Obsolete 6/1/74

WEST VIRGINIA ADMINISTRATIVE REGULATIONS

STATE TAX COMMISSIONER

BUSINESS AND OCCUPATION TAX
Chapter 11, Article 13, West Virginia Code of 1931, as amended

and

PRIVILEGE TAX ON CERTAIN CARRIER CORPORATIONS
(TRANSPORTATION PRIVILEGE TAX)
Chapter 11, Article 12A, West Virginia Code of 1931, as amended

G. Thomas Battle
State Tax Commissioner

Effective: August 30, 1964

F O R E W A R D

The regulations contained herein are designed to assist the taxpayer in reporting accurately the Business and Occupation Tax or Transportation Privilege Tax. They are intended to be general in character and it is not to be assumed that they cover every situation which might arise with respect to the taxability of persons subject to these laws. If a question arises, direct communication with the Department is urged.

The filing of tax returns and the reporting of the true liability are the sole responsibility of the taxpayer and it is the intention of the Tax Commissioner to assist the taxpayer with rules and regulations and specific rulings when requested.

G. Thomas Battle
State Tax Commissioner

WEST VIRGINIA ADMINISTRATIVE REGULATIONS
STATE TAX COMMISSIONER

Chapter 11-13
(1964)

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WEST VIRGINIA ADMINISTRATIVE REGULATIONS
STATE TAX COMMISSIONER

Chapter 11-13
Series I
(1964)

Subject: BUSINESS AND OCCUPATION TAX. This is a tax levied for the privilege of engaging in business in West Virginia. The tax is measured by the application of rates against values of products, gross proceeds of sales, or gross income according to the classification of the business activity in which the taxpayer is engaged. Despite the commonly applied erroneous name "Gross Sales Tax", it is not a sales tax. Neither is it a transaction tax in the sense that once it is paid on a particular article or service or activity it need not again be paid. It is not, strictly speaking, an income tax, although in most instances, the gross income is the measure of the tax. Under the production and manufacturing classifications the measure of the tax is the value of the article produced or manufactured as shown by the gross proceeds derived from the sale thereof, provided the proceeds of sale are indicative of the true value of the article. If more than one person engages in a single activity or transaction, as in the case of the contractor and subcontractor, each must pay a tax measured by his entire income regardless of the tax paid by the other.

Section 1 GENERAL.

BOT 1.01 Scope.--These regulations establish general operating rules and procedures in the office of the Business and Occupation Tax Division.

BOT 1.02 Authority.--These regulations are issued under authority of West Virginia Code, Chapter 11, Article 13, Section 22.

BOT 1.03 Effective Date.--These regulations are promulgated on June 30, 1964 and become effective on sixty days thereafter.

BOT 1.04 Filing Date.--These regulations were filed in the Office of the Secretary of State on June 30, 1964.

BOT 1.05 Certification.--These regulations are certified authentic by the State Tax Commissioner by certification number I.

Section 2. DEFINITIONS.

BOT 2.01 "Person" or the term "company", herein used interchangeably, includes any individual, firm, copartnership, joint adventure, association, corporation, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

BOT 2.02 "Tax year" or "taxable year" means either the calendar year, or the taxpayer's fiscal year when permission is obtained from

the tax commissioner to use same as the tax period in lieu of the calendar year.

BOT 2.03 "Sale", "sales" or "selling" includes any transfer of the ownership of, or title to, property, whether for money or in exchange for other property.

BOT 2.04 "Taxpayer" means any person liable for any tax hereunder.

BOT 2.05 "Gross income" means the gross receipts of the taxpayer received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts by reason of the investment of the capital of the business engaged in, including rentals, royalties, fees or other emoluments however designated and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties, interest or discount paid or any other expense whatsoever.

BOT 2.06 "Gross proceeds of sales" means the value, whether in money or other property, actually proceeding from the sale of tangible property without any deduction on account of the cost of property sold or expenses of any kind.

BOT 2.07 The terms "gross income" and "gross proceeds of sales" shall not be construed to include (1) cash discounts allowed and

taken on sales; (2) the proceeds of sale of goods, wares or merchandise returned by customers when the sale price is refunded either in cash or by credit; (3) the amount allowed as "trade-in value" for any article accepted as part payment for any article sold; or (4) excise taxes imposed by this state.

BOT 2.08 "Business" shall include all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect. "Business" shall not include a casual sale by a person who is not engaged in the business of selling the type of property involved in such casual sale. "Business" shall include the production of natural resources or manufactured products which are used or consumed by the producer or manufacturer.

BOT 2.09 "Service business or calling" shall include all non-professional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible property, but shall not include the services rendered by an employee to his employer. This term shall include persons engaged in manufacturing, compounding or preparing for sale, profit, or commercial use, articles, substances, or commodities which are owned by another or others, as well as persons engaged as independent contractors in producing natural resource products for persons required to pay the tax imposed by section two-a of this article.

BOT 2.10 "Selling at wholesale" or "wholesale sales" shall mean and include: (1) Sales of any tangible personal property for the purpose of resale in the form of tangible personal property; (2) sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity which is subject to the tax imposed by this article or by article twelve-a of this chapter; (3) sales of any tangible personal property to the United States of America, its agencies and instrumentalities or to the State of West Virginia, its institutions or political subdivisions.

BOT 2.11 "Contracting" shall include the furnishing of work, or both materials and work, in the 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.

Section 3. GENERAL INSTRUCTIONS.

BOT 3.01 General Instructions to Taxpayers. Two forms are provided for use in filing Business and Occupation Tax returns: (1) Form 302-B4, estimated quarterly return and (2) Form 301-B7, annual return.

Form 302-B4, estimated quarterly return, is to be used if the tax liability is more than one hundred dollars ($100.00) per annum. These returns must be filed within one month following the close of

each quarter. Persons filing returns on a quarterly basis are required to file three estimated quarterly returns and an annual return. The annual return is filed at the close of the tax year and replaces the fourth quarterly return. It provides a medium for making such adjustments on the quarterly estimates as may be necessary. An exemption of $12.50 for each quarter is allowed.

If the tax liability for the year is less than $100.00, the taxpayer is required to file only an annual return, Form 301-B7.

On the annual tax return, Form 301-B7, the total gross income for the whole year must be shown. From the total taxes due the annual exemption of $50.00 is deducted. If estimated quarterly returns were filed for the first three quarters of the year, payments made on the quarterly returns are listed on the annual form and claimed as credits on the total liability for the year. The balance of taxes due, as shown on the annual return, must be paid within one month after the end of the tax year.

The statute grants each "person" an annual exemption of $50.00 and only one annual exemption can be claimed even though such "person" may conduct more than one business. The entire annual exemption of $50.00 may be claimed only if business has been carried on actively for the whole year. If a business is operated for a part of a tax year, the exemption is reduced in proportion: $12.50 for a

quarter, $4.16 for a month, or 14 cents a day for the period actually engaged in business.

At any time a taxpayer sells or discontinues a business, a final tax return must be filed within thirty days after sale or discontinuance. The return must show the date of sales and the name and address of the purchaser.

Foreign corporations licensed to do business in West Virginia and domestic corporations are required to file a return regardless of the fact that no business is transacted in the State. No corporation may receive a dissolution of charter or make an orderly withdrawal from this State without first filing a final return and paying the tax due thereon.

Penalty accrues at the rate of 5 percent for the first month of delinquency and 1 percent for each succeeding month of delinquency.

BOT 3.02 Extensions of Time for Filing Annual Returns. Under the statute the Tax Commissioner, for good cause shown, may extend the time for making the annual return on the application of any taxpayer and grant such reasonable time within which to make the same as may, by him, be deemed advisable. Extensions are not granted for the filing of quarterly returns.

Any taxpayer desiring an extension of time for filing his annual return must address such request in writing to the Tax Commissioner.

The request must be postmarked before the due date of the return and must state the reason for such request and the period of extension desired. The taxpayer will then be advised in writing as to whether or not such extension is granted.

Such extensions will not be granted as a means of delaying payment and should be requested only when unusual circumstances make it impossible to prepare the annual return before the due date.

BOT 3.03 Penalty. Under the statute if any taxpayer fails to make the return required by this article, or makes his return but fails to remit in whole or in part the proper amount of tax, there shall be added to the amount of the tax unpaid, from the date such tax should have been paid, a penalty in the amount of five percent of the tax for the first month, or fraction thereof, of delinquency and one percent for each succeeding month, or fraction thereof, of delinquency: Provided, however, that if such failure is due to reasonable cause, the Tax Commissioner may waive or remit in whole or in part these penalties.

If failure to pay is due to fraud or intent to evade this law and the rules and regulations promulgated thereunder, there shall be added an additional penalty of twenty-five percent of the amount of tax, exclusive of penalties.

The application of penalty is illustrated below:

An annual taxpayer's net amount of tax due is one hundred dollars for the tax period ended December 31, 1964. The tax is not paid until May 15, 1965. Five percent of the tax is to be added for the month of February and one percent for each of the months of March, April and May, making the total penalty rate eight percent. Applying the rate of eight percent to the net amount of tax due, one hundred dollars, results in penalty due in the amount of eight dollars. It is to be noted that penalty is not applied for the month of January in which the taxpayer is permitted to file his return for the period ended December 31.

BOT 3.04 Books and Records. The Tax Commissioner is not concerned with the system of bookkeeping or accounting of any taxpayer. However, records must be so kept that every business transaction may be readily verified when examination of such records is made. Records of West Virginia business should be kept within the State when practicable. Where records must be kept out of state, the taxpayer shall, upon being notified by the Tax Commissioner that an examination is to be made, make accessible such records to the Tax Commissioner or his representatives. The taxpayer may either transport promptly the required records to West Virginia and notify the Tax Commissioner that such are available for audit; or if the taxpayer's out-of-state records are not transported to West Virginia, the taxpayer may notify

the Tax Commissioner of the time and place that such records will be available for examination out of state. The Tax Commissioner, after examining such records of the taxpayer or after making other investigation, may assess additional tax that such examination or investigation shows to be due. The Commissioner will notify the taxpayer in writing of such assessment.

Section 4. EXEMPTIONS AND DEDUCTIONS.

BOT 4.01 Persons Exempt From The Tax. The Business and Occupation Tax Law exempts from the tax the following businesses:

(a) Insurance companies which pay the State of West Virginia a tax upon premiums: Provided, however, that said exemption shall not extend to that part of the gross income of insurance companies which is received for the use of real property, other than property in which any such company maintains its office or offices, in this State, whether such income be in the form of rentals or royalties.

(b) Persons engaged in the business of banking: Provided, however, that said exemption shall not extend to that part of the gross income of such persons which is received for the use of real property owned, other than the banking house or

building in which the business of the bank is transacted, whether such income be in the form of rentals or royalties.

(c) Non-profit cemetery companies organized and operated for the exclusive benefit of their members.

(d) Fraternal societies, organizations and associations organized and operated for the exclusive benefit of their members and not for profit.

(e) Corporations, associations and societies organized and operated exclusively for religious or charitable purposes.

(f) Production credit associations, organized under the provisions of the federal "Farm Credit Act of 1933": Provided, however, that the exemptions of this section shall not apply to corporations or cooperative associations organized under the provisions of article four, chapter nineteen of the Code of West Virginia, one thousand nine hundred thirty-one, as amended.

(g) Building and loan associations and federal savings and loan associations.

(h) Sales by any person engaging or continuing in the business of horticulture, agriculture or grazing, or of selling stocks, bonds or other evidences of indebtedness.

(i) Persons engaging or continuing in the business of railroad, railroad car, express, pipe line, telephone and telegraph companies, airlines, water carriers by steamboat or steamship and motor carriers which are taxed under Chapter 11, Article 12 A.

(j) Persons engaging or continuing in the business of rendering a professional service. Under the definition of "Service business or calling", BOT 2.09, only non-professional services are taxable.

The fact that the Business and Occupation Tax Law specifically exempts certain classes of business does not mean the person operating the business is exempt from the tax on income received from an activity which is not necessarily a part of the class of business which is exempt. For instance, a charitable organization, while not subject to the tax on dues or other donated income, is subject to the tax on gross income of a commercial enterprise conducted and designed for profit, such as a cafeteria, soft drink stand, etc., to which non-members are admitted, even though all profit goes to the organization for the furtherance of its benevolent purposes.

BOT 4.02 Exemptions and Deductions.

(a) Bad Debts. Taxpayers reporting on a cash basis may not

deduct bad debts from the measure of the Business and Occupation Tax. Those reporting on an accrual basis may, except as hereinafter provided, deduct bad debts from gross receipts for the year in which the debts are ascertained to be worthless and are charged off. The amount to be deducted is net bad debts. Net bad debts are charge offs minus recoveries. The deduction of net bad debts is not allowed to persons subject to tax under the production classification, Section 2a, or under the manufacturing, compounding or preparing for sale classifications, Section 2b of the Business and Occupation Tax Law, because the value of the entire production or entire product manufactured, compounded or prepared is the measure of the tax under the aforecited sections.

(b) Cash Discounts. Cash sales discounts allowed and taken may be deducted. Discounts earned on commercial paper are not deductible. Purchase cash discounts need not be reported for purposes of the tax.

(c) Returned Goods. The proceeds of sale of goods, wares or merchandise returned by customers may be deducted when the sale price is refunded either in cash or by credits and when the sale price has been included in gross income reported in column two of the tax return.

(d) Trade-Ins. The amount allowed as "trade-in value" for any article accepted as part payment for any article sold.

(e) Interstate Sales. Proceeds of out-of-state sales of merchandise made by retailers and wholesalers and delivered from points in West Virginia to out-of-state points may be deducted. In order to obtain such exemptions there must be attached to the tax return a detailed list of all such sales showing the shipping point, the name of the consignee, the delivery point and the date of shipment. If a sale to an out-of-state customer is consummated in West Virginia and out-of-state delivery is for the convenience of the customer and is incidental to the sale, such sale is considered intrastate and must be reported for purposes of the tax.

This exemption does not apply to out-of-state shipments made by persons subject to tax under the production classification, Section 2a, or under the manufacturing, compounding or preparing for sale classifications, Section 2b, of the Business and Occupation Tax Law. Persons subject to tax under the production or manufacturing, compounding or preparing for sale classifications are producing, manufacturing, compounding or preparing for sale products within West Virginia for sale without West Virginia and

the measure of the tax is the value of the entire production or entire product manufactured, compounded or prepared for sale, profit or commercial use in West Virginia, regardless of the place of sale or the fact that the delivery may be made to points outside the state. This exemption does not apply to persons subject to tax under the service classification, Section 2h, of the Business and Occupation Tax Law, for the performance of service or labor in West Virginia for non-residents of West Virginia. The measure of the tax in such case is the value of the service or repair performed in West Virginia even though the article serviced or repaired may be delivered subsequently to a point without West Virginia. This exemption does not apply to the interstate sales of motor vehicles or house trailers (mobile homes). The exemption of interstate sales of motor vehicles or house trailers (mobile homes) is set forth in Business and Occupation Tax Regulation 6.28.

(f) Freight Charges. Prepaid outgoing freight charges, if such deliveries are not made in the taxpayer's own equipment, may be deducted. Only those persons engaged in business taxable under Section 2a, Section 2b, and Section 2c of the Business and Occupation Tax Law are

entitled to the deduction of prepaid outgoing freight charges. Incoming freight charges, such as freight on an automobile from Detroit to the point of sale in West Virginia, whether separately invoiced or not, may not be deducted.

(g) Excise Taxes - Federal and State.

I. Federal Excise Taxes

1. Manufacturers' federal excise tax paid on gasoline, diesel fuel and lubricants, both oil and and grease, may be deducted from the gross income subject to tax.

(a) Gasoline and Diesel Fuel: Period	Federal Tax Per Gallon
Prior to 10/1/59	.03
10/1/59 to present	.04

(b) Lubricants:	
Oil - per gallon	.06
Grease - per pound	.06

Persons claiming deductions for federal excise taxes on gasoline, diesel fuel, and lubricants must itemize on the Annual Business and Occupation Tax Return, page two, Schedule C, the number of gallons of gasoline, diesel fuel or oil sold and/or the number of pounds of grease sold.

