

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
**KEN HECHLER**  
**ADMINISTRATIVE LAW DIVISION**

Form #2

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1991 JUL -3 PM 2:00

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE**

AGENCY: STATE TAX DIVISION TITLE NUMBER: 110

RULE TYPE: LEGISLATIVE; CITE AUTHORITY W.VA. CODE § 11-10-5

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

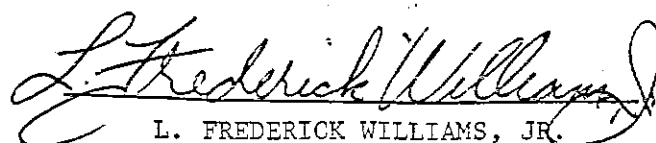
IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:                     

TITLE OF RULE BEING PROPOSED:                     

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON AUGUST 2, 1991 AT 5:00 P.M. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

LEGAL DIVISION  
DEPARTMENT OF TAX AND REVENUE  
P. O. BOX 1005  
CHARLESTON, WV 25324-1005

THE ISSUES TO BE HEARD SHALL BE  
LIMITED TO THIS PROPOSED RULE.



L. FREDERICK WILLIAMS, JR.  
STATE TAX COMMISSIONER

ATTACH A BRIEF SUMMARY OF YOUR PROPOSAL

8-40



State of West Virginia  
Department of Tax and Revenue

GASTON CAPERTON  
GOVERNOR

Charleston 25305

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OFFICE OF WEST VIRGINIA  
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L. FREDERICK WILLIAMS, JR.  
SECRETARY

CONSENT TO FILE RULE

July 2, 1991

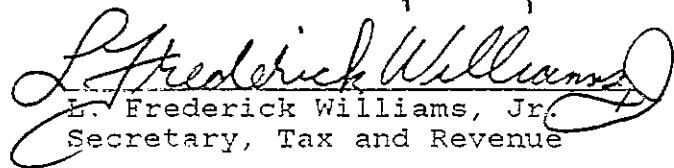
To Whom It May Concern:

Title of Rule: Consumers Sales and Service TAX and Use Tax  
Title Number: 110  
Series Number: 15

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Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this second day of July, 1991..

  
L. Frederick Williams, Jr.  
Secretary, Tax and Revenue

# FISCAL NOTE FOR PROPOSED RULES

Rule Title: Consumers Sales and Service and Use Tax

Type of Rule:   X   Legislative        Interpretive        Procedural   

Agency: State Tax Division Address: State Capitol; Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$	\$	\$
Personal Services	-0-	-0-	-0-	-0-	-0-
Current Expense	-0-	-0-	-0-	-0-	-0-
Repairs and Alterations	-0-	-0-	-0-	-0-	-0-
Equipment	-0-	-0-	-0-	-0-	-0-
Other	-0-	-0-	-0-	-0-	-0-

## 2. Explanation of above estimates:

There should be no fiscal effect on Departmental expenses.

## 3. Objectives of these rules:

These regulations explain and clarify the Consumers Sales and Service Tax imposed by W. Va. Code § 11-15-1 et. seq. and the Use Tax imposed by W. Va. Code § 11-15A-1 et. seq.

## 4. Explanation of Overall Economic Impact of Proposed Rule.

### A. Economic Impact on State Government.

The Consumers Sales and Service Tax and Use Tax provides a very substantial percentage of the State's revenues. The regulations assure proper administration of the taxes.

### B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

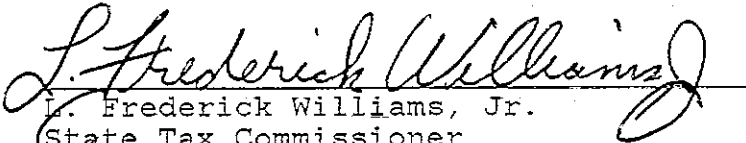
Because the Consumers Sales and Service Tax and Use Tax affects all areas of government and business, the regulations have a similar effect.

C. Economic Impact on Citizens/Public at Large.

Because the Consumers Sales and Service Tax and Use Tax affects all areas of government and business, the regulations have a similar effect.

