fit within the situations outlined in Sections 108.5.1 through 108.5.5 of these regulations.

108.5.1 Pre-July 1, 1987 Contracts. - Where the contracting activity is performed pursuant to a binding contract executed prior to July 1, 1987, any purchases of tangible personal property or taxable services for use or consumption in connection with such contract or contracts continues to be exempt from payment of consumers sales or use taxes with respect to the purchase price of such tangible personal property or taxable services. This exemption is a refundable exemption unless the contractor has a valid direct pay permit number which is given to the vendor of the property or service

108.5.2 Pre-February 16, 1989 Contracts or Firm Bids. - Where the contracting activity is performed pursuant to a binding written contract that was executed prior to February 16, 1989 or pursuant to a written contract executed after February 15, 1989 which embodies a firm written bid for contracting made by the contractor prior to February 16, 1989, tangible personal property or taxable services purchased for direct use or consumption with respect to such contract or contracts continue to be exempt from consumers sales or use taxes under pre-March 1, 1989 rules. This exemption continues to be a refundable exemption unless the contractor has a valid direct pay permit number which is given to each vendor. However, tangible personal property or services purchased exempt for use in fulfilling a contract which is grandfathered under pre-March 1, 1989 rules which is later used in a contract other than a grandfathered contract may be partially taxable. See Section 108.5.2.1.

108.5.2.1 Example.

On April 1, 1989 XYZ Corporation Company purchases a bulldozer for $20,000 with a total remaining useful life of ten years, for use on a contract signed February 1, 1989 which is grandfathered under pre-March 1, 1989 sales and use tax rules. The initial purchase of the bulldozer is exempt from sales and use tax because it is being used on a grandfathered contract. However, beginning April 1, 1990 the bulldozer will be used on other contracts that are not grandfathered under pre-March 1, 1989 sales and use tax rules. To determine the amount of use tax due on the bulldozer, the following calculation is made.

$$\frac{\text{Portion of useful life remaining after use in grandfathered contracts}}{\text{Total useful life}} \times \text{Cost of equipment} = \text{Amount subject to use tax}$$

| | | | | |
|---|---|---|---|---|
| Amount subject to use tax | X | .06 | = | Use tax on bulldozer |
| 9-1/4 yrs. / 10 yrs. | X | $20,000 | = | $18,600 |
| $18,600 | X | .06 | = | $ 1,080 |

The use tax due should be remitted to the Department of Tax and Revenue on a purchaser's use tax form WV/CST 220.

108.5.3 Pre-February 16, 1989 Material Purchase Contracts. - The purchase of tangible personal property or taxable services after February 28, 1989 by a contractor will be exempt from consumers sales and use taxes, when they are purchased pursuant to a written contract entered into on or before February 15, 1989 irrevocably obligating the contractor to purchase identified building materials or specified taxable services in specified quantities. This exemption continues to be a refundable exemption unless the contractor has a valid direct pay permit number which he gives to the vendor of the tangible personal property or taxable service.

108.5.4 Pre-February 1, 1989 Approval of Federal or State Regulatory Body for New Construction. - Where the contracting activity is performed pursuant to a written contract entered into before September 1, 1989 for the construction of a new improvement to real property the construction or operation of which was approved by a federal or state regulatory body prior to February 1, 1989, tangible personal property or taxable services directly used or consumed in fulfillment of such contract will be exempt from consumers sales and use taxes under pre-March 1, 1989 rules. This exemption is a refundable exemption unless the contractor provides the vendor of the tangible personal property or taxable services with the contractor's valid direct pay permit number. Examples of federal or state regulatory bodies which must approve new construction include, but are not limited to, the West Virginia Public Service Commission, the West Virginia Health Care Cost and Review Authority and the Federal Energy Review Commission. Building permits issued by a local governmental entity are not issued by a federal or state regulatory body within the meaning of W. Va. Code § 11-15-8a(b).

108.5.5 Pre-February 1, 1989 Federal Grant for New Construction. - Where the contracting activity is performed pursuant to a written contract executed after February 15, 1989 but prior to September 1, 1989 for construction of a new improvement to real property for which construction the owner of the improvement received a federal grant prior to February 1, 1989, tangible personal property or taxable services directly used or consumed in fulfillment of such contract will be exempt from consumers sales and use taxes under pre March 1, 1989 rules. This exemption is a refundable exemption unless the contractor provides the vendor of the tangible personal property or taxable services with the contractor's direct pay permit number.

108.6 Transition Rules for Leased Tangible Personal Property Directly Used in Contracting. - A lease of tangible personal property is generally treated for consumers sales and use tax purposes in the same manner as a sale of

tangible personal property. Accordingly, a written lease for identified tangible personal property executed prior to February 16, 1989 and expiring after February 28, 1989 will be exempt from consumers sales and use taxes during the period of its primary term, but only to the extent the tangible personal property is directly used in contracting.

108.6.1 When the leased property is directly used in contracting only part of the time, periodic lease payments must be apportioned between the exempt and nonexempt use of the property.

108.6.2 If prior to expiration of the primary lease term, the lease is extended or renewed, lease payments for periods beginning the day after the original primary term of the lease ended shall be subject to consumers sales and use taxes unless some other exemption applies to the transaction.

108.6.3 The following examples illustrate application of this rule.

Example 1: On December 15, 1987 the ABC Construction Company executed a three year written lease for a bulldozer for sole use in its contracting activity. The primary term of the written lease began January 1, 1988 and expires December 31, 1990. Lease payments for the period March 1, 1989 through December 31, 1990 will be exempt from consumers sales and use taxes provided the bulldozer continues to be directly used solely in the lessee's contracting activity.

Example 2: Same facts as example one, except on December 15, 1990, the lessee elects to renew the lease for one year. Lease payments for periods subsequent to December 31, 1990 are taxable unless some other exemption applies.

Example 3: Same facts as example one, except that on December 15, 1990 the lessee exercises his option to purchase the bulldozer for its then fair market value. The purchase price will be subject to consumers sales and use taxes unless some other exemption applies.

Example 4: On February 15, 1989 the ABC Construction Company executed a three year written lease for a bulldozer for use directly in its contracting activity. The primary term of the lease began March 1, 1989 and expires February 28, 1992. The lease payments will be exempt from consumers sales and use taxes provided the bulldozer is directly used solely in the lessee's contracting activity.

Example 5: Same facts as example four, except that on January 1, 1990 the lessee begins using the bulldozer in its coal mining activity. The lease payments for the period beginning January 1, 1990 will still be exempt from consumers sales and use taxes, regardless of whether the lessee is a contract miner or the producer of the coal for severance tax purposes.

Example 6: On February 26, 1989 L&M Construction Company executed a three year written lease for a bulldozer for use directly in its contracting activity. The primary term of the lease began March 1, 1989. The lease payments under the lease are taxable even though the bulldozer will be directly used in contracting activity because the lease was not executed until February 26, 1989, rather than on or before February 15, 1989.

Example 7: Same facts as example six, except that the written lease executed February 26, 1989 embodies an oral agreement of February 10, 1989 to lease the bulldozer. The lease payments are taxable even though there was an oral agreement on February 10, 1989 to lease the bulldozer. The transition rules recognize only written contracts.

Example 8: ABC Construction Company entered into a written three year lease for a bulldozer for direct use in its contracting business. This lease was executed on February 25, 1989 and the lease term commenced on that date. The lease provides for monthly rental payments which are due on the twenty-fifth day of each month. Rent is due in advance. On February 25, 1989 ABC Construction Company paid the first month's rental payment and obtained possession of the bulldozer. The first month's rental payment is exempt from consumers sales and use taxes because it was due on February 25, 1989 prior to the March 1, 1989 change in the law. Payments due for the remaining months of the rental period will be taxable because the lease was not executed on or before February 15, 1989.

**§ 110-15-109. Contracting for Governmental Entities.**

109.1 Exemption from March 1, 1989 through September 30, 1990. Purchase of materials for use in fulfillment of contracts with the United States, the State of West Virginia, its political subdivisions and corporate entities created by the West Virginia Legislature.

Contractors are generally taxable on purchases of materials for use in their contracting activities. However, during the period from March 1, 1989 through September 30, 1990, contractors could purchase exempt from consumer sales and use taxes materials for use in fulfillment of written contracts to provide contracting services to certain governmental agencies, if the materials were installed, affixed or incorporated into a building to be used by the governmental agency for a governmental or proprietary purpose. This exemption was repealed October 1, 1990 except for contracts meeting the requirements set forth in Section 109.2.

109.1.1 The exemption from tax for purchases of materials by contractors for use in governmental contracts applies only if the following four conditions are met:

109.1.1.1 The contractor must enter into a written contract on or before September 15, 1990, or meet another transition rule set forth in Section 109.2, with the United States or the State of West Virginia or their political subdivisions including county and municipal governments or a corporate entity created by the West Virginia Legislature; and

109.1.1.2 The contract must be for the construction, alteration, improvement, repair or decoration of a building, structure or real property which is a capital improvement to the property; and

109.1.1.3 The materials purchased must be actually installed in, affixed to or incorporated into the building or structure or real property; and

109.1.1.4 The building, structure or real property must be or will be owned and used by the governmental entity for a governmental or proprietary purpose.

109.1.2 Example 1. ACE Construction Company enters into a contract with a West Virginia municipality to build a public swimming pool and related facilities which will be owned and operated by the municipality. The contractor applies for and receives a government contractor's material purchase certificate which he may use to purchase tax free materials that will be incorporated into this project by giving a copy of the material purchase certificate to each vendor. As used here, the term "materials" includes building and construction materials, machinery and equipment and any other tangible personal property that is incorporated into the project. This exemption does not apply to the contractor's purchase of any other tangible personal property such as materials not incorporated into the project, tools, construction equipment and construction supplies. Nor does this exemption apply to leases of tangible personal property or to the purchase of taxable services.

Example 2. Same facts as example one except that ACE Construction Company subcontracts the excavating and earth moving portion of its contract to Excavators, Inc. The materials and work provided by the subcontractor in fulfillment of this subcontract are exempt from consumers sales and use taxes because they are provided to fulfill the contractor's contract with the municipality. The subcontractor may use the contractor's material purchase certificate. The subcontractor must pay consumers sales and use taxes on his purchase of any materials, etc., not incorporated into the swimming pool project. The subcontractor's lease of tangible personal property, e.g., a bulldozer, or purchase of taxable service, e.g., repairs to construction equipment, are taxable. The material purchase certificate may not be used for items such as these.

Example 3. The X County Building Authority agrees to sell industrial revenue bonds to acquire certain land and construct a manufacturing facility which it will lease to Manufacturing Company. The County Building Authority enters into a contract with ACE Construction Company to build a turn-key facility in conformity with the plans, specifications and requirements of the Manufacturing Company. The primary lease term is for twenty (20) years. At the end of twenty (20) years, the manufacturing company may exercise its option to purchase the facility for $100. In accordance with generally accepted accounting principles and for federal income tax purposes, the Manufacturing Company will capitalize the cost of the facility and take depreciation on the machinery, equipment and other tangible personal property. The rent it pays to the Building Commission may not be expensed. Because the manufacturing facility will not be owned and used by the X County Building Commission for a governmental or proprietary purpose, the governmental contractor's exemption does not apply to materials and other tangible personal property which ACE Construction Company purchases for incorporation into the manufacturing facility.

109.2 Transition Rules for Repeal of the Exemption. - The exemption for the purchase of materials by contractors for use in governmental contracts was generally repealed as of October 1, 1990. However, the exemption continues for the following:

109.2.1 Purchases of tangible personal property after October 1, 1990 if used in fulfillment of a written contract executed and legally binding on the parties on or before September 15, 1990.

109.2.1.1 The term contract does not include change orders wherein the scope of work contained in the original contract is exceeded to a degree significant enough to require additional charges to the customer. Purchases by a contractor for use in contracting activities performed under such change orders are subject to consumer sales and use tax.

109.2.2 Purchases of tangible personal property purchased on or after October 1, 1990 if used in fulfillment of a written contract entered into after September 15, 1990, pursuant to a written bid made on or before September 15, 1990 to the extent the bid was subsequently incorporated into the contract. The bid must be binding on the contractor.

109.2.3 Purchases of tangible personal property after October 1, 1990 for consumption or use in fulfillment of a written contract for the construction of a new improvement to real property, the construction or operation of which was approved by a federal or state regulatory body prior to September 15, 1990 or pursuant to a federal grant awarded prior to September 15, 1990. Examples of federal or state regulatory bodies which must approve new construction include, but are not limited to, the West Virginia Public Service Commission, the West Virginia Health Care Cost and Review Authority, the Federal Energy Review Commission and the West Virginia School Building Authority. Building permits issued by a local governmental entity are not issued by a federal or state regulatory body within the meaning of this section.

109.3 Methods of Claiming Governmental Contract Exemption. - A contractor or subcontractor entitled to the exemption outlined in Section 109.1 may assert the exemption in one of two ways when purchasing materials prior to July 1, 1990. The contractor or subcontractor may either present his direct pay permit or a government contractor material purchase certificate to the vendor to purchase the materials tax exempt. Beginning July 1, 1990, the government contract exemption may only be claimed by presenting a government contractor material purchase certificate to the vendor.

109.3.1 Direct Pay Permit. - A direct pay permit includes a direct pay permit number, which may be presented to the vendor when purchasing items or services for use in business. When the direct pay permit number is given to the vendor, no tax is charged to the purchaser at the time of sale. However, each month the direct pay permit holder must file a direct pay permit consumers sales and use tax return with the Tax Commissioner showing the total amount of purchases, amount of taxable purchases, amount of exempt purchases, and the amount of tax due on the taxable purchases. The direct pay permit holder is responsible for directly remitting the amount of tax due on taxable purchases to the Tax Commissioner. In order to obtain a direct pay permit, application must be made to the Tax Commissioner. The applicant must have a valid business registration certificate issued in accordance with W. Va. Code § 11-12-1 et seq.

109.3.2 Government Contractor Material Purchase Certificate. - The contractor or subcontractor may if he wishes use a government contractor's material purchase certificate obtained by the prime contractor from the Tax

Commissioner to assert the governmental contract exemption for materials. A government contractor's material purchase certificate, unlike a direct pay permit, may only be used to purchase materials which are exempt because of the governmental contract exemption outlined in Section 109.1 of these regulations.

109.3.2.1 Application for Government Contractor Material Purchase Certificate. - A government contractor's material purchase certificate may only be obtained by the prime contractor making timely application to the Tax Commissioner. The application shall be in the form prescribed by the Tax Commissioner. When applying for the government contractor's material purchase certificate, the prime contractor must provide the Tax Commissioner with a list of all work sublet to others, indicating the amount of work to be performed, and the names and addresses of each subcontractor and such other information as the Tax Commissioner may require. The application for the government contractor's material purchase certificate may be obtained from the entity awarding the contract. A government contractor material purchase certificate will expire upon completion of the contract named therein.

109.3.2.2 Use of the Government Contractor's Material Purchase Certificate. - In order to assert the governmental contract exemption for material outlined in Section 109.1 of these regulations, the contractor or subcontractor must present a copy of the government contractor's material purchase certificate to the vendor when purchasing materials for use as a component part of a capital improvement to a building or structure or improvement to real property in fulfillment of a governmental contract. The vendor will not charge the contractor or subcontractor tax on the exempt materials upon receipt of the material purchase certificate number.

109.4 Vendor's Responsibilities in Relation to Governmental Contract Exemption. - As long as the vendor, in good faith, takes the direct pay permit number or government contractor material purchase certificate from the contractor or subcontractor and notes the number thereof on the invoice, sales slip or other record of sale, the vendor will be absolved of all duties and responsibilities imposed for the collection of sales and use tax on the sale. Failure to take the direct pay permit number or government contractor material purchase certificate or collect the amount of tax due will result in the vendor being liable for the amount of tax not collected.

109.5 A contractor who claims that tangible personal property is exempt from consumers sales and use taxes because it will be incorporated into a government contract will be held strictly accountable for the use of such property and will be liable for payment of consumers sales and use taxes on any tangible personal property purchased for use in a tax exempt government contract that is not used in such a contract.

**§ 110-15-110. Nonresident Contractors.**

110.1 Use tax is levied upon the use in this State of tangible personal property purchased or leased in another state and brought, imported or caused to be brought into this state after February 28, 1989 for use in contracting activity. Excluded from tax are the following:

110.1.1 Tangible personal property directly used in the activity of contracting that was purchased by the contractor prior to March 1, 1989. See the Transition Rules in Section 108 of these regulations for discussion of the scope of this exception.

110.1.2 Tangible personal property not directly used in the activity of contracting that was purchased or leased by the contractor prior to July 1, 1987. See the Transition Rules in Section 108 of these regulations for a discussion of the scope of this exception.

110.1.3 The use in this State of any tangible personal property purchased or leased by a person for use in another state which was actually placed into substantial use in another state before being brought, imported or caused to be brought into this State by such person for use in constructing or repairing its own buildings, structures or real property. "Substantial use in another state" means that the property was used by the taxpayer outside this State for a period of time equal to or greater than seventy-five percent of the useful economic life of the determined at the time such property was first purchased or leased by the taxpayer.

110.2 Contractors (both resident and nonresident) shall compute West Virginia Use tax on tangible personal property which they purchased and used outside this State before such property is brought, imported or caused to be brought into this state for use in their contracting activity. The measure of tax shall be that proportion of the original purchase price of tangible personal property paid by the taxpayer as the duration of time such property is used in this State bears to its total useful life. For purposes of this rule, the word "use" means and includes use, storage, consumption and stand-by time occasioned by weather conditions, controversies or other causes, it being the intention of this rule that the tax shall be computed upon the basis of the relative time each item of tangible personal property is in this State for use, rather than upon the basis of its actual use by the taxpayer. In the case of leased tangible personal property, the measure of tax is the amount of the lease payments attributed to the duration of time such leased property was used in this State.

110.2.1 Example. - Contractor X is a nonresident contractor who had been recently awarded a contract in West Virginia. Contractor X must bring a bulldozer from out-of-state into West Virginia. The job in West Virginia is estimated to take one year. The useful life of the bulldozer when purchased by Contractor X was ten years and its cost to Contractor X was $20,000. The use tax liability of Contractor X on the bulldozer is computed as follows:

$$\text{purchase price of the tangible personal property} \times \frac{\text{duration of time property is in WV}}{\text{useful life of property}} \times 6\% = \text{Use tax due}$$

$$\$20{,}000 \times \frac{1 \text{ Yr.}}{10 \text{ Yr.}} \times 6\% = \text{Use tax}$$

$$\$20{,}000 \times .10 \times .06 = \$120$$

110.2.2 Example. - To compute the use tax due in the case of leased property was used in West Virginia is multiplied by the use tax rate (6%). Contractor Y, a nonresident contractor, leases a bulldozer to use on a contracting site in West Virginia at a cost of $1,500 a month for six months. The use tax liability of Contractor Y is calculated as follows:

| | | | | |
|---|---|---|---|---|
| Amount of Lease Payments for Period of Time Property is in West Virginia | X | 6% | = | Use Tax Due |

($1,500 X 6) X 6% = Use Tax Due

$9,000 X 6% = $540

110.3 Before any property subject to the use tax is brought into this State for use as provided above, the owner, or if the property is leased, the lessee shall register with the Accounting Division of the West Virginia Tax Department. After registering, the taxpayer shall file quarterly reports on forms furnished by the State Tax Commissioner reporting such property bought, imported or caused to be brought into this State during the preceding calendar quarter, together with remittance of the amount of tax due. Such reports are to be filed on or before the twentieth day of the month following the calendar quarter in which such property was brought into this State.

110.4 Reports filed pursuant to this rule shall be accompanied by a schedule listing the property included in the report and showing the original cost price, duration of time of use in this State, total useful life, and the taxable amount for each item.