Deductions claimed for federal excise taxes on gasoline, diesel fuel and lubricants will be disallowed in those cases where the taxpayer fails to provide the necessary information as set forth hereinabove.

2. Manufacturers' federal excise tax, except those allowed in paragraph 1 above, may not be deducted from the gross income subject to tax. Examples: Federal excise tax on automobiles, tires, tobaccos, cigars, cigarettes, matches, etc., may not be deducted.

3. Federal excise tax on the retail sale of certain tangible personal property is considered as a consumer's tax and, if separately invoiced, may be deducted from the gross income subject to tax. The current federal excise tax on the retail sale of certain tangible personal property is ten percent (10%) of the retail price. Example of certain tangible personal property subject to this excise tax: furs, luggage, cosmetics and jewelry.

4. Federal excise admission tax may be deducted from the gross income subject to tax. Reference: Internal Revenue Code of 1954, as amended.

II. State Excise Taxes

The taxpayer may deduct the following state excise taxes from the gross income subject to tax.

1. State excise tax paid on gasoline and diesel fuel may be deducted from the gross income subject to tax.

State Gasoline and Diesel Fuel Tax Period	State Tax Per Gallon
6/9/55 to 3/31/59	.06
4/1/59 to present	.07

2. State Cigarette Tax

Period	State Tax Per Carton	State Tax Per Pack
7/1/56 to 6/30/61	.50	.05
7/1/61 to present	.60	.06

3. State Beer Barrel Tax

31 gallon barrel	5.50
Case (24 containers) 16 oz. containers	.53328
Per 16 oz. container	.0222
Case (24 containers) 12 oz. containers	.40
Per 12 oz. container	.01667

4. State Soft Drink Tax

Per case (24 containers) 16 oz. or under	.24
Per gallon	.08
Per one-half gallon	.04
Per container--33 oz. to 48 oz.	.03
Per container--17 oz. to 32 oz.	.02
Per container-- 1 oz. to 16 oz.	.01
Kool Aid--per package	.01
Soft Drink Syrup--per gallon	.80

Persons claiming deductions for state excise taxes on gasoline, diesel fuel, cigarettes, beer and soft drinks must itemize on the Annual Business and Occupation Tax Return, page two, Schedule C, the number of gallons of gasoline and diesel fuel sold and/or the quantity of cigarettes, beer and soft drinks sold.

Deductions claimed for state excise taxes on gasoline, diesel fuel, cigarettes, beer and soft drinks will be disallowed in those cases where the taxpayer fails to provide the necessary information as set forth hereinabove.

In all cases where the taxpayer claims deductions or exemptions, adequate records must be maintained to establish and support the deductions and exemptions claimed.

The Annual Business and Occupation Tax Return, page one, column three, must be completed showing the gross amount of deductions and/or exemptions claimed. The deductions and/or exemptions claimed on page one, column three, must be itemized in the space as provided on page two and/or page three of the Annual Return. If the space, as provided in the Annual Return, is insufficient to itemize the deductions and/or exemptions claimed, the taxpayer must submit additional information on a separate sheet which is to be attached to the Annual Return and made a part thereof.

(Amended: Effective, January 1, 1963)

BOT 4.03 Exemptions - Specific Statutes

(a) Public Service Districts for Water and Sewage Services. Public service districts for water and sewage services organized in compliance with the provisions of Chapter 16, Article 13 A, West Virginia Code of 1931, as amended, entitled, "Public Service Districts for Water and Sewage Services", are exempt from the payment of the Business and Occupation Tax. This is an exemption provided by specific statute and is only available to those public service districts that have complied with all the requirements as set forth in the aforecited provisions of the Code.

(b) Municipal Waterworks. Waterworks in the State of West Virginia which are organized and/or operated by a municipal corporation in compliance with the provisions of Chapter 8, Article 12, West Virginia Code of 1931, as amended, entitled, "Waterworks", are exempt from the payment of the Business and Occupation Tax. This is an exemption provided by specific statute and is only available to those municipal waterworks that have complied with all the requirements as set forth in the aforecited provisions of the Code.

(c) Municipal Combined Waterworks and Sewage Systems. Waterworks and sewage systems in the State of West Virginia which are organized and/or operated by a municipal corporation in compliance with the provisions of Chapter 8, Article 13, West Virginia Code of 1931, as amended, entitled, "Combined Waterworks and Sewage Systems",

are exempt from the payment of the Business and Occupation Tax. This is an exemption provided by specific statute and is only available to those municipal waterworks and sewage systems that have complied with all the requirements as set forth in the aforecited provisions of the code.

(d) Municipal and Sanitary District Sewage Works. Sewage works in the State of West Virginia which are organized and/or operated by any municipal corporation and/or sanitary district in compliance with the provisions of Chapter 16, Article 13, West Virginia Code of 1931, as amended, entitled, "Sewage Works of Municipal corporations and Sanitary Districts", are exempt from the payment of the Business and Occupation Tax. This is an exemption provided by specific statute and is only available to those sewage works of municipal corporations and sanitary districts that have complied with all the requirements as set forth in the aforecited provisions of the Code.

(e) Credit Unions. Persons engaged in the business of a credit union and organized in compliance with the provisions of Chapter 31, Article 10, West Virginia Code of 1931, as amended, entitled, "Credit Unions", are exempt from the payment of the Business and Occupation Tax. This is an exemption provided by specific statute and is only available to those persons that have complied with all the requirements as set forth in the aforecited provisions

of the Code.

(f) Horse Racing. Persons engaged in the business of horse racing and organized in compliance with the provisions of Chapter 19, Article 23, West Virginia Code of 1931, as amended, entitled, "Horse Racing", are exempt from the payment of the Business and Occupation Tax. This is an exemption provided by specific statute and is only available to those persons that have complied with all the requirements as set forth in the aforecited provisions of the Code.

(g) West Virginia Business Development Corporations. Business development corporations organized in compliance with the provisions of Chapter 31, Article 14, West Virginia Code of 1931, as amended, entitled, "West Virginia Business Development Corporations", are exempt from the payment of the Business and Occupation Tax. This is an exemption provided by specific statute and is only available to those corporations that have complied with all the requirements as set forth in the aforecited provisions of the Code.

(Effective, January 1, 1964)

Section 5. ASSESSMENT AND REFUND.

BOT 5.01 Assessment of Tax. If the Tax Commissioner believes that the tax imposed by this article is insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax or has failed to make a return, or has made a return which

is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability of the taxpayer and make an assessment therefor.

BOT 5.02 Petition for Reassessment. If a person against whom an assessment has been made desires to contest the assessment, he is required to file a petition for reassessment. The petition for reassessment must be filed with the Commissioner personally or by certified mail within thirty days after service of the assessment. In the case of a jeopardy assessment the petition must be filed within twenty days. The original and one copy of such petition for reassessment shall be so filed.

If the taxpayer fails to file such petition for reassessment within the time required by law, the assessment shall be conclusive and the amount thereof shall be due and payable.

The petition for reassessment shall be in writing and shall be complete in itself so as to fully state the issues. No telegram, telephone call or similar communication will be recognized as a petition. The petition shall contain: (a) a caption in the following form:

"TO THE STATE TAX COMMISSIONER

Petition for Reassessment by _____";

(b) a statement of the amount of the deficiency or liability, as

the case may be, determined by the Commissioner, the nature of the tax, the period for which determined; (c) clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency. Each assignment of error shall be numbered; (d) clear and concise statements of facts upon which the petitioner relies as sustaining the assignments of error; (e) a prayer, setting forth the relief sought; (f) the signature of the petitioner; (g) a verification by the petitioner; (h) a copy of the assessment shall be appended to the original of the petition.

In the case of jeopardy assessment a bond with corporate surety thereon in penalty double the amount of the assessment, conditioned upon the payment of all taxes, penalties and costs legally due, shall accompany the petition for reassessment.

BOT 5.03 Place of Hearing. Hearings upon petitions for reassessment shall be held at the State Capitol, in Charleston, West Virginia, unless good cause be shown for conducting the hearing elsewhere within this State.

BOT 5.04 Continuances. Hearings will not be delayed by a motion for continuance unless it is timely made and sets forth good and sufficient cause. Conflicting engagements of counsel or the employment of new counsel will never be regarded as good ground for

a continuance, unless set forth in a motion filed promptly after the notice of hearing has been mailed, or unless extenuating circumstances are shown which the Commissioner deems adequate.

BOT 5.05 Absence of Petitioner or His Counsel. The unexcused absence of the petitioner or his counsel when a petition is called for hearing will not be the occasion for delay. The hearing shall proceed and the case be regarded as submitted on the part of the absent party or parties.

BOT 5.06 Hearing. The hearing may be conducted by an examiner. The term "Commissioner" when used in the regulations dealing with the conduct of the hearing shall mean the examiner.

The petitioner may be represented by counsel. The rules of evidence followed by the courts of this State shall be applicable to such hearings.

BOT 5.07 Argument and Briefs. Petitioner will be given an opportunity for argument within time limits fixed by the Commissioner following submission of evidence. The Commissioner will accept briefs in lieu of argument. Briefs must be filed within ten (10) days after the hearing.

BOT 5.08 Transcript of Proceedings. If, in the opinion of the Commissioner, a transcript of the hearing is deemed necessary, the

hearing shall be reported and a transcript thereof shall be made.

If the petitioner desires a transcript be made of the hearing, he shall advise the Commissioner at least ten days prior to the hearing date and bear the expense of the same.

BOT 5.09 Appeal to Circuit Court. An appeal may be taken by the taxpayer to the circuit court of the county in which the activity taxed was engaged, or in which the taxpayer resides, or in the circuit court of Kanawha County, within thirty days after he shall have received notice from the Tax Commissioner of his determination as provided in section seven-b.

The court shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the Tax Commissioner. In such appeal a certified copy of the Tax Commissioner's assessment shall be admissible and shall constitute prima facie evidence of the tax due under the provisions of this article. The court shall render its decree thereon and a certified copy of said decree shall be filed by the clerk of said court with the Tax Commissioner who shall then correct the assessment in accordance with said decree. An appeal may be taken by the taxpayer or the Tax Commissioner to the supreme court of appeals of this State.

BOT 5.10 Refund. Under the provisions of Chapter 11, Article 1, Section 2a, West Virginia Code of 1931, as amended, any person

claiming to be aggrieved through being required unlawfully to pay the tax may, within three years from the date of such payment, and not after, file with the State Tax Commissioner a petition in writing, duly verified, setting forth therein the facts in support of the alleged claim for refund. In the filing of a petition for refund, the taxpayer shall append thereto amended tax returns for the period involved and any other evidence in support thereof. Upon receipt of the petition, amended tax returns and any other supporting evidence, the Commissioner shall review the same and make a determination. If, in the Commissioner's opinion, the taxpayer is entitled to a refund, the taxpayer may, at his option, request the issuance of a credit memorandum to be applied to his future tax liability or may request the issuance of a state warrant.

Section 6 BUSINESS CLASSIFICATIONS.

BOT 6.01 Sand and Gravel. Persons engaged in the business of producing sand and gravel for sale or consumption either directly or through the activity of others, shall, in addition to being liable under Section (2a) of the law, designated production classification, be deemed manufacturers and are liable under Section (2b) of the law, designated manufacturing classification. The gross proceeds from the sale of the production shall be reported under Item B on the Business and Occupation Tax form, and the value of

the sand or gravel produced at 20¢ per net ton shall also be reported under Item A-2 on the Business and Occupation Tax form.

Other activities are to be reported under the classification on the Business and Occupation Tax form in which they fall as set forth below:

Persons engaged in the business of selling tangible property shall report the gross income of such sales under Item C-1, retail classification, or Item C-2, wholesale classification, depending on whether the sales are retail or wholesale. A producer who sells his sand and gravel at retail in West Virginia must report the gross proceeds derived from the sale of such sand and gravel under Item C-1, retail classification, in addition to the amount reported under Item A-2, production classification, and the value of the sand and gravel reported under Item B, manufacturing classification. However, a producer who sells his sand and gravel to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or comsumption in the purchaser's business shall <u>not</u> be required to report the value of the sand and gravel under Item C-2, wholesale classification.

Persons engaged in any service business or calling not otherwise specifically classified under the Business and Occupation Tax Law, shall report the gross income of such business under Item H, service classification. Such income will include that from service,

alterations, repairs, delivery charges for local deliveries made by the taxpayer, and other miscellaneous charges or receipts.

BOT 6.02 Oil. Persons engaged in the business of producing oil within this State for sale, profit, or commercial use, are liable for the tax levied under Section (2a) of the law, designated production classification, and shall report under Item A-3 on the Business and Occupation Tax form, the gross proceeds derived from the sale of the oil by the producer.

Other activities are to be reported under the classification on the Business and Occupation Tax form in which they fall as set forth below:

Persons engaged in the business of selling tangible property shall report the gross income of such sales under Item C-1, retail classification or Item C-2, wholesale classification, depending on whether the sales are retail or wholesale. A producer who sells his oil at retail in West Virginia shall report the gross proceeds derived from the sale of such oil under Item C-1, retail classification, in addition to the value of the oil reported under A-3, production classification. However, a producer who sells his oil to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to report the value

of the oil under Item C-2, wholesale classification.

Persons engaged in any service business or calling not otherwise specifically classified under the Business and Occupation Tax Law, shall report the gross income of such business under Item H, service classification. Such income will include that from service, alterations, repairs, delivery charges for local deliveries made by the taxpayer, and other miscellaneous charges or receipts.

BOT 6.03 Natural Gas. Persons engaged in the business of producing natural gas within this State for sale, profit, or commercial use are liable for the tax levied under Section (2a) of the law, designated production classification, and shall report under Item A-4 on the Business and Occupation Tax form an amount equal to the well-mouth value of the natural gas produced, to be determined as follows: For all gas produced (except as provided hereinbelow) the well-mouth value shall be the price received at the point of delivery less ten percent (10%) of such price which is to be considered as the average value of transportation from the well-mouth to the point of delivery. There shall be no deduction for royalties, selling commissions or other expenses, or losses on account of bad debts or other causes The tax on production is applicable whether the gas produced is delivered or used within or without the State of West Virginia.

In case of utilities and other producers gathering and delivering natural gas through their own systems, the well-mouth value of such gas produced shall be determined by the weighted average field purchase price paid for gas by the utility or other producers to independent producers in West Virginia less ten percent (10%) of such purchase price which is to be considered as the average value of transportation from the well-mouth to the point of delivery for use, provided that such purchase price represents the true value of the gas purchased. Where ten percent (10%) of such purchase price does not represent the value of transportation, the Tax Commissioner may, upon review, revise the transportation allowance to more accurately reflect the actual value of transportation.

Where purchases are made between affiliated businesses, or under circumstances where the relation between the buyer and seller is such that the purchase price paid is not indicative of the true value, the Tax Commissioner shall determine the well-mouth value to be reported for Business and Occupation Tax purposes and such well-mouth value is to correspond as nearly as possible to the weighted average field purchase price of similar gas produced and sold between non-affiliated businesses in that particular area.

Producers, other than utilities, must report under the service classification, Item H, the difference between the actual gross

receipts derived from the sale of gas and the well-mouth value reported under Item A-4.

Other activities are to be reported under the classifications as set forth below:

(1) Persons engaged in the business of selling tangible property, other than their own production, shall report the gross income of such sales under Item C-1, retail classification, or Item C-2, wholesale classification, depending on whether the sale is at retail or wholesale. Producers of natural gas making utility sales of their gas are referred to BOT 6.48 , Natural Gas Utilities Producing All or Any Part of Their Gas Which is Sold as a Utility.

(2) Persons engaged in any service business or calling not otherwise specifically classified under the Business and Occupation Tax Law shall report the gross income of such business under Item H, service classification. Such income will include that derived from services, alterations, repairs, delivery charges for local deliveries made by the taxpayer, and other miscellaneous charges or receipts.