Date: July 2, 1991

Signature of Agency Head or Authorized Representative

  
L. Frederick Williams, Jr.  
State Tax Commissioner



**State of West Virginia  
Department of Tax and Revenue**

**GASTON CAPERTON**  
GOVERNOR

Charleston 25305

**L. FREDERICK WILLIAMS, JR.**  
SECRETARY

STATEMENT OF CIRCUMSTANCES

The Legislature in 1990 and 1991 enacted amendments to the Consumers Sales and Service Tax imposed by W. Va. Code § 11-15-1 et seq. Additionally, other areas within the regulations were found to need further clarification. As a result, the regulations are amended.

LISTING OF SECTIONS NOT AMENDED WHICH ARE  
DIRECTLY AFFECTED BY SECTIONS AMENDED

Generally speaking, the Consumers Sales and Service Tax and Use Tax are transactional in nature. As a result, amendments to sections within the regulations normally do not affect other sections which are not affected. An exception to that general rule are amendments to sections of general application.

Sections of general application which are either amended or added are as follows:

- |                  |                                                            |
|------------------|------------------------------------------------------------|
| § 110-15-3.4.1.1 | Apportionment of sales price.                              |
| § 110-15-4.9     | Liability of Successor                                     |
| § 110-15-4a      | Liability of Officers of Corporation                       |
| § 110-15-4b      | Priority of Tax in Distribution of<br>Property and Estates |
| § 110-15-5       | Accelerated Payment                                        |
| § 110-15-9d      | Apportionment of Purchase Price                            |
| § 110-15-19      | Agency Relationships; Direct Purchases                     |

NOTE OF EXPLANATION AS TO EFFECT OF AMENDMENTS

The amendments to sections of 110 C.S.R. 15, Consumer Sales and Service Tax and Use Tax, are either a direct result of amendments to W. Va. Code § 11-15-1 et seq. enacted in 1990 and 1991 or found to be necessary for the proper application and administration of the tax. Except for the sections of general application, the amendments, added sections and repealed sections should have no extra-section effect. The sections of general application are as follows:

- |                  |                                                            |
|------------------|------------------------------------------------------------|
| § 110-15-3.4.1.1 | Apportionment of Sales Price                               |
| § 110-15-4.9     | Liability of Successor                                     |
| § 110-15-4a      | Liability of Officers of Corporation                       |
| § 110-15-4b      | Priority of Tax in Distribution of Property<br>and Estates |
| § 110-15-5       | Accelerated Payment                                        |
| § 110-15-9d      | Apportionment of Purchase Price                            |
| § 110-15-19      | Agency Relationships; Direct Purchases                     |

PROPOSED  
WEST VIRGINIA LEGISLATIVE REGULATIONS  
DEPARTMENT OF TAX AND REVENUE  
TITLE 110  
SERIES 15

FILED  
JUL -3 PM 2:01  
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SECRETARY OF STATE

CONSUMERS SALES AND SERVICE TAX AND USE TAX

AMENDED SECTIONS ONLY

§ 110-15-1. General.

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

1.2 Scope. - These proposed amended sections to the legislative regulations further 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. Only the amended sections are filed for public comment.

1.3 Authority. - These proposed amended sections to the legislative regulations are issued under the authority of W. Va. Code §§ 29A-3-1a, 29A-3-15, and W. Va. Code § 11-10-5.

1.4 Filing Date. -

1.5 Effective Date. -

1.6 Citation. - The proposed amended legislative regulations may be cited as 110 C.S.R. 15, § \_\_\_\_\_ (1991).

§ 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 2-25-1-13-c 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 2-23-3-1 2.24.3.1 of these regulations.

2.5 "Another state" means any state, as defined in Section 2-77 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.

2-6 2.7 "Auxiliary personnel" - See Section 2-72-2 2.81.2 of these regulations.

2-7 2.8 "Bona fide dues or membership fees" - See Section 2-40 2.48 of these regulations.

2-8 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.

2-9 2.10 "Capital improvement" - See Section 2-23-3-2 2.24.3.2 of these regulations.

2-10 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.

2-10-1 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.

2-11 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.

2-12 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.

~~2-13~~ 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.

~~2-14~~ 2.15 "Civic organization" means a nonprofit organization or corporation that is operated exclusively for the promotion of social welfare.

~~2-15~~ 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.

~~2-16~~ 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.

~~2-17~~ 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.

~~2-18~~ 2.19 "Consumer" or "ultimate consumer" means any person who uses or consumes taxable services or tangible personal property.

~~2-19~~ 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.

2-28 2.21 "Contract" or "contracts" means, for purposes of the transition rules set forth in W. Va. Code § 11-15-8a ~~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 are subject to the consumer sales and service tax.