110.5 In the absence of satisfactory evidence as to the period of use intended in this State, it will be presumed that such property will remain in this State for the remainder of its useful life, which shall be determined in accordance with the experiences and practices of the building and construction trades. Any taxpayer who claims a greater estimated useful life for a given piece of equipment than its economic useful life shall set forth his reasons therefore.

## § 110-15-111. Installation of Tangible Personal Property.

111.1 General rule. - Installation of tangible personal property can either be a taxable service or contracting. Installation of tangible personal property is generally considered to be a taxable service, unless it results in a capital improvement to a building, structure, or real property or is performed "on or connected with" new construction, reconstruction, alteration, expansion, or remodeling of real property or structures which itself results in a capital improvement. When an installation of tangible personal property results in a capital improvement to a building, structure, or real property or is performed "on or connected with" new construction, reconstruction, alteration, expansion, or remodeling of real property or structures, constituting a capital improvement, it is considered to be contracting. Guidelines for determining whether these situations exist are given below.

111.2 Factors For Determination of Capital Improvement. - In determining whether an installation of tangible personal property results in a capital improvement to a building or other structure or to real property, the following factors shall be considered. If either of the criteria is met, the installation will be considered to be a capital improvement to a building, structure, or real property, and will be considered to be contracting.

111.2.1 The installation results in a significant increase in the capital value of the building or other structure or of the real property, and the tangible personal property becomes part of the building or structure or real property or is permanently affixed to or attached to the building or structure or real property so that its removal would cause material damage to the article being removed or to the building or structure or real property itself, and the tangible personal property is intended to become a permanent installation or to remain for an indefinite period of time.

111.2.2 The installation results in an appreciable increase in the original useful life of the building or other structure or of the real property and the tangible personal property becomes part of the building or structure or real property or is permanently affixed to or attached to the building or structure or real property so that its removal would cause material damage to the article being removed or to the building or structure or real property itself, and the tangible personal property is intended to become a permanent installation or to remain for an indefinite period of time.

111.3 New Construction, Reconstruction, Alternation, Expansion or Remodeling. - The installation of tangible personal property is contracting when it is performed "on or connected with" new construction, reconstruction, alteration, expansion or remodeling of real property or structures which itself results in a capital improvement to a building, structure, or real property.

111.3.1 The term "on or connected with" as used in Section 111.3 is broad and conveys its generally accepted meaning. Therefore, in a specific situation, the facts relating thereto are controlling in determining whether the service is contracting or is a taxable service. "On or connected with" does not connote that things connected have to be primary or subsidiary to the construction, reconstruction, alteration, expansion or remodeling of the building or other structure, or real property.

111.3.1.1 An incidental relationship can qualify the activity as contracting if the relationship forms an immediate connection with the construction activity.

111.3.1.2 The presence of a time relationship can also be a factor in determining the applicability of the contracting exemption.

111.3.1.3 The motive behind the activity and the course of events that could reasonably be expected to occur would be further consideration in determining if an exempt contracting service is involved.

111.3.1.4 A physical relationship is also a factor that should be evaluated. If a building is constructed to house machinery, any enumerated services relating to the installation of that machinery would be an exempt

contracting service. For example, piping joining two pieces of equipment housed in separate buildings would be treated as tax exempt contracting if the equipment in either building was installed while such new construction, reconstruction, alteration, expansion or remodeling of the structure was also taking place to house the equipment.

111.4 Installation Activities Not Constituting Capital Improvement. - On the other hand, a capital improvement does not include a contract providing only for the sale and installation of tangible personal property that remains tangible personal property after its installation. Generally, tangible personal property that is not a capital improvement can be moved without causing damage or injury to itself or to the structure, does not bear the weight of the structure, and does not in any other manner constitute an integral part of the structure. Installation of tangible personal property that does not constitute a capital improvement is considered to be a taxable service.

111.5 Property Remaining Tangible Personal Property After Installation. The following is a list of property which, under normal conditions, remains tangible personal property after installation and does not constitute a capital improvement. This list is non-exclusive and is offered for illustrative purposes only:

111.5.1 Furnishings, radio and television sets and antennas, washers and dryers, portable lamps, home freezers, portable appliances and window air conditioning units.

111.5.2 Portable items such as tables, counters, cabinets, lockers, athletic and gymnasium equipment and other similar items.

111.5.3 Freestanding machinery and equipment, tools, appliances, and materials used exclusively as such by manufacturers, industrial processors and other persons performing a processing function with the items.

111.5.4 Freestanding furniture and equipment, including freestanding office machines, used in offices and banks.

111.6 Property Becoming Part of Realty After Installation. - The following is a list of property which, under normal conditions becomes a part of realty and would be considered to be a capital improvement, and would be treated as contracting. This list is non-exclusive and is offered for illustrative purposes only:

111.6.1 Boilers and furnaces for space heating.

111.6.2 Built-in household items such as kitchen cabinets, dishwashers, sinks (including faucets), fans, garbage disposals and incinerators.

111.6.3 Buildings and structural and other improvements to buildings, including awnings, canopies, foundations, for machinery, floors (including computer room floor), walls, general wiring and lighting facilities, roofs, stairways, stairlifts, sprinkler systems, storm doors and windows, door controls, air curtains, loading platforms, central air conditioning units,

building elevators, sanitation and plumbing systems, and heating, cooling and ventilation systems.

111.6.4 Fixed year-round wharfs and docks.

111.6.5 Improvements to land including retaining walls, roads, walks, bridges, fencing, railway switch tracks, ponds, dams, ditches, wells, underground irrigation systems, drainage, storm and sanitary sewers, and water supply lines for drinking water, sanitary purposes and fire protections.

111.6.6 Telephone switching equipment and wiring.

111.6.7 Residential water heaters, water softeners, intercoms, garage door opening equipment when it satisfies the requirements of Section 117.8 of these regulations, pneumatic tub systems and music and sound equipment (except portable equipment).

111.6.8 Drive-up and walk-up windows, night depository equipment, remote TV, autoteller systems, vault and vault doors, and camera security equipment (except portable equipment).

111.6.9 Seating in auditoriums and theatres and theatre stage lights (except portable seating and lighting).

111.6.10 Silos and grain storage bins.

111.6.11 Storage tanks constructed on the site.

111.6.12 Swimming pools (the framework or walls of which are wholly and partially underground (except portable pools)).

111.6.13 Truck platform scale foundations.

111.6.14 Walk-in cold storage units becoming a component part of a building.

111.7 Tangible Personal Property Which Become Structures by Their Basic Nature. - Items which are manufactured as tangible personal property can, by their very nature, become structure and will be considered to constitute a capital improvement to a building, structure, or real property. Installation of these items will be considered to be contracting. However, the determination is factual and must be made on an item by item basis. The following is a list of criteria to be used in making such a determination:

111.7.1 The degree of architectural and engineering skills necessary to design and construct the structure.

111.7.2 The overall scope of the business and the contractual obligations of the person designing and building the structure.

111.7.3 The amount and variety of materials needed to complete the structure, including the identity of materials prior to assembly and the complexity of assembly.

111.7.4 The size and weight of the structure.

111.7.5 The permanency or degree of annexation of the structure to other real property which would affect its mobility.

111.7.6 The cost of building, moving or dismantling the structure.

Example. A farm silo, which is a prefabricated glass lined structure, is intended to be permanently installed. The prefabricated glass lined structure is 70 feet high, 20 feet around, weighs 30 tons, and it is affixed to a concrete foundation weighing 60 tons, and it is set in the ground specifically for the purpose of supporting the silo. The assembly kit includes 105 steel sheets and 7,000 bolts. The silo can be removed without material damage to the realty or the unit itself at a cost of $7,000. In view of its massive size, the firm and permanent manner in which it is erected on a most substantial foundation, its purpose and function, the expense and size of the task and the difficulty of removing it, it is considered a structure and not machinery and equipment.

111.7.7 The above criteria is intended only to be summation of factors which the Tax Commissioner will consider in determining whether or not a project involves contracting.

111.8 Installation of Tangible Personal Property By Retailer. - Special rules apply to the sale of certain tangible personal property by a retailer involving incidental hookup, connection or installation. These sales may be treated as a retail sale to the consumer. See Section 114 of these regulations for more detailed information concerning these transactions.

111.9 Taxability of Sales. - To determine whether consumers sales and service tax should be collected from the customer and remitted, it is necessary to first determine whether the type of activity involved is contracting or a taxable service by examining the criteria set forth in this section.

111.9.1 Sales of Contracting. - A person who engages in contracting does not charge consumers sales and service tax to the customer. The sale of contracting is exempt from sales and use tax as set forth in Section 9.2.17 of these regulations.

111.9.2 Sales of Service. - A person who engages in providing of taxable service must collect consumers sales and service tax from the customer and remit it to the state or obtain an exemption certificate, or direct pay permit from the customer.

111.10 Taxability of Purchase. - In order to determine whether consumers sales and use tax should be paid on purchases for use in these types of activities, it is necessary to first determine whether the type of activity involved is contracting or a taxable service by examining the criteria set forth in this section.

111.10.1 Taxability of Purchases for Use in Contracting Activity. - Beginning March 1, 1989, except as outlined in Section 108 of these regulations and relating to transition rules and Section 109 of these regulations relating

to the exemption for material used in government contracts, a person who engages in contracting must pay consumers sales or use tax on his purchases for use in the contracting activity. This includes machinery, equipment, materials, and services used in the contracting activity. It does not include labor provided by employees of the contractor. Transition rules and provided in Section 108. Special rules are provided in Section 109 of these regulations for contracts with the United States the State of West Virginia, its political subdivision, or corporate entities created by the West Virginia Legislature.

111.10.2 Taxability of Purchases for Use in Service Activity. - On or after July 1, 1989, a person who engages in the providing of a service is taxable on purchases for use in his taxable service activity, except for purchases for resale.

**§ 110-15-112. Materials Produced or Manufactured by Contractors.**

112.1 The consumers sales and use tax laws provide that where a person produces a natural resource product or manufactures tangible personal property which such person then uses or consumes in the performance of contracting activity in this State, such person must pay consumers sales or use tax on the gross value of the natural resource product or manufactured product so used or consumed by such person in such contracting activity. The three exceptions to this rule are as follows:

112.1.1 Prior to October 1, 1990, where the natural resource product or manufactured product is actually installed, affixed, or incorporated into a building, structure or real property in fulfillment or a contract with the government of the United States, the government of this State or a political subdivision thereof, or with a public corporation created by the West Virginia Legislature or by a governmental entity pursuant to an Act of the Legislature, the product is deemed to have been sold to the governmental entity for which the contracting is being done even though it is directly used or consumed by the contractor in contracting done for the governmental entity. As of October 1, 1990, the exemption for materials purchased by contractors for use in governmental contracts was generally repealed and the use of material purchase certificates became very limited. See Section 109 of these regulations for additional information on the transition rules relating to the taxation of materials for use in governmental contracts.

112.1.2 Where the manufacturer-contractor (or natural resource producer-contractor) enters into two separate and distinct written contracts in arm's length transactions with the contractor (customer), one for the furnishing of materials and the other for the furnishing of contracting work with respect to new construction or to a capital improvement to a building or structure or real property.

112.1.2.1 The contract to furnish materials and the contract to furnish contracting work shall not be treated as separate and distinct contracts for purposes of the consumers sales and use taxes unless it is established by the contractor through clear and convincing evidence that:

112.1.2.1.a Each contract was an arm's-length transaction;

112.1.2.1.b The performance of one contract was not dependent upon the award of the other contract;

112.1.2.1.c The award of one contract was not dependent upon the award of the other contract; and

112.1.2.1.d Title to the materials passed to the contractor (customer) prior to the time the materials were incorporated into the capital improvement to a building or structure or real property.

112.1.2.2 The burden of proving that Section 112.1.2 of these regulations applies shall be upon the contractor.

112.1.2.3 Example. XYZ Co., a public utility, is planning to construct a new electric power generating facility in West Virginia. The XYZ Co. is subject to the West Virginia Business and Occupation Tax on its entire business conducted within the State and is exempt from the West Virginia Consumer Sales and Service Tax on its purchases under Sections 9.4.1 and 9.4.4 of these rules. In constructing the plant, XYZ Co. will purchase major items of equipment, including the boiler; turbo generator, pumps, motors, piping, etc. by entering into contracts for the acquisition of materials and equipment with one or more equipment vendors. XYZ Co. may also enter into construction contracts for all or part of the facility. Under these facts, the consumer sales and use taxes are imposed on the acquisition of materials used in constructing the boiler as follows:

a. If XYZ Co. purchases the materials from a materials vendor and erects the boiler itself, it will owe no consumers sales or use tax on the purchase of the materials.

b. If XYZ Co. purchases the materials from a materials vendor and contracts with a contractor other than the materials vendor to construct the boiler, XYZ Co. will owe no consumers sales or use tax on the purchase of the materials. The contractor will also owe no consumers sales or use tax on the construction contract tax because contracting services are exempt under Section 9.2.17 of these rules.

c. If XYZ Co. requests separate bids for the materials and for construction of the boiler and the same contractor-manufacturer is awarded both the materials and erection contracts, the Tax Commissioner will recognize the separate contracts and XYZ Co. will not owe the consumers sales or use tax on the purchase of the materials. The charge for erection will also be exempt because contracting services are exempt under Section 9.2.17 of these rules.

d. If XYZ Co. enters into one contract covering both the procurement of materials and construction of the boiler with a contractor-manufacturer of boilers, the contractor-manufacturer will owe the consumers sales and use tax on the fair market value of the boiler which it manufactured as well as on the purchase price any tangible personal property or taxable services which it used directly or indirectly in rendering the tax exempt contracting service.

112.1.3 Where the natural resource product or manufactured product is physically produced or manufactured on the job site where the contracting activity is taking place, and such product is directly used or consumed in contracting activity at that job site, the raw materials used or consumed in such contracting activity are taxable and the gross value of the product or manufactured product is not separately taxed.

Example 1: ABC Asphalt Company enters into a subcontract with the general contractor of a large shopping mall for ABC Company to pave the mall's parking lot. ABC Asphalt Company moves its portable asphalt plant to the job site. The asphalt manufactured by the plant is used solely in fulfilling the shopping mall contract. The asphalt mix which ABC Asphalt Company purchases is taxable because it is tangible personal property which ABC Asphalt Company uses or consumes in its contracting activity. The exemption for tangible personal property directly used or consumed in manufacturing activity does not apply to asphalt mix (and other similar property) because the asphalt mix is directly used or consumed in contracting activity and the product is manufactured on the job site.

Example 2: Same facts as example one, except that ABC Asphalt Company utilizes the portable asphalt plant to also manufacture asphalt which it sells other contractors. Under these facts, the asphalt mix is a raw material used in manufacturing tangible personal property. ABC Asphalt Company must collect consumers sales and service tax from the contractors who purchase part of the manufactured asphalt. ABC Company must also pay consumers sales and service tax on the gross value of the manufactured asphalt which it consumes in its contracting activity.

Example 3: ACE Heating and Contracting (ACE) Company has a contract to install a heating and air conditioning system in a ten story office building that is being constructed. ACE has a metal shop at which it fabricates standard sizes of duct work which it uses in its contracting business. It also sells duct work to other contractors. The gross value of duct work which ACE fabricates at the shop and uses in its contracting activity is subject to consumers sales and service tax. ACE also fabricates duct work at the job site. ACE will not pay consumers sales and service tax on the gross value of the duct work which it fabricates on the job site, but will pay consumers sales and service tax or use tax on the sheet metal which it uses at the job site to fabricate the duct work. ACE will not pay consumers sales and service tax or use tax on the sheet metal which is uses at its shop to fabricate duct work, because this sheet metal is a raw material used to fabricate (manufacture duct work).

Example 4: XYZ Construction Company (XYZ) produces limestone which it manufactures into various limestone products. It uses a portion of these limestone products in its contracting activity. XYZ must pay consumers sales and service tax on the gross value of the limestone products which it manufactures and uses in its contracting activity.

112.2 Where the contractor is the manufacturer or compounder of ready-mix concrete or asphalt plant mix used in the performance of a contract, the ready mix concrete or asphalt plant mix is compounded at the job site, the tax applies to the cost of the ingredients that become a component part of the

ready-mix concrete or the asphalt plant mix and to the portable mixer. "Mixed at the job site" as used herein means mixed in a portable plant or mixer set up at or near the job site for use solely in connection with the job for which the concrete or plant mix is prepared and used and from which plant no concrete or plant mix is produced for sale.

112.3 Determination of "Gross Value". - Whenever a person partially or wholly consumes or uses tangible personal property in contracting in this State which he produced or manufactured in this State or in another state, the gross value thereof for consumers sales and use tax purposes shall correspond as nearly as possible to the gross proceeds which such person would have received from the sale of such natural resource product or manufactured product to another person in an arms-length transaction, as that term is defined for federal income tax purposes. Such value shall be determined by application of the following rules in the order stated:

112.3.1 The value of the natural resource product or the manufactured product consumed or used shall be equal to the selling price, at the place of use or consumption, of similar products of like quality and character offered for sale in similar quantities by persons unrelated to the taxpayer.

112.3.2 In the absence of sales of similar natural resource products or similar manufactured products by other persons as a guide to value, gross value shall be equal to the average price at which sales of the same or a similar product are made during the taxable year to customers of the producer or manufacturer.

112.3.3 In the absence of sales to customers of the taxpayer as a guide to value, gross value shall be determined by first determining the cost of the product and adding thereto the average markup realized by the producer or manufacturer of the product being valued. The cost of the product shall include every item of cost attributable to that particular product, including all direct and indirect overhead costs.

## § 110-15-113. Contractors Who Are Also Retailers.

113.1 Special rules apply where contractors are in a dual business which includes reselling to the general public, on a recurring "over-the-counter" basis, the same type of tangible personal property which are used by them in their own contracting activities. A person operating in such a manner is referred to in this rule as a contractor-retailer. A sale by a contractor-retailer of tangible personal property, which does not provide for installation of the merchandise sold is considered a retail sale and is subject to the consumers sales and service tax. Conversely, a sale by a contractor-retailer of tangible personal property which provides for installation of the tangible personal property is generally considered to be contracting and consumers sales and service tax shall be paid by the contractor-retailer based upon the cost of the tangible personal property at the time the tangible personal property is withdrawn from inventory for use in the contracting activity unless the rules set forth in Section 114 apply. Section 114 of these regulations provides special rules for retailers who sell certain types of tangible personal property including incidental installation.

113.2 A contractor-retailer may purchase construction materials, supplies and equipment etc. from vendors free of consumers sales and service tax when the purchase is for resale. When a valid exemption certificate is furnished, the vendor is relieved from the responsibility of collecting the tax if the purchaser has demonstrated that he is a contractor-retailer under the provisions of this rule. The burden of such proof is upon the purchaser.

113.3 The business records of a contractor-retailer must clearly reflect the use made of items purchased and the records must be in such form that the Tax Commissioner can readily determine that the proper consumers sales and use tax liability is being reported and paid.

113.4 The following examples are offered to illustrate the responsibility for paying and remitting consumers sales and service tax under the above rules:

Example 1. ABC Company operates a retail outlet that sells lumber and other building materials and supplies. ABC Company is also a contractor which builds residential and commercial structures. ABC Company would be considered a contractor-retailer and would, therefore, purchase all inventory items for resale. Those items which are used in the performance of a construction contract would be subject to tax in the period they are withdrawn from inventory. The tax would be computed on the cost of the items withdrawn from inventory. Those items which are sold over-the-counter in the retail outlets would be subject to tax at the time of sale. The tax would be computed on the over-the-counter selling price.

