

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

Form #2

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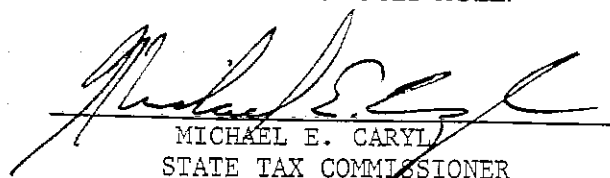
**NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE**

AGENCY: TAX DEPARTMENT TITLE NUMBER: 110  
RULE TYPE: LEGISLATIVE; CITE AUTHORITY W.VA. CODE §§ 29A-3-15 & 11-10-5  
AMENDMENT TO AN EXISTING RULE: YES  NO   
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 15 (Repealed and Reenacted)  
TITLE OF RULE BEING AMENDED: CONSUMERS SALES AND SERVICE TAX AND  
USE TAX  
IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: \_\_\_\_\_  
TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON JULY 31, 1987 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

STATE TAX COMMISSIONER  
WW-300  
STATE CAPITOL  
CHARLESTON, WV 25305

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

  
MICHAEL E. CARYL  
STATE TAX COMMISSIONER

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

BRIEF SUMMARY OF PROPOSED RULE

CONSUMERS SALES AND SERVICE TAX  
AND  
USE TAX

The current regulations governing the consumers sales and service and the use tax are repealed and reenacted by this emergency legislative regulation. These emergency regulations incorporate the many changes in the referenced taxes, such changes being the result of S.B. 536 and S.B. 760, both of which were passed in the 1987 Legislature.



State Tax Department  
of West Virginia

Charleston 25305

ARCH A. MOORE, JR.  
GOVERNOR

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MICHAEL E. CARYL  
COMMISSIONER

July 1, 1987

Honorable Ken Hechler  
Secretary of State  
State of West Virginia  
Charleston, WV 25305

Dear Mr. Hechler:

Under the authority of W. Va. Code §§ 29A-3-15 and 11-10-5, the Tax Department is hereby filing in the State Register the attached emergency legislative regulations for the Consumers Sales and Service Tax and Use Tax.

Also attached are Notice Of A Comment Period On A Proposed Rule and Notice Of An Emergency Rule. The public comment period will end at 5:00 p.m., July 31, 1987.

Very truly yours,

  
Michael E. Caryl  
State Tax Commissioner

jm/ss  
Attachments

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EMERGENCY  
WEST VIRGINIA LEGISLATIVE REGULATIONS  
STATE TAX DEPARTMENT  
TITLE 110  
SERIES 15  
1987

Filed: July 1, 1987

CONSUMERS SALES AND SERVICE TAX  
AND  
USE TAX

EMERGENCY  
WEST VIRGINIA LEGISLATIVE REGULATIONS  
STATE TAX DEPARTMENT  
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CONSUMERS SALES AND SERVICE TAX  
AND  
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§ 110-15-1. General.

1.1 Type of Regulation. - These regulations are emergency legislative regulations as defined in W. Va. Code §§ 29A-1-2(d) and 29A-3-15.

1.2 Scope. - These emergency legislative regulations explain and clarify the West Virginia Consumers Sales and Service Tax, as stated in W. Va. Code § 11-15-1 et seq., and the West Virginia Use Tax, as stated in W. Va. Code § 11-15A-1 et seq.

1.3 Authority. - These emergency legislative regulations are issued under the authority of W. Va. Code § 29A-3-15 and W. Va. Code § 11-10-5.

1.4 Filing Date. - These emergency legislative regulations repeal the Consumers Sales and Service Tax and Use Tax Regulations, Series XV and XV-A, which were filed in 1973, amended in 1979 and refiled December 29, 1982. These emergency legislative regulations become effective immediately upon filing.

1.5 Citation. - These emergency legislative regulations may be cited as 110 C.S.R. 15, § \_\_\_\_\_ (1987).

§ 110-15-1a. Legislative Findings.

It is the intent of the Legislature that the West Virginia Consumers Sales and Service Tax imposed by the provisions of W. Va. Code § 11-15-1 et seq. and the West Virginia Use Tax imposed by the provisions of W. Va. Code § 11-15A-1 et seq. be complementary laws and wherever possible be construed and applied to accomplish that intent as to the imposition, administration and collection of such taxes. To facilitate this intent, regulations for the sales and service tax and for the use tax are combined in these regulations.

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

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

includes any purposeful revenue generating activity in this State.

2.2 "Casual and occasional sales not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character" is intended to restrict to a minimum the number of revenue-generating events held by organizations qualified under either Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or Section 501(c)(4) of the Internal Revenue Code of 1986, as amended, which shall be exempt from the imposition of the consumers sales and service tax. The terms "casual" and "occasional" are to be construed synonymously, and when used in reference to the sales and service tax and in conjunction with the phrase "not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character," the phrase will have the effect of limiting the applicable exemption to similar types of sales which occur infrequently. Sales of the same or similar products or services which occurs more than four times in a twelve-month interval are not "casual or occasional sales." An example of a casual or occasional sale is the Annual Girl Scout Cookie Sale.

2.3 "Church," as used in these regulations, shall refer to an individual parish, congregation or like subgroup of an organized religion, denomination, sect or religious society which is exempt from federal income taxes under 26 U.S.C. §§ 501(c)(3) or 501(c)(4).

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

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

2.6 "Contracting" means the furnishing of work, or both materials and work, in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for removal or demolition of a building or structure, or any part thereof, or for the alteration, improvement or development of real property. For purposes of this definition, the term "structure" shall include, but not be limited to, everything built up or composed of parts joined together in some definite manner and attached to real property, or which adds utility to a particular parcel of property and is intended to remain there for an indefinite period of time.

2.7 "Directly used or consumed" in the activities which occur in this State which are contracting, manufacturing, transportation, transmission, communication or the production of natural resources shall mean used or consumed in those activities or operations which constitute an integral and essential

part of such activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to such activities.

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

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

2.7.1.2 Causing a direct physical, chemical or other change upon property undergoing manufacturing production or production of natural resources or which is the subject of contracting activity;

2.7.1.3 Transporting or storing property undergoing transportation, communication, transmission, manufacturing production, or production of natural resources or which is the subject of contracting activity;

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

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

2.7.1.6 Directly and physically recording the flow of property undergoing transportation, communication, transmission, manufacturing production or production of natural resources or which is the subject of contracting activity;

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

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

2.7.1.9 Controlling or otherwise regulating atmospheric conditions required for transportation, communication, transmission,

manufacturing production or production of natural resources or contracting activity;

2.7.1.10 Serving as an operating supply for property undergoing transmission, manufacturing production or production of natural resources or which is the subject of contracting activity or for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources or contracting activity;

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

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

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

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

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

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

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

2.7.1.13.e "Noise pollution" means the intensity, duration and character of sounds which exceeds standards developed by the state environmental protection agency.

2.7.1.13.f The exemption applies to the gross proceeds from the sales of all devices or facilities (and all identifiable components thereof or materials for use therein) and the rendering of taxable services acquired primarily for the control, reduction or elimination of air, water, or noise pollution and the gross proceeds from the sale of all identifiable components of or materials used or intended for use in structures built primarily for the control, reduction or elimination of air, water, or noise pollution.

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

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

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

2.7.2.1 Heating and illumination of office buildings;

2.7.2.2 Janitorial or general cleaning activities;

2.7.2.3 Personal comfort of personnel;

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

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

2.7.2.6 An activity or function incidental or convenient to transportation, communication, transmission, manufacturing production

or production of natural resources or contracting activity, rather than an integral and essential part of such activity.

2.8 "Drugs" includes all sales of drugs or appliances to a purchaser, upon prescription of a physician or dentist and any other professional person licensed to prescribe.