2-21 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.

2-22 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.

2-23 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.

2-23-1 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.

2-23-1-1 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.

2-23-2 2.24.2 Form of Contract Not Controlling. - Any activity that falls within the definition of contracting under this Section 2-23 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.

2-23-3 2.24.3 Special Rules. - For purposes of this definition:

2-23-3-1 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.

2-23-3-2 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.

2-23-3-2-a 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.

2-23-3-2-b 2.24.3.2.b The term "regular recurring service" means regularly scheduled service intervals of less than one year.

2-23-3-3 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.

2-23-3-4 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.

2-23-3-5 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.

2-23-3-6 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 § 49-28-1 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 § 49-28-1 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 a facility operated for nonresidential care of children for brief periods while parents are shopping, engaging in recreational activities, attending religious services or engaging in other personal affairs or business;

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

2.25.4 family and in-home day care or baby-sitting services.

2.25.5 See Section 9.2.8 of these regulations for additional information.

2-24 2.26 "Decoration" - See Section 2-23-3-3 2.24.3.3 of these regulations.

2-25 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.

2-25-1 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:

2-25-1-1 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;

2-25-1-2 2.27.1.2 Causing a direct physical, chemical or other change upon property undergoing manufacturing production or production of natural resources;

2-25-1-3 2.27.1.3 Transporting or storing property undergoing transportation, communication, transmission, manufacturing production, or production of natural resources;

~~2-25-1-4~~ 2.27.1.4 - Measuring or verifying a change in property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

~~2-25-1-5~~ 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;

~~2-25-1-6~~ 2.27.1.6 Directly and physically recording the flow of property undergoing transportation, communication, transmission, manufacturing production or production of natural resources;

~~2-25-1-7~~ 2.27.1.7 Producing energy for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

~~2-25-1-8~~ 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;

~~2-25-1-9~~ 2.27.1.9 Controlling or otherwise regulating atmospheric conditions required for transportation, communication, transmission, manufacturing production or production of natural resources;

~~2-25-1-10~~ 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;

~~2-25-1-11~~ 2.27.1.11 Maintaining or repairing property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

~~2-25-1-12~~ 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;

~~2-25-1-13~~ 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.

~~2-25-1-13-a~~ 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.

2-25-1-13-b 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.

2-25-1-13-c 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.

2-25-1-13-d 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.

2-25-1-13-e 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.

2-25-1-14 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

2-25-1-15 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.

2-25-2 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:

2-25-2-1 2.27.2.1 Heating and illumination of office buildings;

2-25-2-2 2.27.2.2 Janitorial or general cleaning activities;

2-25-2-3 2.27.2.3 Personal comfort of personnel;

2-25-2-4 2.27.2.4 Production planning, scheduling of work, or inventory control;

2-25-2-5 2.27.2.5 Marketing, general management, supervision, finance, training, accounting and administration; or

2-25-2-6 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.

2-25-3 2.27.3 For a more detailed discussion of the direct use concept, See Section 123 of these regulations.

2-26 2.28 "Distributor" means and includes, for purposes of the tax on gasoline and special fuel, every person:

2-26-1 2.28.1 Who produces, manufactures, processes or otherwise alters gasoline or special fuel in this State for use or for sale; or

2-26-2 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

2-26-3 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.

2-27 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, or dentist and any other professional person licensed to prescribe.

2-28 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.

2-28-1 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.

2-28-2 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.

2-28-3 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.

2-28-4 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.



2-29 2.31 "Environmental quality or protection activity or facility" - See Section 2-26-1-13-b 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 on a farm such as, but not limited to, jams, preserves, apple cider or quilts.

2-30 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; ~~candy-and-confections~~; chewing gum; cake letters; breath mints; or food sold through a vending machine.

2-30-1 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.

2-30-1-1 2.33.1.1 Test One. - Is the product generally regarded by the public as being food intended for human consumption?

2-30-1-2 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?

2-30-2 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.

2-30-3 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."

2-31 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 2-76 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.

2-32 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.

2-32-1 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.

2-32-2 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.

2-32-3 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."

2-32-4 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.

2-33 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 2-44 2.52 of these regulations.

2-34 2.37 "Improvement" - See Section 2-23-3-4 2.24.3.4 of these regulations.