Example 2. EFG Company is a mechanical contractor and has no retail outlets. EFG Company rarely sells any of its inventory to other persons or to other contractors. EFG Company would not be considered a contractor-retailer under this rule. However, EFG Company would be considered a contractor and must pay tax to its vendor at the time it purchases any construction materials, supplies, equipment or other tangible personal property. However, on those rare occasions when an inventory item is sold to another person or to another contractor, tax must be collected at the time of sale, therefore, EFG Company should be registered to collect consumers sales and service tax. An adjustment can be made to the consumers sales and service tax reported by taking a credit for tax previously paid on the item sold.

Example 3. Country Construction Company is owned and operated by two individuals in a rural West Virginia community. They do not have a retail outlet but they frequently make sales of building materials which are in their inventory to local residents. Country Construction Company would be a contractor-retailer and could purchase all inventory items for resale. Those items which are used in the performance of a construction contract would be subject to tax in the period they are withdrawn from inventory. The tax would be computed on the cost of the items withdrawn from inventory. Those items which are sold to residents would be subject to the consumers sales and service tax at the time of the sale. The tax would be computed on the selling price of the items.

Example 4. Downhome Construction Company is operated by two individuals in a rural West Virginia community. They do not have a retail outlet and rarely

make sales of building materials from their inventory to local residents. Downhome Construction Company would not be considered a contractor-retailer under this rule. Rather, Downhome Construction Company would be considered a contractor and must pay tax to its vendor at the time it purchases any building materials, supplies and equipment. When sales are made to local residents, tax must be collected at the time of sale, therefore, Downhome Construction Company should be registered to collect consumers sales and service tax. However, Downhome Construction Company can adjust its consumers sales and service tax report by taking a credit for tax paid to its vendor on the item sold to the local resident.

§ 110-15-114. Sales of Tangible Personal Property with Incidental Installation.

114.1 The sale of certain types of tangible personal property with incidental hookup, connection or installation by a "retail dealer" or by his arrangement is a transaction which is considered to be a sale of tangible personal property to a final consumer. Therefore, the retail dealer who sells such tangible personal property with incidental hookup, connection or installation may purchase the tangible personal property exempt from tax as a purchase for resale. This rule should not be confused with Section 113 regarding building equipment. A "retail dealer," is a merchant engaged in reselling to the general public on a recurring "over the counter" basis from a general or special store during regular business hours. The term "retail dealer" does not include a contractor who makes only occasional retail sales to the public and who does not have a regular retail place of business. This section does not apply to installation performed by a third party arranged for directly by the purchaser, and not by the retail dealer.

114.2 In order to determine whether hookup, connection, or installation is incidental to the retail sale of tangible personal property, the true object of the transaction must be examined. If the true object of the transaction is to secure the tangible personal property, then the entire transaction is taxable, including the hookup, connection or installation charge.

114.2.1 Hookup, connection or installation will be considered incidental, when rendered in connection with the retail sale of the items set forth below. This list is for illustrative purposes only and is not intended to be all-inclusive.

Wall-to-wall carpeting
Mobile Homes (See Section 122 for additional rules relating to the sale and installation of mobile homes)
Window air conditioning units
Dishwashers
Clothing washing machines or dryers
Other household appliances
Drapery rods
Window shades
Venetian blinds
Canvas awnings
Free-standing industrial and commercial equipment

114.3 Elements of a mixed contract, e.g., where an installation contract is mingled with a tangible personal property sales contract, cannot be separated for consumers sales and service tax purposes. For example, the entire transaction is taxable if it involves the sale by a retail dealer of tangible

personal property with incidental installation. (Special rules apply to the sale and installation of mobile homes. See Section 122 of these regulations for details.) On the other hand, the entire transaction would be exempt if the transaction involves contracting for a capital improvement to a building or structure or real property.

114.4 Certain services are subject to tax when performed under a contract for the incidental installation of the machinery, equipment or other tangible personal property, which is not done in connection with a capital improvement to a building, structure, or real property. Examples of these services are: electrical installation, plumbing, welding, and pipelining, etc.

Example: Company B contracts with company A to furnish and install a portable conveyor unit in company A's new building. Company B can purchase the portable conveyor unit tax free because the portable conveyor unit maintains its identity as tangible personal property after installation and does not become a component part of the real property. Company B would then charge tax to company A on the sale of the portable conveyor unit. Installation would be part of the total gross receipts subject to consumers sales and service tax. It makes no difference whether the charge for installation is separately or included within the selling price of the machinery and equipment.

114.5 If the sales transaction is one made with an out-of-state vendor and the tangible personal property is shipped in interstate commerce to a consumer or user in West Virginia, and is not otherwise exempt from tax, the final purchaser is required to pay West Virginia use tax on the purchase price of the tangible personal property and installation, unless the transaction involves contracting or a capital improvement to a building or structure or real property.

114.6 Example 1. Downtown, Inc. a retail dealer, has a retail outlet and makes recurring sales to the general public. Downtown, Inc. sells a replacement hot water heater from inventory to a homeowner and either installs it or makes arrangements for its installation. The transaction is a retail sale of tangible personal property and the total charge to the homeowner for the merchandise and the installation is subject to sales and use tax. Downtown, Inc. may purchase the hot water heater exempt from tax as a purchase for resale.

Example 2. Uptown Construction Co. is a heating and plumbing contractor who makes only occasional retail sales to the public and who does not have a regular retail place of business. Uptown Construction Co. sells a homeowner a replacement hot water heater and installs it. The sale and installation of the hot water heater is considered to be contracting because it is not performed by a "retail dealer." Sales and use tax is not charged to the customer on the transaction, but the contractor must pay sales and use tax on his purchase of the hot water heater and other items used in the installation.

Example 3. Mr. Homeowner must replace his hot water heater. He goes to Downtown, Inc. a retail store and purchases the hot water heater and other items needed for installation and pays consumers sales and service tax on the purchase. Mr. Homeowner then arranges with Uptown Construction Co. to install the hot water heater. The installation transaction with Uptown Construction Co. is considered to be contracting. No sales or use tax is charged to the

homeowner on the installation, but the contractor must pay sales or use tax on the equipment used in the installation.

§ 110-15-115. Maintaining, Servicing, or Repairing Tangible Personal Property.

115.1 General rule. - Maintaining, servicing and repairing are terms used to cover all activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness, or safety or restoring it to such condition. The activity of maintaining, servicing, or repairing of tangible personal property can either be a taxable service or contracting. The activity of maintaining, servicing or repairing of tangible personal property is generally considered to be a taxable service, whether or not any tangible personal property is transferred in conjunction with the service. However, the maintaining, servicing or repairing of tangible personal property will be considered to be contracting if it involves either a capital improvement or is performed on or connected with new construction, reconstruction, alteration, expansion, or remodeling which itself results in a capital improvement to a building, structure or real property. Guidelines for determining whether these situations exist are given below.

115.1.1 Capital Improvement. - The maintenance, service or repair of tangible personal property is considered to be contracting if both of the following two conditions are met:

115.1.1.1 Tangible Personal Property was Capital Improvement. - The maintenance, service or repair is performed on tangible personal property which constituted a capital improvement to a building, structure, or real property when installed, (See Section 111 of these regulations for detailed information regarding when installation of tangible personal property constitutes a capital improvement to a building, structure or real property) and;

115.1.1.2 Maintenance, Service or Repair Constitutes Capital Improvement. - The maintenance, service or repair itself constitutes a capital improvement to the building, structure, or real property to or in which the tangible personal property is affixed or incorporated.

115.1.1.3 Factors for Determination of Capital Improvement. - In determining whether maintaining, servicing or repairing tangible personal property results in a capital improvement to a building or other structure or to real property to or in which the tangible personal property is affixed or incorporated, the following factors shall be considered. If either of the criteria is met, the maintenance, service or repair will be considered to be a capital improvement and will be considered to be contracting.

115.1.1.3.a The maintenance, service, or repair results in a substantial increase in the capital value of the building or other structure or of the real property to or in which the tangible personal property is affixed or incorporated;

115.1.1.3.b The maintenance, service or repair results in a appreciable increase in the original useful life of the building or other

structure or of the real property to or in which the tangible personal property is affixed or incorporated.

115.1.2 New Construction, Reconstruction, Alteration, Expansion or Remodeling. - The maintenance, service, or repair of tangible personal property is contracting when it is performed "on or connected with" new construction, reconstruction, alteration, expansion or remodeling of real property, buildings or structures which itself results in a capital improvement thereto.

115.1.2.1 The term "on or connected with" as used in Section 115.1.2 is broad and conveys its generally accepted meaning. Therefore, in a specific situation, the facts relating thereto are controlling in determining whether the service is contracting or is a taxable service. "On or connected with" does not connote that things connected have to be primary or subsidiary to the construction, reconstruction, alteration, expansion or remodeling of the building or other structure or real property, which results in a capital improvement thereto.

115.1.2.1.a An incidental relationship can qualify the activity as contracting if the relationship forms an immediate connection with the construction activity.

115.1.2.1.b The presence of a time relationship can also be a factor in determining the applicability of the contracting exemption.

115.1.2.1.c The motive behind the activity and the course of events that could reasonably be expected to occur would be further consideration in determining if an exempt contracting service is involved.

115.1.2.1.d A physical relationship is also a factor that should be evaluated. If a building is constructed to house machinery, any enumerated services relating to the installation of that machinery would be an exempt contracting service. For example, piping joining two pieces of equipment housed in separate buildings would be treated as tax exempt contracting if the equipment in either building was installed while such new construction, reconstruction, alteration, expansion or remodeling of the structure was also taking place to house the equipment.

115.2 Examples of Maintenance, Service or Repair of Tangible Personal Property Constituting a Taxable Service.

Example 1. The repair or tuning of a piano is a taxable service.

Example 2. The service of lubricating a motor vehicle is a taxable service.

Example 3. Washing an automobile is a taxable service, whether the washing is performed manually or by a money machine.

Example 4. A company operates a diagnostic service in which it tests an appliance for a set fee. The diagnostic service is a taxable service.

Example 5. A company-operated central station burglar alarm system charges its customers a fee for repairs to the system necessitated by damage beyond the control of the company. The repair of the system is a taxable service.

Example 6. The replacing of a thermocouple on a furnace is a taxable service. The repair is not contracting because it does not constitute a capital improvement to a building, structure or real property. It does not constitute a capital improvement, because it does not increase the capital value of the furnace, nor extend the original useful life of the furnace.

Example 7. The repair of a hole in the lining of a boiler is a taxable service. The repair is not contracting because it does not constitute a capital improvement to a building, structure, or real property. It does not constitute a capital improvement because it does not increase the capital value of the boiler or extend the original useful life of the furnace.

115.3 Examples of Maintenance, Service or Repair of Tangible Personal Property Constituting Contracting.

Example 1. The replacement of the lining of a boiler is contracting because it constitutes a capital improvement to a building, structure or real property. It constitutes a capital improvement because the original useful life of the boiler has been extended.

Example 2. The repair of a faucet is normally considered to be a taxable service. However, if the repair of the faucet is performed with or connected to the remodeling of a kitchen, it will be contracting, because the overall activity involves a capital improvement to a building, structure or real property.

115.4 Taxability of Sales. - To determine whether consumers sales and service tax should be collected from the customer and remitted, it is necessary to first determine whether the type of activity involved is contracting or a taxable service by examining the criteria set forth in Section 115 of these regulations.

115.4.1 Sales of Contracting. - A person who engages in contracting does not charge consumers sales and service tax to the customer. The sale of contracting is exempt from sales and use tax as set forth in Section 9.2.17 of these regulations.

115.4.2 Sales of Service. - A person who engages in providing of taxable service must collect and remit consumers sales and service tax from the customer or obtain an exemption certificate or direct pay permit.

115.5 Taxability of Purchases. - In order to determine whether consumers sales and use tax should be paid on purchases for use in these types of activities, it is necessary to first determine whether the type of activity involved is contracting or a taxable service by examining the criteria set forth in the previous Section 115 of these regulations.

115.5.1 Taxability of Purchases for Use in Contracting Activity. - Beginning March 1, 1989, except as outlined in Section 108 of these regulations relating to transition rules and Section 109 of these regulations relating to the exemption for material used in government contracts, a person who engages in contracting must pay consumers sales or use tax on his purchases for use in the contracting activity. This includes machinery, equipment, materials, and services used in the contracting activity. It does not include labor provided by employees of the contractor. Transition rules are provided in Section 108 of these regulations. Special rules are provided in Section 109 of these regulations for contracts with the United States, the State of West Virginia, its political subdivision, or corporate entities created by the West Virginia Legislature.

115.5.2 Taxability of Purchases for use in Service Activity. - On or after July 1, 1989, a person who engages in the providing of a service is taxable on purchases for use in his taxable service activity, except for purchases for resale.

**§ 110-15-116. Maintaining, Servicing, Repairing, Altering, Improving, or Decorating of Buildings, Structures or Real Property.**

116.1 General Rule. - The activity of maintaining, servicing, repairing, altering, improving or decorating of buildings, structures or real property can either be a taxable service or contracting. The activity of maintaining, servicing, repairing, altering, improving, or decorating of buildings, structures or real property is generally considered to be a taxable service, whether or not any tangible personal property is transferred in conjunction with the service. However, the maintaining, servicing, repairing, altering, improving or decorating of buildings, structures or real property will be considered to be contracting if it involves either a capital improvement or is performed on or connected with new construction, reconstruction, alteration, expansion, or remodeling which itself results in a capital improvement to the building, structure or real property. Guidelines for determining whether these situations exist are given in Sections 116.1.1 and 116.1.12 of these regulations.

116.1.1 Capital Improvement. - The maintaining, servicing, repairing, altering, improving, or decorating of buildings, structures or real property is considered to be contracting if it results in a capital improvement to the building, structure or real property.

116.1.1.1 Factors for Determination of Capital Improvement. - In determining whether maintaining, servicing, repairing, altering, improving, or decorating of buildings, structures or real property results in a capital improvement to a building or other structure or to real property, the following factors shall be considered. If either of the criteria is met, the maintaining, servicing, repairing, altering, improving, or decoration will be considered to be a capital improvement and will be considered to be contracting.

116.1.1.1.a The maintaining, servicing, repairing, altering, improving, or decoration results in a significant increase in the value of the building or other structure or of the real property.

116.1.1.1.b The maintaining, servicing, repairing, altering, improving, or decoration results in an appreciable increase in the original useful life of the building or other structure or of the real property.

116.1.2 New Construction, Reconstruction, Alteration, Expansion or Remodeling. - The maintaining, servicing, repairing, altering, improving, or decoration of buildings, structures or real property is contracting when it is performed "on or connected with" new construction, reconstruction, alteration, expansion or remodeling of real property or structures which itself results in a capital improvement to the building, structure, or real property.

116.1.2.1 The term "on or connected with" as used in Section 116.1.2 is broad and conveys its generally accepted meaning. Therefore, in a specific situation, the facts relating thereto are controlling in determining whether the service is contracting or is a taxable service. "On or connected with" does not connote that things connected have to be primary or subsidiary to the construction, reconstruction, alteration, expansion or remodeling of the building or other structure or real property, resulting in a capital improvement thereto.

116.1.2.1.a An incidental relationship can qualify the activity as contracting if the relationship forms an immediate connection with the construction activity.

116.1.2.1.b The presence of a time relationship can also be a factor in determining the applicability of the contracting exemption.

116.1.2.1.c The motive behind the activity and the course of events that could reasonably be expected to occur would be further consideration in determining if an exempt contracting service is involved.

116.1.2.1.d A physical relationship is also a factor that should be evaluated. If a building is constructed to house machinery, any enumerated services relating to the installation of that machinery would be an exempt contracting service. For example, piping joining two pieces of equipment housed in separate buildings would be treated as tax exempt contracting if the equipment in either building was installed while such new construction, reconstruction, alteration, expansion or remodeling of the structure was also taking place to house the equipment.

116.2 Examples of Maintenance, Service, Repair, Alteration, Improvement, or Decoration of Buildings, Structures or Real Property Constituting a Taxable Service.

Example 1. The replacement of some shingles, or the patching of a roof is a repair. However, a new asphalt shingle roof is a capital improvement.

Example 2. A contractor sells and installs an above-ground swimming pool. The pool consists of a vinyl liner supported by an aluminum and wood frame which rests on the ground and a wood and metal deck. The vinyl liner rests on a bed of sand to prevent damage. The deep end of the pool is set approximately 2 feet into the ground. The pool may be dismantled and moved without substantially damaging the real property. The installation of the pool is not a capital

improvement, as it may be dismantled and moved without substantial injury to the land, and there is no intent that it become affixed so that it has become part of the real property. Therefore, the charges for the sale and installation of the pool are subject to the tax.

Example 3. The replacement of broken window panes is a repair to a building, which is taxable.

Example 4. Company A enters into an agreement to provide periodic maintenance services on elevators and escalators belonging to its customers. The contract provides for inspection, lubrication and the performance of necessary repairs. These services are taxable.

Example 5. The periodic repainting of a building is not by itself a capital improvement. The entire charge for the paint and the service is taxable.

Example 6. A landscaping company enters into a contract to mow a customer's lawn on a regular basis, re-seed in the spring and fall and fertilize as needed. The total charge to the customer is taxable.

Example 7. A consumer has a maintenance contract with a heating and air conditioning company to supply all parts and emergency services for his heating and air conditioning system for one full year for a set fee. The cost of the contract is taxable, whether or not any services or parts are actually furnished.

Example 8. Repair of broken or defective glass is a taxable service.

Example 9. Replacement of broken windowpanes is a taxable service.

Example 10. Replacing individual or damaged roof shingles is a taxable service.

Example 11. Replacing or repairing a portion of worn out or broken kitchen cabinets is a taxable service.

Example 12. Replacement of garage door hinges is a taxable service.

Example 13 Replacing or repairing a portion of a broken or worn tub, shower, or faucets is a taxable service.

Example 14. Replacing or repairing a portion of a broken water heater, furnace or central air conditioning compressor is a taxable service.

116.3 Examples of Maintenance, Service, Repair, Alteration, Improvement or Decoration of Buildings, Structure or Real Property Constituting Contracting.

Example 1. The building of a garage or adding a garage to an existing building would be considered a capital improvement.

Example 2. Adding a redwood deck to an existing structure would be considered a capital improvement.

Example 3. Replacing a complete roof on an existing structure would be considered a capital improvement.

Example 4. Adding a new room to an existing building would be considered new construction.

Example 5. Adding a new room by building interior walls would be considered a capital improvement.

Example 6. Replacing kitchen cabinets with some modifications would be considered a capital improvement.

Example 7. Paneling existing walls would be considered a capital improvement.

Example 8. Laying a new floor over an existing floor would be considered a capital improvement. (See special rules for carpeting and other floor coverings sold and installed by retailers in Section 114 of these regulations.)

Example 9. Rebuilding a structure damaged by flood, fire or other uncontrollable disaster or casualty would be considered to be a capital improvement.

Example 10. Building a new wing to an existing building would be considered a capital improvement.

116.4 Taxability of Sales. - To determine whether consumers sales and service tax should be collected from the customer and remitted, it is necessary to first determine whether the type of activity involved is contracting or a taxable service by examining the criteria set forth in Section 116.1 of these regulations.

116.4.1 Sales of Contracting. A person who engages in contracting does not charge consumers sales and service tax to the customer. The sale of contracting is exempt from sales and use tax as set forth in Section 9.2.17 of these regulations.

116.4.2 Sales of Service. - A person who engages in providing of taxable service must collect and remit consumers sales and service tax from the customer or obtain an exemption certificate or direct pay permit.

116.5 Taxability of Purchase. - In order to determine whether consumers sales and use tax should be paid on purchases for use in these types of activities, it is necessary to first determine whether the type of activity involved is contracting or a taxable service by examining the criteria set forth in the previous Section 116.1 of these regulations.