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

2.10 "Isolated transaction" means a transaction or event in which tangible personal property is sold, transferred, offered for sale or delivered by the owner thereof or by his representative. In order to qualify as an isolated transaction, the seller may not be in the business of selling the type of tangible personal property which is the subject of the transaction. The isolated transaction may be in the form of a single transaction, or a series of individual transactions which would be an event. An example of a single transaction would be the sale of a boat or an individual's furnishings. An example of a series of transactions comprising an event would be a yard sale. Whether as separate transactions or as events, or as a combination of the two, a person may hold no more than four isolated transactions in any twelve month period. Additionally, an event may not be longer than 48 hours in duration.

2.11 "Lease" includes rental, hire and license.

2.12 "Manufacturing" means a systematic operation or integrated series of systematic operations engaged in as a business or segment of a business which transforms or converts tangible personal property by physical, chemical or other means into a different form, composition or character from that in which it originally existed.

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

2.14 "Personal service" includes those services:

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

2.14.2 Rendered to the person of an individual without, at the same time, selling tangible personal property, such as nursing, barbering, shoe shining, manicuring and similar services.

2.14.3 "Personal services" shall mean and include, but shall not be limited to, barbering, manicuring, hair setting, washing and dyeing, nursing, massaging, shoe shining, et cetera. Services to be personal must be done in person without the intervention of another and must be rendered to the person of an individual without, at the same time, selling tangible personal property.

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

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

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

2.18 "Purchaser" means a person who purchases tangible personal property or a taxable service subject to either the sales and service tax or the use tax.

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

2.20 "Retailer" means and includes every person or vendor engaging in the business of selling, leasing or renting tangible personal property or dispensing taxable services for use within the meaning of the use tax statute, regardless of whether the purchaser is a member of the general public or a person engaged in business, and every person or vendor engaging in the business of selling, at auction, tangible personal property owned by the person or others for use in

this State: Provided, That when in the opinion of the Tax Commissioner it is necessary for the efficient administration of the use tax to regard any salesmen, representatives, truckers, peddlers or canvassers as the agents of the dealers, distributors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers or persons, the Tax Commissioner may so regard them and may regard the dealers, distributors, supervisors, employers, or persons as retailers.

2.21 "Retailer engaging in business in this State" or any like term, unless otherwise limited by federal statute, means and includes but is not limited to any retailer having or maintaining, occupying or using, within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent (by whatever name called) operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this State pursuant to W. Va. Code § 31-1-49.

2.22 "Sale," "sales" or "selling" means for purposes of the use tax any transaction resulting in the purchase of tangible personal property or taxable services from a retailer or vendor, and for purposes of the sales and service tax includes any transfer of the possession or ownership of tangible personal property for a consideration, including a lease or rental, when the transfer or delivery is made in the ordinary course of the transferor's business and is made to the transferee or his agent for consumption or use or any other purpose. This term embraces renting or leasing, conditional sales contracts, leases with options to purchase, and contracts under which possession of property is given to the purchaser but title is retained by the vendor or retailer as security for payment of purchase price. This term does not include an isolated transaction in which tangible personal property or a service is sold, transferred, offered for sale, or delivered by the owner thereof or by his representative for the owner's account, such sale, transfer, offer for sale or delivery not being made in the ordinary course of the owner's business activities. Repeated sales of tangible personal property or services, or any combination thereof will not be deemed to be an isolated transaction.

2.23 "Seller" means a retailer and vendor, and includes every person selling or leasing tangible personal property and dispensing taxable services in a transaction which is subject to the use tax.

2.24 "Service" or "selected service" 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 personal property, but shall not include contracting, personal services, the services rendered by an employee to his employer or any service rendered for resale.

2.25 "Tangible personal property" means tangible goods, wares and merchandise when sold, furnished or delivered by a vendor or when sold, furnished or delivered by a retailer for use in this State.

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

2.27 "Tax Commissioner" or "Commissioner" means the State Tax Commissioner, or his delegate.

2.28 "Taxable services " means services which would be taxable in all circumstances but for the existence of an applicable exemption in certain defined circumstances. As a result, the term does not include those services which are subject to the per se exemptions provided in Section 9.2 of these regulations. However, all other services are taxable and may be subject to some other specific exemption.

2.29 "Taxpayer" includes any person who is liable for the tax imposed by W. Va. Code § 11-15-1 et seq., or who is subject to the tax imposed by W. Va. Code § 11-15A-1 et seq. whether acting for himself or as a fiduciary.

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

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

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

solely outside this State.

2.33 "Vendor" means any person, whether selling at retail to the general public or otherwise selling to a person engaged in any business, who is engaged in this State in furnishing or rendering services or making sales of tangible personal property, the sale or use of which is subject to the sales and service tax.

§ 110-15-3 Amount of Tax.

3.1 For the privilege of selling tangible personal property and of dispensing certain selected services as defined in Section 110-15-2 of these regulations, the vendor shall collect from the purchaser the tax as provided under W. Va. Code § 11-15-3, and shall pay the amount of tax to the Tax Commissioner in accordance with the provisions of the above referenced Section 3 and this regulation.

There shall be no tax on sales where the monetary consideration is five cents or less. The amount of the tax shall be computed as follows:

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

3.1.2 On each sale, where the monetary consideration is from twenty-one cents to forty cents, both inclusive, two cents.

3.1.3 On each sale, where the monetary consideration is from forty-one cents to sixty cents, both inclusive, three cents.

3.1.4 On each sale, where the monetary consideration is from sixty-one cents to eighty cents, both inclusive, four cents.

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

3.1.6 If the sale price is in excess of one dollar, five cents on each whole dollar of sale price, and upon any fractional part of a dollar in excess of whole dollars, as follows: One cent on the fractional part of the dollar if less than twenty-one cents; two cents on the fractional part of the dollar if in excess of twenty cents but less than forty-one cents; three cents on the fractional part of the dollar if in excess of forty cents but less than sixty-one cents; four cents on the fractional part of the dollar if in excess of sixty cents but less than eighty-one cents; and five cents on the fractional part of the dollar if in excess of eighty cents. For example, the tax on sales from one dollar and one cent to one dollar and twenty cents, both inclusive, six cents; on sales from one dollar and twenty-one cents to one dollar and forty cents, both inclusive, seven cents; on sales from one dollar and forty-one cents

to one dollar and sixty cents, both inclusive, eight cents; on sales from one dollar and sixty-one cents to one dollar and eighty cents, both inclusive, nine cents; on sales from one dollar and eighty-one cents to two dollars, both inclusive, ten cents.

3.2 There also is levied and imposed a use tax on the use in this State of tangible personal property or taxable services as defined in Section 110-15-2 of these regulations, such tax to be at the rate of five percent (5%) of the purchase price of such tangible personal property and taxable services.

3.3 Separate sales, such as daily or weekly deliveries, shall not be aggregated for the purpose of computation of the tax even though such sales are aggregated in the billing or payment therefor. Notwithstanding any other provision, coin-operated amusement and vending machine sales shall be aggregated for the purpose of computation of the sales and service tax.

3.4 The amount of the sale shall be the actual cost to the purchaser of the item or service purchased without any deduction for the value of any item traded-in or service provided as part of the consideration paid for the tangible personal property or service purchased.

§ 110-15-4 Collection of Sales and Service Tax and Use Tax.

4.1 How Sales and Service Tax Collected. - Every purchaser shall pay to the vendor the amount of sales and service tax levied which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser. The vendor shall keep the amount of tax paid separate from the proceeds of sale exclusive of the tax unless authorized in writing by the Tax Commissioner to keep such amount of tax in a different manner. Where such authorization is given, the State's claim shall be enforceable against and shall take precedence over all other claims against the moneys commingled.

4.2 How Use Tax Collected.

4.2.1 The use tax is imposed upon every person using tangible personal property or taxable services within this State. That person's liability is not extinguished until such tax has been paid. A receipt with the tax separately stated thereon issued by a retailer engaged in business in this State, or by a foreign retailer who is authorized by the Tax Commissioner to collect the use tax, relieves the purchaser from further liability for the tax to which the receipt refers.