(Amended: Effective November 1, 1962)

BOT 6.04 Other Natural Resource Products. Persons engaged in the business of producing other natural resource products, either directly or through the activity of others, are liable for the tax levied under Section 2a of the law, designated production classification, and shall report under Item A-7 on the Business and

Occupation Tax form the sales value of the products without any deduction for royalties, selling commissions or other expenses, or losses on account of bad debts or other causes. Shipments made to points both inside and outside of West Virginia are to be included.

The sales value of other natural resource products used or consumed in manufacturing plants operated by the producer in West Virginia is to be reported under the production classification.

In all cases where a product is sold to affiliated companies at prices which do not reflect its true value, the sales value to be returned for tax purposes shall be the fair market price of the product sold.

The gross sales value, or proceeds of all goods manufactured by the taxpayer in manufacturing plants in West Virginia is to be reported under Item B, manufacturing classification. No deduction is allowed under the Business and Occupation Tax Law on account of the market value of the natural resource products used in manufacturing, upon which the tax has been computed under Item A-7.

Other activities are to be reported under the classification on the Business and Occupation Tax form in which they fall as set forth below:

Persons engaged in the business of selling tangible property shall report the gross income of such sales under Item C-1, the retail classification, or Item C-2, wholesale classification,

depending on whether the sales are retail or wholesale. A producer who sells his natural resource products at retail in West Virginia shall report the gross proceeds derived from the sale of such natural resource products under Item C-1, retail classification, in addition to the value of the natural resource products reported under Item A-7, production classification. However, a producer who sells his natural resource products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to report the value of the natural resource products under Item C-2, wholesale classification.

BOT 6.05 Manufacturers and Producers of Natural Resources Who Operate Through Independent Contractors. Manufacturers and producers of natural resources who contract with independent contractors for all or part of their production or manufacturing processes are none the less responsible for Business and Occupation Tax measured by the sales value of the completed or partially completed products under Section 2a production classification, and Section 2b, manufacturing classification. In addition to tax under the production or manufacturing classification to be paid by the producer or manufacturer, the independent contractor shall pay tax under Section 2h service classification, on his gross income as

hereinbefore provided in these regulations.

BOT 6.06 Clay, Shale, Brick, China, and Pottery. Manufacturers of brick, pottery, china or other clay products producing and consuming clay or shale in their business, shall be deemed to be engaged in the business of producing clay or shale for sale, profit or commercial use and shall be required to make returns on account of the production of clay or shale based on a value equal to 5% of the sales value of the manufactured brick, china, pottery, or other products.

Thus, 100% of the gross receipts from the sale of the manufactured product should be reported on the Business and Occupation Tax form under Item B, manufacturing classification, and 5% of such gross receipts should be reported as "other natural resource products" under Item A-7, production classification.

A producer who sells his manufactured brick, china, pottery, or other products at retail in West Virginia shall report the gross proceeds derived from the sale of such brick, china, pottery, or other products under Item C-1, retail classification, in addition to the amount reported under Item A-7, production classification, and the value of the manufactured brick, china, pottery, or other products reported under Item B, manufacturing classification. However, a producer who sells his manufactured brick, china, pottery, or

other products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to report the value of the sand and gravel under Item C-2, wholesale classification.

BOT 6.07 Bread and Ice. Persons engaged in the bakery business and in the business of manufacturing ice shall report the gross income from such activities on the Business and Occupation tax form as follows:

The total wholesale value of the manufactured products is to be reported under Item B, manufacturing classification.

In the event all or part of such manufactured products are sold at retail, the gross proceeds of such sales shall be reported under Item C-1, gross income of retailers, with no deduction whatsoever by reason of the amount reported or tax paid under Item B, manufacturing classification.

The gross sales value of products manufactured by the taxpayer and sold at wholesale are to be reported only under Item B, manufacturing classification.

BOT 6.08 Photoprinting, Photostating, Photography, Etc. Persons engaged in the business of photoprinting, photostating, photography, photoengraving, blueprinting, etc., are required to

report the gross income from such activities as follows:

Gross income from the developing of films, owned by others, is to be reported under Item H, service and all other business.

Gross income from making prints, photostats, blueprints, etc., shall be reported under Item B, manufacturing classification.

Persons who develop film owned by others and make prints therefrom shall, when a charge is made for the development process, report under Item H the gross income derived from developing said film and under Item B the wholesale value of the prints manufactured. In addition, if said prints are sold at retail, the gross proceeds derived from said retail sale must be reported under Item C-1, gross income from retailers.

Persons engaged in the photography business who take pictures, make prints and sell the finished product at retail shall report the wholesale value of said product under Item B and, in addition to this, shall report the gross proceeds derived from the sale under Item C-1, gross income of retailers.

A manufacturer who sells his manufactured product at wholesale is not required to report the value of the products under Item C-2, wholesale classification.

BOT 6.09 Awnings, Storm Doors and Storm Windows. Persons engaged in the business of manufacturing or preparing for sale,

selling and/or installing awnings, storm doors and storm windows shall report the gross income derived from these activities in the following manner:

(a) Manufacturing or Preparing for Sale. Where a person is engaged in the business of manufacturing or preparing for sale, profit or commercial use, either directly or through the activity of others in whole or part, any article, the gross proceeds derived therefrom shall be reported under the manufacturing classification, Item B on the tax return. The measure of this tax is the value of the entire product manufactured or prepared in this state for sale, profit, or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the state.

(b) Manufacturing or Preparing for Sale and Retail Sale. Where a person is engaged in the business of manufacturing or preparing for sale a product as set forth in paragraph (a) above and also is engaged in business of selling at retail the product manufactured or prepared for sale, the manufacturer shall report the wholesale value of such product under the manufacturing classification, Item B on the tax return, and in addition, the gross income derived from the retail sale shall be reported under the retail classification, Item C-1 on the tax return.

(c) Manufacturing or Preparing for Sale and Wholesale Sale. Where a person is engaged in the business of manufacturing or

preparing for sale a product as set forth in paragraph (a) above and the product manufactured or prepared for sale is sold at wholesale, the manufacturer shall report the gross income derived therefrom only under the manufacturing classification, Item B on the tax return. The manufacturer is not required to report gross income under the wholesale classification, Item C-2 on the tax return.

(d) Retail and/or Wholesale Sale. Where a person is engaged in business of selling at retail and/or wholesale a product manufactured or prepared for sale by another, the gross income shall be reported under the retail classification, Item C-1, or under the wholesale classification, Item C-2, on the tax return, depending on whether the sale is a retail or wholesale sale as defined in BOT 6.14 and BOT 6.15 .

(e) Manufacturing or Preparing for Sale, Retail Sale, and Service. Where a person is engaged in the business of manufacturing or preparing for sale a product and sells the same at retail and installs the same for customers, the gross income derived therefrom shall be reported in the following manner:

1. For manufacturing or preparing for sale the product and selling same at retail, as set forth in paragraph (b) above;

2. For installing the product, the gross income derived from

labor charges shall be reported under service classification, Item H on the tax return, in addition to the manufacturing and retail classifications as set forth in paragraph (b) above.

When a person is engaged in business as set forth in paragraph (e) herein, the gross income shall be reported under three separate, distinct classifications, viz. manufacturing, retail and service.

(f) Retail or Wholesale Sale and Service. Where a person is engaged in business of selling at retail or wholesale the product and installing the same for customers, the gross income derived therefrom shall be reported in the following manner:

1. The gross income derived from sale at retail or wholesale of the product shall be reported as set forth in paragraph (d) above;
2. The gross income derived from labor charges for installing the product shall be reported under service classification, Item H on the tax return.

In those cases where a person sells at retail or wholesale the product and agrees to install the same, there shall appear on the invoice to the customer a breakdown showing the retail or wholesale price of the product and the labor charges for installing the same.

Where a person is engaged in business as set forth in paragraph (f) herein, the gross income shall be reported under two or three separate, distinct classifications, viz. retail, wholesale and service.

(g) Service. Where a person is engaged in the business of installing, repairing, servicing, reconditioning, etc., the product, the gross income derived therefrom shall be reported under the service classification, Item H on the tax return.

In those cases where a person reports gross income for Business and Occupation Tax purposes under the retail, wholesale and/or service classification(s), the Consumers' Sales and Service Tax must be charged to the customer on the total invoice price or the customer shall furnish a duly executed exemption certificate in lieu of the sales tax.

In every case, the person taxed hereunder shall keep adequate records for the purpose of segregating and reporting the gross income under the proper classifications.

This regulation shall apply to all types of awnings, storm doors and storm windows, whether the composition of same be wood, aluminum, canvas, etc.

This regulation shall not apply to siding, whether the composition of same be wood, aluminum, asbestos, etc.

(Effective January 1, 1964)

BOT 6.10 Tire Recappers and Retreaders. Persons engaged in purchasing used tire carcasses, recapping or retreading such carcasses and selling them are classified as manufacturers by this department.

Persons engaged in the business of recapping or retreading tires shall report the gross income from such activities on the Business and Occupation Tax form as follows:

(a) If such tires are sold at wholesale, the taxpayer shall report the gross proceeds from such sales under Item B, manufacturing classification. In such cases, no amount is to be reported under Item C-2, gross income of wholesalers.

(b) If the person manufacturing the tires sells the tires at retail he must report the wholesale value of such tires under Item B, manufacturing classification, and in addition to this, shall report the gross proceeds derived from the sale of such tires under Item C-1, gross income of retailers, without any deduction of amounts reported under Item B.

Persons recapping or retreading tires belonging to others and making a charge for such recapping or retreading are considered to be performing a service and shall report the gross proceeds from such business under Item H, service and all other business. If

the recapper keeps separate records for cost of material and for cost of installation, he may report the proceeds derived from the sale of the materials under Item C-1, gross income of retailers, or Item C-2, gross income of wholesalers, whichever applies, and the proceeds derived from the installation charges under Item H, the service classification.

BOT 6.11 Junk Dealers. Persons engaged in the business of preparing for sale and selling scrap metal, paper, rags, rubber, etc., are required to report the gross income from such activities on the Business and Occupation Tax form as follows:

Persons cutting, separating, grading or cleaning scrap metal, paper, rags, rubber, etc., are engaged in the business of preparing for sale and shall report the gross proceeds of sales of such materials prepared in West Virginia under Item B. The gross proceeds of the sales of such prepared materials sold in West Virginia at retail, with no deduction whatsoever by reason of the amount reported under Item B, shall also be reported under Item C-1.

The gross proceeds of sales made within West Virginia of materials which are not prepared for sale, as hereinbefore defined, must be reported under Item C-1, if the sale is at retail, or under Item C-2, if the sale is at wholesale.

Persons acting as brokers and selling materials for other

suppliers on a commission basis must report the gross commissions received from sales to West Virginia purchasers under Item H, irrespective of the fact that the supplier is located outside of this State.

Persons acting as brokers and obtaining orders from customers located outside of West Virginia for the shipment of materials to the out-of-state purchaser where such solicitation takes place outside of West Virginia are not liable for the tax on the commissions earned on such interstate sales.

BOT 6.12 Meat Packers and Livestock Slaughterers. Persons engaged in the slaughtering of livestock and/or meat packing, with the exception of persons dressing and processing poultry and turkeys, are liable for the tax levied under Section 2b of the Business and Occupation Tax Law, designated manufacturing classification, and shall report the gross income from such activities on the Business and Occupation Tax form as follows:

The total wholesale value of meat products manufactured or processed including livestock slaughtered and/or processed is to be reported under Item B, manufacturing classification.

In the event all or part of such manufactured or processed product is sold at retail, the gross proceeds of such sales are to be reported under Item C-1, gross income of retailers, with no

deduction whatsoever by reason of the amount reported or tax paid under Item B, manufacturing classification.

The gross sales value of products manufactured or processed by the taxpayer and sold at wholesale is to be reported only under Item B, manufacturing classification.

Gross income received from the sale of products not slaughtered or processed in any way by the taxpayer is to be reported under Item C-1, gross income of retailers, or Item C-2, gross income of wholesalers, depending on whether the sale is at retail or wholesale. Since Section 2c of the subject law exempts sales made by any person engaging or continuing in the business of agriculture and grazing, in the event, the taxpayer is the producer of the livestock sold he would not be liable for the tax with respect to such livestock sold on foot. The exemption referred to above does not, however, apply to producers slaughtering and/or processing their livestock (other than poultry and turkeys). The activity of slaughtering and processing such livestock (other than poultry and turkeys) is not the business of agriculture but is a business taxable under the subject law as set forth in the first, second, third, and fifth paragraphs of this regulation.

The 1951 Legislature amended Section 2b of the Business and Occupation Tax Law by adding the following provision:

"***However, the dressing and processing of poultry and turkeys by a person, firm or corporation, which poultry and turkeys are to be sold on a wholesale basis by such person, firm or corporation shall not be considered as manufacturing or compounding, but the sale of these products, on a wholesale basis shall be subject to the same tax as is imposed on wholesalers or jobbers as provided in section two-c of this article."

From the effective date of this amendment, June 3, 1951, gross income from sales of poultry and turkeys dressed or processed by the taxpayer which are not produced by the taxpayer, is not to be reported under Item B, manufacturing classification, but is to be reported under Item C-1, gross income of retailers, or Item C-2, gross income of wholesalers, depending on whether the sale is at retail or wholesale. Items C-1 and C-2 do not apply to persons engaged in the business of agriculture; therefore, from the effective date of this amendment producers of poultry and turkeys are not liable for the tax with the respect to sales of poultry and turkeys produced by them. Before that date, however, the dressing and/or processing of poultry and turkeys, whether by the producer or by others, is an activity taxable under Item B, manufacturing classification.

BOT 6.13 Dairy Business. Persons engaged in the business of operating dairies shall report their gross income from such activity on the Business and Occupation Tax form as follows:

The total wholesale sales value of products manufactured or compounded shall be reported under Item B, manufacturing classification. Manufactured or compounded products include butter, cheese, buttermilk, orange drink, ice cream, etc. Milk which is merely pasteurized or homogenized is not considered a manufactured or compounded product.

If the manufactured or compounded products are sold at retail in West Virginia, the manufacturer shall report the gross proceeds derived from the sale of such products under Item C-1, retail classification, in addition to the wholesale value of the products reported under Item B, manufacturing classification. However, a manufacturer who sells his manufactured products at wholesale is not required to report the value of the products under Item C-2, wholesale classification.

The business of horticulture, agriculture, or grazing is not taxable under Section 2c of the Business and Occupation Tax Law, designated business of selling tangible property, but the exemption does not carry through to a processing enterprise. Persons compounding products from milk produced from their own herds are therefore

only taxable on the sale of the manufactured products as set forth in the second and third paragraphs above. The sale of milk produced from their own herds is not taxable.

Sales of milk or other products purchased from others which are not manufactured or compounded by the taxpayer are liable under Item C-1 or C-2, depending on whether the sale is retail or wholesale.

BOT 6.14 Retailers. Persons engaged in the business of selling tangible property, real or personal at retail, are liable for the tax levied under Section 2c of the law, designated business of selling tangible property, and shall report under Item C-1 on the Business and Occupation Tax form the gross income from the business. Only sales of tangible property including carrying charges are to be reported under this classification. Gross income received from other sources, such as the sale of service and rentals, is to be reported under Item H or Item I.

The business of horticulture, agriculture or grazing is not taxable under the Business and Occupation Tax Law. These three categories include florists growing their own stock, orchardists, and farmers. Any person purchasing the products of horticulture, agriculture or grazing for resale does not come within this exemption. For instance, florists who purchase their stock of flowers are required to report as retailers or wholesalers, but may take

exemption for the sale of plants and flowers of their own cultivation.

Other activities are to be reported under the classification on the Business and Occupation Tax form in which they fall as set forth below:

Persons engaged in the business of selling tangible property at retail and who also make sales at wholesale shall report the gross income of such wholesale sales under Item C-2, wholesale classification. "Selling at wholesale" or "wholesale sales" shall mean and include: (1) sales of any tangible personal property for the purpose of resale in the form of tangible personal property; (2) sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity which is subject to the tax imposed by the Business and Occupation Tax Law or by the Transportation Privilege Tax Law; (3) sales of any tangible personal property to the United States of America, its agencies and instrumentalities or to the State of West Virginia, its institutions or political subdivisions.