116.5.1 Taxability of Purchases for Use in Contracting Activity. - Beginning March 1, 1989, except as outlined in Section 108 of these regulations relating to transition rules and Section 109 of these regulations relating to transition rules for the exemption for purchases of material used in government contracts that was repealed October 1, 1990, a person who engages in contracting must pay consumers sales or use tax on his purchases for use in the contracting

activity. This includes machinery, equipment, materials, and services used in the contracting activity. It does not include labor provided by employees of the contractor. Transition rules are provided in Section 108 of these regulations. Special transition rules are provided in Section 109 of these regulations for contracts with the United States, the State of West Virginia, its political subdivision, or corporate entities created by the West Virginia Legislature.

116.5.2 Taxability of Purchases for Use in Service Activity. - On or after July 1, 1989, a person who engages in the providing of a service is taxable on purchases for use in his taxable service activity, except for purchases for resale.

**§ 110-15-117. Specific Businesses with Contracting Issues.**

117.1 Carpentry. - Persons engaged in the business of carpentry, (as the trade is known in the usual course of business) are generally considered to be rendering, furnishing or performing a service, the gross receipts from which are subject to consumers sales and service tax, when the work does not result in a capital improvement to a building, structure or real property.

117.2 Chimney Cleaning. - The cleaning and servicing of chimneys of gas, oil or woodburning stoves, furnaces or fireplaces in residential dwellings is a service subject to consumers sales and service tax.

117.3 Demolition. - The charges for the demolition of a building or structure (or any part of either) is contracting and is not subject to the consumers sales and service tax. In general, the demolition of buildings or structures constitutes an improvement to land, because it enhances the value of land in preparing it for its best use.

117.4 Draperies and Drapery Hardware. - Retailers who contract to sell and install draperies, including drapery hardware, such as brackets, rods, tracks, etc., are retailers of the items which they furnish and install. Tax applies to the entire contract price including the charge for installation. Installers who furnish drapery hardware or other tangible personal property may accept resale certificates from department stores or other sellers to furnish and install the draperies and drapery hardware. Department stores or other retailers furnishing resale certificates are required to collect and remit the consumers sales and service tax to this State upon the gross receipts which they derive from selling and installing the draperies and drapery hardware.

117.5 Electrical Repair and Installation. - Persons engaged in the business of repairing or installing electrical wiring, fixtures, switches in or on real property or repairing or installing any article of personal property powered by electric current are rendering, furnishing or performing a service, the gross receipts from which are subject to tax unless the repair results in a capital improvement. "Repair" is synonymous with mend, restore, maintain, replace, or service. A "repair" contemplates an existing structure or thing which has become imperfect and constitutes the restoration to the original existing structure that which has been lost or destroyed. A "repair" that is a capital improvement to a building or other structure or to real property is treated as a contracting service which is exempt from the consumers sales and

service tax. A "repair" that is not a capital improvement is one that does not materially add to the value or substantially prolong the useful life of the property. "Installation" includes affixing electric wiring, fixtures or switches to real property, affixing any article of personal property powered by electric current to any other article of personal property, or making any article of personal property powered by electric current operative with respect to its intended functional purpose. Tax does not apply to electrical installation repair when the service is on or connected with a structural change (capital improvement) to a building or similar structure, whether the structural change be internal or external to the building or structure. For example, the electrical repair or installation on or connected with new construction on buildings or structures would not be subject to the consumers sales and service tax.

117.6 Excavation Services.

117.6.1 The charges for excavation services by a contractor who provides his equipment and operator to perform a specific job in the manner to be directed or controlled by the contractor are contracting services exempt from the consumers sales and service tax.

117.6.2 Charges for the basic rental of equipment are subject to the consumers sales and service tax. Where the rental includes the services of an operator the charges for the operator are also subject to consumers sales and service tax.

117.7 Floor Covering Dealer Transactions. - Whenever an installation service is incidentally rendered in conjunction with the sale of floor coverings, the agreement for installation is treated as a taxable service regardless of whether the installation is done by the retail dealer or by the retail dealer's agent. The sale of the floor covering is also subject to consumers sales and service tax.

117.8 Garage Door Openers.

117.8.1 The charges for the sale and installation of electrically controlled garage door openers are subject to consumers sales and service tax. Such installations are not deemed to result in a capital improvement to real property.

117.8.2 However, when there is construction of a new building or portion thereof, or the installation of new garage doors in an existing building and there is the installation of an electric garage door opener, the transaction constitutes a capital improvement to real property. In such instance, the charges to the customer are not subject to consumers sales and service tax. However, the contractor must pay sales tax on the new garage doors and the electric garage door opener.

117.9 Heating Plant. - The installation of a new heating plant in a building or other structure results in a capital improvement. No consumers sales and service tax is charged to the contractor's customer.

117.10 House and Building Moving. - Persons engaged in the business of moving houses or buildings from one location to another, whether for repair or otherwise, are rendering, furnishing or performing a service, the gross receipts from which are generally subject to consumers sales and service tax.

117.11 Janitorial and Building Maintenance.

117.11.1 Gross receipts from janitorial services and building maintenance and cleaning are subject to consumers sales and service tax. "Janitorial services" means the type of cleaning services performed by a janitor in the regular course of duty, whether such services are performed individually, under separate contract, or are included within a general contract to perform a combination of such services. This term includes, but is not limited to, contracts to perform interior window washing, floor cleaning, vacuuming and waxing, the cleaning of interior walls and movement of furniture and other items of personal property within a building. Persons performing either one or a number of janitorial services are engaged in a business the gross receipts from which are subject to consumers sales and service tax. Therefore, for example, a person engaged only in cleaning the interior windows of a building is engaged in taxable janitorial services.

117.11.2 Cleaning of the exterior walls or windows of any building or any other act performed upon the exterior of a building with the intent to keep the building in good upkeep or condition, other than a repair, is the service of "building maintenance." Gross receipts therefrom are subject to consumers sales and service tax.

117.11.3 Janitorial services or building maintenance performed on or in connection with new construction, reconstruction, alteration, expansion or remodeling of the structure is exempt from tax.

117.12 Kitchen Remodeling. - Generally, the remodeling of a kitchen results in a capital improvement to real property. The contractor is required to pay the consumers sales and use taxes on the materials, supplies and equipment he purchases for use on the job.

117.12.1 In instances where the remodeling is done by a retailer and is limited in its scope to mere replacement of kitchen cabinets, appliances and wall-to-wall carpet, the transaction is treated as a sale of tangible personal property and the providing of a taxable service. The retailer is required to charge consumers sales and service tax on the gross receipts from the transaction.

117.12.2 Special rules also apply to the sale of kitchen cabinets manufactured by the installer. See Section 114 of these regulations for more detail relating to such transactions.

117.13 Lawn Care. - Persons engaged in the business of "lawn care" are performing a service the gross receipts from which are subject to consumer sales and use taxes. "Lawn care" includes but is not limited to the following services: Mowing, trimming, watering, fertilizing, reseeding, resodding and killing of insects, moles, or other vermin, weeds or fungi which may be

threatening a lawn. Persons who mow lawns are providing taxable services regardless of their ages.

117.14 Landscaping.

117.14.1 The gross receipts from the service of "landscaping" are subject to consumers sales and service tax unless the landscaping results in a capital improvement to real property. In such instance, the landscaping is contracting. The services performed by one who arranges and modifies the natural condition of a given parcel or tract of land so as to render the land suitable for public or private use or enjoyment is engaged in the business of "landscaping."

117.14.2 Any services for which a license as a landscape architect is required under Chapter 30 of the West Virginia Code are not subject to the consumer sales and use taxes. When the taxable landscaping service provided consists of both professional and non-professional services, the professional services shall not be taxed if the charge therefor is separately stated on the invoice. The gross receipts from landscaping performed by a contractor in connection with new construction, reconstruction, alternation, expansion or remodeling of a building or structure or a contract for the alteration, improvement or development of real property are not subject to tax. However, the contractor must pay consumers sales and use taxes on all tangible personal property or taxable services purchased for use or consumption in such activity.

117.15 Monuments and Grave Stones. - Sales of monuments and grave stones by a retail dealer are subject to consumers sales and service tax. Monuments and grave stones that are sold and installed for a customer by a retail dealer or his agent are subject to consumers sales and service tax. The retail dealer is not treated as a contractor unless the installation is not incidental to the sale of the monument or grave stone.

117.16 Painting, Papering and Interior Decorating.

117.16.1 Persons engaged in the business of painting, papering and interior decorating are generally considered to be rendering, furnishing or performing a service, the gross receipts from which are subject to consumers sales and service tax. "Painting" means covering of both interior and exterior surfaces of tangible personal or real property with a coloring matter and mixture of a pigment or sealant, with some suitable liquid to form a solid adherent when spread on thin coats for decoration, protection or preservation purposes and all necessary preparations necessary to, including surface preparation. The following are not within the definition of painting: automobile undercoating; the coating of railroad cars, storage tanks or the plating of tangible personal property with metals such as but not limited to chrome, bronze, tin galvanized metal, or platinum. "Papering" means applying wall paper or wall fabric to the interior of houses or buildings and all necessary preparations thereto including surface preparation. "Interior decorating" shall mean the service of designing or decorating or the procurement of furniture fixtures or home or building decorations. When any person provides interior decorating service without charge as an incident to the sale of real or personal property, no consumers sales and service tax in addition to that paid

on purchase price or any part thereof of the personal property, shall be charged.

117.16.2 Paper Hanging and Painting New or Existing Structures.

117.16.2.1 Papering or painting the walls of a new structure or a new addition to a structure is considered to be a capital improvement. In such cases the contractor will pay consumers sales and service tax to his supplier when he purchases his materials and supplies. He will not charge the property owner any consumers sales and service tax as such. Presumably, the consumers sales tax paid by the contractor will be included in the price the contractor charges his customer.

117.16.2.2 Papering or painting the walls of an existing structure is considered to be maintenance or repair work which does not constitute a capital improvement. In this case, the charges to the customer for the materials and for the labor are subject to consumers sales and service tax.

117.17 Pest Control Services.

117.17.1 Persons engaged in the business of termite and pest control are providing services that are subject to consumers sales and use taxes. A nonexclusive list of taxable services includes:

117.17.1.1 initial inspection for termites or other pests

117.17.1.2 reinspection

117.17.1.3 certification of reports for mortgage lenders

117.17.1.4 spraying of insecticides

117.17.1.5 fumigation

117.17.1.6 replacement or rehabilitation of infested wood (provided, the degree of work does not result in a capital improvement to a building or other structure or to real property)

117.18 Prefabricated Cabinets. - A cabinet will be considered to be "prefabricated" as a "fixture" when seventy-five percent (75%) of the total direct cost of labor and material in fabricating and installing the cabinet is incurred prior to affixation to the realty. In determining this seventy-five percent (75%) the total direct cost of all labor and materials in fabricating the cabinet to the point of installation will be compared to the total cost of all labor and materials in completely fabricating and installing the cabinet. If more than one cabinet is fabricated and installed under the contract, each cabinet will be considered separately in determining whether the cabinet is prefabricated.

117.19 Removal Service, Solid Waste.

117.19.1 Charges for the removal of garbage, rubbish and trash are exempt from consumers sales and service tax when the service is regulated by the West Virginia Public Service Commission.

117.19.2 Charges for the removal of debris resulting from land clearing, demolition or capital improvement construction are exempt from consumers sales and service tax when the removal is performed by the contractor or the contractor's subcontractor.

117.20 Roofing.

117.20.1 When a contractor or other person engages to repair a roof, he is providing a taxable service and must collect consumers sales and service tax on the charges to his customer.

117.20.2 Installation of a new roof would constitute a capital improvement. Thus there would be no consumers sales and service tax added to the charges to the customer. However, the contractor must pay consumers sales and service tax on all materials purchased and used or consumed in installing the new roof.

117.21 Signs.

117.21.1 When a sign is sold and the installation thereof does not result in a capital improvement to a building or other structure or to real property, consumers sales and servive tax must be charged on the charges for both the sign and its installation.

117.21.2 If a concrete base is installed in the ground to be used as a foundation for a pole sign, the base is considered to be a capital improvement to real property and the contractor must pay consumers sales and service tax on the sign and on the materials and supplies used or consumed in its installation.

117.22 Swimming Pools. - The sale and installation of an above-ground swimming pool does not ordinarily result in a capital improvement to real property. Thus the charges for the pool and its installation are subject to the consumers sales and service tax.

117.23 Tin and Sheet Metal Repair. - Persons engaged in the business of repairing tin or sheet metal whether the same has or has not been formed into a finished product are rendering, furnishing or performing a service, the gross receipts from which are subject to tax.

117.24 Tree Trimming and Removal. - Persons engaged in the business of tree trimming and removal are performing a service, the gross receipts of which are subject to consumers sales and service tax. Persons engaged in "stump removal" are engaged in a taxable service, as are persons engaged in the removal of any other portion of a tree, such as the branches or trunk. The trimming or removal of any scrub which has a woody main stem or trunk with branches shall constitute tree trimming or removal and the gross receipts from the trimming or removal of such a scrub shall be subject to tax. Persons who engage in the business of tree trimming and removal who cut the wood from the trees which they trim or remove into sizes suitable for sale as firewood and to sell this wood

for firewood are engaged in the sale of tangible personal property, and the gross receipts from the sale of this wood are subject to tax. The services of persons who trim or remove trees and sell the wood which they have cut are providing services for resale. Therefore, such persons must collect consumers sales and service tax on the service of tree trimming or removal and on the sale of firewood.

117.25 Venetian Blinds. - The sales of venetian blinds and the incidental installation thereof by the retail dealer or his agent are transactions subject to consumers sales and service tax.

117.26 Wall-to-Wall Carpeting. - The sale and incidental installation of wall-to-wall carpeting by a retail dealer or his agent is subject to consumers sales and service tax beginning July 1, 1989.

117.27 Water Conditioning and Softening. - Persons engaged in the business of water conditioning and softening are performing a service, the gross receipts of which are subject to tax. "Water softening" means the removal of minerals from water to render it more suitable for drinking and washing. "Water conditioning" means any action other than water softening taken with respect to water which renders the water fit for its intended use for more healthful or enjoyable for human consumption. The phrase "water conditioning" includes but is not limited to water filtration, water purification, the ionization and reverse osmosis. The service of water purification is taxable whether performed for residential, commercial, industrial, or agricultural uses.

117.28 Well Drilling. - Persons engaged in the business of water well drilling are rendering a contracting service, the gross receipts from which are not subject to tax.

**§ 110-15-118 and § 110-15-121 are Reserved for Future Use.**

**§ 110-15-122. Mobile Homes, Modular Homes and Manufactured Homes.**

122.1 General rule. Consumers sales and use taxes apply to the sale or use in this State of mobile homes. The term "mobile homes" is defined for purposes of these regulations to mean "manufactured homes," as defined in Section 122.2 of these regulations. If the manufactured home will be used by the owner thereof as the owner's principal year-round residence and dwelling, a special consumers sales and use tax rate of three (3%) applies to the sale or use rather than the general consumers sales and service tax rate. All other purchases and uses of manufactured homes are subject to the general consumers sales and service tax rate.

122.1.1 Before the special three percent consumers sales and use tax rate can apply to the sale of a manufactured home, the purchaser must give to the vendor of the manufactured home a properly executed exemption certificate. If the vendor of the manufactured home is not required to collect this State's consumers sales or use taxes, the purchaser must remit the amount of consumers sales or use taxes due directly to the Tax Commissioner.

122.1.2 A manufactured home owned and used by a nonresident outside this state for more than six months prior to moving it into this State and establishing residency here is exempt from use tax.

122.1.3 If the manufactured home was purchased outside this State, then the amount of sales or use taxes lawfully paid to another state on the purchase price of the mobile home may be applied to reduce to zero any West Virginia use tax liability based on the purchase price.

122.2 "Manufactured Home" Defined. The term "manufactured home" means a structure, transportable in one or more sections, which in the traveling mode is eight body feet or more in width or forty body feet or more in length or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning and electrical systems contained therein; except that such term shall include any structure which meets all the requirements of this definition except the size requirements and with respect to which the manufacturer voluntarily files a certificate which complies with the applicable federal standards as set forth in the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. § 5401, et. seq.) and the federal manufactured home construction and safety standards and regulations promulgated by the Secretary of the United State Department of Housing and Urban Development to implement such act. The term "manufactured housing" includes:

122.2.1 Units containing parts that may be folded, collapsed or telescoped when being towed and that may be expanded to provide additional cubic capacity.

122.2.2 Units composed of two (2) or more separately towable components designed to be jointed into one (1) integral unit capable of being separated again into the components for repeated towing.

122.2.2.1 For purposes of these regulations, such units shall include, but not be limited to, "modular homes" comprised of two or more sections, with or without a chassis, built to a state or model code other than the National Manufactured Housing Construction and Safety Standards Act, which are primarily constructed at a location other than the permanent site at which they are to be finally assembled, which are shipped to the permanent site with most permanent components in place, and which require less than five percent (5%) of final assembly (measured by the cost of construction, materials and labor) at the permanent site of installation.

122.2.3 Units designed to be used for residential, commercial, educational or industrial purposes, excluding, however recreational vehicles. As used herein, "recreational vehicle" means a vehicular portable structure built on a chassis designed to be used as a temporary dwelling for travel, recreational and vacation uses, permanently identified "travel trailer" by the manufacturer of the trailer and when factory equipped for the road, having a body width not exceeding eight feet and a body length not exceeding thirty-two feet.

122.2.3.1 Beginning July 1, 1989, recreational vehicles are subject to the vehicle title privilege tax imposed by W. Va. Code § 17A-3-4. When that tax is paid, the recreational vehicle is exempt from consumers sale and use taxes.

122.3 Sale and Installation of Manufactured Home by Seller.

122.3.1 When a retail dealer of manufactured homes sells a manufactured home from his inventory and agrees to hook-up and connect the same, or to arrange for the hook-up and connection to be done by another, consumers sales and use taxes are due on the gross proceeds which the retail dealer derives from the entire transaction. By statute, the hook-up and connection of a manufactured home is deemed to be incidental to the sale thereof when the retail dealer does the hook-up and connection or arranges for another person to do the hook-up and connection.

122.3.2 Activities which are included in the phrase "hook-up or connection" include, but are not necessarily limited to, the hooking-up of utility lines, the blocking up of the home, the underskirting of the home, attaching the home to the foundation, the finishing of interior trim, the joining together of modules or sections, or mere delivery of the home to the site.

122.3.3 If the vendor of the home, or another whose work is arranged for by the vendor, prepares the site for the home by constructing a foundation for the home or by installing utility lines to the site or doing other contracting activity, the hook-up and connection of the home are no longer incidental to the sale of the manufactured home. Under these circumstances, the vendor should charge consumers sales and use taxes on only the sales price of the mobile home. Consumers sales and use taxes should not be charged on the contracting service. For example, the sales price of a manufactured a home is $20,000.00. The vendor prepares the site at a cost of $5,000.00. The sales price of the home is subject to consumers sales and use tax. Site preparation, which is classified as contracting, is not taxable; but the materials purchased for use or consumption in the contracting activity would be taxable to the contractor at the time of purchase.

122.3.3.1 The special rule provided in Section 122.3.2 is contrary to the general rule that when materials are provided as part of a contract for contracting services the contractor is deemed to be the consumer or user of all the material used or consumed in the contract and must pay consumers sales and use taxes on the purchase price of such items. If the general rule were to be applied, the contractor would pay tax on the purchase price of the manufactured home at the rate of six percent (6%) even though, the contract might be with a person who will utilize the manufactured home as such person's principal year-round residence and dwelling. In order to preserve the benefit of the lower consumers sales and use tax for such persons, this special rule is provided. This special rule shall have no effect on the general rule; and if the general rule is successfully challenged because of this special rule, the special rule must be set aside.