4.2.2 Purchases of tangible personal property or taxable services made from the government of the United States or any of its agencies by ultimate consumers shall be subject to the use tax. Industrial materials and equipment owned by the federal government within the State of West Virginia of a character

not ordinarily readily obtainable within the State, shall not be subject to use tax when sold, if such industrial materials and equipment would not be subject to use taxes if such were sold outside of the State for use in West Virginia.

4.2.3 The use tax shall not apply to purchases made by counties or municipal corporations.

4.2.4 The use tax shall be collected in the following manner:

4.2.4.1 The tax upon the use of all tangible personal property and taxable services, which are sold by a retailer engaging in business in this State, or by such other retailer as the Tax Commissioner shall authorize pursuant to W. Va. Code § 11-15A-7, shall be collected by such retailer and remitted to the Tax Commissioner, pursuant to the provisions of W. Va. Code §§ 11-15A-6 through 10 and these regulations.

4.2.4.2 The tax upon the use of all tangible personal property and taxable services not paid pursuant to the foregoing paragraph 4.2.1 shall be paid to the Tax Commissioner directly by any person using such property within this State. The amount of use tax due and owing shall be paid quarterly, no later than 15 days after the completion of the calendar quarter; following are the due dates for such quarterly use tax payments: (April 15, July 15, October 15 and January 15, respectively) unless the purchaser has a direct pay permit number and, in that event, the tax must be remitted monthly, on or before the fifteenth day of the next succeeding month.

#### 4.3 Collection of Use Tax by Retailer.

4.3.1 Every retailer engaging in business in this State and making sales of tangible personal property or taxable services for delivery into this State, or with the knowledge, directly or indirectly, that the property or services are intended for use in this State, that so long as such transactions are not exempted under the provisions of W. Va. Code § 11-15A-3, shall at the time of making such sales, whether within or without the State, collect the use tax from the purchaser, and give to the purchaser a receipt therefor with the tax separately stated thereon unless the purchaser claims the sale is exempt under either Sections 110-15-9.2 or 11-15-9.3 of these regulations and the purchaser gives the vendor a properly executed exemption certificate or his direct pay permit number.

4.3.2 Each retailer engaging in business in this State shall list with the Tax Commissioner the name and address of all his agents operating in this State, and the location of any and all distribution or sales houses, offices or other places of business in this State.

4.4 Foreign Retailers. - The Tax Commissioner may, in his discretion and upon application, authorize the collection of the use tax by any retailer not

engaging in business within this State, who, to the satisfaction of the Tax Commissioner, furnishes adequate security to insure collection and payment of the tax. Such retailer may then be issued, without charge, a permit to collect the tax in the manner prescribed by the Tax Commissioner. When so authorized, it shall be the duty of such retailer to collect the use tax upon all tangible personal property or taxable service sold to his knowledge for use within this State, in the same manner and subject to the same requirements as a retailer engaging in business within this State. Such authority and permit may be canceled when, at any time, the Tax Commissioner considers the security inadequate, or that such tax can more effectively be collected from the person using such property in this State.

4.5 Absorbing Tax; Criminal Penalty. - It shall be unlawful for any vendor or retailer to advertise or hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the sales and service tax or the use tax or any part thereof will be assumed or absorbed by the vendor or retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section within this State shall be guilty of a misdemeanor and subject to the penalties provided in W. Va. Code § 11-9-7.

4.6 Failure to Collect Tax; Liability of Vendor. - If any vendor or retailer fails to collect the sales and service tax or the use tax, he shall be personally liable for the amount he failed to collect and subject to the penalties provided in W. Va. Code § 11-9-1 et seq.

4.7 Liability of Purchaser for Failure to Pay the Sales and Service Tax. - If any purchaser (a) refuses to pay to the vendor the sales and service tax, or (b) in the case of a sale subject to Section 110-15-9.3 of these regulations, a purchaser refuses to sign and present to the vendor a proper certificate indicating the sale is not subject to either the sales and service tax or the use tax, or (c) signs or presents to the vendor a false certificate, or (d) after signing and presenting a proper certificate uses the items purchased in such manner that would cause the sale to be subject to either tax, or (e) presents a direct pay permit number which has been cancelled or is otherwise false or uses such direct pay permit in a manner not authorized by the Tax Commissioner; he shall be personally liable for the amount of tax applicable to the transaction or transactions.

In such cases, the Tax Commissioner has authority to make an assessment against such purchaser, based upon any information within his possession or that may come into his possession. The assessment and notice thereof shall be made and given in accordance with W. Va. Code §§ 11-10-7 and 8.

This Section shall not be construed as relieving the vendor from liability for the tax; Provided, That the vendor shall be relieved from liability for the purchaser's refusal under either (a) or (b) above if he notifies the Tax

Commissioner in writing of such refusal; and he shall be relieved from liability for the purchaser's activities which fall within category (c), (d) or (e) above. The information provided to the Tax Commissioner must include the name and, if known, address of the purchaser, the date of the purchase and a description of the item purchased, the purchase price of the item, and the amount of tax not collected.

4.8 Liability of User for Payment of the Use Tax. - Any person who uses any tangible personal property or taxable services upon which the use tax has not been paid either to a retailer or directly to the Tax Commissioner, shall be liable therefor, and shall on or before the fifteenth day of the month next succeeding each quarterly period pay the use tax imposed upon all such property or services used by him during the preceding quarterly period in such manner and accompanied by such returns as the Tax Commissioner shall prescribe. All of the provisions of W. Va. Code § 11-15A-10 with reference to such returns and payments shall be applicable to the returns and payments herein required: Provided, That if the purchaser has a direct pay permit number, tax must be remitted monthly on or before the fifteenth day of the next succeeding month.

4.8.1 Credit for Sales Tax Liability Paid to Another State.

4.8.1.1 A person is entitled to a credit against the tax imposed by W. Va. Code § 11-15A-1 et seq. on the use of a particular item of tangible personal property or taxable service equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that property or service: Provided, That the amount of credit allowed shall not exceed the amount of use tax imposed on the use of the property or service in this State.

4.8.1.2 For purposes of this Section:

4.8.1.2.a "Sales tax" includes a sales tax or compensating use tax imposed on the use of tangible personal property by the state in which the sale occurred; and

4.8.1.2.b "State" includes the District of Columbia but does not include any of the several territories organized by Congress.

4.8.1.3 This Section shall apply to claims for refund or credit of use tax filed after the thirty-first day of August, 1986, for taxable purchases made on or after the first day of July, 1985, that were legally subject to a sales tax or compensating use tax paid in another state and the use tax in this State.

§ 110-15-5 Remittance of Tax.

5.1 No profit shall accrue to any person as a result of the collection of the sales and service tax regardless of the fact that the total amount of such

taxes collected may be in excess of the amount for which such person would be liable by the application of the levy of five percent to the gross proceeds of his sales. The total of all sales and service taxes collected by any such person shall be returned and remitted to the Tax Commissioner.

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

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

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

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

5.2.2.2 if the amount of tax paid on his exempt purchases is greater than the amount collected, he may seek a refund or credit for the difference as provided in Section 110-15-9a of these regulations.

§ 110-15-6 Taking Exemption Certificate.

6.1 Vendor Must Show Sale or Service Exempt; Presumption. - In the case of sales subject to Section 110-15-9.3 of these regulations, the burden of proving that a sale or service was exempt from the tax shall be upon the vendor, unless he in good faith takes from the purchaser his direct pay permit number or a properly completed exemption certificate signed by and bearing the address of the purchaser and setting forth the reason for the exemption. In order to assure maintenance of appropriate records, the vendor should take during his taxable year one completed exemption certificate from each of his purchasers who are authorized to issue an exemption certificate for exempt purchases. The completed exemption certificate may be used for the exempt purchases by the respective purchaser. The exemption certificate shall be substantially in the form prescribed by the Tax Commissioner. To prevent evasion of the sales and service tax, it shall be presumed that all sales and services are subject to tax until the contrary is clearly established.