Persons engaged in any service business or calling not otherwise specifically classified under the Business and Occupation Tax Law, shall report the gross income of such business under Item H, service classification. Such income will include that from service, alterations, repairs, delivery charges for local deliveries made by the taxpayer, and other miscellaneous charges or receipts.

BOT 6.15 Wholesalers. Persons engaged in the business of selling tangible personal property at wholesale are liable for the tax levied under Section 2c of the law, designated business of selling tangible property, and shall report under Item C-2 on the Business and Occupation Tax form the gross income from the business. Only sales of tangible personal property including carrying charges are to be reported under this classification. Gross income from other sources such as the rendering of a service and rentals is to be reported under Item H or Item I.

"Selling at wholesale" or "wholesale sales" shall mean and include: (1) sales of any tangible personal property for the purpose of resale in the form of tangible personal property; (2) sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity which is subject to the tax imposed by the Business and Occupation Tax Law or by the Transportation Privilege Tax Law; (3) sales of any tangible personal property to the United States of America, its agencies and instrumentalities or to the State of West Virginia, its institutions or political subdivisions.

The business of horticulture, agriculture or grazing is not taxable under the Business and Occupation Tax Law. These three categories include florists growing their own stock orchardists,

and farmers. Any person purchasing the products of horticulture, agriculture or grazing for resale does not come within this exemption. For instance, florists who purchase their stock of flowers are required to report as retailers or wholesalers, but may take exemption for the sale of plants and flowers of their own cultivation.

Persons engaged in the business of selling tangible personal property at wholesale and who also make sales at retail shall report the gross income of such retail sales under Item C-1, retail classification.

BOT 6.16 Department Stores, Jewelry Stores, Appliance Stores and Similar Businesses. Persons engaged in the business of operating department stores, jewelry stores, appliance stores or similar businesses, in addition to making sales of tangible property, may also perform installation of such property for which a charge is made and may perform repairs on articles belonging to others. Such persons shall report the income from such activities on the Business and Occupation Tax form as follows:

Gross income from sales of tangible property including carrying charges is to be reported under Item C-1, retail classification, or Item C-2, wholesale classification, depending on whether the sale is at retail or wholesale.

Gross income from installation charges is to be reported under Item H, service classification.

Gross income from repair charges is to be reported under Item H, service classification. In the event tangible property is furnished in connection with the service charge, the material used may be reported under Item C-1 or C-2, and the labor charges reported under Item H. In order to report the service charges in this manner, however, the taxpayer must keep his records in such a way as to show separately the income received from the material sold, and the income received from the labor charges. If such records are not maintained, the entire amount of the charge to the customer must be reported under the service classification.

Gross receipts from sales and installation of electrical fixtures, plumbing fixtures, etc., under contract are to be reported under Item E, contracting classification. This will apply in all cases where installation of the material is performed by persons selling the material unless the job is considered "time and material", as set forth in the sixth paragraph. The contractor is not required to collect Consumers' Sales and Service Tax from customers for whom the work has been performed on a contract basis, nor is he required to pay Consumers' Tax on purchases of material which are to be incorporated in his contract work.

In the event electrical fixtures, plumbing fixtures, etc., are sold to a customer at the seller's established price and installation of such fixtures, etc., by the seller is to be performed at a stipulated price per hour and the billing to the customer itemizes the material and labor, the sale and installation is to be considered a "time and material job".

Gross receipts from "time and material" jobs are to be reported as follows:

(a) Charges for materials are to be reported under Item C-1, retail classification, or Item C-2, wholesale classification, depending on whether the sale is at retail or wholesale.

(b) Charges for labor are to be reported under Item H, service classification.

BOT 6.17 Florists and Nurserymen. Florists and nurserymen are not subject to the Business and Occupation Tax with respect to sales of plants, flowers, shrubs, etc., produced by them in this State.

Gross income from sales of products purchased and resold is to be reported on the Business and Occupation Tax form under Item C-1, retail classification, or Item C-2, wholesale classification, depending on whether the sale is at retail or wholesale.

The florist or nurseryman taking an order from a customer to be delivered by a second florist through the F.T.D. service is a retailer and the amount collected from the customer is to be reported under Item C-1, retail classification. The florist or nurseryman receiving the telegraphic instructions and delivering the order is making a sale for resale to the sending florist and the amount received by him is to be reported under Item C-2, wholesale classification.

Income received from orders taken by a florist located in West Virginia to be delivered through the F.T.D. service by a florist located outside of West Virginia to an out-of-state address may be claimed as an exemption for Business and Occupation Tax purposes. Sales delivered by a florist located in West Virginia to a West Virginia address pursuant to a F.T.D. request from an out-of-state florist must be reported for Business and Occupation Tax purposes.

BOT 6.18 Hatchery Business. Persons engaged in the hatchery business shall report the gross income from such activity on the Business and Occupation Tax form as follows:

Gross income from the sale of baby chicks hatched in West Virginia is to be reported under Item C-1, retail classification, or Item C-2, wholesale classification, depending on whether the sale is at retail or wholesale.

The Business and Occupation Tax Law exempts sales by persons engaging or continuing in the business of agriculture; therefore, hatcheries maintaining their own flocks will be exempt on sales of baby chicks hatched from eggs produced by such flock; provided, adequate records are kept to establish accurately the amount of exemption claimed.

BOT 6.19 Mortuaries. Persons engaged in the business of operating mortuaries shall report the gross income from such activities on the Business and Occupation Tax form as follows:

(a) 50% of gross income under Item C-1, retail classification.

(b) 50% of gross income under Item H, service classification.

Accommodation charges made to the customers for services rendered by others such as grave digging charges, etc., for which the customer is billed at cost and which are not part of the usual service rendered by the mortuary, need not be reported for purposes of the tax. In order to claim this exemption such charges must be shown separately on the invoice to the customer and must be accurately reflected in the records of the taxpayer.

BOT 6.20 Monuments and Memorials. Persons engaged in the business of selling monuments and memorials shall report their gross income, including all charges for services such as lettering, installation, etc., on the Business and Occupation Tax form as follows:

(a) 85% of gross income under Item C-1, retail classification.

(b) 15% of gross income under Item H, service classification.

BOT 6.21 Cemeteries or Memorial Parks. Persons engaged in the business of operating cemeteries or memorial parks, which usually includes the rendering of a service, e. g. "perpetual care", shall report the gross income from such activities on the Business and Occupation Tax form as follows:

(a) 50% of gross income under Item C-1, retail classification.

(b) 50% of gross income under Item H, service classification.

If the taxpayer can show by his records an exact breakdown of his charges, distinguishing the amount received from sales of tangible property from service charges, the actual gross income from sales of tangible property may be reported under Item C-1, retail classification, and the actual gross income from service charges under Item H, service classification, in lieu of the percentages allowed by the Commissioner as set forth in the preceding paragraph.

BOT 6.22 Sale of Motor Vehicles or House Trailers (Mobile Homes) to Residents and Non-Residents Taking Delivery Outside of West Virginia. The scope of this regulation is limited to sales by dealers in West Virginia of motor vehicles or house trailers (mobile homes) to:

(1) Residents of this State for use in this State but who take delivery outside of West Virginia; and

(2) Non-residents for use outside of this State and who take delivery outside of West Virginia.

In computing the Business and Occupation Tax liability of persons engaged in the business of selling motor vehicles or house trailers (mobile homes), no deduction is allowed by reason of sales made to non-residents for use outside this State but who take delivery in West Virginia. Furthermore, no deduction is allowed with respect to sales of motor vehicles or house trailers (mobile homes) made to local residents for use by them in this State regardless of the fact that delivery may be taken by the buyer at the factory or other point outside this State, or that shipment be made direct from a point outside this State to the buyer in this State. It is presumed that a motor vehicle or house trailer (mobile home) is purchased for use in this State when the buyer secures a West Virginia title pursuant to the provisions of Chapter 17A, Code of West Virginia, 1931, as amended.

A deduction from gross income will be allowed as to sales made to bona fide non-residents of West Virginia, when, as a necessary incident of the contract of sale, the seller agrees to, and does, deliver the motor vehicle or house trailer (mobile home) to the buyer

at a point outside this State, or delivers the same to a common carrier consigned to the non-resident purchaser outside this State. In either case, the expense of delivery must be borne by the seller and without additional charge to the buyer for such delivery.

THE FOREGOING DEDUCTION, HOWEVER, WILL BE ALLOWED ONLY WHEN THE SELLER HAS SECURED AND RETAINS IN HIS FILES SATISFACTORY PROOF:

(a) That the purchaser was a bona fide resident of another state;

(b) That the motor vehicle or house trailer (mobile home) is purchased for use outside of West Virginia;

(c) That under the terms of the sales agreement, the seller was required to deliver the motor vehicle or house trailer (mobile home) to the buyer at a point outside this State;

(d) That such out-of-state delivery was actually made by the seller, or by a common carrier acting as his agent, at the expense of the seller and without additional charge to the buyer for such delivery; and

(e) That, to the seller's knowledge, the motor vehicle or house trailer (mobile home) was not titled in West Virginia by the buyer pursuant to Chapter 17A, Code of West Virginia, 1931, as amended.

The form of proof acceptable to the Tax Commissioner for the purpose of showing a sale to be an out-of-state sale, hence excluded

from gross income taxable under the Business and Occupation Tax Law, Chapter 11, Article 13, Code of West Virginia, 1931, as amended, shall be as follows:

CERTIFICATE OF OUT-OF-STATE DELIVERY

NOTICE: This certificate is for the purpose of establishing the within transaction as being exempt from the West Virginia Business and Occupation Tax, a tax levied upon the named dealer, not the purchaser. False statements subject the maker to punishment as provided by law.

Please print or type the information requested by this certificate. Post Office box numbers, as an address, are not acceptable and render this certificate void. Rural route with box numbers is acceptable.

TO THE STATE TAX COMMISSIONER OF WEST VIRGINIA:

The undersigned hereby certifies that he is a bona fide resident of the State of _____ and that his address is

_____, _____,
(Street and number or rural route) (City, town or post office)

_____.
(State)

That on the _____ day of _____, 19___, he purchased from _____, _____, _____
(Dealer's Name) (Street address) (City and state)

_____, the following described motor vehicle or house trailer

(mobile home) to-wit:

Make_____, Model_____, Year_____, (Motor No.) (Serial No.)_____,

and that said motor vehicle or house trailer (mobile home) was purchased for use outside the State of West Virginia;

That under the terms of the sales agreement, at no charge to me, the above named dealer was required to, and did, deliver said motor vehicle or house trailer (mobile home) to me at _____ (Street and number or rural route and box number) _____, (City, town or post office) _____ (State).

Dated at _____ (City), _____ (State), this _____ day of _____, 19___.

_____
(Purchaser's Signature)

_____
(Print Purchaser's Name)

CERTIFICATION OF DEALER

STATE OF WEST VIRGINIA,

COUNTY OF _____, to-wit:

I hereby certify that I delivered the above described motor vehicle or house trailer (mobile home) to _____ (Name of Purchaser)

at the place described in the above certificate on the ____ day of _____, 19___.

Date: _____

_____
(Signature of dealer or representative)

_____
(Print name)

_____
(Title--officer or agent)

The above certification of dealer was taken, subscribed and sworn to before me this _____ day of _____, 19___.

My commission expires: _____

_____
(Notary Public)

BOT 6.23 Trading Stamps. Persons engaged in the business of trading stamps and who have redemption stores within West Virginia shall report fifty percent (50%) of the gross income derived therefrom under the retail classification, Item C-1, on the tax return, and the remaining fifty percent (50%) under the service classification, Item H, on the tax return.

Persons engaged in the business of trading stamps and who do not have redemption stores within West Virginia shall report the

entire gross income derived therefrom under the service classification, Item H, on the tax return.

Where persons are engaged in the business of trading stamps and the facts and circumstances are such that there may be a question as to the application of the above, such question shall be submitted to the State Tax Commissioner for determination.
(Effective January 1, 1963)

BOT 6.24 Amusement. Persons engaged in the business of operating a theatre, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, bowling alley, billiard parlor, etc., or any other place at which amusements are offered to the public shall report the gross income derived therefrom under the amusement classification, Item G on the Business and Occupation Tax form.

In the case of operators of places of amusement doing business on a percentage basis, the operator is liable for the tax on the total admissions regardless of whether, under the terms of his agreement, he is required to pay out a percentage of the admissions as part of the cost of operating. Motion picture show operators renting films on a percentage basis are required to report the total admissions without any deduction on account of the proportion of admissions paid out for the use of the films.

Persons engaged in the business of selling tangible property shall report the gross income of such sales under the retail classification, Item C-1, or under the wholesale classification, Item C-2, on the Business and Occupation Tax form, depending on whether the sales are retail or wholesale.

Persons engaged in the amusement business may also be subject to tax under the rental classification, Item I, on the Business and Occupation Tax form, for gross income derived from the rental of personal property, e.g. lockers, equipment, etc., or from the rental of real property.

BOT 6.25 Carrying Charges and Service Charges. Carrying charges added to the sales price of merchandise by the seller under conditional sales contracts or other contracts providing for deferred payments of the purchase price, regardless of whether or not such carrying charges are segregated on the taxpayer's books and records or billed separately to the customer, are considered as part of the sales price of the merchandise and are taxable under the retail classification, Item C-1, on the Business and Occupation Tax form. Also, carrying charges on service charges are taxable under the service classification, Item H, on the Business and Occupation Tax form.

BOT 6.26 Commissions on Ticket Sales. Persons receiving commissions from the sale of tickets shall report the gross commissions

under the service classification, Item H, on the Business and Occupation Tax form, without any deductions for expenses or cost of doing business.

BOT 6.27 Real Estate Brokers and Salesmen. Persons engaged in the business of selling real estate shall report the gross income from such activities on the Business and Occupation Tax form as follows:

Real estate brokers and independent salesmen, who are not employed on an employer-employee relationship, selling real estate for others on a commission basis, shall report their gross commissions under the service classification, Item H, on the Business and Occupation Tax form. Gross commissions shall include commissions paid to or deducted by other brokers or salesmen.

Persons engaged in the business of buying and selling real estate shall report the entire gross income derived therefrom without deduction of any expense whatsoever, including the original cost or purchase price, under the retail classification, Item C-1, on the Business and Occupation Tax form.

Persons building houses or structures on lots owned by them and selling such houses and lots shall report the gross income from such sales under the retail classification, Item C-1, on the Business and Occupation Tax form.

BOT 6.28 Merchandise Brokers. Persons engaged in business as merchandise brokers maintaining a place of business in West Virginia for the purpose of representing out-of-state suppliers of merchandise on a commission basis and obtaining orders for the shipment from such out-of-state suppliers to customers in West Virginia shall report their gross commissions on the Business and Occupation Tax form under the service classification, Item H, on the Business and Occupation tax form.

Merchandise brokers maintaining a place of business in West Virginia, representing West Virginia suppliers on a commission basis, obtaining orders from customers located outside of West Virginia for the shipment of merchandise from the West Virginia supplier to out-of-state points, where such solicitation takes place outside of West Virginia, are not liable for the tax on the commissions earned on such interstate sales.

BOT 6.29 Insurance Agents and General Agents. Persons engaged in business as insurance agents and general agents shall report the gross income derived from said business under the service classification, Item H, on the Business and Occupation Tax form. The gross income shall consist of commissions received for the service rendered and not the gross amount of premiums passing through the agency or collected by the agent.

Insurance companies which pay the State of West Virginia a tax upon premiums are exempt if said companies meet the requirements set forth in BOT 4.01 (a).

Agents and general agents whose contracts of employment make such agents employees of the insurance company are not subject to the Business and Occupation Tax. The decision as to whether or not an agent is an employee of the company shall be made by the Commissioner in each particular case. The circumstances and facts must be presented to the Commissioner for review. In every case, a copy of the contract of employment of the particular agent in question shall be submitted to the Commissioner for review.

BOT 6.30 Barbers and Beauticians. Persons engaged in business as barbers and beauticians shall report the gross income derived from said business under the service classification, Item H, on the Business and Occupation Tax form, without any deductions or any other expenses whatsoever. The entire gross income of the shop shall be reported without deducting commissions or shares of barbers or beauticians working in the shop.