122.3.4 Charges for activities which are incidental to the sale of a manufactured home are taxable at the rate of six percent (6%), regardless of the

anticipated use of the home. To illustrate, a manufactured home cost $20,000. The vendor agrees to deliver, hook-up and connect the home at the customer's site for $2,000. Because the purchaser will use the manufactured home as his principal year-round residence and gives the vendor a certificate to that effect, the $20,000 charge for the manufactured home is taxed at three percent (3%). The $2,000 charge is taxed at six percent (6%).

122.3.5 A vendor of manufactured homes who sells accessories for manufactured homes or other tangible personal property must collect consumers sales and use taxes at the six percent (6%) rate.

122.3.6 See Section 107 of these regulations for information relative to contracting.

122.4 Activities by an Independent Third Party.

122.4.1 The hook-up and connection or installation of manufactured homes by a contractor who is not the vendor of the home, and who is not a person whose services are arranged for by the vendor of the home, will generally be classified as the performance of a contracting service.

122.4.2 Tangible personal property and taxable services used or consumed in the preparation of the site or in the hook-up and connection or installation of the home are taxable at the time of sale to the contractor.

**§ 110-15-123. Direct Use Concept.**

123.1 General Concept. - Beginning July 1, 1987, the liability of certain industries outlined in Section 123.2 for consumers sales and service tax on purchases for use in business became subject to the direct use concept. Under this concept, the applicability of the sales and use tax depends on the classification of the business purchasing the property or service and the use of the property or service being purchased rather than the type of property or service purchased. The same purchase of the same item may be taxable in one instance and exempt in another, depending totally on its purchaser and usage. The basic concept is that purchases directly used in activities or operations which are an integral and essential part of the specified business' activity are exempt from sales and use tax, while purchases which are instead used in activities or operations which are incidental, convenient, or remote to such activities are taxable for sales and use tax purposes. More specific guidelines are provided in Sections 123.3 and 123.4 of these regulations.

123.2 Industries Subject to the Direct Use Concept and Effective Dates. - Persons who are engaged in the business of manufacturing, transportation, transmission, communication or production of natural resources who purchase property or services for use in that business activity are subject to the direct use concept. Persons engaged in the business activity of contracting are subject to the direct use concept only for the period July 1, 1987 to February 28, 1989. On or after March 1, 1989, purchases for use in contracting are subject to the rules outlined in Section 107 of these regulations.

123.3 General Guidelines for Determining Taxability of Purchases for Use in Industries Subject to Direct Use Concept. - General guidelines for

determining whether property or services are directly or indirectly used in an activity, thereby making the purchase taxable or exempt, are outlined in Sections 123.3.1 and 123.3.2 of these regulations. More specific examples are listed by industry in Section 123.4 of these regulations.

123.3.1 Uses of Property or Services Constituting Direct Use. - Uses of property or services which will constitute direct use when used by a person engaged in the business of manufacturing, transportation, transmission, communication or the production of natural resources, thereby making its purchase exempt from sales and use tax shall include only the following

123.3.1.1 Tangible personal property physically incorporated into a finished product resulting from manufacturing production, production of natural resources or from contracting activity during the period July 1, 1987 to February 28, 1989. For example, raw materials used by a manufacturer in making the finished product would be directly used in manufacturing.

123.3.1.2 Tangible personal property or services causing a direct physical, chemical or other change upon property undergoing manufacturing production, production of natural resources or subject to contracting activity during the period July 1, 1987 to February 28, 1989. For example, equipment used to assemble parts during the manufacturing process would be directly used in manufacturing.

123.3.1.3 Tangible personal property or services used in transporting or storing property undergoing transportation, communication, transmission, manufacturing production, production of natural resources or subject to contracting activity during the period July 1, 1987 to February 28, 1989. For example, fork lifts used to move partially manufactured goods from one area to another would be directly used in manufacturing, while fork lifts used to move completed goods on the loading dock would not be directly used in manufacturing.

123.3.1.4 Tangible personal property or services used in measuring or verifying a change in property directly used in transportation, communication, transmission, manufacturing production, production of natural resources, or in contracting activity during the period July 1, 1987 to February 28, 1989. For example, testing equipment used in quality control to determine whether goods being manufactured meet contract specifications would be directly used in manufacturing.

123.3.1.5 Tangible personal property or services used to physically control or direct the physical movement or operation of property directly used in transportation, communication, transmission, manufacturing production, production of natural resources or in contracting activity during the period July 1, 1987 to February 28, 1989. For example, conveyor belts used in moving manufactured goods on an assembly line would be directly used in manufacturing.

123.3.1.6 Tangible personal property or services used to direct or record the flow of property undergoing transportation, communication, transmission, manufacturing production or production of natural resources or in contracting activity during the period July 1, 1987 to February 28, 1989. For

example, meters used to record the amount of natural gas traveling through a pipeline would be directly used in transmission.

123.3.1.7 Tangible personal property or services used to produce energy for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources, or in contracting activity during the period July 1, 1987 to February 28, 1989. For example, an electrical generator or boiler used to produce energy for use in operating equipment directly used in manufacturing is considered to be directly used in manufacturing.

123.3.1.8 Tangible personal property or services used to facilitate the transmission of gas, water, steam or electricity from the point of their diversion to property directly used in transportation, communication, transmission, manufacturing production, production of natural resources, or in contracting activity during the period July 1, 1987 to February 28, 1989. For example, pipes used to carry water to equipment directly used in manufacturing would be directly used in manufacturing.

123.3.1.9 Tangible personal property or services used to control or otherwise regulate atmospheric conditions required for transportation, communication, transmission, manufacturing production, production of natural resources or in contracting activity during the period July 1, 1987 to February 28, 1989. For example, air conditioning necessary to control temperatures during a manufacturing process would be directly used while air conditioning for the personal comfort of employees would not be directly used in manufacturing.

123.3.1.10 Tangible personal property or services which serve as an operating supply for property undergoing transmission, manufacturing production, production of natural resources or in contracting activity during the period July 1, 1987 to February 28, 1989, or for property directly used in transportation, communication, transmission, manufacturing production, production of natural resources or in contracting activity during the period July 1, 1987 to February 28, 1989. For example, warehouses used to store property directly used in the manufacturing process are directly used in manufacturing.

123.3.1.11 Tangible personal property or services used in the maintenance or repair of property directly used in transportation, communication, transmission, manufacturing production, production of natural resources or in contracting activity during the period July 1, 1987 to February 28, 1989. For example, repair services performed on equipment used directly in the manufacturing process are directly used in manufacturing.

123.3.1.12 Tangible personal property or services used in the storage, removal or transportation of economic waste directly resulting from the activities of transportation, communication, transmission, manufacturing production, production of natural resources, or in contracting activity during the period July 1, 1987 to February 28, 1989. For example, trash bins used to store waste directly resulting from manufacturing are directly used in manufacturing.

123.3.1.13 Tangible personal property or services used in pollution control or environmental quality or protection activity directly relating to the activities of transportation, communication, transmission, manufacturing production, production of natural resources or in contracting activity during the period July 1, 1987 to February 28, 1989. For example, a scrubber used to clean air emissions from a manufacturing facility would be directly used in manufacturing or a slurry pond used to collect runoff from a mine would be directly used in the production of natural resources.

123.3.1.14 Tangible personal property or services used in personnel, plant, product, or community safety or security activity directly relating to the activities of transportation, communication, transmission, manufacturing production, production of natural resources, or in contracting activity during the period July 1, 1987 to February 28, 1989. For example, safety shoes used by personnel for protection in a hazardous manufacturing facility are directly used in manufacturing.

123.3.1.15 Tangible personal property or services used as an integral and essential part of transportation, communication, transmission, manufacturing production, production of natural resources or in contracting activity during the period July 1, 1987 to February 28, 1989.

123.3.2 Uses of Property or Services Not Constituting Direct Use. - Uses of property or services which will not constitute direct use, thereby making the purchase subject to the sales and use tax shall include, but not be limited to the following:

123.3.2.1 Tangible personal property or services used in the heating or illumination of office buildings. For example, the purchase of lighting fixtures for an office building would not be directly used.

123.3.2.2 Tangible personal property or services used in janitorial or general cleaning activities. For example, cleaning supplies or janitorial services purchased for general maintenance of a facility would not be directly used.

123.3.2.3 Tangible personal property or services used for the personal comfort of employees. For example, couches purchased for the employee lounge would not be directly used.

123.3.2.4 Tangible personal property or services used in production planning, scheduling of work or inventory control. For example, a computer purchased for use in maintaining records on inventory levels or for layout and designing of products would not be directly used.

123.3.2.5 Tangible personal property or services used in marketing, general management, supervision, finance, training, accounting and administration. For example, property purchased for use in research for a new or improved product would not be directly used.

123.3.2.6 Tangible personal property or services used in an activity or function incidental or convenient to transportation, communication, transmission, manufacturing production, production of natural resources, or in

contracting for the period July 1, 1987 to February 28, 1989, rather than in an integral or essential part of such activity.

123.4 Direct Use Guidelines for Specific Industries. - Guidelines for determining whether property or services are directly or indirectly used in certain specific industries are outlined in Sections 123.4.1 through 123.4.5 of these regulations.

123.4.1 Transportation. - Transportation means the act or process of conveying, as a commercial enterprise by a person engaged in the business of transportation, passengers or goods from one place or geographical location to another place or geographical location. The transportation activity must be conducted for others as a commercial enterprise and does not include the transportation of goods by the owner of the goods, such as the transportation of goods to a customer by the manufacturer, or the transportation of goods by the seller of the goods to the buyer of the goods, such as a retailer delivering goods it has sold. Transportation also does not include storage of tangible personal property unless it is only temporarily stored while in transit. Purchases of tangible personal property or services not directly used in transportation are subject to the sales and use tax. This regulation also applies to taxpayers engaged in transportation that are subject to the control of the Public Service Commission.

123.4.1.1 Taxable Items. - The following items are indirectly used in transportation activity and subject to sales and use tax. This list gives only examples of taxable items and is not intended to be all inclusive.

123.4.1.1.a Office supplies.

123.4.1.1.b Office equipment.

123.4.1.1.c Billing supplies.

123.4.1.1.d Tariff rate schedules.

123.4.1.1.e Motor freight guides or other trade publications.

123.4.1.1.f Uniforms.

123.4.1.1.g Paper towels, cloth towels.

123.4.1.1.h Hand cleaner.

123.4.1.1.i Toilet supplies.

123.4.1.1.j Space heaters, except when used to preserve property being transported.

123.4.1.1.k Linens.

123.4.1.1.l Beds.

123.4.1.1.m Dishwasher, stove, other kitchen items.

123.4.1.1.n Time records - log books.

123.4.1.1.o Machinery and tools used to repair vehicles other than transportation vehicles, i.e., supervisor's car.

123.4.1.1.p Repair parts for vehicles other than transportation vehicles, i.e., supervisor's car.

123.4.1.1.q Equipment such as fork lifts or hand trucks used to move goods in storage rather than goods in transit.

123.4.1.1.r Temporary employment services when persons are not employees of the taxpayer and are rendering services not directly used in the transportation activity, such as clerical services.

123.4.1.1.s Consultant services unless the services rendered are professional or directly used in the transportation activity.

123.4.1.2 Exempt Items. - The following items are directly used in transportation activity and exempt from sales and use tax. The list only gives examples and is not intended to be all inclusive.

123.4.1.2.a Repair parts for transportation vehicles.

123.4.1.2.b Machinery and tools used to repair transportation vehicles.

123.4.1.2.c Tires, tubes, batteries, motor oil, grease lubricants, and brake and transmission fluids used on or in transportation vehicles.

123.4.1.2.d Repair manuals for transportation vehicles.

123.4.1.2.e Cleaning supplies used to clean transportation vehicles.

123.4.1.2.f Equipment such as fork lifts, hand trucks, conveyor systems and dollies, used to load, unload or move goods in transit rather than goods in storage.

123.4.1.2.g Heating or cooling equipment used to maintain temperatures necessary to maintain goods in transit.

123.4.1.2.h Truck scales.

123.4.1.2.i Two-way radios used in transportation vehicles.

123.4.1.2.j Reflectors and fire extinguishers used on transportation vehicles.

123.4.1.2.k Crates and packing materials used to pack goods in transit.

123.4.1.3 Items Used in Both Taxable and Exempt Manner. - It is possible for an item to be used in both a taxable or exempt manner. In such instances, apportionment of the tax may be necessary. The apportionment must be performed using a reasonable method acceptable to the Tax Commissioner. Additional information on apportionment is provided in Section 9d of these regulations.

123.4.2 Manufacturing. - Manufacturing means a systematic operation or integrated series of systematic operations engaged in as a business or segment of a business which transforms or converts tangible personal property by physical, chemical or other means into a different form, composition or character from that in which it originally existed. Purchases of tangible personal property and services which are directly used in manufacturing activity by a person engaged in the business of manufacturing are exempt from sales and use tax. Purchases of tangible personal property or services not directly used in manufacturing are subject to sales and use tax.

123.4.2.1 Taxable Items. - The systematic operation or integrated series of systematic operations which constitutes manufacturing begins with the storage and handling of raw materials and continues through the last step of processing. Storage of completed products and transportation of completed products to the customer or to another site is not included in manufacturing. Also, items relating to the administration of the plant or manufacturing facility are not considered to be directly used and are taxable. The list provides only some examples of taxable items and is not intended to be all inclusive.

123.4.2.1.a Office furniture.

123.4.2.1.b Office supplies and equipment.

123.4.2.1.c Recordkeeping materials.

123.4.2.1.d Research and development equipment used in developing new products or improving present products.

123.4.2.1.e Computer and computer software, unless used to control the flow of goods in production.

123.4.2.1.f Layout and design equipment, including computers and computer software.

123.4.2.1.g Manuals and trade publications.

123.4.2.1.h Uniforms.

123.4.2.1.i Toilet supplies, paper and cloth towels

123.4.2.1.j Heating and air conditioning equipment, except if specifically designed to maintain atmospheric conditions essential to the manufacturing process or to the maintenance of the manufactured goods.

123.4.2.1.k Machinery, tools, parts, and materials used to repair equipment other than equipment directly used in the manufacturing process.

123.4.2.1.l Machinery, tools, parts and materials used to maintain site facilities other than facilities directly used in manufacturing, such as materials used to maintain office facilities.

123.4.2.1.m Materials used to construct, pave or maintain parking lots.

123.4.2.1.n Tangible personal property and services used to convey, handle, transport market or display finished products, including flag car services.

123.4.2.1.o Tangible personal property and services used to convey finished goods to storage or to store, or to remove or load finished goods from storage at the plant site.

123.4.2.1.p Tangible personal property or services used in advertising or marketing manufactured goods, including withdrawal of salesman's samples from inventory.

123.4.2.1.q Purchases of repairs to fulfill manufacturer's warranty.

123.4.2.1.r Temporary employment services when persons are not employees of the manufacturer and are rendering services not directly used in the manufacturing activity, such as clerical services.

123.4.2.1.s Consultant services unless the services rendered are professional or directly used in manufacturing activity.

123.4.2.1.t Blueprints and blueprinting equipment.

123.4.2.2 Exempt Items. - The following items when purchased by a person engaged in the business of manufacturing are directly used in manufacturing and are exempt from sales and use tax. The list provides only some examples and is not intended to be all inclusive.

123.4.2.2.a Raw materials used in manufacturing which are incorporated into and become part of the completed product.

123.4.2.2.b Tangible personal property or services used in conveying or unloading raw materials into storage or from storage to the production line.

123.4.2.2.c Tangible personal property or services used in storage of raw materials or partially finished manufactured goods.

123.4.2.2.d Machinery or equipment used directly in manufacturing.

123.4.2.2.e Machinery, tools, repair parts, and materials used to repair and maintain equipment directly used in the manufacturing process.

123.4.2.2.f Tangible personal property or services used to convey partially finished manufactured goods from storage to the production line or from one part of the production line to another.

123.4.2.2.g Machinery, tools, repair parts, and materials used to maintain plant site facilities directly used in the manufacturing process.

123.4.2.2.h Heating and air conditioning equipment, but only if specifically designed to maintain atmospheric conditions essential to the manufacturing process or to the maintenance of the manufactured goods.

123.4.2.2.i Tangible personal property and services used in testing and inspecting products on the production line for quality control purposes.

123.4.2.2.j Computer hardware and software but only if used to direct production line operations or control the flow of goods in production or in quality control. If used for administrative purposes, computer hardware and software are taxable.

123.4.2.2.k Safety equipment or clothing such as safety shoes, safety goggles, safety gloves, fire extinguishers, or first aid kits, but only if used in connection with or if necessary to the manufacturing process.

123.4.2.2.l Tangible personal property or services used in plant security, such as plant security guard services or alarm systems.

123.4.2.2.m Pollution control equipment used to eliminate, prevent, or reduce air, water or noise pollution resulting directly from manufacturing activity.

123.4.2.2.n Boxes, cartons, containers, and wrapping and packaging materials and supplies used in packaging or packing manufactured products for sale, but only if the packaging material is actually transferred to the purchaser as part of the product. For example, cartons transferred to the purchaser as part of the sale are exempt, but racks used to facilitate delivery which must be returned by the purchaser are taxable.

123.4.2.3 Items Used in Both Taxable and Exempt Manner. - It is possible for an item to be used in both a taxable or exempt manner. In such instances, apportionment of the tax may be necessary. The apportionment must be performed using a reasonable method acceptable to the Tax Commissioner. Additional information on apportionment is provided in Section 9d of these regulations.

123.4.2.4 Exemption from Direct Use Concept for Persons Engaged in Activities Subject to the Business and Occupation Tax. - Persons subject to the business and occupation tax are exempt on all purchases made by them for use in business and occupation tax activities. This exemption includes purchases used either directly or indirectly in the public service or utility business or in the business of generating or producing electric power, but only in activities for which the gross receipts are subject to business and occupation tax (W. Va. Code § 11-13-1 et seq.). It should be noted that some entities may be engaged in many businesses, some of which are subject to business and occupation tax and some of which are not subject to the business and occupation tax. Both those purchases directly or indirectly used in activities subject to the business and occupation tax made by a person subject to the business and occupation tax would be exempt from sales and use tax. Purchases for use in the other activities would be taxable unless they qualify for another exemption. If a person will be using the item both in an exempt manner and a taxable manner, it is possible that he may have to apportion the tax on purchases used in more than one activity. The apportionment must be performed using a reasonable method acceptable to the Tax Commissioner. Additional information on apportionment is provided in Section 9d of these regulations.

123.4.3 Production of Natural Resources. - The production of natural resources means the performance by the owner of the natural resources, or another of the act or process of exploring, developing, severing, extracting, reducing to possession and loading for shipment for sale, profit, or commercial use of any natural resource products, and any reclamation, waste disposal or environmental activities associated with these activities. Persons engaged in the business of the production of natural resources are subject to the direct use concept, unless they fall within the special exemption for severance taxpayers outlined in Section 123.4.3.4 of these regulations. If the person engaged in the production of natural resources is not entitled to the exemption for severance taxpayers, they must pay tax on purchases of tangible personal property and services, which are indirectly used in the production of natural resources. Purchases of tangible personal property and services which are directly used in the business of the production of natural resources are exempt from sales and use tax when such property or services are purchased by a person engaged in the business of the production of natural resources.

123.4.3.1 Natural Resource. - The term natural resource means all forms of mineral including, but not limited to, rock, stone, limestone, coal, shale, gravel, sand, clay, natural gas, oil, and natural gas liquids which are contained in or on the soils or waters of this State, including standing timber.