6.1.1 Because of the nature of the transactions, purchasers of tangible personal property or taxable services which are specified in Section 110-15-9.2 of these regulations are not required to complete an exemption

certificate in order to qualify for the exemption. However, any exemption certificate or a direct pay permit number is required for an exemption claimed under Section 110-15-9.3 of these regulations.

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

6.3 Acceptance of Exemption Certificate. - The acceptance of a properly executed exemption certificate relieves the vendor and the retailer from the burden of proof only if accepted in good faith from a person engaged in an activity which is specifically exempt from the sales and service tax and use tax so long as the transaction is one for which an exemption certification may be issued. Any person who gives an exemption certificate to a vendor or retailer and knows, at the time of purchase, that the article will be used in a manner other than expressed in the exemption certificate, is guilty of a misdemeanor.

6.3.1 A vendor who makes sales to non-resident purchaser may accept the exemption certificate utilized in the state in which the non-resident is located. In order for such an exemption certificate to be acceptable, it must provide the same information as that required on the exemption certificate used in this State: name and address of the purchaser; basis for the claim of exemption; and, the signature of the person authorized to sign such an exemption certificate for the purchaser.

6.4 Retention of Exemption Certificate. - In order that the Tax Department may verify a vendor's or a retailer's taxable and nontaxable sales upon audit, it is necessary that such persons retain executed exemption certificates and other appropriate books and records for at least three (3) years or so long as the taxable period remains open for assessment or refund. An exemption certificate, to be valid, must be given by the vendee and accepted by the vendor at the time of the sale and not thereafter. If a vendor lists nontaxable sales or services for which he has no exemption certificates, the Tax Department will presume such sales were taxable and make an assessment of tax against the vendor. Of course, the preceding sentence is not applicable to sales of articles and types of services enumerated in paragraph 6.1.1 of this section. A sample exemption certificate will be furnished by the Tax Department to any vendor, retailer or organization upon request, in order that the certificate may be

reproduced for the convenience of its customers. Additionally, a vendor or retailer may take the purchaser's direct pay permit number and, provided that proper records are maintained, the vendor or retailer shall not be liable for the tax not collected.

§ 110-15-7 Tax on Gross Proceeds of Sales of Manufactured, Etc., Products. - A person exercising the privilege of producing for sale, profit or commercial use, any natural resources, product or manufactured product, and engaged in the business of selling such product not otherwise exempted under W. Va. Code § 11-15-1 et seq. shall make returns of the gross proceeds of such sales and pay the tax imposed by W. Va. Code § 11-15-1 et seq. There shall not be allowed a deduction or credit for production expenses when determining the gross proceeds from such sales.

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

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

8.1.1 Professional Services.

8.1.1.1 "Professional services" shall mean and include those activities which were recognized as professional under common law, their natural and logical derivatives, and any expansion of the term made by the West Virginia Legislature. Professional services are rendered by physicians, dentists, lawyers, certified public accountants, public accountants, optometrists, architects, engineers, registered professional nurses, veterinarians and licensed real estate brokers. The determination as to whether other activities are "professional" in nature will be determined on a case-by-case basis through a Taxpayer Assistance Advisory.

8.1.1.2 Professional services provided by corporations, regardless of whether such corporations are professional or business, are not subject to the sales and service tax. Likewise, non-professional services provided by a professional corporation are subject to the tax.

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

8.1.1.4 Professional services shall not be related to the quality of performance or expertise of the person performing the service.

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

#### 8.1.2 Personal Services.

8.1.2.1 Personal services shall include those services done to or performed on the person of an individual, and such services must be directly from one person to another. Personal services include barbering, massaging, nursing, manicuring, hair setting, hair washing and dyeing, services of dental hygienists and similar services.

8.1.2.2 As provided in Section 110-15-2 of these regulations, personal services are services rendered to the person of an individual without, at the same time, selling tangible personal property. In order for the service to be personal in nature, it is necessary for there to be physical contact of a continuing nature by the provider of the service to the recipient of such service. Additionally, it is necessary for such contact to directly affect the person or the clothing worn by such person.

8.1.2.3 Not all personal physical fitness programs qualify as personal services. The issue as to whether a program qualifies as a personal service will be determined by the nature of physical contact, the degree and level of individual supervision, and the degree to which the program is tailored to the requirements of the individual participant. Mere monitoring, even if by computer, of performance is insufficient to qualify; however, individual instruction and performance monitoring in conjunction with a program specifically designed to meet the needs of the individual would fall within the category of activity which would be considered as personal service. This activity should not be confused with courses of instruction in the martial arts, boxing, aerobic dancing, etc., which, while being physical in nature, are not service oriented.

8.1.2.4 Those services performed by a professional which are not personal services or not professional services are subject to the sales and service tax.

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

8.1.3.1 Regulated services rendered by corporations which are subject to the control of the West Virginia Public Service Commission are not

subject to the sales and service tax.

8.1.3.2 To illustrate: Services rendered by taxi companies and bus companies (carrying of passengers) holding a certificate of convenience and necessity are not subject to consumers tax.

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

8.2 On those services which are excepted from the imposition of the sales and services tax, enumerated 8.1.1 through 8.1.3 above, the Tax Department does not deem it necessary for the vendor to require an exemption certificate from the purchaser of such services. However, the burden of proving that a service is exempt rests upon the vendor. See Section 110-15-9.2 of these regulations.

8.3 Those services which are excepted from the imposition of the sales and service tax, enumerated 8.1.1 through 8.1.3 above, are not required to collect the sales and service tax on the sale of services to consumers. As a result, the purveyors of such services are required to pay the sales and service tax on all purchases of tangible personal property and services which are used or consumed in the business.

§ 110-15-9 Exemptions.

9.1 General. - Certain types of transactions are exempt from the sales and service tax and the use tax. The question of whether an exemption is applicable is determined by the nature of the tangible personal property or service being sold, purchased or used; how the property or service is being used; or the status of the vendor, purchaser or user. The exemptions allowed by law are classified in Subsections 9.2, 9.3, 9.4 and 9.5 of these regulations; and the words "gasoline and special fuel" are defined in Section 110-15-11 of these regulations.

9.2 Per Se Exemptions. - The following sales and purchases of tangible personal property or services are exempt per se from the sales and service tax and the use tax, meaning that no exemption certificate is required to claim any of the following exemptions:

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

9.2.2 Sales of electricity.

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

9.2.4 Sales of textbooks required to be used in any of the schools of the state, regardless of whether such textbooks are sold directly to such schools or to a student enrolled in such schools: Provided, That the vendor must retain proof that the book is a required textbook and that the purchaser is currently enrolled as a student at the school where the textbook is required.

9.2.4.1 This exemption applies to the sale of any textbook which is required to be used in any school, public or private, within West Virginia.

9.2.4.2 A textbook is a book or manual of instruction containing a presentation of the principles of a subject and which is used as a basis of instruction.

9.2.4.3 This exemption does not include or extend to pens, paper, supplies, outlines, etc.; nor shall this exemption apply to books which are not textbooks or to textbooks which are not required to be used by the school in which the purchaser is enrolled.

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

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

9.2.7 Sales of drugs dispensed upon prescription and sales of insulin to consumers for medical purposes.

9.2.8 Sales and services performed by licensed day care centers. This exemption does not include sales of tangible personal property and services to a day care center; such sales are taxable unless exempt under some other provision of this Section.

9.2.9 Sales of West Virginia lottery tickets and materials by licensed lottery sales agents and lottery retailers authorized by the West Virginia Lottery Commission, under the provisions of W. Va. Code § 29-22-1 et seq., provided the materials sold relate directly to the lottery. Tangible

personal property and services sold by a licensed lottery sales agent or a lottery retailer which are not directly related to the operation of the lottery are taxable unless exempt from tax under some other provision of this Section.

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

9.2.11 Sales of food intended for human consumption which are exempt under W. Va. Code § 11-15-11 and § 11-15A-3 when sold by grocery-type stores.