BOT 6.31 Mail Carriers. Persons engaged in the business of transporting mail under contract or otherwise for the Post Office Department of the United States Government shall report the gross income derived therefrom under the service classification , Item H,

on the tax return.

Where a person who was awarded the original contract to perform this transporting service subcontracts the performance of this service to another, the person who was awarded the original contract shall report the gross income derived therefrom under the service classification, Item H, on the tax return. Also, the person who was awarded the subcontract shall report the gross income derived therefrom under the service classification, Item H, on the tax return.

Persons engaged in this type of business are independent contractors, and not employees of the United States Government or any of its instrumentalities and are not engaged in the performance of a governmental function.

(Effective February 1, 1964)

BOT 6.32 Newspaper Carriers. Persons engaged in the business of transporting newspapers under contract or otherwise for others shall report the gross income derived therefrom under the service classification, Item H, on the tax return.

Where a person who was awarded the original contract to perform this transporting service subcontracts the performance of this service to another, the person who was awarded the original contract shall report the gross income derived therefrom under the service

classification, Item H, on the tax return. Also, the person who was awarded the subcontract shall report the gross income derived therefrom under the service classification, Item H, on the tax return. (Effective February 1, 1964)

BOT 6.33 Laundry and/or Dry Cleaning. The term "laundry and/or dry cleaning business" applies to: (1) the business of operating a plant or establishment for laundering, cleaning, dyeing, pressing, and the incidental repair of such articles as clothing, linens, towels, curtains, draperies, rugs, etc., (2) a person who, under his own name operates a place of business or pick-up and delivery system for the collection and distribution of such articles, holding himself out to the public as performing such services even though such person owns no plant and contracts with another for a part or all of the services rendered. This does not apply, however, to a person who establishes himself or who acts as an agent for laundry and/or dry cleaning plants.

The term "serve yourself laundry business" means the business of providing laundry facilities for hire.

The term "laundry and/or dry cleaning agent" applies to any person who operates a place of business or pick-up and delivery system for the collection and distribution of articles to be laundered, cleaned, dyed, or pressed, acting as an agent for another or others, and acting as an independent contractor rather than as an employee.

For the purposes of the Business and Occupation Tax, persons engaged in the "laundry and/or dry cleaning business" and "serve yourself laundry business" as defined above, are taxable on the Business and Occupation Tax form under Item H, service classification, on the gross income of the business without any deductions on account of commissions allowed or paid "laundry and/or dry cleaning agents". If such commissions are deducted by a "laundry and/or dry cleaning agent" from gross collections, with only the balance appearing as an entry in books of account of the "laundry and/or dry cleaning business", said commissions must be added to the net figure remitted by the agent in the determination of the proper tax base of the business.

A person engaged in the "laundry and/or dry cleaning business" or "serve yourself laundry business", as defined above, performing work for another person engaged in the same business, is required, however, to report only the compensation received from the second person. The second person shall report the full amount received from his customers without any deduction of the amount paid the first person.

Whether or not a taxpayer is acting as a "laundry and/or dry cleaning agent" will be determined as follows:

(a) From the manner of billing customers and advertising. If the advertising on his truck, or otherwise, and/or

the billing to the customer, indicates that he is actually engaged in the "laundry and/or dry cleaning business", that is conclusive evidence that he is so engaged. If the advertising and/or billing indicates that a second person is performing the actual work, this is conclusive evidence that the taxpayer is engaged in the business of a "laundry and/or dry cleaning agent".

(b) From any contract entered into between the agent and the business if the terms of such contract are carried out in business practice.

For purposes of the Business and Occupation Tax "laundry and/or dry cleaning agents", as defined above, are taxable under Item H, the service classification, on the amount of gross commissions received from or withheld from the person actually engaged in the "laundry and/or dry cleaning business" or "serve yourself laundry business" as defined in the regulation. The tax will be imposed on the "agent" unless he can establish an employer-employee relationship with the "business".

The burden of reporting any change in the method of doing business from employer-employee to contractual relationship which may have the effect of shifting any part of tax liability will be primarily on the "business" and secondarily on the "agent" although

both are liable for reporting to this office such change.

Persons engaged in the business of furnishing any real or tangible personal property, which has a tax situs in this State, or any interest therein for hire, loan, lease, or otherwise, whether the return be in the form of rentals, royalties, fees or otherwise shall report the gross income of such business under the rental classification, Item I, on the Business and Occupation Tax form.

The term "tangible personal property", as used herein shall not include money or public securities.

BOT 6.34 Coin Operated Machines. Persons who own coin operated machines and who place same in a business establishment belonging to another person are considered to be rendering a service to the person in whose place of business such machines are located. The gross income derived by the owner from these machines shall be reported under the service classification, Item H, on the Business and Occupation Tax form; that is, the owner's proportionate share of the entire gross income of the machine shall be reported under that classification. The person in whose place of business the machine is located is considered to be receiving commissions and shall report his share of the gross income from the machine under the service classification, Item H.

A person who owns and operates a machine in his own place of business is considered to be engaged in the amusement business and the gross income derived from said machine shall be reported under the amusement classification, Item G.

BOT 6.35 Drilling Contractors. Persons engaged in the business of drilling contractors, e.g. wells shall report the gross income derived from said business under the service classification, Item H, on the Business and Occupation Tax form. Gross income shall include any oil or gas payments or production payments in lieu of cash.

The receipt by the contractor of an interest in consideration for the drilling of a well is considered as a contribution of capital by the contractor to the enterprise and is not considered as income to the contractor. Any other compensation received by the contractor from other interested lease holders represents income to the contractor and such compensation is subject to the tax.

BOT 6.36 Shooting Oil and Gas Wells. Persons engaged in the business of shooting oil and gas wells shall report their gross income from such activities on the Business and Occupation Tax form as follows:

When the nitro-glycerin and other explosives are not manufactured in West Virginia by the taxpayer, 75% of the income

received shall be reported on the Business and Occupation Tax form under Item C-2, wholesale classification, and the remaining 25% of such income shall be reported under Item H, service classification.

When the nitro-glycerin and other explosives are manufactured in West Virginia by the taxpayer, 75% of the income received shall be reported under Item B, manufacturing classification, and the remaining 25% of such income shall be reported under Item H, service classification.

Gross income received from the shooting of wells by the taxpayer, without the furnishing of the explosives, shall be reported under Item H, service classification.

Gross income received from sale of explosives and other materials, which are not manufactured by the taxpayer in West Virginia, and the shooting is performed by another, shall be reported under Item C-2, wholesale classification.

Gross income received from sale of explosives manufactured by the taxpayer in West Virginia, the shooting to be performed by another, shall be reported under Item B, manufacturing classification.

BOT 6.37 Garage and/or Automotive Business. Persons engaged in the business of operating a garage and/or the business of selling, servicing or repairing motor vehicles or house trailers (mobile homes) and parts used in the servicing or repairing thereof shall report the gross income derived from the sales of such tangible

personal property under the retail classification, Item C-1, on the tax return or under the wholesale classification, Item C-2, on the tax return, depending whether the sale is a retail or wholesale sale.

Selling at wholesale or wholesale sales shall mean and include: (1) Sales of any tangible personal property for the purpose of resale in the form of tangible personal property; (2) sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity which is subject to the tax imposed by the Business and Occupation Tax or Transportation Privilege Tax; (3) sales of any tangible personal property to the United States of America, its agencies and instrumentalities or to the State of West Virginia, its institutions or political subdivisions.

Persons engaged in the business of operating a garage and/or business of selling, servicing or repairing motor vehicles or house trailers (mobile homes) shall report the gross income derived from the performance of labor or service under the service classification, Item H, on the tax return. Examples of service or repair work: tire repairing, washing or greasing cars, labor for car repairs, etc.

Persons engaged in the business of operating a garage and/or business of selling, servicing or repairing motor vehicles or house trailers (mobile homes) are entitled to certain deductions and

exemptions in computing gross income subject to tax. These deductions and exemptions are set forth in BOT 4.02 and in BOT 6.22.

In all cases where the taxpayer claims a deduction or exemption, adequate records must be maintained to establish and support the deduction or exemption claimed. The Annual Business and Occupation Tax Return, page one, column three, must be completed showing the gross amount of deductions and/or exemptions claimed. The deductions and/or exemptions claimed on page one, column three, must be itemized in the space as provided on page two and/or page three of the Annual Return.

In those cases where the nature of the business requires the reporting of gross income under the retail, wholesale and service classifications, the taxpayer must maintain adequate records to establish the gross income properly subject to tax under the retail, wholesale and service classifications. Example: A repairs B's car for $100. A's invoice to B shows $40 for parts and shows $60 for labor. A must report the $40 as subject to tax under the retail or wholesale classification while the $60 for labor must be reported as subject to tax under the service classification.

In the above example, assuming that A failed to show a proper breakdown on his invoice to B for parts and labor in the repair job, the State Tax Commissioner will presume the entire gross income of $100 as subject to tax under the service classification. The

burden of proof will be upon the taxpayer to rebut this presumption. (Amended: Effective January 1, 1963)

BOT 6.38 Gasoline Service Stations. Persons engaged in the business of operating a gasoline service station shall report the gross income derived from the sale of all tangible personal property, including, but not limited to, the sale of gasoline, oil, tires, tubes, batteries, etc., under the retail classification, Item C-1, on the tax return.

Persons engaged in this type of business activity shall report the gross income derived from service charges, including, but not limited to, washing, greasing, repairing or any other type of service rendered to its customers, under the service classification, Item H, on the tax return.

Persons engaged in this type of business activity who have a vending machine or machines on the premises which are not owned by the service station operator and said vending machine dispenses soft drinks, cigarettes, candy, insurance or any other tangible personal property, the service station operator shall report the gross income derived from commissions from the vending machine under the service classification, Item H, on the tax return. Where the vending machine is owned by the service station operator, the service station operator shall report the gross income derived from

the sale of tangible personal property from the vending machine under the retail classification, Item C-1, on the tax return.

Persons engaged in this type of business activity who have tangible personal property for rent, e. g. trailers, etc., which are not owned by the service station operator, the service station operator shall report the gross income derived from commissions from the rental of the tangible personal property under the service classification, Item H, on the tax return.

Where the service station operator owns tangible personal property, e. g. trailers etc., and rents the same, the gross income derived therefrom shall be reported under the rental classification, Item I, on the tax return. Also, where the service station operator owns and rents real property, the gross income derived therefrom is subject to tax under the rental classification, Item I, on the tax return.

The taxpayer may deduct from gross income the federal and state excise tax on gasoline, diesel fuel and oil. The taxpayer may not deduct from gross income the federal excise tax on tires, accessories, etc. The deductions and exemptions for this type of business activity are set forth in detail in BOT 4.02.

In all cases where the taxpayer claims a deduction or exemption, adequate records must be maintained to establish and support the deduction or exemption claimed. The Annual Business and

Occupation Tax Return, page one, column three, must be completed showing the gross amount of deductions and/or exemptions claimed. The deductions and/or exemptions claimed on page one, column three, must be itemized in the space as provided on page two and/or page three of the Annual Return.

In those cases where the nature of the business requires the reporting of gross income under the retail, wholesale and service classifications, the taxpayer must maintain adequate records to establish the gross income properly subject to tax under the retail, wholesale and service classifications. Example: A repairs B's car for $100. A's invoice to B shows $40 for parts and shows $60 for labor. A must report the $40 as subject to tax under the retail or wholesale classification while the $60 for labor must be reported as subject to tax under the service classification.

In the above example, assuming that A failed to show a proper breakdown on his invoice to B for parts and labor in the repair job, the State Tax Commissioner will presume the entire gross income of $100 as subject to tax under the service classification. The burden of proof will be upon the taxpayer to rebut this presumption.

BOT 6.39 Rental and Royalty. Persons engaged in the business of furnishing any real or tangible personal property, which has a tax situs in this State, or any interest therein for hire, loan,

lease or otherwise, whether the return be in the form of rentals, royalties, fees or otherwise, shall report the gross income derived therefrom under the rental classification, Item I on the tax form.

The term "tangible personal property" as used herein, shall not include money or public securities.

Special directions applicable to any other activities in which the taxpayer is engaged will be furnished upon request.

BOT 6.40 Rental of Equipment. Persons engaged in the business of renting equipment without an operator for same shall report the gross income derived therefrom under the rental classification, Item I on the Business and Occupation Tax form.

Persons engaged in the business of renting equipment and furnishing the operator for the same on a charge per hour, per day, etc., shall report the gross income derived therefrom under the service classification, Item H on the Business and Occupation Tax form. However, in the event the gross income from such activity is subject to the Transportation Privilege Tax, the Business and Occupation Tax shall not apply.

Persons engaged in the business of furnishing any real or tangible personal property, which has a tax situs in this State, or any interest therein for hire, loan, lease or otherwise, whether the return be in the form of rentals, royalties, fees or otherwise

shall report the gross income derived therefrom under the rental classification, Item I on the Business and Occupation Tax form.

The term "tangible personal property", as used herein, shall not include money or public securities.

Gross income received from rental of equipment, as set forth hereinabove, which is received by a contractor as part of the consideration for the performance of a contract as defined in BOT 2.11, is taxable under the contracting classification, Item E on the Business and Occupation Tax form.

BOT 6.41. Leased Departments. The owner or operator, lessor, of the store or establishment in which leased departments are conducted may include in his return the gross income of the leased departments under the appropriate classification. If the tax is so reported and paid by the lessor, it shall not be necessary for the lessee, operator of the leased department, to file a return or pay tax on the gross income so included in the return of the lessor, owner or operator of the store. The lessor, owner or operator, shall indicate on the return or by rider attached thereto, the name of the lessee of any leased department so included in his return. The fact that the lessor reports and pays the tax does not relieve the lessee from liability for any deficiency.

If the lessor, owner or operator, of the store does not elect

to include the gross income of leased departments on his return, the lessee, operator of the leased department, shall file separate returns of the gross income of the business of such department under the appropriate classification.

The lessor in all cases shall report the rental income derived from the leased departments under the rental classification, Item I on the Business and Occupation Tax form.

The lessor, owner and operator, shall advise the Commissioner in writing as to the manner in which such return will be filed. After such notification, the lessor, owner or operator, shall not change his method of reporting without first having obtained in writing the approval of the Tax Commissioner for such change.

BOT 6.42 Small Loan and Industrial Loan. Persons engaged in the business of making loans of money, credit goods, or things in action, who because of such activity are required under the provisions of Chapter 47, Article 7A, West Virginia Code of 1931, as amended, to obtain a license from the West Virginia Commissioner of Banking, and persons engaged in business as an industrial loan company, shall report the gross income derived therefrom under the small loan and industrial loan classification, Item J on the Business and Occupation Tax form.

The measure of the tax for persons engaged in this type of business shall not include the return of capital or return of

principal in making loans of money, credit goods or things in action. Bad debts as defined in BOT 4.02 are not proper deductions for persons taxable under Item J on the Business and Occupation Tax form.

The term "gross income" is defined in BOT 2.05.

BOT 6.43 Accommodation Sales. The term "Accommodation Sales" includes only those sales for resale by persons regularly engaged in the business of making sales of the type of tangible personal property so sold to other persons engaged in the business of selling that type of tangible personal property where (1) the amount paid by the buyer does not exceed the amount paid by the seller to his vendor in the acquisition of the article and (2) the sale is made as an accommodation to the buyer to enable him to fill a bona fide existing order of a customer or to reimburse in kind a previous accommodation sale by the buyer to the seller; provided, that such accommodation sales must be incidental to the seller's principal business activity.

The "amount paid by the seller to his vendor" may under some circumstances include certain actual costs incurred by the seller and billed as such to the buyer in addition to the invoice cost of the article sold as an accommodation sale. The term "incidental to the seller's principal business activity" shall mean infrequent

in relation to the total volume of sales.

In computing the tax under the wholesale classification, there may be deducted from the reported gross amount so much as represents receipts from accommodation sales. Each seller claiming this deduction must retain sales and cost records sufficient to prove each individual accommodation transaction claimed. In the event the seller fails to keep sufficient sales and cost records to establish the nature of the transaction, no deduction will be allowed under this regulation.