123.4.3.2 Severing or Severed. - Severing or severed means the physical removal of the natural resources from the earth or waters of this State by any means or from the waste or residue of prior mining.

123.4.3.3 Activities Not Included in the Production of Natural Resources. - The production of natural resources shall not include the following:

123.4.3.3.a In the case of limestone quarried or mined, any activity after the stone is severed and reduced to possession on the surface. Processing of limestone is considered to be manufacturing.

123.4.3.3.b In the case of natural gas, any conversion or refining process. Conversion or refining of natural gas is considered to be manufacturing.

123.4.3.3.c In the case of oil, any conversion or refining process. Refining of oil is considered to be manufacturing.

123.4.3.3.d In the case of timber, any cuts after the tree is severed, topped and delimbed. See Burruss v. Hardesty, 297 S.E.2d 836 (W. Va. 1982). The cutting of timber at a sawmill is considered to be manufacturing.

123.4.3.4 Exemption from Direct Use Concept for Persons Engaged in Activities Subject to the Severance Tax. - Persons subject to the severance tax are exempt on all purchases made by them for use in severance activities. This exemption includes purchases used either directly or indirectly in the production of natural resources, but only in activities for which the gross receipts are subject to severance tax (W. Va. Code § 11-13-1 et seq.). It should be noted that some entities may be engaged in many businesses, some of which are subject to severance tax and some of which are not subject to the severance tax. Both those purchases directly or indirectly used in activities subject to the severance tax made by a person subject to the severance tax would be exempt from sales and use tax. Purchases for use in the other activities would be taxable unless they qualify for another exemption. If a person will be using the item both in an exempt manner and a taxable manner, it is possible that he may have to apportion the tax on purchases used in more than one activity. The apportionment must be performed using a reasonable method acceptable to the Tax Commissioner. Additional information on apportionment is provided in Section 9d of these regulations.

123.4.3.4.a Example. - The gross receipts received by the owner from the quarrying of limestone is subject to the severance tax. If that same entity also processes the limestone, the processing activity would be classified as manufacturing. Purchases for use either directly or indirectly, in the quarrying business would fall within the exemption for severance taxpayers. However, only those purchases directly used or consumed in the manufacturing activity would be exempt.

123.4.3.5 Treatment of Contract Miners or Contract Cutters Engaged in Production of Natural Resources. - A contract miner or cutter is a person engaged as an independent contractor in producing natural resources which are owned by others. Contract miners or cutters are considered to be engaged in the production of natural resources and their purchases are subject to the direct use concept when engaged in the activities outlined in Section 123.4.3 of these regulations. Purchases made by a contract miner or cutter for direct use in the production of natural resources are exempt, while purchases made for indirect use are taxable. Contract miners or cutters are not eligible for the exemption outlined in Section 123.4.3.4 of these regulations, because they are not subject to the severance tax. Contract miners or cutters are not subject to the severance tax because they do not have an economic interest in the natural resource product being produced.

123.4.3.6 Taxable Items. - Purchases of tangible personal property or services indirectly used in the production of natural resources are taxable, unless made by a person subject to the severance tax and used in an activity subject to the severance tax. The following items are not directly used in production of natural resources and may be subject to the sales and use tax depending on whether the purchaser is subject to the severance tax. The list provides only some examples of taxable items and is not intended to be all inclusive.

123.4.3.6.a All Natural Resources. - (Special rules exist for severance taxpayers. See Section 123.4.3.4 of these regulations).

123.4.3.6.a.1 Blueprints or blueprinting equipment.

123.4.3.6.a.2 Engineering equipment and surveying equipment, maps, and other property used in exploration.

123.4.3.6.a.3 Office and clerical supplies and equipment.

123.4.3.6.a.4 Janitorial supplies.

123.4.3.6.a.5 Light bulbs and fixtures used in offices, repair shops, bath-houses, or similar facilities.

123.4.3.6.a.6 Supplies used in bath-house.

123.4.3.6.a.7 Textbooks, manuals, and reference materials.

123.4.3.6.a.8 Research and development equipment used in developing new products or improving present products.

123.4.3.6.a.9 Personnel records, time logs.

123.4.3.6.a.10 Machinery, tools, parts, and materials used to repair equipment other than equipment directly used in the production of natural resources.

123.4.3.6.a.11 Machinery, tools, parts and materials used to maintain office facilities, repair shops, bath-houses, or eating facilities.

123.4.3.6.a.12 Temporary employment services when persons not employees of the taxpayer and are rendering services not directly used in the activity of the production of natural resources, such as clerical services.

123.4.3.6.a.13 Consultant services, unless services rendered are professional or directly used in the activity of the production of natural resources.

123.4.3.6.b Coal Mining and Processing. - (Special rules exist for severance taxpayers. See Section 123.4.3.4 of these regulations).

123.4.3.6.b.1 Tangible personal property or services used in the transportation of coal from the mine to the customer or from the processing plant to the customer.

123.4.3.6.c Limestone Quarrying. - (Special rules exist for severance taxpayers. See Section 123.4.3.4 of these regulations).

123.4.3.6.c.1 Tangible personal property or services used in the transportation of limestone from the quarry floor to a customer.

123.4.3.6.c.2 Tangible personal property or services used indirectly in the processing of limestone. Limestone processing is considered to be manufacturing rather than the production of natural resources, therefore purchases for indirect use in processing are taxable. See Section 123.4.2 of these regulations for more specific guidelines.

123.4.3.6.d Natural Gas and Oil Production. - (Special rules exist for severance taxpayers. See Section 123.4.3.4 of these regulations).

123.4.3.6.d.1 Tangible personal property or services used indirectly in the refining or processing of natural gas or oil. The refining or processing of natural gas or oil is considered to be manufacturing. Therefore, purchases for indirect use in refining or processing are taxable. See Section 123.4.2 of these regulations for more specific guidelines.

123.4.3.6.e Timbering. - (Special rules exist for severance taxpayers. See Section 123.4.3.4 of these regulations).

123.4.3.6.e.1 Cables used to secure logs to a truck for transportation to a customer.

123.4.3.6.e.2 Machinery, tools, parts and materials used to maintain equipment used to transport logs to a customer.

123.4.3.6.e.3 Tangible personal property or services used indirectly in activities occurring after the delimbing of the tree. Activities such as cutting timber at the sawmill are considered to be manufacturing. Purchases for indirect use in manufacturing are taxable. See Section 123.4.2 of these regulations for more specific guidelines.

123.4.3.7 Exempt Items. - Purchases of tangible personal property or services directly used in the production of natural resources are exempt from sales and use tax. The following items when used by a person engaged in the business of production of natural resources are directly used in the production of natural resources and are exempt from sales and use tax. The list provides only some examples of exempt items and is not intended to be all inclusive.

123.4.3.7.a All Natural Resources.

123.4.3.7.a.1 Pollution control equipment used to eliminate, prevent, or reduce air, water, or noise pollution resulting directly from production activity.

123.4.3.7.a.2 Tangible personal property or services used for production site security, such as security guard services or alarm systems.

123.4.3.7.a.3 Safety equipment or clothing such as safety shoes, safety goggles, safety gloves, fire extinguishers, or first aid kits, but only if used directly in the production process.

123.4.3.7.a.4 Machinery, tools, repair parts, and materials used to repair and maintain equipment directly used in production.

123.4.3.7.a.5 Machinery, tools, repair parts, and materials used in reclamation activities associated with the production of natural resources.

123.4.3.7.b <u>Coal Mining and Processing</u>.

123.4.3.7.b.1 Machinery and equipment used to sever or extract the coal including continuous miners, augers, picks, and other cutting machines and tools for underground mining and dozers, end loaders, cranes, backhoes, and power shovels for surface mining.

123.4.3.7.b.2 Mine support and roof materials such as timbers, roof bolts, and glue.

123.4.3.7.b.3 Drainage pipes, pumps and valves located at or in the mine.

123.4.3.7.b.4 Blasting equipment and explosives.

123.4.3.7.b.5 Mine ventilation equipment.

123.4.3.7.b.6 Rock dust and other dust alloying materials.

123.4.3.7.b.7 Mine and supply cars.

123.4.3.7.b.8 Equipment used to generate energy to operate machinery and equipment directly used in production such as generators, battery chargers, compressors, and transformers.

123.4.3.7.b.9 Tangible personal property or services used in transportation of coal from the mine face to a stockpile located at the mouth of the mine, such as mine and shuttle cars, trolley and battery locomotives, conveyor belts, or railroad tracks located inside the mine.

123.4.3.7.b.10 Tangible personal property or services used in the transportation of coal from the site of a surface mine to a stockpile where coal is stored for further shipment.

123.4.3.7.b.11 Communication equipment used within the mine.

123.4.3.7.b.12 Processing equipment, such as washers, centrifuges.

123.4.3.7.b.13 Tangible personal property or services used to transport coal from the mine to the processing plant, but only if both activities are conducted by the same person.

123.4.3.7.c Limestone Quarrying.

123.4.3.7.c.1 Machinery and equipment used to sever or extract the limestone from the face of the quarry.

123.4.3.7.c.2 Blasting equipment and explosives.

123.4.3.7.c.3 Rock dust and other dust alloying materials.

123.4.3.7.c.4 Tangible personal property or services used to transport limestone from the quarry to the processing plant but only if both activities are conducted by the same person.

123.4.3.7.d Natural Gas and Oil Production.

123.4.3.7.d.1 Gas and oil drilling rigs and equipment.

123.4.3.7.d.2 Chemicals used in gas and oil well completion.

123.4.3.7.e Timbering.

123.4.3.7.e.1 Axe.

123.4.3.7.e.2 Chain saw.

123.4.3.7.e.3 Cables and chains, if used to move trees to permit delimbing.

123.4.3.7.e.4 Hydraulic slasher.

123.4.3.7.e.5 Oil if used in severing equipment.

123.4.3.7.e.6 Sawblades.

123.4.3.7.e.7 Saws.

123.4.3.7.e.8 Shearers.

123.4.3.7.e.9 Wedges.

123.4.3.8 Items Used in Both Taxable and Exempt Manner. - It is possible for an item to be used in both a taxable or exempt manner. In such instances, apportionment of the tax may be necessary. The apportionment must be performed using a reasonable method acceptable to the Tax Commissioner. Additional information on apportionment is provided in Section 9d of these regulations.

123.4.4 Transmission. - The activity of transmission means the act or process of causing liquid, natural gas or electricity to pass or be conveyed for others for consideration from one place or geographical location through a pipeline or other medium for commercial purposes but does not include the passage or conveyance of liquid, natural gas or electricity by the owner thereof. The word medium refers to the stationary mode by which liquid, natural gas, or electricity moves from one location to another, including pipelines or wires, but excluding tank trucks and barges. Purchases of tangible personal property or services which are directly used in transmission by a person engaged in the business of transmission are exempt from sales and use tax. Purchases of tangible personal property or services which are not directly used in transmission are subject to the sales and use tax.

123.4.4.1 Taxable Items. - Purchases of tangible personal property or services relating to the administration or management of a transmission facility are not considered to be directly used and are taxable. The list provides only some examples of taxable items and is not intended to be all inclusive.

123.4.4.1.a Office furniture.

123.4.4.1.b Office supplies and equipment.

123.4.4.1.c Recordkeeping materials.

123.4.4.1.d Research and development equipment.

123.4.4.1.e Computers and computer software, unless used to trace or control the flow of goods in transmission.

123.4.4.1.f Uniforms.

123.4.4.1.g Toilet supplies, paper and cloth towels.

123.4.4.1.h Light bulbs and lighting fixtures.

123.4.4.1.i Heating or air-conditioning equipment, except if specifically designed to maintain atmospheric conditions essential to the transmission process or to maintain products in transmission.

123.4.4.1.j Machinery, tools, parts, and materials used to repair equipment other than equipment directly used in the transmission process.

123.4.4.1.k Machinery, tools, parts, and materials used to maintain facilities other than those directly used in transmission, such as materials used to maintain office facilities.

123.4.4.1.l Storage tanks used to store products before or after transmission.

123.4.4.1.m Temporary employment services when persons are not employees of the taxpayer and are rendering services not directly used in the activity of transmission, such as clerical services.

123.4.4.1.n Consultant services, unless the services are professional or directly used in the transmission activity.

123.4.4.2 Exempt Items. - The activity of transmission begins with the receipt or intake of the liquid, natural gas, or electricity into the transmission system and ends with the delivery of the product to the customer. Purchases by persons engaged in the business of transmission of tangible personal property or services directly used in transmission activities are exempt from sales and use tax. The list provides only some examples and is not intended to be all inclusive.

123.4.4.2.a Machinery and equipment used directly in the transmission process, such as pipes, poles, and wires.

123.4.4.2.b Machinery, tools, repair parts and materials used to repair and maintain equipment directly used in the transmission process.

123.4.4.2.c Machinery and equipment used in clearing the right of way for transmission lines.

123.4.4.3 Items Used in Both Taxable and Exempt Manner. - It is possible for an item to be used in both a taxable or exempt manner. In such instances, apportionment of the tax may be necessary. The apportionment must be performed using a reasonable method acceptable to the Tax Commissioner. Additional information on apportionment is provided in Section 9d of these regulations.

123.4.4.4 Exemption from Direct Use Concept for Persons Engaged in Activities Subject to the Business and Occupation Tax. - Persons subject to the business and occupation tax are exempt on all purchases made by them for use in business and occupation tax activities. This exemption includes purchases used either directly or indirectly in the public service or utility business or in the business of generating or producing electric power, but only in activities for which the gross receipts are subject to business and occupation tax (W. Va. Code § 11-13-1 et seq.). It should be noted that some entities may be engaged in many businesses, some of which are subject to business and occupation tax and some of which are not subject to the business and occupation tax. Both those purchases directly or indirectly used in activities subject to the business and occupation tax made by a person subject to the business and occupation tax would be exempt from sales and use tax. Purchases for use in the other activities would be taxable unless they qualify for another exemption. If a person will be using the item both in an exempt manner and a taxable manner,

it is possible that he may have to apportion the tax on purchases used in more than one activity. The apportionment must be performed using a reasonable method acceptable to the Tax Commissioner. Additional information on apportionment is provided in Section 9d of these regulations.

123.4.5 Communication. - The activity of communication includes all telephone, radio, light, light wave, radio telephone, telegraph and other communication or means of communication, whether used for voice communication, computer data transmission, or other encoded symbolic information transfers. Communication activity also includes commercial broadcast radio, commercial broadcast television and cable television. Persons engaged in the business of communications are subject to the direct use concept on their purchases of tangible personal property or services for use in communication business, unless they fall within the exemption for telecommunication taxpayers outlined in Section 123.4.5.1 of these regulations. If a person does not fall within this exemption, their purchases of tangible personal property and services for use indirectly in the activity of communications are subject to sales and use tax. Purchases by persons engaged in this State in the business of communications of tangible personal property or services for use directly in the activity of communication are exempt from sales and use tax.

123.4.5.1 Exemption from Direct Use Concept for Persons Engaged in Activities Subject to Telecommunications Tax. - Persons subject to the telecommunications tax are exempt on all purchases for use in telecommunications activities. This exemption includes purchases of tangible personal property or services, whether used directly or indirectly, but only in activities for which the gross receipts are subject to the telecommunications tax (W. Va. Code § 11-13B-1 et seq.). The Public Service Commission provides annually to the Tax Commissioner a list of activities deemed to be competitive, which are not subject to the telecommunications tax. Purchases of tangible personal property or services for use in these competitive activities may be taxable, since the gross receipts from them are not subject to the telecommunications tax. It should be noted that some entities may be engaged in many activities, some of which are subject to telecommunications tax and some of which are not subject to the telecommunications tax. Both those purchases directly or indirectly used in activities subject to the telecommunications tax made by a person subject to the telecommunications tax would be exempt from sales and use tax. Purchases for use in the other activities would be taxable unless they qualify for another exemption. If a person will be using the item both in an exempt manner and a taxable manner, it is possible that they may have to apportion the tax on purchases used in more than one activity. The apportionment must be performed using a reasonable method acceptable to the Tax Commissioner. Additional information on apportionment is provided in Section 9d of these regulations.

**§ 110-15-124. Reserved for Future Use.**

**§ 110-15-125. Educational Summer Camps.**

125.1 The tuition charged for attending an "educational summer camp," as defined in Section 2 of these regulations, is exempt per se from the consumers sales and service tax and use tax. This exemption does not extend to charges for services or tangible personal property provided by or sold by the educational summer camp. Those charges are subject to tax unless otherwise

exempt under these regulations. Examples of taxable charges are those for food, lodging, equipment rental or usage, clothing, books and study materials, except for required textbooks and study materials directly related to the educational nature of the summer camp.

125.2 In order for the exemption to be claimed, the tuition charge must be separately identifiable and it may not include other charges for services or tangible personal property provided or sold by the educational summer camp.

125.3 The educational summer camp may claim exemption for those purchases of tangible personal property or taxable services which are purchased for resale. However, tangible personal property or taxable services purchased for use in the activity of selling tangible personal property or the dispensing of a taxable service are subject to the consumers sales and service tax and use tax.

**§ 110-15-126. Food.**

126.1 Food sold by public or private schools, school sponsored student organizations, or school sponsored parent-teacher associations to students enrolled in such school or to employees of such school during normal school hours is exempt from the consumers sales and service tax and the use tax. However, sales of food to the general public during normal school hours are taxable.

126.1.1 Organizations which may make such exempt sales are as follows:

126.1.1.1 A public, private, parochial or denominational school which is subject to regulation by the West Virginia State Board of Education;

126.1.1.2 An organization which is sponsored by a public, private, parochial or denominational school which is subject to regulation by the West Virginia State Board of Education; or

126.1.1.3 A parent-teacher association which is sponsored by a public, private, parochial or denominational school which is subject to regulation by the West Virginia State Board of Education.

126.1.2 The following sales of food or food products during other than normal school hours also are exempt.

126.1.2.1 Sales by a school sponsored student or parent-teacher association, or similar association, at athletic, cultural or social events when the proceeds of such sales, after payment of reasonable expenses, are donated to the school or used to purchase tangible personal property or services which are donated to the school.

126.1.2.2 Sales by a school sponsored student or parent-teacher association, or similar association, during a fund raising activity which does not qualify as an athletic, cultural or social event when the proceeds of such sales, after payment of reasonable expenses, are donated to the school or used

to purchase tangible personal property or services which are donated to the school.

126.1.3 The following sales of food or food products are subject to consumers sales and service tax.

126.1.3.1 Sales of food by vending machines regardless of where the machine is located, who owns the machine or the time of day when the sale occurs.

126.1.3.2 Sales of food to the general public during normal school hours.

126.1.4 Only purchases of food sold during normal school hours as authorized in the foregoing Section 126.1 of these regulations are exempt from the consumers sales and service tax and use tax. All other purchases are taxable unless an exemption other than a purchase for resale is available for use. The exemption may be claimed by issuing a properly completed exemption certificate to the vendor.

126.2 Food sold by a public or private college or university or by a student organization officially recognized by such college or university to students enrolled at such college or university is exempt from tax when such sales are made on a contract basis so that a fixed price is paid for consumption of food products for a specific period of time without respect to the amount of food product actually consumed by the particular individual contracting for the sale and no money is paid at the time the food product is served or consumed.

126.2.1 Applications.

126.2.1.1 College Operated Dormitory. - A public or private college subject to the control of the Board of Trustees of the University System of West Virginia, the Board of Directors of the State College System or a similar board for a private college in this State operates a dormitory providing room and board to its students on a semester-by-semester basis. An itemization is made for room and for board. The price for board is determined regardless of the amount of food consumed by the student or the number of missed meals. The charge made for board is exempt from the consumers sales and service tax.