9.2.12 Sales of tangible personal property or services purchased after the September 30, 1987, and lawfully paid for with food stamps pursuant to the Federal Food Stamp Program codified in 7 U.S.C. § 2011, et seq., as amended. Such tangible personal property or services include, but are not necessarily limited to the following:

9.2.12.1 "Food" as defined in Section 110-15-10 of these regulations.

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

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

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

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

9.2.14 Sales of radio and television broadcasting time, preprinted advertising circulars, and newspaper and outdoor advertising space for the advertisement of goods or services.

9.2.15 Personal services, as defined in Section 110-15-2.

9.2.16 Professional services, as defined in Section 110-15-2.

9.2.17 Contracting, as defined in Section 110-15-2.

9.2.18 Services rendered by an employee to his or her employer.  
See Section 110-15-60, Employee or Independent Contractor.

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

9.3.1 Sales of tangible personal property to this State, its institutions or subdivisions, and to the United States, including agencies of federal, state or local governments for distribution in public welfare or relief work.

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

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

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

9.3.2.1 The term "vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks. W. Va. Code § 17A-1-1(a).

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

9.3.2.4 Any vehicle which is licensed or titled by the West Virginia Department of Motor Vehicles, such as a travel trailer or a camping

trailer, which is purchased from a person who is not engaged in the business of selling such vehicles or related property is considered to have been the subject of an isolated sale and is exempt from sales and service tax and the use tax.

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

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

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

9.3.4.1 Tangible personal property purchased for resale is taxable when it is withdrawn from inventory for use or consumption by the purchaser unless that consumption or use is exempt under some other provision of this Section.

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

9.3.4.3 The exemption allowed by this Subsection permits vendors of tangible personal property, whether they be wholesalers, distributors, jobbers, retailers or others to purchase tangible personal property for the purpose of resale in the form of tangible personal property without paying the sales and service tax or the use tax. However, when such vendors purchase tangible personal property or services for use or consumption in their business of selling tangible personal property, they must pay the sales and service tax or the use tax on such purchases. Therefore, purchases of janitorial services, equipment repairs, adding machines, etc., are taxable. In other words, vendors of tangible personal property are exempt from tax only on purchases of tangible

personal property which is purchased for the purpose of resale in the form of tangible personal property, unless the purchase is exempt under some other provision of this Section.

9.3.5 Taxable services purchased for resale. To illustrate, a customer takes his car to a service station for State inspection. It is discovered that the brakes must be relined. To do the job properly, the brake drums need to be ground. The service station, not having the proper equipment, takes the drums to another vendor who does the grinding. That is a service purchased for resale for which an exemption certificate may be issued under this Subsection.

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

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

9.3.7.1 The sale of a mobile, modular, or manufactured home generally involves three separate and distinct transactions: the sale itself, the transportation to the site where the mobile home is to be located, and installation of the mobile home at that site. Following are the tax consequences for those transactions.

9.3.7.1.a The sale of these mobile homes is subject to the consumers sales or use taxes at the rate of three percent.

9.3.7.1.b Mere delivery of the home to the site is considered to be an activity incidental to the sale of the home. Depending upon whether the transporter is subject to the control of the West Virginia Public Service Commission, the charge for transporting the mobile home will be subject to the tax at the rate of five percent. If the transportation is regulated by the West Virginia Public Service Commission, the charge is exempt.

9.3.7.1.c The charge for the installation of the mobile home will be subject to the sales and service tax if the mobile home is merely being set on a foundation at the site, and it is not being permanently installed on the real property.

9.3.7.1.d The foregoing application of the sales and service tax and the use tax is imposed regardless of whether the seller of the mobile home, or his agent or sub-contractor, transports and installs the mobile home or

whether those activities are accomplished by an independent third-party vendor.

9.3.7.2 If, as part of the sale the vendor selling the mobile home is required to permanently attach the mobile home to a foundation, such activities are considered to be beyond those which are incidental to the sale of the home; the entire transaction is then treated as contracting, which is exempt from consumers sales and use taxes.

9.3.7.2.a The activities which determine whether the home is permanently attached are whether the dealer hooks up the utility lines to the home, blocks up the home, underskirts the home, attaches the home to the foundation, finishes the interior trim and joins modules together.

9.3.7.2.b If as part of the same transaction the dealer delivers a home and places it on a foundation which he constructed, or which was constructed by a subcontractor at the dealer's direction, the activity is considered to be contracting. The foundation must be of construction suitable for the permanent attachment of the home upon and to it.

9.3.7.2.c If the dealer or his subcontractor delivers a home in two or more sections and connects the sections together after placing the sections or a foundation constructed by the customer, the dealer, or a subcontractor, the activities engaged in by the dealer are considered to be contracting.

9.3.7.3 Sales of mobile homes which are not to be utilized by purchasers as their principal year-round residence and dwelling are subject to the sales and service tax or use tax at the rate of five percent (5%), unless the purchase is exempt under some other provision of this Section.

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

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

9.3.9 Sales of tangible personal property or taxable services purchased for use or consumption in connection with the business of selling a taxable service or the commercial production of an agricultural product:

Provided, That sales of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property and sales of gasoline and special fuel shall not be exempt.

9.3.9.1 Effective July 1, 1987, and except as otherwise provided in these regulations, sales of tangible personal property and taxable services purchased for use or consumption in connection with the business of selling tangible personal property are no longer exempt from the sales and service tax and the use tax.

9.3.9.2 Sales of tangible personal property and taxable services purchased for use or consumption in connection with the conduct of the business of dispensing a service subject to the sales and service tax and use tax are exempt from such taxes: Provided, That sales of tangible personal property and taxable services to be used or consumed in the construction of or permanent improvement to real property and sales of gasoline and special fuel shall not be exempt.

9.3.9.2.a For example, persons who repair appliances, clean carpets, repair automobiles, etc., may purchase tangible personal property and taxable services for use in such business activities and claim exemption from the imposition of the sales and service tax and use tax with respect to such purchases. To illustrate: A company which cleans carpets may purchase shampoo, soap, vacuum cleaners, pens and paper, and repairs to its vehicles may claim exemption from tax for such purchases.

9.3.9.2.b To be exempt from the sales and service tax and the use tax under this Subsection, the purchaser must be in the business of dispensing taxable services, the purchase must be of tangible personal property or taxable services, and the purchase must be used or consumed in the purchaser's business of selling taxable services to consumers services. In order to qualify for this exemption, all elements listed in the preceding sentence must be present.

9.3.9.2.c Persons who dispense services not subject to the sales and service tax and the use tax are not eligible for this exemption. To illustrate: Doctors do not charge or collect the sales and service tax on professional services to patients. Therefore, any tangible personal property (such as bandages, disinfectants, drugs, pens, typewriters, stethoscopes, etc.) purchased by a doctor is subject to the sales and service tax, and any services (janitorial services, typewriter repair, etc.) purchased by a doctor are also subject to that tax.

9.3.9.2.d Also, persons in the business of renting or leasing real estate to others do not qualify for the exemption contained within this subsection. These persons do not dispense services subject to the sales and service tax and use taxes. Therefore, lessors who purchase items to improve

realty or for use in business must pay the sales and service tax thereon.

9.3.9.2.e Purchases of tangible personal property for use or consumption in providing public services subject to regulation by the West Virginia Public Service Commission, are exempt from the sales and service tax and the use tax.

9.3.9.3 Sales of tangible personal property and services rendered for use or consumption in connection with the commercial production of an agricultural product are exempt: Provided, That sales of tangible personal property and taxable services to be used or consumed in the construction of or permanent improvement to real property and sales of gasoline and special fuel shall not be exempt.

9.3.9.3.a This exemption applies to purchases for use in the commercial production of agricultural products as a business and not to purchases for use or consumption for any other purpose. Therefore, a person in the business of farming may purchase feed, seed, fertilizer, repairs to a tractor, etc., without payment of the sales and service tax.

9.3.9.3.b Sales of tangible personal property or services to a farmer to be used or consumed in the construction or improvement of real property are not exempt from the sales and service tax and the use tax. For example, sales to farmers of building materials to construct barns, sheds or fences are taxable.