2-35 2.38 "Intangible personal property" means chattel interests, real and personal, money, credits, investments and the evidences thereof.

2-36 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.

~~2-36-1~~ 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.

~~2-37~~ 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.

2-38 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:

2-38-1 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.

2-38-2 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.

2-38-3 2.45.3 units designed to be used for residential, commercial, educational or industrial purposes, excluding, however, recreational vehicles, as defined in Section 2-78 2.71 of these regulations.

2-39 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.

2-39-1 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 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.

2-41 2.49 "Mobile home" means a "manufactured home" as defined in Section 2-44 2.45 of these regulations.

2-42 2.50 "Modular home" means a "manufactured home" as defined in Section 2-44 2.45 of these regulations.

2-43 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.

2-44 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.

2-45 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."

2-46 2.54 "Natural Resources." - See Section 123 of these regulations.

2-47 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.

2-48 2.56 "Noise pollution" - See Section 2-25:1-13:e 2.27.1.113.e of these regulations.

2-49 2.57 "Occasional sale of food" means a casual and occasional sale, as defined in Section 2-10 2.11 of these regulations, of food, as defined in Section 2-30 2.33 of these regulations.

2-50 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.

2-51 2.59 "Personal service" includes those services:

2-51-1 2.59.1 Compensated by the payment of wages in the ordinary course of employment;

2-51-2 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.

2-52 2.60 "Pollution control" - See Section 2-25-1-13-a 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.

2-53 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.

2-54 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.

2-60 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.

2-55 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 expansion-of-the-term-made 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.

2-56 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.

2-57 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.

2-58 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.

2-59 2.69 "Purchaser" means a person who purchases tangible personal property or a taxable service.

2-61 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).

2-62 2.71 "Recreational vehicles" - See Section 2-95 2.105 of these regulations.

2-63 2.72 "Regular recurring service" - See Section 2-23-3-2-b 2.24.3.2b of these regulations.

2-64 2.73 "Relatively permanent" - See Section 2-23-3-2-a 2.24.3.2a of these regulations.

2-65 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.

2-66 2.75 "Repair" - See Section 2-23-3-5 2.24.3.5 of these regulations.

2-67 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.

2-68 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.

2-69 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:

2-69-1 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.

2-69-2 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.

2-69-3 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.

2-69-4 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.



2-69-5 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.

2-69-6 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.

2-69-7 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."

2-70 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.

2-71 2.80 "Sales tax" - See Section 2-19 2.20 of these regulations.

2-72 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:

2-72-1 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.

2-72-2 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.

2-72-3 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.

2-73 2.82 "Seller" means a retailer and vendor and includes every person selling or leasing tangible personal property or dispensing taxable services.

2-74 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.

2-75 2.84 "Service personnel" - See Section 2-72-3 2.81.3 of these regulations.

2-76 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.

2-77 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 West Virginia Public Service Commission" means a person which is subjected to regulation by such Commission, regardless of whether said Commission actually regulates such person.

2-78 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.

2-79 2.89 "Structure" - See Section 2-23-3-6 2.24.3.6 of these regulations.

2-80 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:

2-80-1 2.90.1 Gifts, grants, contributions or membership fees;

2-80-2 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);

2-80-3 2.90.3 Net income from unrelated business activities, whether or not such activities are carried on regularly as a trade or business;

2-80-4 2.90.4 Gross investment income as defined in Section 509(e) of the Internal Revenue Code of 1986, as amended;

2-88-5 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

2-88-6 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.

2-81 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.

2-82 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.

2-82-1 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).

2-83 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.

2-84 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.

2-85 2.95 "Tax Commissioner" or "Commissioner" means the State Tax Commissioner of West Virginia or his delegate.

2-86 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.

2-87 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.

2-88 2.98 "Teacher" - See Section 2-72-1 2.81.1 of these regulations.

2-89 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.

2-90 2.100 "This State" means the State of West Virginia.

2-91 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.

2-92 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.

2-93 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.

2-94 2.104 "Use tax" means the tax imposed by Section 11-15A-1 et seq. of the West Virginia Code.

2-95 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.

2-96 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.

2-97 2.107 "Water pollution" - See Section 2-25-1-13-d 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 or surgery through liposuction. 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 and 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. 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.

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.