126.2.1.2 Lump Sum Charge for Room and Board. - If a college-operated dormitory makes a lump sum charge for room and board, the entire amount is exempt from consumers sales and service tax. Room charges are exempt under Section 9.2.2.0 of these regulations.

126.2.1.3 Food Furnished by Caterer. - If the food service is furnished by a caterer and the contract is between the student and the caterer, the food is not being sold by the college or the university and the sale of food is subject to consumers sales and service tax but the charge for the room remains exempt. If the contract is between the student and the college or university, the charge is exempt.

126.2.1.4 Dormitory Operated by Private Person. - If room and board are furnished by a dormitory not operated by the college or university,

the charge made for board is subject to consumers sales and service tax. The charge made for the room is exempt from the consumers sales and service tax if the person renting the room continues to do so for a period in excess of thirty (30) consecutive days.

126.2.1.5 Lump Sum Charge for Room and Board. - If a dormitory operated by a private person makes a lump sum charge for room and board, the entire amount is subject to the consumers sales and service tax.

126.2.1.6 Fraternities and Sororities. - Sales of food and meals on a "contract basis," as defined in Section 2 of these regulations, by student fraternities and sororities that are officially recognized by the college or university at which they are located, to a student enrolled at the college or university are exempt. Food or meals sold to the general public or on any basis other than a "contract basis," are subject to consumers sales and service tax.

126.2.2 To the extent that an organization qualifies for exemption for its sales of food under this Section 126.2, its purchases of such food shall also be exempt; however, purchases of food by a fraternity or sorority shall not be exempt as a purchase for resale. The exemption may be claimed by issuing a properly completed exemption certificate to the vendor.

126.3 Food sold by a charitable or private nonprofit organization, a nonprofit organization or a governmental agency under a program to provide food to low-income persons at or below cost is exempt from tax. All of the following conditions must be satisfied in order to establish the exemption:

126.3.1 The purchaser must be classified as having low income.

126.3.2 The sale must be made by a charitable or private nonprofit organization nonprofit organization or governmental agency.

126.3.3 The sale must be under a program established to provide food to low-income persons.

126.3.4 The sale must be made at or below cost.

126.3.5 Purchases of food by a charitable or private nonprofit organization, nonprofit organization or a governmental agency under a program to provide food to low-income persons at or below cost are exempt when such food is used or consumed in the program. The exemption may be claimed by issuing a properly completed exemption certificate to the vendor.

126.4 Food sold in an occasional sale by a charitable or nonprofit organization, including volunteer fire departments and rescue squads is exempt from tax, if the purpose of the sale is to obtain revenue for the functions and activities of the organization and the revenue so obtained is actually expended for that purpose.

126.4.1 Charitable Organization.

126.4.1.1 "Occasional sales of food," as defined in Section 2 of these regulations, by a corporation or organization that is exempt from income

tax under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, and which satisfy the definition of "charitable organization" as provided in Section 2 of these regulations, are exempt from consumers sales and service tax.

126.4.2 Civic Organization Operated for Social Welfare.

126.4.2.1 "Occasional sales of food," as defined in Section 2 of these regulations, by a corporation or organization that is exempt from income tax under Section 501(c)(4) of the Internal Revenue Code of 1986, as amended, are exempt from consumers sales and service tax.

126.4.2.2 Examples of organizations that may qualify.

Educational radio stations
Junior Chamber of Commerce
Civic Improvement Association
Volunteer fire department
Volunteer rescue squad

126.4.3 Nonprofit Organization.

126.4.3.1 "Occasional sales of food," as defined in Section 2 of these regulations, by a nonprofit corporation or organization not included in Sections 126.4.1.1 and 126.4.1.2 of these regulations may be exempt from consumers sales and service tax.

126.4.3.2 Examples of organizations that may qualify.

126.4.3.2.a Labor, agricultural or horticultural organizations which are exempt from income tax under Section 501(c)(5) of the Internal Revenue Code of 1986, as amended.

126.4.3.2.b Business leagues, chambers of commerce and other organizations which are exempt from income tax under Section 501(c)(6) of the Internal Revenue Code of 1986, as amended.

126.4.3.2.c Social clubs and clubs organized for pleasure, recreation and other nonprofit purposes which are exempt from income tax under Section 501(c)(7) of the Internal Revenue Code of 1986, as amended.

126.4.3.2.d Fraternal or benevolent societies, orders or associations which are exempt from income tax under Section 501(c)(8) of the Internal Revenue Code of 1986, as amended.

126.4.4 Purchases of food for sale under the foregoing Section 126.4 are not exempt from the consumers sales and service tax or the use tax as a purchase for resale.

126.5 Food sold by any religious organization at a social or other gathering conducted by it or under its auspices, if the purpose in selling the food is to obtain revenue for the functions and activities of the organization and the revenue obtained from selling the food is actually used in carrying on

such functions and activities: Provided, That purchases made by such organizations shall not be exempt as a purchase for resale.

126.6 Sales of food by little leagues, midget football leagues, youth football or soccer leagues and similar types of organizations including scouting groups and church youth groups are exempt if the purpose in selling the food is to obtain revenue for the functions and activities of the organization and the revenue obtained from selling the food is actually used in supporting or carrying on the functions and activities of the groups.

**§ 110-15-127. Roadside Market, Open-Air Market, Farmer's Market, Etc.**

127.1 Sales by an agricultural producer or by members of such producer's immediate family, who is not otherwise engaged in making retail sales of tangible personal property of the type being sold at such market of livestock, poultry, or other farm products in their original state to consumers at pick-your-own fruit and vegetable operations, farmers markets, roadside stands, or through similar operations are exempt from the consumers sales and service tax; however, such sales by others who are not the producers of such goods are subject to the sales and service tax. It is the responsibility of the operator to collect and remit the tax or to accept from the purchaser a properly completed exemption certificate. See Section 9.2.26 of these regulations for additional information.

127.2 Vendors of livestock, poultry or other farm products who are required to collect the tax on the sale of agricultural products, are required to obtain a business registration certificate as provided in W. Va. Code § 11-12-1 et seq.

**§ 110-15-128. Mail Order Sales.**

128.1 Effective July 1, 1989, every person who engages in the business of making mail order sales is exercising a taxable privilege, when:

128.1.1 The retailer is a corporation doing business under the laws of this State or a person domiciled in, a resident of, or a citizen of this State;

128.1.2 The retailer maintains a retail establishment or office in this State whether or not the mail order sales result from or are related in any other way to the activities of such establishment or office; or

128.1.3 The retailer has agents in this State who solicit business or transact business on behalf of the retailer, whether or not the mail order sales result from or are related in any other way to such solicitation or transaction of business; or

128.1.4 The property or the result of a service was delivered within this State in fulfillment of a sales contract that was entered into in this State, in accordance with applicable conflict of laws rules, when a person in this State accepted an offer by ordering the property or the service; or

128.1.5 The retailer, purposefully or systematically exploiting the market provided by this State by any media-assisted, media-facilitated, or media-solicited means, including, but not limited to, direct mail advertising, unsolicited distribution of catalogs, computer-assisted shopping, television, radio or other electronic media or magazine or newspaper advertisements or other media, creates nexus with this State; or

128.1.6 Through compact or reciprocity with any other jurisdiction of the United States which jurisdiction uses its taxing power and its jurisdiction over the retailer in support of this State's taxing power; or

128.1.7 The retailer consents, expressly or by implication, to the imposition of the West Virginia use tax.

128.2 Definitions. - The following terms or phrases when used in this Section shall have the meaning ascribed to them except where the context clearly indicates a different meaning is intended:

128.2.1 "Retailer" means and includes every person engaging in the business of selling or leasing tangible personal property for use in this State or rendering taxable services the results of which will be used in this State, including a retailer who transacts mail order sales.

128.2.1.1 When in the opinion of the Tax Commissioner it is necessary for the efficient administration of the use tax, the Tax Commissioner may regard any salesperson, representative, trucker, peddler, or canvasser as the agent of the dealers, distributors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property or taxable service sold by them, regardless of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers or persons; and the Tax Commissioner may regard such dealers, distributors, supervisors, employers or persons as retailers for purposes of collecting the use tax imposed by this State.

128.2.2 "Retailer engaging in business in this State" means and includes, but shall not be limited to:

128.2.2.1 Any retailer having or maintaining, occupying or using within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent (by whatever name called) operating within this State under the authority of the retailer, or its subsidiary, regardless of whether such place of business or such agent is located here permanently or temporarily, or whether such retailer, or subsidiary, is admitted to do business within this State pursuant to W. Va. Code § 31-1-49. This definition shall be administered and enforced in conformity with the Constitutions and statutes of this State and of the United States.

128.2.2.2 Any retailer soliciting orders from persons located in this State for the sale of tangible personal property or taxable services by means of any of the following:

128.2.2.2.a By means of a telecommunication or television shopping system which utilizes a telephone or mail ordering system, including

toll free telephone numbers, reverse charge telephone systems or other telephone ordering systems and which is intended by the retailer to be broadcast by cable television or other means of broadcasting to consumers located in this State.

128.2.2.2.b By means of advertising that is broadcast from, printed at, or distributed from, a location in this State if the advertising from such location is primarily intended to be disseminated to consumers located in this State and is only secondarily or incidentally disseminated to bordering jurisdictions. Advertising which is broadcast from a radio or television station located in this State or is printed in or distributed by a newspaper published in this State is presumed to be primarily intended for dissemination to consumers located in this State. This presumption may be rebutted by persuasive evidence to the contrary. However, the number and geographic location of a television station's viewers, a radio station's listeners, a newspaper's subscribers or the distributees of advertising printed at or distributed from a location in this State is but one factor to be considered and, standing alone, shall not be controlling the controlling factor.

128.2.2.2.c By mail if the solicitations are substantial and recurring and if the retailer economically benefits from any banking, financing, debt collection, telecommunication or marketing activities occurring in this State or economically benefits from the location in this State of an authorized installation or service or repair facility, regardless of whether such facility is owned or operated by such retailer or by a related or unrelated person.

128.2.2.2.d By having a franchisee or licensee operating in this State under the retailer's trade name, if the franchisee or licensee is required to collect the consumers sales and service tax or use tax imposed by this State.

128.2.2.2.e By means of a contract with a cable television operator located in this State pursuant to which the retailer solicits from persons located in this State orders for the sale of tangible personal property or taxable services by means of advertising which is transmitted or distributed over a cable television system in this State.

This definition shall be administered and enforced in conformity with the Constitutions and statutes of this State and of the United States.

128.2.3 "Final adjudication" means a decision of a court of competent jurisdiction from which no appeal can be taken or from which the official or officials of this State with authority to make such decisions have decided not to appeal.

128.2.4 "A mail order sale" is a sale of tangible personal property, or a taxable service that is ordered by mail, computer-assisted shopping, media-assisted, media-facilitated, or media-solicited, or by other means of communication (including but not limited to direct mail advertising, unsolicited distribution of catalogs, television, radio or other electronic media, telephone or magazine or newspaper advertising), to a purchaser who is in this State at the time the order is remitted, from a dealer who receives the order in another

state of the United States, or is in a commonwealth, territory or other area under the jurisdiction of the United States, and transports the property or causes the property to be transported, whether or not by mail, from any jurisdiction of the United States, including this State to a person in this State, including the person who ordered the property. For purposes of this definition, there is a presumption that every person who is a resident of this State who remits an order was in this State when the order was finally remitted by the vendor.

Example 1: A purchaser, who is a resident of West Virginia, receives in the mail a catalog of the seller who resides in another state and whose business facilities are all located in that state. The purchaser orders tangible personal property advertised in the catalog by completing an order blank furnished with the catalog, attaching his or her personal check in the amount required for the purchase, and mails the order from within this State to the seller. The seller, by mail or other means of transportation, transmits the property to the purchaser in West Virginia. If any of the provisions of Section 128.1 are applicable, this is a taxable mail order sale and the out-of-state vendor must collect use tax from the West Virginia customer.

Example 2: A purchaser, not a resident of West Virginia, while outside this State orders tangible personal property from a seller in another state to be sent to the purchaser's grandchildren in West Virginia. This is not a "mail order sale" because the purchaser was not in West Virginia at the time the order was remitted.

Example 3: A West Virginia resident, while vacationing in another state, orders tangible personal property from a seller in another state to be sent to the purchaser's home in West Virginia. Since the purchaser is a West Virginia resident, he or she is presumed to have purchased the property for use or consumption in this State. If any of the provisions of Section 128.1 are applicable, the out-of-state vendor must collect West Virginia use tax. If this presumption is rebutted, this would not be a taxable "mail order sale."

128.3 Vendor's Responsibilities. - Every vendor engaged in the business of making mail order sales that are subject to use tax is required to have a business registration certificate. No registration fee is required unless the vendor has contact with this State that is sufficient to sustain imposition by this State of a direct tax on the out-of-state vendor.

128.4 Transportation and Handling Charges. - The total amount paid for tangible personal property, including transportation charges, handling charges, and any other charges whatsoever that occur prior to actual transfer of title to the tangible personal property to the purchaser by the vendor are subject to the tax regardless of whether such charges are separately stated.

128.5 No Dealer Collection Allowance. - Persons who collect consumers sales and service tax or use taxes must turn over to the Tax Commissioner the full amount of consumers sales and service or use taxes they collect from West Virginia customers. Neither the consumers sales and service tax law nor the use tax law authorizes the taking of a vendor's collection allowance.

128.6 Refund of Taxes on Mail Order Sales.

128.6.1 When there has been a final adjudication that any tax upon a mail order sales transaction was levied or collected, or both levied and collected, contrary to the Constitution of the United States, or the Constitution of West Virginia, or both Constitutions, the Tax Commissioner will, in accordance with Section 128.6.2 of these regulations, refund the amount of tax to the person who paid the tax or, at the taxpayer's election, establish a tax credit.

128.6.2 To receive a refund or credit of consumers sales and service tax or use tax, the person who paid the tax must file a claim for refund within two years from the date the tax was paid to the vendor or directly to the State Tax Commissioner. Such claim must include the following information.

128.6.2.1 A description of the tangible personal property or taxable service purchased;

128.6.2.2 The date on which the purchase was made;

128.6.2.3 The purchase price of the item(s) or service(s);

128.6.2.4 The amount of West Virginia consumers sales or use taxes paid for such item;

128.6.2.5 The name and mailing address of the seller from which the purchase of the tangible personal property or taxable service was made;

128.6.2.6 The citation of the court decision or decisions upon which the claim for refund is based;

128.6.2.7 A copy of the sales invoice made out by the seller of the tangible personal property or taxable service; and

128.6.2.8 Any other information that is required by the State Tax Department in order to verify the authenticity or accuracy of the claim for refund.

128.6.3 The Tax Commissioner may refuse to grant a claim for refund or credit if the claim for refund is incomplete or fails to contain all of the information required by Section 128.6.2 of these regulations.

128.6.4 Upon formal approval of a complete claim for refund, the Tax Commissioner shall promptly issue his requisition on the Treasury. If a claim for credit is approved, the Tax Commissioner shall promptly establish the amount of the credit.

**§ 110-15-129. <u>Leases of Tangible Personal Property</u>.**

129.1 <u>In General</u>. - The consumers sales and and service and use tax laws apply to leases of tangible personal property. A lessor of tangible personal property who engages in this State in selling or leasing tangible personal property is required to collect consumers sales and service tax with respect to such leases when the lessee takes delivery of the leased property in this State. A lessee is required to pay use tax with respect to the use in this

State of leased tangible personal unless the lessee has paid West Virginia consumers sales and service tax with respect to the transaction. A lessor who is a "retailer engaging in business in this State," as defined in Section 2 of these regulations, is required to collect and remit West Virginia use taxes with respect to tangible personal property leased for use in this State. A lessee who pays to the lessor of the tangible personal property either the amount of West Virginia consumers sales and service tax due or the amount of West Virginia use tax due has no further liability for payment of the tax directly to the Tax Commissioner. Exemptions from payment of tax allowed by law with respect to certain sales of tangible personal property equally apply to leases of tangible personal property and the methods of claiming exemption from payment of tax are the same. See Section 9 (exemptions) of these regulations. Additionally, long term leases of motor vehicles are exempt. See Section 9.2.10 of these regulations. A lessee of tangible personal property used in this State is allowed credit against his West Virginia use tax liability for payment of consumers sales and service taxes lawfully imposed by another state on lease payments attributable to the period of time the lessee uses the leased property in this State. The measure of tax is the amount of the periodic lease payments.

129.2 Certain terms used in this section have the following meanings for purposes of application of this regulation:

129.2.1 Financing Lease. - The term "financing lease" means:

129.2.1.1 A lease contract which contains at the inception of the contract a provision or condition that (1) title to the leased property must be transferred to the lessee at the end of the lease, or (2) the lessee has an option to purchase the leased property at a nominal price.

129.2.1.2 A lease contract containing either of the following provisions or conditions at the inception of the contract is presumed to be a financing lease:

129.2.1.2.a The primary lease term is equal to seventy-five percent (75%) or more of the estimated economic life of the property (determined at the time the primary term of the lease begins) and makes no provision for the return of the property to the lessor. For used property, this provision does not apply if the beginning of the lease term falls within the last twenty-five percent (25%) of the total estimated economic life of the leased property, or

129.2.1.2.b The residual value of the leased property is less than ten percent (10%) of the property's fair market value at the inception of the lease and the contract makes no provision for the return of the property to the lessor.

129.2.1.3 The presumption that the contract is a financing lease may be rebutted by showing that the contract is not merely a security device, that the property will be usable for its intended purpose at the end of the primary lease term, that the lessor in good faith intends to reclaim possession of the property at the end of the lease term or to sell or re-lease it at that time for its fair rent or fair market value, and that the lease was not treated

by the lessor as a sale of tangible personal property or by the lessee as the acquisition of a capital asset.

129.2.2 Lease. - The term "lease" means a transaction in which possession but not title to tangible personal property is transferred for a consideration. The term "lease" includes a rental, hire or license. Likewise, "lessor" includes a rentor, hiror or licensor; and "lessee" includes a rentee, hiree or licensee. For the purpose of these regulations, a lease must be made for bona fide consideration with lease payments approximating fair market lease payments at the time the lease contract is entered into.

129.2.3 Nominal Price. - The term "nominal price" means consideration for obtaining technical title to leased property which is significantly less than the fair market value of the tangible personal property at the time the consideration is paid or the option to purchase is exercised, whichever occurs first.

129.2.4 Operating Lease. - The term "operating lease" means a lease contract which gives the lessee use of the leased property for a certain period, while the lessor retains all or substantially all of the risk and rewards of ownership. For purposes of the consumers sales and use taxes, a contract in the legal form of a lease will be treated as an operating lease unless it meets the definition of a financing lease.

129.2.5 Tangible Personal Property. - The term "tangible personal property" means property which may be seen, weighted, measured, felt or touched, or is in any other manner perceptible to the senses. "Tangible personal property" includes, but is not limited to, motor vehicles, machinery, equipment, movies, whether they be on reel, cassette, disk or other medium, computer software, whether it be off-the-shelf software or custom designed software, music whether it be sheet music or music on records, tapes, disks or other medium, and any other tangible goods, wares or merchandise.

129.3 Treatment of Leases.

129.3.1 An operating lease will be treated as a lease for purposes of the consumers sales and use taxes.

129.3.2 A financing lease will be treaded as a sale for purposes of the consumers sales and use taxes.

129.3.3 Operating and financing leases are subject to consumers sales and use taxes.

129.3.4 The lessor of tangible personal property may purchase the property provided under the terms of a lease without paying tax on its purchase price by issuing a resale certificate to the seller of the property in lieu of paying the consumers sales or use tax. Tax must be collected from the lessee on all charges contained in the lease which are subject to the consumers sales and use taxes.