9.3.10 Sales of tangible personal property in this State, or the use in this State of tangible personal property or services, which this State is prohibited from taxing under its sales and service tax and use tax laws by the United States Constitution, controlling federal law, the Constitution of this State or some controlling provision of West Virginia law not found in the sales and service tax and use tax laws.

9.4 Refundable Exemptions. - The vendor liable for collection of the sales and service tax or use tax shall collect such taxes when making the following sales of tangible personal property or taxable services (unless the purchaser presents his direct pay permit number issued by the Tax Commissioner under W. Va. Code §§ 11-15-9d and 11-15A-3d); and such taxes, after payment, shall, upon proper application therefor, be refunded or credited to the purchaser as provided in W. Va. Code §§ 11-15-9b and 11-15A-3b:

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

9.4.1.1 For purposes of this regulation, a bona fide charitable organization is an organization which qualifies or is qualified under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

9.4.2 Sales of property or services to corporations or organizations which qualify or are qualified under Section 501(c)(3) or (4) of the Internal Revenue Code of 1986, as amended, who make casual and occasional sales (as defined in Section 110-15-2) not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character: Provided, That the exemption herein granted shall apply only to services, equipment, supplies and materials directly used or consumed in the activities for which such organizations qualify as tax exempt organization under the Internal Revenue Code by these organizations and shall not apply to purchases of gasoline or special fuel.

9.4.3 Sales of property or services to persons engaged in this State in the business of contracting, manufacturing, transportation, transmission, communication or in the production of natural resources (as such terms are defined in Section 110-15-2): Provided, That on and after July 1, 1987, the exemption provided in this Subsection shall only apply to services, machinery, supplies and materials directly used or consumed in the activities of contracting, manufacturing, transportation, transmission, communication or the production of natural resources in the businesses or organizations named above and shall not apply to purchases of gasoline or special fuel.

9.4.3.1 For example:

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

9.4.3.1.b Sales of telephone poles and wires to a telephone or telegraph company are exempt but the sale of janitorial services and supplies to such a company are not exempt.

9.4.3.1.c Sales of tools to a contractor are exempt if the tools are purchased for use solely in the contracting business; but there is no exemption if the tools are purchased for personal use. Additionally, a person who owns a contracting business cannot purchase tools for another or for personal use at home without payment of consumers sales and use taxes.

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

9.4.3.2 The sale, to be exempt, must be of tangible personal property or taxable services directly used or consumed (as defined in Section

110-15-2) in the business activity of contracting, manufacturing, transportation, communication or in the production of natural resources.

9.4.3.3 Persons engaged in this State in the business of contracting, manufacturing, transportation, transmission, communication, or in the production of natural resources may purchase tangible personal property and services to be used or consumed in the construction of or permanent improvement to that real property in which or where the exempt activity actually occurs. All other persons, including (but not limited to) speculative builders or persons constructing for resale, must pay the sales and service tax or use tax on purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement of real estate.

9.4.3.3.a A builder who constructs a home for another must pay sales and service tax or use tax on all building materials and other tangible personal property and taxable services he purchases for use or consumption in building the home. Because the builder is engaged in the business of contracting, he may apply to the Tax Commissioner for a refund or credit for the tax paid on purchases directly used or consumed in building the home. (This example assumes the builder does not have a direct pay permit number. If he has a direct pay permit number and makes all purchases using that number then, when the builder files his direct pay return he will remit tax on all purchases not directly used or consumed in building the home.)

9.4.3.3.b For example, a contractor who builds a home for resale must pay the tax on all purchases of tangible personal property and taxable services for use or consumption in constructing the home.

9.4.3.3.c Any person who constructs his own home or an addition thereto must pay the sales and service tax or the use tax on all purchases of tangible personal property or taxable services to be used or consumed in building his home or any addition thereto.

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

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

9.4.7 Casual and occasional sales (as defined in Section 110-15-2) of property or services not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character by corporations or organizations which qualify or are qualified under Section 501(c)(3) or (4) of the Internal Revenue Code of 1986, as amended.

9.4.8 Sales of property and services to persons subject to the Business and Occupation Tax, the Severance Tax or the Telecommunications Tax after June 30, 1987: Provided, That this exemption shall apply only to tangible personal property or services directly or not directly used or consumed in activities the gross receipts from which are subject to one of the above-referenced taxes and shall not apply to purchases of gasoline or special fuel.

9.4.8.1 For purposes of this exemption, the tangible personal property or services "not directly used or consumed" in the businesses upon which the tax on gross receipts is imposed shall be the property or services stated in paragraph 2.7.2 of these regulations.

9.4.8.2 It should be noted that some businesses may be engaged in many activities, some of which are subject to the tax on gross receipts and some of which are subject to other taxes imposed under Chapter 11 of the Code of West Virginia. Only those purchases for those activities upon which the tax on gross receipts is imposed may qualify for this exemption. Purchases for the other activities would be subject to this tax unless they qualified for another exemption. It will be necessary for the purchaser to apportion the purchase price in accordance with Section 110-15-9d of these regulations.

9.4.8.3 Example -- The mining of limestone is subject to the tax on the gross receipts received from such activities. However, if that same business also processes the limestone, those activities would be classified as manufacturing. Those purchases for any use in the mining activity would fall within this exemption. However, only those purchases directly used in the manufacturing activity would be exempt.

9.4.9 Sales of electronic data processing services and related software: Provided, That for the purposes of this Subsection, "electric data processing services" means (1) the processing of another's data, including all processes incident to processing of data such as keypunching, keystroke verification, rearranging, or sorting of previously documented data for the purpose of data entry or automatic processing, and changing the medium on which data is sorted, whether these processes are done by the same person or several persons; and (2) providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment.

9.4.9.1 This exemption does not apply to the sale of computer

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

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

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

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

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

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

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

9.7 Moving Residence or Business Into State. - The use tax shall not apply

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

9.7.1 Tangible personal property used out-of-state for six or more months by a nonresident individual, or a business entity not actually doing business in this State, that is brought into this State for use by such individual or business in this State is exempt regardless of how it was brought into this State.

9.7.2 Property purchased and used out-of-state for less than six months by a nonresident individual, or by a business not actually doing business in this State, will be subject to use tax when such property is relocated in this State unless:

9.7.2.1 One of the exemptions in this Section 110-15-9 specifically applies; or

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

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

9a.1 General. - Any person having a right or claim to an exemption from the sales and service tax or the use tax by reason of any of the foregoing exemptions in Section 9, except those exemptions set forth in Subsections 9.2, 9.3, 9.5, 9.6 and 9.7, and who is not utilizing the direct pay permit procedure authorized in Section 110-15-9c of these regulations, shall pay to the vendor the sales and service tax and use tax imposed and may exercise or assert such exemption only in accordance with the following Subsection 9a.2 or Subsection 9a.3 of this Section.

9a.2 Filing Claim for Refund. - Any person who has paid the sales and service tax or the use tax imposed and who may lawfully claim any exemption set forth under Subsection 9.1 which is not enumerated in the foregoing Subsection 9a.1 of this regulation, may exercise or assert such claim by filing a claim for

refund of the sales and service tax or the use tax overpayments on such form and in such manner as the Tax Commissioner may require and in accordance with the requirements of this Section. The refund shall be made within thirty days after the receipt of a complete, accurate and lawful claim.

9a.3 Filing Claim for Credit. - In lieu of filing a claim for refund of sales and service tax and use tax overpayments, the taxpayer may, at his option and within one year from the date of payment of the tax, file a claim for credit on such form and in such manner as the Tax Commissioner may require and credit the amount of sales and service tax and use tax overpayments against certain payments of other taxes due, so long as such credit is applied in accordance with the requirements in Subsections 9a.3.1 through 9a.3.10.

9a.3.1 This procedure may not be utilized unless the vendor has submitted a properly completed application for credit to the Tax Commissioner.

9a.3.1.1 An application for credit is required each time a vendor seeks to utilize this procedure.

9a.3.1.2 Any credit may be disallowed as a result of Tax Department audits of the taxpayer's records.