(Effective January 1, 1963)

BOT 6.44 Sales Between Affiliates. Where sales are made between affiliated businesses, or under circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the Tax Commissioner shall determine the sales price to be reported by the taxpayer on the Business and Occupation Tax form, such sales price to correspond as nearly as possible to the sales price of similar products between non-affiliates.

BOT 6.45 Casual Sales. Sales are deemed to be casual sales when made by a person who is not engaged in the business of selling the type of property involved. Examples of casual sales are the

following:

1. Sale of a capital asset by a manufacturer, wholesaler or retailer;
2. Sale of any second hand property which is of a type not regularly sold by the taxpayer; e. g., sale of an automobile or radio by a plumber.
3. Sale of household furniture by a person who is not engaged in the business of selling; e.g., sale of a dining set by a lawyer.

On the other hand, the sale at retail by a manufacturer or wholesaler of an article of merchandise manufactured or handled by him is not a casual sale, even though he may make but one such sale.

Furthermore, persons who hold themselves out to the public as making sales at retail or wholesale are deemed to be engaged in the business of selling, and sales made by them of the type of property which they hold themselves out as selling, are not casual sales even though such sales are not made frequently.

BOT 6.46 Direct or "Drop" Shipments of Merchandise. Persons engaged in the business of selling tangible property at wholesale and retail in West Virginia frequently have occasion to take orders from customers, which orders are forwarded to an out-of-state manufacturer or jobber. The out-of-state manufacturer or jobber may then make

shipment direct from an out-of-state point to the West Virginia customer. The invoice, however, is made to the West Virginia seller who in turn bills his customer. While such shipments themselves are in interstate commerce, the sale from the West Virginia seller to his customer is strictly intrastate and the gross income of such sale must be included in the measure of the Business and Occupation Tax.

BOT 6.47 Opticians, Optometrists, Ophthalmologists and Oculists. Optometrists, ophthalmologists and oculists are not subject to the Business and Occupation Tax on fees and charges which are attributable to the rendition of professional services, such services including the furnishing of temples and frames fitted with prescription lenses prepared by and secured from opticians or optical laboratories.

Opticians are subject to the Business and Occupation Tax and are required to report their gross income on the Business and Occupation Tax form as follows:

(a) The wholesale value of eye glasses, lenses, or other articles manufactured, assembled, or prepared for sale in West Virginia by the taxpayer shall be reported under the manufacturing classification, Item B on the Business and Occupation Tax form.

(b) The gross income derived from the retail sales of eye glasses, lenses, or other articles manufactured, assembled, or prepared for sale by the optician shall be reported under the retail classification, C-1 on the form, and in addition thereto, the gross income shall be reported under the manufacturing classification, Item B on the form, as set forth in paragraph (a) above.

(c) The sales value of eye glasses, lenses, or other articles manufactured, or prepared for sale in West Virginia by the taxpayer and sold at wholesale to optometrists, ophthalmologists, oculists or to other opticians shall be reported only under the manufacturing classification, Item B on the form.

(d) The gross income of wholesale sales of merchandise not manufactured, assembled, or prepared for sale in West Virginia by the taxpayer shall be reported under the wholesale classification, Item C-2 on the form.

(e) The gross income from repair charges shall be reported under the service classification, Item H on the form. In the event tangible property is furnished in connection with the repair charges, the material used may be reported under the retail or wholesale classification, as the case may be, and the service charges may be reported

under the service classification. In order to report the service charges in above manner, however, the taxpayer must keep his records in such a way as to show separately the income received from the material sold and the income received from the service charges. If such records are not maintained, the entire amount billed to the customer shall be reported under the service classification.

BOT 6.48 Natural Gas Utilities Producing all or any Part of Their Gas Which is Sold as a Utility. Persons engaged in the business of selling gas as a utility are liable for the tax levied under Section 2d of the law, designated utility classification, and shall report under Item D-5 on the Business and Occupation Tax form the gross income from all sales made as a utility. In addition to other allowable deductions, persons producing natural gas and selling such produced gas as a utility are allowed to claim as an exemption under Item D-5, utility classification, the proportion of the production tax paid under Item A-4 that the amount of such production sold as a utility bears to the total production.

Utilities producing gas must report under Item A-4, the well-mouth value of the gas produced as set forth in the instructions to persons engaged in the business of producing gas.

Utilities engaged in the business of making non-utility

sales of tangible property shall report the gross income of such sales under Item C-1, retail classification, or Item C-2, wholesale classification, depending on whether the sales are retail or wholesale. However, utilities making non-utility sales of their own production to producers of natural resources, manufacturers, etc., for use or consumption in the purchaser's business are not required to report the income received from the sale of the produced gas under Item C-2, wholesale classification.

Other activities are to be reported under the classification on the Business and Occupation Tax form in which they fall as set forth below:

Persons engaged in any service business or calling not otherwise specifically classified under the Business and Occupation Tax Law, shall report the gross income of such business under Item H, service classification. Such income will include that from service, alterations, repairs, delivery charges for local deliveries made by the taxpayer, and other miscellaneous charges or receipts.

Persons engaged in the business of furnishing any real or tangible personal property (the term tangible personal property shall not include money or public securities) which has a tax situs in this State, or any interest therein, for hire, loan, lease or otherwise, whether the return be in the form of rentals, royalties, fees or otherwise (excluding interest and dividends) shall report the

gross income of such business under Item I, rents, royalties, etc.

Special directions applicable to any other activities in which the taxpayer is engaged will be furnished upon request.

BOT 6.49 Limestone or Sandstone. Persons engaged in the business of producing limestone or sandstone for sale or consumption, either directly or through the activity of others, shall in addition to being subject to tax under Section 2a of the law, production classification, be deemed manufacturers and are subject to tax under Section 2b of the law, manufacturing classification. The gross proceeds from the sale of the production shall be reported under the manufacturing classification, Item B on the Business and Occupation Tax form and the value of the limestone or sandstone produced at 35¢ a net ton shall also be reported under the production classification, Item A-5 on the Business and Occupation Tax form.

Persons engaged in the business of selling tangible property shall report the gross income derived from such sales under the retail classification, Item C-1 or under the wholesale classification, Item C-2, depending on whether the sales are retail or wholesale. A producer who sells limestone or sandstone at retail in West Virginia shall report the gross proceeds derived from the sale of such limestone or sandstone under the retail classification, Item C-1, in addition to the amount reported under the production classification,

Item A-5, and the value of the limestone or sandstone reported under the manufacturing classification, Item B.

A producer who sells limestone or sandstone at wholesale to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to report the value of the limestone or sandstone under the wholesale classification, Item C-2, but shall report the same under the production and manufacturing classification as set forth hereinabove.

BOT 6.50 Timber, Lumber and Pulpwood. Persons engaged in the timber, lumber and pulpwood businesses shall report the gross income derived therefrom in the following manner:

(a) Timber - Production. A person who owns timber on the stump and who produces by cutting the timber and who sells the same at wholesale shall report the entire gross proceeds derived from such wholesale sales only under the production of timber classification, Item A-6 on the Business and Occupation Tax form, regardless of whether such timber is sold on the ground or delivered to the mill.

(b) Timber and Lumber - Production and Manufacturing or Preparing for Sale. A person who owns timber on the stump and who produces by cutting the timber and who manufactures or

prepares for sale the timber by sawing, etc., it himself into lumber shall report the entire gross proceeds derived from the sale of such lumber under the manufacturing or preparing for sale classification, Item B on the Business and Occupation Tax form, and in addition shall report under the production of timber classification, Item A-6 on the Business and Occupation Tax form, twenty percent (20%) of the amount reported under the manufacturing or preparing for sale classification, Item B. It is to be noted that the amount reported under the production of timber classification, Item A-6, is twenty percent (20%) of the gross proceeds derived from the sale of the lumber manufactured or prepared for sale from timber owned and produced by the taxpayer.

(c) Pulpwood - Production and Manufacturing or Preparing for Sale. A person who owns timber on the stump and who produces by cutting the timber and who manufactures or prepares for sale the timber, which is to be used in the making of pulp, shall report the entire gross proceeds derived from the sale of the pulpwood under the manufacturing or preparing for sale classification, Item B, and in addition, shall report under the production of timber classification, Item A-6, fifty percent (50%) of the amount reported under the manufacturing or preparing for sale classification, Item B.

In cases involving timber to be used in the making of pulp, the amount reported under the production of timber classification,

Item A-6, is fifty percent (50%) of the gross proceeds derived from the sale of the pulpwood.

(d) Service. A person who does not own timber on the stump, and who never takes title to the same, and who produces by cutting the timber for the owner and/or who manufactures or prepares for sale the same into lumber or pulpwood and other products for consideration, shall report the gross income derived from the performance of services for the owner under the service classification, Item H.

(e) Owner who Hires Another to Produce and/or Manufacture or Prepare for Sale. A person who owns timber on the stump, but who hires another to produce by cutting the timber and/or who hires another to manufacture or prepare for sale the timber by sawing, etc., shall report gross income in the same manner as a person who owns, produces and/or manufactures or prepares for sale the timber into lumber as set forth in paragraph (b) above.

(f) Purchased Severed Timber - Manufacturing or Preparing for Sale. Where a person purchases severed timber and manufactures or prepares for sale such severed timber into lumber, he shall report the gross proceeds derived from the sale of the lumber manufactured or prepared for sale from purchased severed timber under the manufacturing or preparing for sale classification, Item B, and shall not be required to report under the production of timber classification, Item A-6, the twenty percent (20%) of the gross

proceeds derived from the sale of lumber manufactured or prepared for sale from purchased severed timber.

(g) Retail and/or Wholesale. A person who sells at retail or at wholesale timber, e.g. mine timber, etc., which he does not produce by cutting and which he does not manufacture or prepare for sale, shall report the gross income derived from such sale under the retail classification, Item C-1, or under the wholesale classification, Item C-2, as the case may be.

(h) Retail and/or Wholesale. A person who owns, produces and/or prepares for sale timber or lumber and the same is sold at retail, the gross income derived from such retail sale shall be reported under the retail classification, Item C-1, in addition to the amounts reported under the production of timber classification, Item A-6, and/or manufacturing or preparing for sale classification, Item B.

Where a person taxable under paragraph (b) above sells at wholesale timber or lumber, the gross income derived from such wholesale sale shall not be reported under the wholesale classification, Item C-2, but only under the production of timber classification, Item A-6, and the manufacturing or preparing for sale classification, Item B.

BOT 6.51 Manufacturing, Compounding or Preparing for Sale. Persons engaged in the business of manufacturing, compounding, or

preparing for sale, profit or commercial use, either directly or through the activity of others, in whole or part, any article, substance, commodity or electric power not produced by public utilities are subject to tax under the manufacturing, compounding, or preparing for sale classification, Item B on the Business and Occupation Tax form. The amount of the tax is to be equal to the value of the article, substance, commodity or electric power manufactured, compounded or prepared for sale as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except as otherwise provided.

The measure of this tax is the value of the entire product manufactured, compounded or prepared in this State for sale, profit or commercial use, <u>regardless of the place of sale or the fact that delivery may be made to a point outside the State</u>. There shall be no deductions for selling commissions, bad debts or any other expenses whatsoever in determining the value of the entire product.

In those instances in which the same person partially manufactures products within this State and partially manufactures such products outside the State the measure of his tax under the manufacturing classification shall be either of the following at the option of the taxpayer.

(a) That proportion of the sale price of the manufactured product that the payroll cost of manufacturing such product within West Virginia bears to the entire payroll cost of manufacturing the same product.

(b) The proportion of the sales value of the articles that the cost of operations in West Virginia bears to the full cost of manufacture of the article.

In determining the value of the entire product, the taxpayer must adhere to BOT 6.52, Rules for Determining the Value of Natural Resource Products or Articles Manufactured, which is applicable.

Persons engaged in the business of manufacturing, compounding or preparing for sale, profit or commercial use, any article, substance or commodity, title to which is vested in another, and the article, etc. is returned, not sold, by the manufacturer to the owner, the manufacturer shall report the gross income derived therefrom under the service classification, Item H, on the Business and Occupation Tax form. In those cases where the manufacturer is not vested with title to the article, etc., the manufacturer is rendering a service rather than manufacturing the same.

Persons engaged in the business of manufacturing, compounding or preparing for sale, profit or commercial use, any article, substance, commodity or electric power and the same is sold at retail

shall report the gross income derived from such retail sale under the retail classification, Item C-1, and the value of the same shall be also reported under the manufacturing, compounding or preparing for sale classification, Item B.

In those cases where a person manufactures, compounds or prepares for sale, profit or commercial use, any article, substance or commodity or electric power and the same is sold at wholesale, as defined in BOT 2.10, the gross income derived therefrom shall be reported only under the manufacturing classification, Item B, and not under both the manufacturing and wholesale classifications.

BOT 6.52 RULES FOR DETERMINING THE VALUE OF NATURAL RESOURCE PRODUCTS OR ARTICLES MANUFACTURED.

I. RULES APPLICABLE TO ALL PRODUCERS AND MANUFACTURERS.

A. Values Based upon Actual Gross Proceeds from Sales.

B. Equivalent Values in the Absence of Sales.

(1) Shipments made without sale.

(2) Use or consumption by producer or manufacturer.

C. Equivalent Values Where Sales are not Indicative of True Value.

(1) Sales made exclusively to affiliates.

(2) Sales made partially to affiliates.

II. RULES APPLICABLE TO PRODUCERS AND MANUFACTURERS OPERATING BOTH WITHIN THE STATE AND WITHOUT THE STATE.

A. Values Based Upon Actual Gross Proceeds From Sales.

B. Equivalent Values If Gross Proceeds Cannot Be Segregated.

C. Allocated Values In Case Of Partial Production.

III. MINIMUM VALUES.

A. Purchase of Like Products.

B. Values Used For Other Purposes.

I. RULES APPLICABLE TO ALL PRODUCERS AND MANUFACTURERS.

The following rules for determining the taxable value of natural resource products or articles manufactured within the state shall apply equally to producers and manufacturers engaged in such activities exclusively within the state and to those engaged in such activities both within and without the state. The values determined under these rules will be uniformly applied in computing the taxes imposed by the statute.

A. Values Based Upon Actual Gross Proceeds From Sales.

Whenever possible, and unless otherwise provided in these rules, the value of articles produced or manufactured within the state shall be determined by the actual gross proceeds derived from the sale thereof by the producer or manufacturer. Adjustment to such sales values for inventories at the beginning or end of the taxable year may be made or may not be made, as long as the method employed is

followed consistently throughout the years.

The gross proceeds from sales shall be those shown by the books of the producer or manufacturer, and the inventories, whenever used, shall be those employed in closing such books, except that the following adjustments shall be made in those instances where sales are made at retail rather than at the wholesale prices of the producer or manufacturer:

(1) There shall be deducted from the retail sales shown by the books the difference between the retail and wholesale prices of the producer or manufacturer for the items sold at retail. This deduction may also be made by using the customary discount granted by the producer or manufacturer to his wholesale customers.

(2) If all sales are at retail and no wholesale prices of the producer or manufacturer are available, any reasonable adjustments will be accepted, if such adjustment is based either upon the customary margin of gross profit enjoyed by retailers of like or similar items or if such adjustment is

based upon the actual retail selling expenses of the producer or manufacturer.

The gross proceeds from sales shall be those after discounts, allowances, returns and trade-ins, provided that the gross proceeds from subsequent sales of returns and trade-ins are included.

In order to determine the value within the state, there may be deducted from the gross proceeds of sales any outgoing freight charges actually paid by the producer or manufacturer, but no deduction will be allowed for expenses incurred by him through the use of his own equipment in transporting items produced or manufactured.

B. Equivalent Values In The Absence Of Sales.

Whenever the value of articles produced or manufactured cannot be determined by the actual gross proceeds from the sales by the producer or manufacturer, because he ships or transfers such products or articles without making sales thereof or because he uses or consumes such products or articles in his business, then the values shall be determined according to the following rules.

(1) Shipments made without sale.