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

$$\text{Purchase price } (\$.94) \times .06 = \text{sales tax } (\$.056 \text{ carried to the next higher number} - \$.06)$$

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. 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 to 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 ~~or a change in the name of a corporation.~~

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, 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 ~~or transferee~~ 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 predecessor 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 predecessor former owner. Purchase price is not limited to cash transferred to the seller, but includes any consideration flowing directly or indirectly to a seller. ~~or predecessor.~~

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 or the predecessor 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 predecessor, or any prior predecessor, 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 predecessor former owner, without regard to whether a tax lien has been issued or perfected against the predecessor former owner. If any predecessor former owner is given a certificate from the Tax Department stating that no taxes are due from his predecessor former owner, then the successor shall only be liable for the tax liability of his predecessors 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. Liability of Officers of Corporation.**

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, or 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 wilfully, 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

officer shall not be greater than the 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. The priority applies to all distributions of a major part or substantial part 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, transfer or liquidation of less than a substantial part of the property of any person; 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 any other 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. Remittance of Tax.**

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, 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 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 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 exempt from subject to consumers sales and use tax, as manufacturing for sale to the governmental entity. 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, licensed real estate appraisers and certified real estate appraisers licensed in accordance with W. Va. Code § 37-14-1 et seq., and licensed real estate brokers, licensed professional counselors. Persons who provide services classified as nonprofessional for consumers sales and service tax purposes include interior decorators, private detectives/investigators, security guards, bookkeepers, foresters, truck driving schools, nursing home administrators, hearing aid dealers/fitters, contractors, electricians, enrolled agents, musicians, auctioneers, and hospital administrators; the foregoing listing is not all-inclusive but intended as containing examples of trades and occupations. ~~Generally, the Tax Department will only recognize as "professional" the activities indicated as such in Chapter 38 of the West Virginia Code.~~ 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.6.3 Installation is incidental to the sale of other tangible personal property when the charge for the installation is reasonable under the circumstances of the transaction and does not exceed five percent (5%) of the price for which the tangible personal property was sold or one hundred dollars (\$100.00); whichever is less.~~

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 407 110 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 48 126 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 ~~funded-by-the-State-or-the-United-States~~ to provide food to low-income elderly 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: 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 consumer's 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, with 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 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 West-Virginia-Board-of-Regents-or-its-successor 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.

~~9-3-10-5~~ 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.

~~9-3-10-6~~ 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.

~~9-3-10-7~~ 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 funded by the State or government of the United States to provide food to low-income elderly 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, or wines or fortified wines, as defined in Chapter 60 of the Code, from the Alcohol Beverage Control Commissioner for resale by persons or organizations to 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.

§ 110-15-9d. 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.

**§ 110-15-19. Agency Relationships; Direct Purchases.**

~~19-1 Unless specifically authorized by the consumers sales and service tax law, or these regulations, an agency relationship between a purchaser and his principal will not be recognized by the Tax Commissioner for purposes of exempting the transaction from consumer sales or use taxes.~~

~~19-2 To qualify as an exempt direct purchase by the principal, any bill, invoice, contract or other evidence of the transaction shall be made out in the name of the principal which qualifies for an exemption under the consumers sales and use tax laws and the payment shall be 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.~~

~~19-3 Each sale of tangible personal property or taxable service made to and paid for by an agent, employee or other representative, except sales qualifying under Section 19-2 of these regulations, shall be taxable, even though the same purchase would have been exempt from consumers sales and service tax had the principal or employer directly purchased the tangible personal property or service in accordance with Section 9 of these regulations. 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:~~

~~19-3-1 Is on official business on behalf of the principal or employer; or~~

~~19-3-2 Is on a per diem from the principal or employer; or~~

~~19-3-3 Is on an expense account or will otherwise be reimbursed by the principal or employer; or~~

~~19-3-4 Has or will receive monies, credits or other assets from the principal or employer to pay for the transaction.~~

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.

**§ 110-15-30. 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 not incidental but was indispensable, not incidental to consumation of the service provided.

**§ 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	Motor repair
Armored car service	Motorcycle repair
Automobile repair	Painting
Billboards	Photography
Billiards, pool	Planing mills
Bowling alleys	Printing
Boat repair	Recapping
Business machine repair	Repairing tangible
<u>Child care</u>	personal property
Cleaning, pressing, dyeing	Sewing
Creosoting	Shoe repair
Dance schools	Storage warehouse and
Delivering	storage lockers
Engraving	Termite and pest
Foundries	control
Furniture repair	Tin and sheet metal
Hotels, motels, tourist,	repair shops
homes, rooming houses	Warehouses
House moving	Washing cars
Jewelry repair	Watch repair
Laundries	Weighing
Machine operators	Welding
Meat cutting	Well-drilling
	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. Other Factors.