129.4 Service Contracts. - The charges for services provided under a service contract relating to leased tangible personal property are subject to consumers sales and use taxes.

129.5 Equipment Leased With and Without an Operator.

129.5.1 Receipts from the lease of equipment without an operator are taxable as lease or sale of tangible personal property.

129.5.2 The furnishing of equipment with an operator for which a single charge is made to the customer is presumed to be the providing of a taxable service, even when the charge is to a customer engaged in contracting or subcontracting activity. Itemization of the charges does not change the taxability of this transaction.

129.5.2.1 Contractors renting equipment (with or without operator) for use in their contracting activity must pay consumers sales or use taxes on the entire charge for the transaction regardless of whether the charge for the equipment and the charge for the operator are separately stated or are combined in a lump sum.

129.5.2.1.a A lease of equipment and an operator to a contractor for use in providing tax exempt contracting services will be treated as a tax exempt subcontract only when the contractor can exercise no control (beyond specification of desired results or work to be accomplished) or supervision over the equipment and the operator thereof. In such a case the denominated lessor is viewed as a subcontractor providing equipment and labor in fulfillment of a contract with a prime contractor.

129.5.2.2 Providers of taxable services who rent equipment (with or without an operator) must pay consumers sales or use taxes on the entire charge for the transaction regardless of whether the charge for the equipment and the charge for the operator are separately stated or are combined in a lump sum. Allowable exemptions from tax must be asserted as provided in Section 9 (exemptions) of these regulations.

129.5.2.2.a A lease of equipment and an operator to a provider of taxable services will be treated as a tax exempt subcontract for taxable services only when the person providing the taxable service to the customer can exercise no control or supervision over the equipment and the operator thereof.

129.6 Other Charges In a Lease Agreement. - Operating as well as financing lease agreements may contain a variety of charges in addition to the basic lease payment. These charges and their tax consequences are as follows:

129.6.1 Separately stated charges for labor or services rendered in remodeling, maintaining, or repairing the tangible personal property being leased are subject to tax.

129.6.2 Separately stated charges for labor or services rendered in installing or applying the tangible personal property being leased are subject to tax.

129.6.3 Separately stated charges by the lessor for transportation of the leased property from the lessor to the lessee and back which are included in the lease price are taxable. Charges for transportation of property from a supplier to the lessor which are included in the lease price are taxable. Separately stated charges for transportation of the property from the supplier directly to the lessee or from the lessor to the lessee are taxable unless an exemption otherwise provided by law is applicable.

129.6.4 A charge imposed for early termination of the lease is included in the lease price and is taxable.

129.6.5 Under an operating lease, any interest charges properly included in the cost of property to the lessor, or in overhead costs of the lessor and passed on or reflected in the ultimate lease payment paid by the lessee are taxable whether or not separately stated. Interest charges clearly imposed for late payments or other defaults of the lessee under the lease are not taxable.

129.6.6 Under a financing lease, charges for interest by the lessor to the lessee will be taxable unless the rate of interest or the actual interest charged is separately stated in the contract to the customer.

129.7 Imposition of Tax; Returns; Credits.

129.7.1 Operating Leases. - An operating lease executed while the property is within this state is subject to consumers sales and service tax. Tax is due on the total lease amount for the entire term of the lease regardless of where the property is used unless as a condition for the lease the lessor delivers the property to an out-of-state location for use there. Any renewal of the contract, extensions or options exercised while the lessee uses the property outside this State will not be subject to consumers sales and use taxes unless the property reenters this State.

129.7.2 Financing Leases. - A financing lease executed while the property is within this State is subject to consumers sales and service tax unless the lessor deliverers the property to an out-of-state destination for use there. Consumers sales and service tax will be due on the total amount of the contract regardless of where the leased property received in this State is used during the lease.

129.7.3 Leases Subject to Use Tax; Credit. - Tangible personal property bought or shipped into this State for use under the terms of a financing lease or an operating lease are presumed to be subject to use tax. The use tax will be due on the lease price, for the entire term of the lease and regardless of where the initial contract was executed, determined in the same manner as if consumers sales and service tax applied to the transaction. Credit will be allowed against any sales or use tax legally imposed and paid to another state. See Section 10 of these regulations.

129.7.4 Method and time for filing returns. - A lessor required to collect consumers sales and service tax or use tax must report the tax due based upon the lessor's method of accounting. The term "method of accounting" means the method of accounting used for federal income tax purposes. If the lessor

does not have a method of accounting for federal income tax purposes, then any generally recognized method of accounting which correctly reflects the lessor's business operation may be used.

129.7.4.1 Under an operating lease, tax must be reported by the lessor in the period in which the lease payments are considered income based upon the lessor's method of accounting.

129.7.4.2 Under a financing lease, tax must be collected on any payment made at the time the purchaser (lessee) takes possession of the property or on any payment made when the first payment is due from the purchaser (lessee). Tax must be reported on each lease payment and paid as provided in Section 5 of these regulations.

129.7.4.3 When the lessor is not a "retailer engaging in business in this State" as defined in Section 2 of these regulations or a foreign retailer authorized to collect use tax, the lessee must remit the use tax directly to the Tax Commissioner. Tax must be reported by the lessee based upon the method of accounting the lessee uses for federal income tax purposes. Under a financing lease, the use tax must be reported on any payment made by the lessee when the lessee takes possession of the property or on any payment made when the first payment is due, whichever is earlier and on each lease payment made thereafter.

129.8 Sales of Leased Property Under Operating Leases; Credit Allowed.

129.8.1 When the lessor sells leased property to the lessee and allows credit against the sales price for all or part of the lease payments previously made by the lessee, tax should not be collected on the amount allowed as credit provided the lessor has collected and remitted tax on the prior lease payments. The lessor must collect tax on the balance of the sales price.

129.8.2 When the lessor sells leased property to a person other than the lessee and allows the lessee credit for a part of the sales price against lease payments previously made by the lessee, tax may not be refunded on the amount allowed as credit. The lessor must also collect the tax on the sales price of the property to the third party.

129.9 Sales for Resale

129.10.1 The purchaser of tangible personal property which the purchaser intends to hold for lease may issue an exemption certificate in lieu of payment of consumers sales and service tax at the time the property is purchased under the sale for resale exemption. If the purchaser subsequently uses the property in any manner other than by leasing it, or by displaying or demonstrating it, the purchaser becomes liable at the time of such other use for use tax based on the fair rental value of the property for the period of time it is used for a nonexempt purpose. The fair market rental value is the amount that the purchaser would pay on the open market to rent the item for use. If the fair market rental value of the property cannot be ascertained, tax is due on the original purchase price of the property.

129.9.2 At any time, the lessor using the property purchased under a exemption certificate may stop paying tax on the fair market rental value of such property and instead pay tax on the original purchase price. When the lessor elects to pay tax on the purchase price, no credit is allowed for taxes previously paid on the fair market rental value of the property.

129.10 Leases of Real Property With Tangible Personal Property.

129.10.1 If a contract for the lease of real property for a lump sum amount includes the lease of tangible personal property as part of the contract, e.g. a lease of a furnished apartment, no consumers sales or use taxes are due on the portion of lump sum rental amount charged the lessee, which is attributable to the leased tangible personal property. However, the lessor may not issue an exemption certificate, and consumers sales or use taxes must be paid at the time the tangible personal property is purchased by the owner or manager of the real estate.

129.10.2 Consumers sales and service tax is due on the separate lease of tangible personal property by a person owning or managing the real property in which the tangible personal property is or will be situated. An exemption certificate may be issued in lieu of paying the consumers sales and service tax at the time the tangible personal property is purchased for purposes of leasing it to a third party.

129.11 Leases of Motor Vehicles.

129.11.1 If the rental of a motor vehicle, leased in another state and driven into West Virginia, is paid in West Virginia, the entire amount of such rental is taxable. If a credit card is used in lieu of cash payments, the West Virginia vendor honoring the credit card is liable for the collection of the tax on the rental and the remitting of it directly to the Tax Commissioner. If the rental of a motor vehicle leased in West Virginia and driven to a destination in another state is paid in such other state, such rental is exempt from West Virginia tax. However, if a motor vehicle is leased in West Virginia and the rental is paid in West Virginia, the rental is taxable even though the motor vehicle is removed from West Virginia immediately after the lessee takes possession thereof.

129.11.2 A rental car agency shall charge the consumer sales and use taxes on the total rental charge, including any charge for insurance, except for a policy issued to the customer by a licensed insurance company for which a specific charge is made.

129.11.3 Where a "collision damage waiver" fee is paid by a customer (lessee) to the lessor of a vehicle and is considered as payment for the lessor's waiver of all claims against the customer for damage to the leased vehicle and the fee is not required as a condition of the lease, the fee, when separately stated, does not constitute rent and is not taxable.

129.11.4 Where a "personal accident insurance" fee is paid by a customer (lessee) to the lessor of a vehicle, which fee covers personal injuries, and the fee is not required as a condition of the lease, the fee, when separately stated, does not constitute rent and is not taxable.

129.11.5 Parts and materials used to maintain, repair, rebuild, and recondition aircraft, boats, and motor vehicles, which are used exclusively for rental purposes are exempt when tax is charged on the rental of such vehicles. Likewise exempt when the rentals are subject to tax are polishes, lubrication oils, and greases used in their operation when purchased by the owner-lessor of the vehicles. All items above are subject to the tax when the owner-lessor of motor vehicles is not required to charge tax on the rentals of the motor vehicles.

129.11.6 The taxable gross proceeds derived from the lease or rental of a vehicle shall not include the price of fuel on which the proper tax has been paid, provided the fuel is separately stated from the rental or lease charge. If the price of the fuel is not separately stated from the rental or lease charge, it is considered to be a portion of the gross proceeds derived from the rental or lease and is fully taxable.

129.12 Third Party Lessors; Sale and Lease-Back.

129.12.1 Each purchase of tangible personal property by a person engaged in the business of renting or leasing such tangible personal property to the final user or consumer shall be exempt from consumers sales and service tax as a purchase for resale when the lessor has a West Virginia Business Registration Certificate.

129.12.2 Consumer sales and service tax shall be imposed on the total amount of each lease payment when the lessee is obligated under the contract to pay the lessor for the continued use of the tangible personal property. There is no deduction or exclusion from the lease price for insurance, taxes, service or maintenance contracts, handling charges, administration charges, late fees, repair or service charges, or any other charges regardless of how any contract, invoice or other evidence of the transaction is stated or computed or whether separately billed or segregated on the same bill.

129.12.3 When a lessee contracts with a third party lessor to purchase and lease back to the original purchaser tangible personal property after the purchaser has received the billing and paid the vendor on the initial transaction, both the original purchase by the lessee and the subsequent lease payments made by the lessee shall be taxable. No deduction, exclusions, credits or refunds for consumers sales and service tax previously paid on the original sale shall be allowed. Both transactions are treated by the Tax Commissioner as separate sales subject to the consumers sales and service tax and neither transaction qualifies for an exemption.

## § 110-15-130. Emergency Medical Services and Ambulance Authorities.

130.1 Emergency Medical Services (EMS) are primarily engaged in providing a personal and professional service when patients are accompanied in transport by "emergency medical service personnel" certified by the Director of Health as defined in the West Virginia Emergency Medical Services Act of 1984 as amended. See W. Va. Code § 16-14C-1 et seq. No consumers sales and service tax is due for Emergency Medical Services. However, consumers sales and service tax must be charged on purchases for use in providing Emergency Medical Services.

130.2 Ambulance Authorities duly created and incorporated under the provisions of W. Va. Code § 7-15-1 et. seq. are not required to either collect consumers sales and service tax on the service fees charged or to pay consumers sales and service or use tax on their purchases. Both exemptions are per se exemptions for such Ambulance Authorities and no exemption certificate or direct pay permit number is necessary to document these exemptions.

130.3 Non-emergency convalesent transportation is not a personal or professional service exempt from the sales and service tax.

Appendix 1. Condiments Considered to be "Food".

This list of condiments which are eligible food items is intended to illustrate application of these terms and is not intended to be a comprehensive listing.

1.1 Essential Oils, Oleoresins (Solvent-Free) and Natural Extractives.

Alfalfa
Allspice
Almond, bitter (free from prussic acid)
Ambrette (seed)
Angelica root
Angelica seed
Angelica steam
Angostura (cusparia bark)
Anise
Asafetida
Balm (lemon balm)
Balsam of Peru
Basil
Bay leaves
Bay (myrcia oil)
Bergamot (bergamot orange)
Bitter almond (free from prussic acid)
Bols de rose
Cacao
Camomile (chamomile) flowers, Hungarian
Camomile (chamomile) flowers, Roman or English
Cananga
Capsicum
Caraway
Cardamom seed
Carbo bean
Carrot
Cascarilla bark
Cassia bark, Chinese
Cassia bark, Padang or Batavia
Cassia bark, Saigon
Celery seed
Cherry, wild, bark
Chervil
Chicory

Cinnamon bark, Ceylon
Cinnamon bark, Chinese
Cinnamon bark, Saigon
Cinnamon leaf, Ceylon
Cinnamon leaf, Chinese
Cinnamon leaf, Saigon
Citronella
Citrus peels
Clary (clary sage)
Clove bud
Clove leaf
Clove stem
Clover
Coca (decocainized)
Coffee
Cola nut
Coriander
Corn silk
Cumin (cummin)
Curacao orange peel (orange, bitter peel)
Cusparia bark
Dandelion
Dandelion root
Dog grass (quackgrass, triticum)
Elder flowers
Estragole (esdragol, esdragon, tarragon)
Estragon (tarragon)
Fennel, sweet
Fenugreek
Galanga (galangal)
Geranium
Garanium, East Indian
Geranium, rose
Ginger
Glycyrrhiza
Glycyrrhizin, ammoninated
Grapefruit
Guava
Hickory bark
Horehound (hoarhound)
Hops
Horsemint
Hyssop
Immortelle
Jasmine
Juniper (berries)
Kola nut
Laurel berries
Laurel leaves
Lavender
Lavender, spike
Lavandin
Lemon

Lemon balm (See balm)
Lemon grass
Lemon peel
Licorice
Lime
Linden flowers
Locust bean
Lupulin
Mace
Malt (extract)
Mandarin
Marjoram, sweet
Mate
Melissa (See balm)
Menthol
Menthyl acetate
Molasses (extract)
Mustard
Naringin
Netroli, bigarade
Nutmeg
Onion
Orange, bitter, flowers
Orange, bitter, peel
Orange leaf
Orange, sweet
Orange, sweet, flowers
Orange, sweet, peel
Origanum
Palmarosa
Paprika
Parsley
Pepper, black
Pepper, white
Peppermint
Peruvian balsam
Pettigrain
Pettigrain lemon
Pettigrain mandarin or tangerine
Pimenta
Pimenta leaf
Pipcissewa leaves
Pomegranate
Prickly ash bark
Rose absolute
Rose (otto of roses, attar of roses)
Rose buds
Rose flowers
Rose fruit (hips)
Rose geranium
Rose leaves
Rosemary
Saffron

Sage
Sage, Greek
Sage, Spanish
St. John's bread
Savory, summer
Savory, winter
Schinus molle
Sloe berries (blackthorn berries)
Spearmint
Spike lavender
Tamarind
Tangerine
Tannic acid
Tarragon
Tes
Thyme
Thyme, white
Thyme, wild or creeping
Triticum (seed or grass)
Tuberose
Turmeric
Vanilla
Violet flowers
Violet leaves
Violet leaves absolute
Wild cherry bark
Ylang-ylang
Zedoary bark

1.2 Flavorings and Flavoring Extracts.

Oil of Lemon
Vanilla extract
Vanilla flavoring
Vanilla powder
Vanilla - vanillin extract
Vanilla - vanillin flavoring
Vanilla - vanillin powder

1.3 Food Colorings.

1.4 Food Dressings.

French dressing
Mayonnaise
Mayonnaise dressing
Salad dressing

1.5 Glazes.

1.6 Gravies.

1.7 Herbs (For Which No Medicinal Qualities Are Claimed).

Angelica
Anise
Bee balm
Bays
Borage
Bunnet
Camomile
Capers
Caraway
Celenes
Chervil
Chives
Corriander
Dill
Fennels
Genugreek
Geranum
Horehound
Horseradish
Hyssop
Lavender
Leeks
Lemon Verbena
Lovage
Marigold
Mayorame
Mints
Mustards
Nasturtium
Onion
Parsleys
Peppers, red and green
Ramps
Rosemary
Rue
Sage
Savories
Scallions
Sesame
Shallots
Sorrels
Sweet Woodruff
Tarragon
Thymes
Waldmeister
Wild leeks

1.8 Marinades.

1.9 Mustard.

1.10 Natural Substances and Extractions (Solvent-Free) Used in Conjunction With Spices, Seasonings and Flavorings.

Algae, brown
Algae, red
Apricot kernel (persic oil)
Dulse
Kelp (See algae, brown)
Peach kernel (persic oil)
Peanut stearine
Persic oil (See apricot kernel and peach kernel)
Quince seed

1.11 Pepper.

Black pepper
Cayenne pepper
Red pepper
White pepper

1.12 Salt and Salt Substitutes.

Coarse or kosher salt
Cooking or table salt
Dairy salt
Monozodium glutamate
Pickling salt
Seasoned salt - These are usually a combination of vegetable salts, spices and monozodium glutomates.
Smoked salt
Sour salt
Vegetable salt - These are sodium chloride with added vegetable extracts, celery and onion.
Salt substitute - These are chlorides in which sodium is replaced by calcium, potassium or ammonium.

1.13 Sauces.

Worcestershire sauce
Soy sauce
A-1 steak sauce
Barbecue sauce
Shrimp cocktail sauce

1.14 Spices and Other Natural Seasonings and Flavorings.

Alfalfa herb and seed
Allspice
Ambrette seed
Angelica
Angelica root
Angelica seed
Anise
Anise, star
Balm (lemon balm)
Basil, bush

Basil, sweet
Bay
Calendula
Camomile (chamomile), English or Roman
Camomile (chamomile), German or Hungarian
Capers
Capsicum
Caraway
Caraway, black (black cumin)
Cardamon
Cassia, Chinese
Cassia, Padang or Batavia
Cassia, Saigon
Cayene pepper
Celery seed
Chervil
Chives
Cinnamon, Ceylon
Cinnamon, Chinese
Cinnamon, Saigon
Clary (clary sage)
Clover
Cloves
Corlander
Cumin (cummin)
Cumin, black (black caraway)
Elder flowers
Fennel, common
Fennel, sweet (finocchio, Florence fennel)
Fenugreek
Galanga (galangal)
Geranium
Ginger
Glycyrrhiza
Grains of paradise
Horehound (hoarhound)
Horseradish
Hyssop
Lavender
Licorice
Linden flowers
Mace
Marjoram
Mustard, black or brown
Mustard, brown
Mustard, white or yellow
Nutmeg
Oregano (oreganum, Mexican oregano, Mexican sage, origan)
Paprika
Parsley
Pepper, black
Pepper, cayenne
Pepper, red

Pepper, white
Peppermint
Poppy seed
Rosemary
Saffron
Sage
Sage, Greek
Savory, summer
Savory, winter
Sesame
Spearmint
Star anise
Tarragon
Thyme
Thyme, wild or creeping
Turmeric
Vanilla
Zedoary

1.15 Vinegar.

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JUDY COOPER
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

(Plus all the volunteer help we can get)

FAX: (304) 558-0900

TO: John Montgomery

AGENCY: Tax Dept.

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: October 13, 1993

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

**PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.**

SERIES: 15 TITLE: 110 Tax Dept.

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: John M Montgomery

TITLE OF PERSON SIGNING: Attorney

DATE: 10/28/93

******************************************

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

**NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.**