9a.3.2 Method of Applying Credit.

9a.3.2.1 If the taxpayer is a vendor who is subject to Consumers Sales and Service Tax on certain purchases, he may credit the amount of sales and service tax and use tax overpayments made against the sales and service tax liability accrued through the use of his direct pay permit and apply any remaining tax liability against his quarterly or monthly remittance of the Consumers Sales and Service Tax imposed and otherwise due; or

9a.3.2.2 If the taxpayer is a vendor who is subject to the Use Tax on certain purchases, he may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing part 9a.3.2.1 against the use tax liability accrued through the use of his direct pay permit and apply the remaining tax liability against his monthly remittance of the Use Tax imposed and otherwise due; or

9a.3.2.3 If the taxpayer is subject to the Consumers Sales and Service Tax, he may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing parts 9a.3.2.1 and 9a.3.2.2 against his quarterly or monthly remittance of the Consumers Sales and Service Tax imposed and otherwise due; or

9a.3.2.4 If the taxpayer is subject to the Use Tax, he may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing parts 9a.3.2.1 through 9a.3.2.3 against his

quarterly remittance of the Use Tax imposed and otherwise due; or

9a.3.2.5 If the taxpayer is subject to the Business and Occupation Tax, he may credit the amount of sales and service tax and use tax overpayments after application of the foregoing parts 9a.3.2.1 and 9a.3.2.4 against his quarterly or monthly remittance of the Business and Occupation Tax imposed and otherwise due; or

9a.3.2.6 If the taxpayer is subject to the Annual Tax On Incomes Of Certain Carriers imposed by W. Va. Code § 11-12A-1 et seq., he may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing parts 9a.3.2.1 through 9a.3.2.5 against his annual or semiannual remittance of the tax imposed under W. Va. Code § 11-12A-1 et seq. and otherwise due; or

9a.3.2.7 If the taxpayer is subject to the Severance Tax imposed under W. Va. Code § 11-13A-1 et seq., the taxpayer may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing parts 9a.3.2.1 and 9a.3.2.6 against the taxpayer's quarterly or monthly remittance of the Severance Tax imposed and otherwise due; or

9a.3.2.8 If the taxpayer is subject to the Telecommunications Tax imposed under W. Va. Code § 11-13B-1 et seq., the taxpayer may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing parts 9a.3.2.1 through 9a.3.2.7 against the taxpayer's quarterly or monthly remittance of the Telecommunications Tax imposed and otherwise due; or

9a.3.2.9 If the taxpayer is subject to the Corporation Net Income Tax imposed under W. Va. Code § 11-24-1 et seq., the taxpayer may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing parts 9a.3.2.1 through 9a.3.2.8 against the taxpayer's installment of estimated tax for the Corporation Net Income Tax imposed and otherwise due under W. Va. Code § 11-24-17; or

9a.3.2.10 If the taxpayer is subject to the Personal Income Tax imposed under W. Va. Code § 11-21-1 et seq., the taxpayer may credit the amount of use tax overpayments remaining after application of the foregoing parts 9a.3.2.1 through 9a.3.2.9 against the taxpayer's installment of estimated tax for the Personal Income Tax imposed and otherwise due under W. Va. Code § 11-21-56; or

9a.3.2.11 If the taxpayer is subject to the Business Franchise Tax imposed under W. Va. Code § 11-23-1 et seq., the taxpayer may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing parts 9a.3.2.1 through 9a.3.2.10 against the taxpayer's annual remittance of the Business Franchise Tax imposed and otherwise

due; or

9a.3.2.12 If the taxpayer is required to deduct and withhold personal income tax under W. Va. Code § 11-21-1 et seq., the taxpayer may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing parts 9a.3.2.1 through 9a.3.2.11 against the taxpayer's monthly remittance of the personal income tax withheld under said W. Va. Code § 11-21-1 et seq. and otherwise due.

9a.4 Documents Supporting Claim for Exemption. - Any person asserting or exercising a claim of exemption from the sales and service tax and use tax under the foregoing Subsections 9a.2 or 9a.3 of this Section shall file with the Tax Commissioner an application for exemption in such form as the Tax Commissioner shall prescribe and shall file such affidavits, invoices, sales slips, records or documents as the Tax Commissioner may require to prove or verify the taxpayer's right and entitlement to such exemption. The Tax Commissioner may inspect or examine the records, books, papers, documents, affidavits, sales slips and invoices of a taxpayer or any other person to verify the truth and accuracy of any report or return or to ascertain whether the sales and service tax or the use tax has been paid.

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

9a.5 Filing Claim Within Time Limitation. - All claims for refund of sales and service tax or use tax overpayments, including applications from vendors for authorizations to apply the amounts of sales and service tax and use tax paid for business purchases against the amounts of such sales and service tax collected from consumers, under Subsection 9a.2 of this Section shall be filed within the time limitation for filing claims for refund set forth in W. Va. Code § 11-10-14. Any claim for such refund or claim of entitlement to such refund made or asserted after the said time limitation shall be null and void, and if the sales and service tax or use tax overpayment has not otherwise been credited against tax remittances in accordance with this Section, such claims shall be forfeited.

9a.6 Time Limit for Filing Claim for Credit. - Any credit of sales and service tax or use tax overpayments against taxes under Subsection 9a.3 of this section shall be taken within one year after the payment of the tax by the taxpayer to the vendor. Any such credit or claim of entitlement to such credit made or asserted more than one year after the payment of such tax by the taxpayer to the vendor shall be null and void, and such tax overpayments shall be forfeited.

9a.7 Assignment of Right to Refund or Credit. - Any assignment of the right or entitlement to a refund or credit arising under either W. Va. Code § 11-15-9b or W. Va. Code § 11-15A-3b shall be subject to strict proof. Any assignee claiming a right or entitlement to an assigned refund or credit shall submit to the Tax Commissioner and in the form prescribed by him, an affidavit signed by the assignor and acknowledging the assignment. The assignee shall attest to the assignment and the terms thereof in his signed application for refund or credit. The assignee will be subject to the penalties provided under West Virginia law for perjury for any falsehood set forth in his signed application. The assignee also will be subject to the penalties set forth in W. Va. Code § 11-9-1 et seq. for any violation of Article 9. Except as provided in Subsection 9a.8, no payment of a refund arising under this Section shall be made to any person other than the taxpayer or assignee of the taxpayer making the original overpayment of sales and service tax or use tax.

9a.8 No refund shall be due and no credit shall be allowed unless the taxpayer or assignee shall have filed a claim for refund or a claim for credit, as appropriate, with the Tax Commissioner in accordance with this Section.

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

§ 110-15-9b Delivery of a Certificate of Exemption in Lieu of Tax. - Persons having a right or claim to any exemption set forth in Subsection 9.3 of these regulations shall, in lieu of paying the sales and service tax or use tax, give his direct pay permit number to the vendor or execute a certificate of exemption in such form as the Tax Commissioner may require, and such executed exemption certificate shall be delivered to the vendor in such manner as the Tax Commissioner may require. If any person presents to any vendor an exemption certificate, and then knowingly uses the item or service purchased in a manner inconsistent with the exemption granted, and who does not remit the tax on the purchase in a manner required by law, such person shall be subject the provisions of W. Va. Code § 11-9-1 et seq.

§ 110-15-9c Direct Pay Permits.

9c.1 The Tax Commissioner may, in his discretion, issue a direct pay permit to any person who has a current Business Registration Certificate (issued in accordance with W. Va. Code § 11-12-1 et seq.) and who is a person that is a user, consumer, distributor or lessee to whom sales or leases of tangible personal property are made or services provided to pay the sales and service tax and use tax levied directly to the Tax Commissioner, thereby waiving the collection of those taxes by that person's vendor. Prior to paying the sales and service tax and the use tax directly to the Tax Commissioner, such person must first apply to the Tax Commissioner and receive appropriate authorization in the form of a direct pay permit. The direct pay permit application shall specify the vendor or vendors from whom purchases subject to direct payment of the tax may be made. The taxpayer shall provide the names of such vendors to the Tax Commissioner. If a direct pay permit is issued, payment of the sales and service tax and use tax on all sales and leases of tangible personal property and sales of taxable services from designated vendors and the assertion of all exemptions asserted with respect to purchases from such vendors shall be made directly to the Tax Commissioner by the permit holder.