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. ~~Sales of admission tickets to a municipally owned or operated swimming pool are subject to consumers sales and service tax, if such pool competes with the activities of privately owned swimming pools.~~ 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 Providing public services for which a charge is made, such as sewage fees, license fees, fire service fees, inspection fees and the like are not 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. Governmental unit includes, 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

**§ 110-15-60. 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.

**§ 110-15-63. 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.

**§ 110-15-72. 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 this 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; or has obtained 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.

§ 110-15-74. 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.

**§ 110-15-83. Private-Music-Instruction- Reserved For Future Use.**

~~83.1 Private-music-instruction; when-rendered-by-certain-qualified-persons; is- considered- a- professional- service- and- therefore- would- be- exempt- from- the consumers-sales-and-service-tax.~~

~~83.2 In-order-to-qualify-for-the-professional-exemption; such-persons-must be-certified-by-the-West-Virginia-Department-of-Education-to-teach-music; or-be certified-by-the-Department-of-Education-with-a-speciality-in-music-to-teach-in the-public-school-system; or-be-members-of-the-music-faculty-of-an-accredited institution-of-higher-learning-in-the-State-of-West-Virginia-which-has-approval from-the-Board-of-Regents-to-award-degrees.~~

~~83.3 Purchases-of-tangible-personal-property-or-services-used-or-consumed in-the-business-of-rendering-professional-services-are-taxable; except-for purchases-of-property-or-services-for-resale-- An-exemption-certificate-can-be issued-for-purchases-of-items-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 Purchases for use in rendering professional services are subject to the consumers sales and service tax and use tax, except for purchases for resale, for which an exemption certificate may be issued.

~~87.3 However, 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 real estate license, are taxable, except for purchases for resale for which an exemption certificate may be issued.

#### § 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.

#### § 110-15-91. 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 the Alcoholic Beverage Control Commissioner. Items which are reusable such as cloth napkins, ceramic plates and metal silverware are subject to tax. See Section 32.6 of these regulations.

#### § 110-15-107. 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, or are purchased from a subcontractor in fulfillment of the prime contractor's contract resulting in a capital improvement to a building or other structure or to real property. 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 contractor's 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 charge sales tax on these types of sales to prime contractors.

~~107-2-7-2~~ 107.2.7.3 Taxable services include, but are not limited to, the following:

~~107-2-7-2-1~~ 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.

~~107-2-7-2-2~~ 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.

~~107-2-7-2-3~~ 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.

~~107-2-7-2-4~~ 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.

107-2-7-2-5 107.2.7.3.5 Rental of equipment with an operator.

107-2-7-3 107.2.7.4 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	Paper
Bricks	Piping, valves, and pipe fittings
Builder's hardware	Plaster
Caulking Material	Power poles, towers, and lines
Cement	Putty
Conduit	Reinforcing mesh
Doors	Roofing
Ducts	Sand
Electric wiring and connections	Sheetmetal
Flooring	Steel
Glass	Stone
Gravel	Stucco
Insulation	Tile
Lath	Wall coping
Lead	Wallboard
Lime	Wallpaper
Linoleum	Wall-to-wall carpeting (when affixed to the floor)
Lumber	Weather stripping
Macadam	Windows
Millwork	Window Screens
Mortar	Wire netting and screen
Oil Paint	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	Replacement parts for
Drill presses	equipment
Electric generators	Scaffolds
Forms	Tools
Hand tools	Grading, lifting and
Lathes	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	Plumbing fixtures
Awnings	Refrigeration units
Burglar alarm and fire alarm fixtures	Signs
Cabinets, counters, and lockers (prefabricated)	Telephone switchboards and instruments
Electric generators (affixed to and accessory to a building, structure or fixed works)	Television antennas
Elevators, hoists, and conveying	Transformers and switchgear
	Vault doors and equipment
	Venetian blinds
	Furnaces, boilers, and heating

Lighting fixtures 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 may could claim immunity or exemption from the consumers sales and service tax or use taxes on account of materials purchased and used 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, and 108.6 and 109 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.~~

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.