Whenever products or articles manufactured within the state are shipped without sale to warehouses, branches or

other establishments maintained by the producer or manufacturer or any of his agents, the value of such products or articles manufactured within the state shall be determined, whenever possible, by the actual gross proceeds derived from the subsequent sales thereof by the producer, manufacturer or any of his agents, except that if such sales are made at retail the same adjustments as those outlined above shall be made.

Whenever shipments without sale are made to consignees or other bona fide purchasers of the producer or manufacturer, their value shall be determined by the actual gross proceeds of the subsequent sales as if such sales had been made at the time of shipment.

(2) Use or consumption by producer or manufacturer.

Whenever natural products or articles manufactured within the state are used or consumed by the producer or manufacturer in his business, whether within the state or without the state, whether in the same business or in an affiliated business, the values of such products or articles shall be determined by one of the following methods, but not necessarily in the order stated:

(a) By applying to the products or articles the wholesale list prices of the producer or

manufacturer.

(b) If no such list prices are available, by applying to the products or articles the average prices at which sales are made during the taxable year to regular customers of the producer or manufacturer.

(c) If no such sales are made or if the proceeds from such sales are relatively small and their average prices inconclusive, by applying to the products or articles the average market prices for products or articles of like quality or character obtained by other producers and manufacturers.

(d) If such market prices are not readily available, then values shall be determined by adding to the total production or manufacturing cost within the state the average markup realized by the producer or manufacturer on his products or, if necessary, by resorting to the average markup of other producers or manufacturers of such products or articles.

In all instances where products or articles are used or consumed at a point distant from the place of production or manufacturing, outgoing freight charges paid by the

producer or manufacturer will not be allowed as a deduction, unless due consideration has been given to them also in the method by which the values were determined; for example, if wholesale list prices, average selling prices or market prices used are f.o.b. and the producer or manufacturer pays the freight on shipments destined for use or consumption in his business, then such prepaid freight will not be an allowable deduction in arriving at a local sales value.

Which one of the above methods will be preferable depends entirely on the particular circumstances in each instance. In general, preference should be given to any method which can be applied with the least effort, without the necessity for burdensome calculations and for which the needed data are most readily available from the books and records of the producer or manufacturer, as long as such method will reflect as nearly as possible approximately true values of production or articles manufactured.

C. Equivalent Values Where Sales Are Not Indicative of True Value.

Whenever the actual gross proceeds from the sale of products or articles are not indicative of their true value, because such sales are made to affiliates of the producer or manufacturer or under other circumstances where a common interest exists between him and the purchaser, the following

rules shall be applied in determining values produced or manufactured. The same shall apply also to inter-departmental, inter-divisional or inter-company shipments which are not sales within the legal meaning of the word.

(1) Sales made exclusively to affiliates.

Whenever sales are made exclusively to affiliates the value of products or articles manufactured within the state shall be determined on the basis of the actual gross proceeds from the subsequent sale of such products or articles by the affiliate of the producer or manufacturer, except that in cases where such sales are made at retail the same adjustments as those outlined above shall be made.

If the gross proceeds from the sale of such products or articles cannot be segregated from those of other products or articles sold by the affiliate, but not produced or manufactured within the state, then the determination of values shall be made on the basis of the wholesale list prices or average selling prices of the affiliate or on the basis of average market prices or by resort to cost plus values in the same manner as outlined above in the rules for producers or manufacturers using or consuming products or articles manufactured within the State.

(2) Sales made partially to affiliates.

If sales are only partially made to affiliates and partially to regular customers of the producer or manufacturer, then values produced or manufactured shall be determined in the following manner.

If sales to affiliates are made on a discount basis from wholesale list prices to regular customers and such discounts to affiliates are separately accounted for on the books of the producer or manufacturer, then such discounts shall be disregarded and the values which are the measure of the tax shall be based upon the wholesale list prices without any reduction for such discounts to affiliates.

If sales to affiliates are not made on such discount basis or if such discounts to affiliates are not segregated on the books of the producer or manufacturer, then the value of that portion of the products or articles manufactured which has been sold to affiliates shall be determined by applying the wholesale list prices or average selling prices of the producer or manufacturer to regular customers, or by adding to the proportionate production or manufacturing cost of the products or articles sold to affiliates the actual markup shown by the proportionate cost of the sales to customers

and the gross proceeds derived from such sales. The latter method shall be used in all instances where sales or shipments to affiliates are being made on a cost basis or by reference to cost through the use of a cost plus basis.

II. RULES APPLICABLE TO PRODUCERS AND MANUFACTURERS OPERATING BOTH WITHIN THE STATE AND WITHOUT THE STATE.

The following rules for determining the taxable value of natural resource products or articles manufactured within the state shall apply only to producers and manufacturers who are engaged in such activities both within the state and without the state. The values determined under these rules will be uniformly applied in computing the taxes imposed by the statute.

(A) Values Based Upon Actual Gross Proceeds From Sales.

Whenever possible, and unless otherwise provided in these rules, the value of products or articles manufactured within the state shall be determined by the actual gross proceeds derived from the sale thereof by the producer or manufacturer, if such gross proceeds can be clearly segregated from the gross proceeds of products or articles not produced or manufactured within the state.

Such segregation may be made in a number of ways which will be acceptable whenever actual gross proceeds form the

basis for such segregation.

If the books of the producer or manufacturer clearly segregate the gross proceeds from the sale of products or articles manufactured within the state, totally or partially, then such gross proceeds shall be used in determining the value.

If the books of the producer or manufacturer do not segregate such gross proceeds, but clearly segregate the gross proceeds from the sale of various products or articles and any of those are produced or manufactured exclusively within the state, then the gross proceeds from the sale of such products or articles shall be used in determining their value.

If the books of the producer or manufacturer clearly segregate the gross proceeds from the sale of various products or articles, but such products or articles are not exclusively produced or manufactured within the state, being produced or manufactured in other states as well, then the values shall be determined by that portion of the gross proceeds which bears the same ratio to total gross proceeds which the number of units produced or manufactured within the state bears to the total number of units produced or manufactured both within and without the state.

Whenever the gross proceeds from sales are segregated on the books of the producer and manufacturer, but exclusions and deductions are not so segregated, then that portion of such exclusions and deductions shall be used in determining values which bears the same ratio to the total of such exclusions and deductions as the values determined to have been produced or manufactured within the state bear to the total gross proceeds.

(B) Equivalent Values If Gross Proceeds Cannot Be Segregated.

Whenever the actual gross proceeds derived from the sale of products or articles manufactured within the state cannot be segregated from the gross proceeds derived from the sale of products or articles manufactured without the state in any manner described above, then the values shall be determined by adding to the production or manufacturing cost within the state the markup based upon the difference between the total gross proceeds and the total production or manufacturing cost both within the state and without the state. The values so determined shall be the equivalent of that portion of the gross proceeds which bears the same ratio to the total gross proceeds as the production or manufacturing cost within the state bears to the total production or manufacturing cost both within and without the state.

Production cost, whenever used in these rules, shall mean only the cost of raw materials, productive labor and production or manufacturing overhead, but shall not be construed to include any general, selling or administrative expenses or any portion thereof, since this would be tantamount to an indirect deduction of such expenses not allowed to any other taxpayer.

(C) Allocated Values In Case Of Partial Production.

Whenever articles are only partially manufactured within the state and partially manufactured without the state, regardless of whether such partial production begins, ends or only passes through some process within the state, the rules contained herein shall be applied only to the extent that they do not conflict with the statutory formula for the allocation of gross proceeds to partial production within the state on the basis of payroll cost of manufacturing within the state to total payroll cost of manufacturing or on the basis of cost of operations within the state to the comparable total cost of operations both within and without the state. The option which the statute has granted to manufacturers as to articles only partially manufactured in this state is not intended to be limited by any of the rules herein.

III. MINIMUM VALUES.

Notwithstanding all rules outlined heretofore, certain minimum values shall be presumed to be the value of products or articles manufactured within the State, unless the producer or manufacturer makes a clear and convincing showing that such minimum values would be inequitable under his particular circumstances.

Such presumed minimum values shall be applied in all instances where, under the rules above, values would be determined otherwise than by reference to the actual gross proceeds from sales.

It shall be further presumed that products or articles manufactured within the state are of the highest quality of any products or articles of the same producer or manufacturer, unless they are shown to be of a different quality or character.

Under no circumstances shall values be presumed to be less than the actual cost of operations within the state.

(A) Purchases of Like Products.

Whenever a producer or manufacturer in addition to producing or manufacturing within the state purchases products or articles of like quality and character, whether within the state or without the state, then the highest price paid by him

during the taxable year for such products or articles shall be presumed to be their minimum value, unless the market conditions under which such price was paid are shown to have been abnormal and the resulting price in excess of true value.

(B) Values Used For Other Purposes.

Whenever a producer or manufacturer represents the value of products or articles manufactured within the state to be in excess of the value determinable under these rules or uses such excess value in computing his inventories, preparing his financial statements or otherwise for purposes other than determining his Business and Occupation Taxes in this state, then the values so represented or used during the taxable year shall be presumed to be the minimum value, unless they are shown to be incongruous.

This regulation became effective January 1, 1959, and supercedes any and all prior provisions inconsistent herewith.

BOT 6.53 Service Business or Calling. Persons engaged in any service business or calling not otherwise specifically taxed under the Business and Occupation Tax Law shall report the gross income derived therefrom under the service classification, Item H, on the Business and Occupation Tax form.

"Service business or calling" shall include all nonprofessional activities engaged in for other persons for a consideration, which

involve the rendering of a service as distinguished from the sale of tangible property, but shall not include the services rendered by an employee to his employer. This term shall include persons engaged in manufacturing, compounding or preparing for sale, profit, or commercial use, articles, substances, or commodities which are owned by another or others, as well as persons engaged as independent contractors in producing natural resource products for persons required to pay the tax imposed under the production classification, Section 2a of the Business and Occupation Tax Law.

(a) Services to Personal Property. Where a person renders a service to personal property belonging to others, e.g. mechanic repairing another's automobile, the gross income derived from the work or labor performed in rendering the service shall be reported under the service classification.

There are many cases where a person in rendering a service, furnishes or sells tangible personal property, e.g. parts used in automotive repairs. In such instances, the gross income derived from the rendition of the service, usually labor charges, is taxable under the service classification and the gross income derived from the furnishing or sale of tangible personal property is taxable under the retail or wholesale classification, as the case may be.

(b) Services to Real Property. Where a person agrees with another to furnish work or labor or material and work or labor on

a "time and material" basis, the gross income derived from the work or labor is taxable under the service classification and the gross income derived from the furnishing or sale of material is taxable under the retail or wholesale classification, as the case may be.

In all cases where the service rendered involves work or labor charged on an hourly basis, daily basis, footage basis, or other similar basis, whether the labor charges are for work rendered to personal or real property, the gross income shall be reported under the service classification.

Persons who furnish work or labor or material and work or labor to real property and the work or labor is not furnished on an hourly basis, daily basis, footage basis, or other similar basis the gross income derived therefrom is subject to tax under the contracting classification, BOT 6.56.

(c) Personal Services. Where a person renders personal services to another, the gross income derived therefrom shall be reported under the service classification, e.g. barbers.

(d) Professional Services. Persons who render professional services are exempt from the Business and Occupation Tax Law, e.g. attorneys, physicians.

* * *

In every case, the person taxed hereunder shall keep adequate records for the purpose of segregating and reporting the gross

income derived from the furnishing of work or labor and the gross income derived from the furnishing or sale of tangible personal property. If such person shall fail to maintain adequate records, the entire gross income shall be taxed under the service classification and the burden will be upon the taxpayer to show the proper segregation.

In those cases where a person reports gross income for Business and Occupation Tax purposes under the service, retail and/or wholesale classifications, the Consumers' Sales and Service Tax must be charged to the customer on the total invoice price or the customer shall furnish a duly executed exemption certificate in lieu of the sales tax.

Some examples of business which are subject to tax under the service classification, include, but are not limited to, the following: Barbers, beauticians, brokers, coal sales agents, credit bureaus, dry cleaners, hospitals, hotels, insurance agents, laundries, motels, parking lots, photographers, real estate agents, shoe repairs, window cleaners, etc. Some of the gross income derived from the above businesses also may be subject to tax under the retail and/or wholesale classification, as the case may be, if the rendition of the service involves the sale or furnishing of tangible personal property.

It is to be noted that a person engaged in any service business

or calling in West Virginia not otherwise specifically taxed under the Business and Occupation Tax Law is taxed under the service classification.

BOT 6.54 Floor Covering and Wall Covering. Persons engaged in the business of selling and/or installing floor covering and wall covering shall report the gross income derived therefrom in the following manner:

(a) Service - Labor and Material. Where a person agrees with another to furnish work or labor and material on a "time and material" basis, the gross income derived from the work or labor is taxable under the service classification, Item H on the Business and Occupation Tax form, and the gross income derived from the furnishing or sale of material is taxable under the retail, Item C-1, or wholesale, Item C-2, classification, as the case may be.

In cases where the work or labor is charged on an hourly basis, daily basis, footage basis or other similar basis, the gross income derived from the labor charges shall be reported under the service classification and the material under the retail or wholesale classification, as the case may be.

(b) Contracting - Labor and Material. Persons who furnish work or labor or material and work or labor and the work or labor is not

furnished on an hourly basis, daily basis, footage basis, or other similar basis, the gross income derived therefrom is subject to tax under the contracting classification, BOT 6.56, Item E on the Business and Occupation Tax form.

(c) Labor Only. Persons who furnish only work or labor on a cost plus fixed fee basis, lump sum basis, or other similar basis shall report the gross income derived therefrom under the contracting classification, Item E.

Persons who furnish only work or labor on an hourly basis, daily basis, footage basis, or other similar basis, shall report the gross income derived therefrom under the service classification, Item H.

(d) Material Only. Persons who sell or furnish material only and not work or labor shall report the gross income derived therefrom under the retail, Item C-1, or wholesale, Item C-2, classification, as the case may be.

* * *

A person taxed hereunder shall keep adequate records for the purpose of segregating where applicable and reporting the gross income derived from the furnishing of work or labor and the gross income derived from the furnishing or sale of tangible personal property. If such person shall fail to maintain adequate records, the entire gross income shall be taxed under the contracting classification and the burden will be upon the taxpayer to prove otherwise.

In those cases where a person reports gross income under the service, retail and/or wholesale classifications, the Consumers' Sales and Service Tax must be charged to the customer on the total invoice price or the customer shall furnish a duly executed exemption certificate in lieu of the sales tax.

In those cases where a person reports gross income under the contracting classification, the Consumers' Sales and Service Tax is not to be charged to the customer.

BOT 6.55 Plumbing, Heating, Air Conditioners, Vacuum Cleaners and Kitchens. Persons engaged in the business of selling and/or installing plumbing fixtures, heating fixtures, central air conditioning systems, central vacuum cleaning systems and built-in kitchens, shall report the gross income derived therefrom in the following manner:

(a) Service - Labor and Material. Where a person agrees with another to furnish work or labor and material on a "time and material" basis, the gross income derived from the work or labor is taxable under the service classification, Item H on the Business and Occupation Tax form, and the gross income derived from the furnishing or sale of material is taxable under the retail, Item C-1, or wholesale, Item C-2, classification, as the case may be.

In cases where the work or labor is charged on an hourly basis,

daily basis, footage basis or other similar basis, the gross income derived from the labor charges shall be reported under the service classification and the material under the retail or wholesale classification, as the case may be.

(b) Contracting - Labor and Material. Persons who furnish work or labor or material and work or labor and the work or labor is not furnished on an hourly basis, daily basis, footage basis, or other similar basis, the gross income derived therefrom is subject to tax under the contracting classification, BOT 6.56, Item E on the Business and Occupation Tax form.

(c) Labor only. Persons who furnish only work or labor on a cost plus fixed fee basis, lump sum basis, or other similar basis shall report the gross income derived therefrom under the contracting classification, Item E.

Persons who furnish only work or labor on an hourly basis, daily basis, footage basis or other similar basis, shall report the gross income derived therefrom under the service classification, Item H.

(d) Material Only. Persons who sell or furnish material only and not work or labor shall report the gross income derived therefrom under the retail, Item C-1, or wholesale, Item C-2, classification, as the case may be.

* * *

A person taxed hereunder shall keep adequate redords for the purpose of segregating where applicable and reporting the gross income derived from the furnishing of work or labor and the gross income derived from the furnishing or sale of tangible personal property. If such person shall fail to maintain adequate records, the entire gross income shall be taxed under the contracting classification and the burden will be upon the taxpayer to prove otherwise.

In those cases where a person reports gross income under the service, retail and/or wholesale classifications, the Consumers' Sales and Service Tax must be charged to the customer on the total invoice price or the customer shall furnish a duly executed exemption certificate in lieu of the sales tax.

In those cases where a person reports gross income under the contracting classification, the Consumers' Sales and Service Tax is not to be charged to the customer.

BOT 6.56 Contracting. Persons engaged in the business of furnishing of work, or both materials and work, in the fulfillment of a contract, either written or oral, 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 are subject to tax under the contracting classification, Item E, on the Business and Occupation

tax form.

(a) Prime Contractor. A "prime contractor" or "general contractor" is one who furnishes work or both materials and work and contracts directly with the owner or another under expressed or implied contract, under which the prime contractor may furnish work or both materials and work himself or sublet portions thereof.

The prime contractor shall report the entire gross income of the original contract and any amendments thereto under the contracting classification, Item E, even though the prime contractor may have executed a contract(s) with a subcontractor(s) for a portion of the original contract.

(b) Subcontractor. A "subcontractor" is one who has contracted with the prime contractor for the furnishing of all or any part of the work or both materials and work which the prime contractor has himself contracted to perform.

The subcontractor shall report under the contracting classification the entire gross income derived from his subcontract, even though the prime contractor has reported the entire gross income of the original contract.

(c) Subcontractor of Subcontractor. A person who contracts with a subcontractor for the furnishing of all or any part of the work or both materials and work in the fulfillment of a subcontract is also a subcontractor.

In those cases where the subcontractor has executed a contract with another, the subcontractor of the subcontractor shall report the gross income derived therefrom under the contracting classification.

(d) Gross Income. The term "gross income" means the gross receipts of the taxpayer received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts by reason of the investment of the capital of the business engaged in, including rentals, royalties, fees or other emoluments however designated and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties, interest or discount paid or any other expense whatsoever.

(e) Contracts-Turnkey Job, Cost Plus Fixed Fee, Lump Sum or Other Similar Basis. Persons engaged in the contracting business shall report the entire gross income derived from a turnkey job contract, cost plus fixed fee contract, lump sum contract, or other contracts having a similar basis under the contracting classification.

The measure of the tax under the contracting classification is gross income which is defined in paragraph (d) hereinabove. It includes all items of cost where the contractor has incurred a

liability, either as principal or as agent for the owner or another, for payment thereof.

The cost of materials and/or the cost of labor can only be exempted from the measure of the tax in those cases where the vendors and/or workmen may not look to the contractor for payment of the materials and/or labor. In those cases where the contractor contends that he has not incurred a tax liability because he acted solely as agent for the owner or another, the burden of proving the alleged agency relationship shall be upon the contractor.

(f) Arm's Length Transactions. In cases where the contractor enters into a separate contract for the furnishing of materials by the contractor and a separate contract for erection of such materials by the contractor, the gross income from both contracts is taxable under the contracting classification, unless it can be proved by the contractor that passage of title of the materials was not dependent upon the erection of the materials by the contractor and that the sale of such materials is, in fact, a separate and distinct transaction, taxable under Section 2c of the Business and Occupation Tax Law, as a retail or wholesale sale, as the case may be. The contract to furnish materials shall not be considered a separate and distinct transaction from the contract to erect the same, unless it is established by the contractor to be a

complete arm's length transaction with no dependency existing between the contract for materials and the contract for erection.

The burden of proving any alleged arm's length transaction shall be upon the contractor.

(g) Purchase Orders. A separate purchase order for the furnishing of work or labor and a separate purchase order for the furnishing of materials which constitute the contract(s) between the parties shall be treated in the same manner as set forth in paragraph (f) above.

(h) Other Contracting Activities. The term "contracting" shall also include those persons engaged in the business of the moving of earth or clearing of land or clearing or cutting rights of way or razing, demolishing or moving buildings or structures. The gross income derived from such activities is also subject to tax under the contracting classification.

Persons engaged in the business of clearing or cutting rights of way shall report the gross income derived therefrom under the contracting classification, but the gross income from the maintenance thereafter of such rights of way shall be reported under the service classification.

(i) Contract for Work or Labor Only. Persons who furnish only work or labor on a turnkey job contract, cost plus fixed fee contract, lump sum contract, or other contracts having a similar basis

shall report the gross income derived therefrom under the contracting classification.

Persons who furnish only work or labor on an hourly basis, daily basis, footage basis or other similar basis, shall report the gross income derived therefrom under the service classification, as set forth in detail in BOT 6.53.

(j) Contract for Material Only. Persons who sell or furnish material only shall report the gross income derived therefrom under the retail or wholesale classification, as the case may be.

(k) Speculative Builder. As used herein the term "speculative builder" means one who constructs improvements upon real estate owned by him for sale or rental. The gross income derived by the speculative builder from the sale of real property upon which the speculative builder has constructed improvements, e.g. buildings, shall be reported under the retail classification, Item C-1. The sales price is the measure of the tax. A speculative builder is deemed to be the ultimate consumer of all supplies, materials or equipment used in the construction of buildings or the improvement of real property. Therefore, speculative builders must pay Consumers' Sales and Service Tax upon all supplies, materials, etc., purchased by them and services rendered for them. The Use Tax is applicable to their purchases made from outside of West Virginia.

(l) Professional Services. Professional services, e.g. architectural fees, are not subject to the Business and Occupation Tax. However, in those cases where professional services are rendered to the contractor, as part of the contract, the fees for such professional services are not excludable by said contractor in reporting his gross income under the contracting classification.

(m) Rental of Equipment, etc. Persons engaged in the contracting business who rent to others tangible personal property, e.g. equipment, or real property shall report their gross income derived therefrom under the rental and royalties classification, Item I.

(n) Reporting of Gross Income. All gross income received, whether on a partial or final payment, by the contractor during a particular tax period shall be reported on the tax return for that period. The reporting of gross income and the payment of tax due should not be delayed until completion of the contract.

(o) Contracts with State or Political Subdivision - Final Settlement. All state, county, district and municipal officers and agents making contracts on behalf of the State of West Virginia or any political subdivision thereof shall withhold payment in the final settlement of such contracts until the receipt of a certificate from the Commissioner to the effect that all taxes levied or accrued under the Business and Occupation Tax Law against the

contractor have been paid.

Any official violating this section shall be guilty of a misdemeanor and, on conviction thereof, shall be fined not more than one thousand dollars, or imprisoned not exceeding one year in the county jail, or shall be subject to both said fine and imprisonment, in the discretion of the court. (Chapter 11, Article 13, Section 16, West Virginia Code of 1931, as amended.)

Upon request, the Commissioner will provide the necessary forms for compliance with the above provisions.

(p) Nonresident Contractor - Final Settlement. Any person, firm, or corporation contracting with a nonresident person, firm or corporation engaged in a business or service taxed under the Business and Occupation Tax Law shall withhold payment in sufficient amount to cover taxes assessed by this article in the final settlement of such contracts until the receipt of a certificate from the Commissioner to the effect that all taxes levied and accrued under the Business and Occupation Tax Law against the contractor have been paid.

If any person, firm or corporation shall fail to withhold as provided herein he shall be personally liable for the payment of all such taxes, and the same shall be recoverable by the Commissioner by appropriate legal proceedings. (Chapter 11, Article 13, Section 16a, West Virginia Code of 1931, as amended.)

Upon request, the Commissioner will provide the necessary forms for compliance with the above provisions.

* * *

In those cases where the contractor reports gross income under the service, retail and/or wholesale classifications, the contractor shall charge and collect the Consumers' Sales and Service Tax or a duly executed exemption certificate shall be furnished to the contractor in lieu of the sales tax.

In those cases where the contractor reports gross income under the contracting classification, the Consumers' Sales and Service Tax is not to be charged and collected by the contractor.

The contractor is not required to pay the Consumers' Sales and Service Tax on the materials, supplies, etc. purchased by him and directly used in his contracting business.

BOT 6.57 Coal. Persons engaged in the coal business shall report the gross proceeds of sale or gross income derived therefrom in the following manner:

(a) Production. Persons engaged in the business of producing coal for sale, profit or commercial use shall report the gross proceeds derived therefrom under the production of coal classification, Item A-1 on the Business and Occupation Tax form.

The measure of the tax is the value of the entire production in this state, regardless of the place of sale or the fact that the

delivery may be made to points outside the State.

In determing the value, the taxpayer must adhere to BOT 6.52, Rules for Determining the Values of Natural Resource Products or Articles Manufactured, which is applicable.

The Tax Commissioner shall determine the person who is the actual producer of coal from the substance of the agreement or agreements between the parties contracting for the mining or severance of coal, irrespective of whether such an agreement or agreements shall be oral or in writing. The burden of proof as to the true relationship between the parties shall be upon the individual taxpayer. In making the determination of the person who is the actual producer of coal the Commissioner shall consider, in addition to the substance of the agreement or agreements between the parties, other elements which shall include, but not be limited to the following:

1. That the person is obligated to pay to the owner of the coal in place a royalty after severance therecf;

2. That the person owns coal in place or has under lease agreement the exclusive right to sever or mine, or caused to be severed or mined, by sub-lease or otherwise, the coal and/or owns or controls the only tipple or tipples from which it is economically feasible to process or load the coal for delivery to purchasers;

3. That the person owns the coal in place or has the exclusive right to sever or mine or cause to be severed or mined, the coal, by sub-lease or otherwise, shall be deemed to have title to the coal;

4. That the person claims production depletion allowance for mined or severed coal;

5. That a person may be determined to be the producer of coal irrespective of whether the agreement between the contracting parties is oral or in writing;

6. That the person is the beneficiary of an exclusive purchase agreement which is contained in a sub-lease for coal, whether such sub-lease be oral or in writing.

* * *

It is immaterial whether the gross proceeds are paid to the producer or his agent or employee. The fact that the agent may guarantee the credit of the buyer does not alter his agency status. The commission or other remuneration realized by the agent is part of the producer's expense of doing business and is not deductible from the tax base.

Out-going freight charges and transportation charges of coal produced and/or prepared for sale in West Virginia may be deducted from the gross proceeds derived from the sale of such coal, provided that the seller has paid such freight and/or transportation charges.

A person who produces coal and does not sell the same, but uses or consumes it in his business within or without the State shall report the value of the same under the production of coal classification, Item A-1. In determining the value of the coal, the taxpayer must adhere to BOT 6.52, Rules for Determining the Value of Natural Resource Products or Articles Manufactured, which is applicable.

Where the relationship between the producer of the coal and the purchaser thereof is such that the gross proceeds derived from the sale of the coal are not indicative of the true value of the coal, the amount to be reported shall be the value of the coal as prescribed in BOT 6.52, Rules for Determining the Value of Natural Resource Products or Articles Manufactured, which is applicable.

(b) Service - Contract Mining. The Tax Commissioner shall determine, from the substance of the agreement or agreements between the parties contracting for the mining or severance of coal, irrespective of whether such an agreement or agreements shall be oral or in writing, the person who is performing a service in the mining or severance of coal. The gross income derived from this activity shall be reported under the service classification, Item H, on the Business and Occupation Tax form. The burden of proof as to the true relationship between the parties shall be upon the individual taxpayer. In making the determination of the person who is performing a service in the mining or severance of coal, the

Commissioner shall consider, in addition to the substance of the said agreement or agreements between the parties, other elements which shall include, but not be limited to, the following:

1. That the person is not obligated to pay to the owner of the coal in place a royalty after severance thereof;

2. That the person does not own the coal in place or does not have the exclusive right to sever or mine or cause to be severed or mined, by sub-lease or otherwise, the coal;

3. That the person does not claim production depletion allowance for the mined or severed coal;

4. That the person mining or severing the coal is doing so under oral agreement or agreements only; and

5. That the person is obligated to deliver all or any portion of the mined or severed coal to the beneficiary of an exclusive purchase agreement, which agreement is contained in a sub-lease for such coal.

A person who makes charges to the producer or another for preparing coal for sale is deemed to be engaged in a service business and shall report the gross income from such charges under the service classification, Item H.

(c) Manufacturing or Preparing for Sale. Persons engaged in the business of manufacturing, compounding, or preparing for sale, profit or commercial use, either directly or through the activity

of others, in whole or part, any article, substance or commodity are subject to tax under the manufacturing, compounding, or preparing for sale classification, Item B on the Business and Occupation Tax form. The amount of the tax is to be equal to the value of the article, substance or commodity manufactured, compounded or prepared for sale as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same.

The measure of this tax is the value of the entire product manufactured, compounded or prepared in this State for sale, profit or commercial use, regardless of the place of sale or the fact that delivery may be made to a point outside the State.

In determining the value of the entire product, the taxpayer must adhere to BOT 6.52, Rules for Determining the Value of Natural Resource Products or Articles Manufactured, which is applicable.

In those instances in which the same person partially manufactures products within this State and partially manufactures such products outside the State, the measure of the tax is as prescribed in BOT 6.52, Rules for Determining the Value of Natural Resource Products or Articles Manufactured, which is applicable.

Persons engaged in the business of buying coal from others and preparing for sale, e.g. screening, crushing, grading, washing, oiling, or otherwise, such coal in West Virginia shall report the gross

proceeds derived therefrom under the manufacturing, compounding, or preparing for sale classification, Item B.

Persons engaged in the business of mining and severing coal outside of West Virginia but who prepare for sale, e. g. screening, crushing, grading, washing, oiling, or otherwise, such coal within West Virginia shall report the gross proceeds derived therefrom under the manufacturing, compounding, or preparing for sale classification, Item B.

Where a person taxable under paragraph (a) hereinabove, manufactures, compounds or prepares for sale the coal produced into a by-product, e. g. coke, the value of the coal produced shall be reported under the production of coal classification, Item A-1, and in addition, the value of the by-product shall be reported under the manufacturing, compounding or preparing for sale classification, Item B.

(d) Retail - Wholesale. Persons engaged in the business of selling tangible property shall report the gross income of such sales under the retail classification, Item C-1, or under the wholesale classification, Item C-2 on the Business and Occupation Tax form, depending on whether the sales are retail or wholesale. A producer who sells coal at retail e.g. house coal to employees, in West Virginia shall report the gross income from the retail sale of such coal under the retail classification, Item C-1, and in addition,

shall report the value of the coal under the production of coal classification, Item A-1.

However, a producer who sells coal at wholesale to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to report the gross income from the wholesale sale of the coal under the wholesale classification, Item C-2, but shall report only under the production of coal classification, Item A-1.

Examples of retail sales: Sales to employees or others of explosives, dynamite caps, mining supplies, etc.

(e) Rental and Royalty. Persons engaged in the business of furnishing any real property or tangible personal property which has a tax situs in this state, which shall include coal in place, or any interest therein, for hire, loan, lease or otherwise, whether the return be in the form of rents, royalties, fees or otherwise, shall report the gross income of such business under the rental and royalty classification, Item I on the Business and Occupation Tax form.

The term "tangible personal property" as used herein, shall not include money or public securities.

Example: A leases coal lands to B and B agrees to pay royalty of 30¢ per ton to A. Later B subleases to C and C agrees to pay

royalty of 40¢ per ton to B.

A reports royalty of 30¢ per ton and B reports royalty of 40¢ per ton under Item I.

BOT 6.58 Receipts From Sales to or Services for Federal and State Governments and Their Subdivisions. Sales made to or services rendered for the State and Federal Governments or any of their instrumentalities or subdivisions are not exempt from Business and Occupation Tax.

WEST VIRGINIA ADMINISTRATIVE REGULATIONS
STATE TAX COMMISSIONER

Chapter 11-13
(1964)

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