Portion of useful life  
remaining after use in  
grandfathered contracts

X Cost of equipment

= Amount subject

<u>Total useful life</u>		<u>to use tax</u>	
<u>Amount subject to use tax</u>	X	<u>.06</u>	= <u>Use tax on bulldozer</u>
<u>9-1/4 yrs.</u>	X	<u>\$20,000</u>	= <u>\$18,600</u>
<u>10 yrs.</u>			
<u>\$18,600</u>	X	<u>.06</u>	= <u>\$ 1,080</u>

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. - Purchases of materials for use in fulfillment of a written contract to provide contracting services to the United States, the State of West Virginia, its political subdivisions, or corporate entities created by the West Virginia Legislature, are exempt from consumers sales and use tax. This exemption applies only to materials which are actually installed, affixed or incorporated into the building or structure or real property as a capital improvement thereto. This exemption does not apply to any other purchases of tangible personal property or to leases or to purchases of services. The building, structure or improved real property must be owned or going to be owned by the government entity and must be used by the governmental entity for a governmental or proprietary purpose.

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.

~~109.1.1~~ 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 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 and 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.

~~109-2~~ 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.

~~109-2-1~~ 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.

109-2-2 109.3.2 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.

109-2-2-1 109.3.2.1 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.

109-2-2-2 109.3.2.2 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.

109-3 109.4 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.

~~109.4~~ 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:

purchase price of the X duration of time property is in WV X 6% = Use tax  
tangible personal property X useful life of property due

$$\text{\$20,000} \times \frac{1 \text{ Yr.}}{10 \text{ Yr.}} \times 6\% = \text{Use tax}$$

$$\text{\$20,000} \times .10 \times .06 = \text{\$120}$$

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 X 6% = Use Tax Due  
in West Virginia

$$(\text{\$1,500} \times 6) \times 6\% = \text{Use Tax Due}$$

$$\text{\$9,000} \times 6\% = \text{\$540}$$

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.

**§ 110-15-112. 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 of 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 it 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, ~~unless the limestone used in the contracting activity is deemed to have been sold to a governmental entity and the contractor has obtained a materials purchase certificate for the particular government contract. If the contractor has not obtained such a certificate, then the special rule permitting tax exempt treatment of materials directly used or consumed in fulfillment of the government contract does not apply and the contractor must pay tax on all the materials directly used or consumed in the contract.~~

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.

**§ 110-15-116. 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 service 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.

**§ 110-15-122. 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 States 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 Separately--itemized 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 ~~in a separate transaction~~ 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.  
- ~~The activities in this State of manufacturing; transportation; transmission; communication; and the production of natural resources are subject to the direct~~

use-concept-on-and-after-july-1,-1987- 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. The Persons engaged in the business activity of contracting ~~is~~ 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-f~~ 123.4.2.1.g Manuals and trade publications.

~~123-4-2-1-g~~ 123.4.2.1.h Uniforms.

~~123-4-2-1-h~~ 123.4.2.1.i Toilet supplies, paper and cloth towels

~~123-4-2-1-i~~ 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-j~~ 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-k~~ 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-l~~ 123.4.2.1.m Materials used to construct, pave or maintain parking lots.

~~123-4-2-1-m~~ 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-n~~ 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-o~~ 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-p~~ 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 Coal Mining and Processing.

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 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 activity business of communications are subject to the direct use concept on their purchases of tangible personal property or services for use in communication activity 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.

§ 110-15-126. 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 West Virginia Board of Regents 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 funded-by-the State-or-the-United-States to provide food to low-income elderly 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-age-68-or-older-

~~126-3-2~~ 126.3.1 The purchaser must be classified as having low income.

~~126-3-3~~ 126.3.2 The sale must be made by a charitable or private nonprofit organization nonprofit organization or governmental agency.

~~126-3-4~~ 126.3.3 The sale must be under a program funded-by-the State-or-the-United-States established to provide food to low-income persons.

~~126-3-5~~ 126.3.4 The sale must be made at or below cost.

~~126-3-6~~ 126.3.5 Purchases of food by a charitable or private nonprofit organization, nonprofit organization or a governmental agency under a program funded-by-the-State-or-the-government-of-the-United-States to provide food to low-income elderly 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 producers; or others; of agricultural food-products-and-beverages 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 subject to 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 Agricultural-producers; or others; 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.

**§ 110-15-130. 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 convalescent transportation is not a personal or professional service exempt from the sales and service tax.