9c.1.1 It is the responsibility of the person to whom the direct payment permit is issued to notify the Tax Commissioner of any additions to or deletions from the list of vendors from which the qualified sales are made. Such notification shall be provided to the Tax Commissioner on a quarterly basis.

9c.1.2 The listing of vendors from whom purchases subject to the direct payment permit may be made may be printed, typed, legibly handwritten, or in a computer compatible format (compatible magnetic tape or compatible computer print-out). Taxpayers may contact the Taxpayers Services Division for information relative to the standards for this listing.

9c.2 On or before the fifteenth day of each month, every permit holder shall make and file with the Tax Commissioner a return for the preceding month in the form prescribed by the Tax Commissioner. The return shall show the total value of the tangible personal property and services purchased, the amount of taxable and services purchased, the amount of sales and service tax and use tax due from the permit holder, which amount shall be paid to the Tax Commissioner with such return, and such other information as the Tax Commissioner deems necessary. The Tax Commissioner, upon written request by the permit holder, may grant a reasonable extension of time for the making and filing of returns and for paying the tax due. Interest on such sales and service tax and use tax shall be chargeable on every such extended payment at the rate determined in accordance with W. Va. Code § 11-10-17.

9c.3 A direct pay permit shall continue to be valid until expiration of the

business's registration year under W. Va. Code § 11-12-1 et seq. This permit shall be renewed automatically when the business's business registration certificate is issued for the next succeeding fiscal year, unless the permit is surrendered by the holder or canceled for cause by the Tax Commissioner.

9c.4 Persons who hold a direct payment permit which has not been canceled shall not be required to pay the sales and service tax and use tax to any vendor specified on the permit application. Such persons shall notify each vendor from whom tangible personal property is purchased or leased or from whom taxable services are purchased of their direct payment permit number and that the tax is being paid directly to the Tax Commissioner. Upon receipt of such notice, such vendor shall be absolved from all duties and liabilities imposed for the collection and remittance of the sales and service tax and use tax with respect to sales, distributions, leases or storage of tangible personal property and sales of services to such permit holder so long as he takes the direct payment permit number for each applicable sale, such number being appropriately noted on the invoice, sales slip, or other record of the sale. Failure to take the permit number or to collect the amount of tax due shall result in the vendor being liable for the amount of tax not collected. Vendors who make sales upon which the sales and service tax or use tax is not collected by reason of direct payment of such tax by the purchaser to the Tax Commissioner shall maintain records in such manner that the amount of each purchase and identity of each such purchaser may be easily ascertained.

9c.4.1 Any vendor not specified on the direct payment permit application who accepts the direct payment permit number in lieu of the sales and service tax or use tax shall not be liable for any such taxes he failed to collect; however, the purchaser must list the item so purchased on his direct payment return.

9c.4.2 Any vendor who takes the direct payment permit number in lieu of the sales and service tax or use tax due and who has received notice in writing that such direct payment permit has been cancelled or surrendered shall be liable for any such tax he failed to collect unless the person using the permit displayed it to the vendor at the time of the purchase.

9c.5 Upon the expiration, cancellation or surrender of a direct payment permit, the provisions of W. Va. Code § 11-15-1 et seq. and W. Va. Code § 11-15A-1 et seq., without regard to direct payment permits, shall apply to the person who previously held such permit. Such person shall promptly notify in writing all vendors from whom he purchases or leases tangible personal property or purchases taxable services with the use of direct payment permits that such permit was cancelled or surrendered. The notice required by this subsection shall be made within 10 days after the permit has been cancelled or surrendered. Upon receipt of such notice, the vendor shall be required to collect the sales and service tax and the use tax on all sales or leases of tangible personal property and sales of taxable services, thereafter made to or for such person.

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

9d.1 Whenever a purchaser will use tangible personal property or a service or the results of a service for both exempt and nonexempt purposes, the gross proceeds paid to the vendor of such property or service shall be apportioned between the exempt and nonexempt uses in a reasonable manner acceptable to the Tax Commissioner. In the absence of books and records documenting how gross proceeds were apportioned and how the property or service or the results of a service were actually used by the purchaser, that portion of the gross proceeds for which exemption is claimed shall be disallowed and the tax due thereon shall be paid by the purchaser.

9d.2 Whenever the vendor and purchaser are related persons or the sale is under other circumstances where the relation between the vendor and purchaser is such that the gross proceeds may not be indicative of the true value of the tangible personal property or services purchased, the Tax Commissioner shall revalue the transaction whenever he believes that the gross proceeds thereof are not indicative of the true value of the transaction. Adjusted gross proceeds shall correspond as nearly as possible to the gross proceeds derived in this State from the sale of similar tangible personal property or services of like quality or character where no common interest exists between the vendor and purchaser but the circumstances and conditions are otherwise similar.

9d.3 When a contract was in existence, executed and binding prior to July 1, 1987, and was for the purchase, lease or other transfer of possession of tangible personal property or taxable services, there is no new tax liability for any payments made on or after July 1, 1987 or for any payments prepaid for periods commencing on or after that date, even though such transaction was subject to an exemption from tax which terminated on July 1, 1987. Only new contracts entered into on and after July 1, 1987 shall be subject to the tax.

§ 110-15-10 Exemption of Food Intended for Human Consumption; Definitions and Exceptions.

10.1 Exemption. - Retail sales of food intended for human consumption made on or after July 1, 1981, shall be exempt from the sales and service tax. This exemption shall be in addition to any other exemption permitted under W. Va. Code § 11-15-1 et seq.

10.2 Aggregation of Sales. - Separate sales such as daily or weekly deliveries, shall not be aggregated for purpose of computation of this tax even though such sales are aggregated in the billing or the payment.

10.3 Definition of Food. - For purposes of this Section, and except as provided in subsection 10.4, the term "food" shall mean and include all edible foodstuffs, beverages containing no alcohol and items commonly thought of as

food, including, by way of illustration and not by limitation, cereals and cereal products, meat and meat products, fish and fish products, poultry and poultry products, fresh and salt water animal products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, flour and flour products, sugar and sugar products, milk and milk products, cocoa and cocoa products, coffee and coffee substitutes, tea, herbs, spices, salt and salt substitutes, condiments, candy and confections, soft drinks, soft drink mixes and syrups, tenderizers, food coloring, bottled drinking water, sugar substitutes, oleomargarine, shortening, gelatins, baking and cooking ingredients, mushrooms, spreads, relishes, desserts, flavorings, chewing gum, edible seeds, nuts and berries.

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

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

10.3.1.2 Test Two. - Do the words, statements or pictures on the label or food package suggest that the food is intended for human consumption?

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

Example 1. Horse meat and horse meat products are not generally regarded by the public as food products intended for human consumption since they are primarily purchased as food for animal consumption. The fact that such products are inspected and may be suitable for human consumption is insufficient proof of exemption.

Example 2. Canned cat food may be purchased and eaten by human beings. Cat food is nevertheless subject to the sales and service tax. Canned tuna fish is intended for human consumption and is exempt even though the canned tuna fish may be fed to the cats.

10.3.2 Foods Exempt After June 30, 1981. General. - Retail sales of foods and food products intended for human consumption, except when sold by food service establishments or from vending machines, are exempt from sales and

service tax where the sale is made on or after June 30, 1981. The term "food" is broadly defined to include all edible foodstuffs, beverages containing no alcohol and items commonly thought of as food. This includes (by way of illustration and not by limitation):

10.3.2.1 Baking and Cooking Ingredients. - Certain food items are normally only consumed after being incorporated into food and other ingredients. Since these items then become part of the food intended for human consumption, they are eligible items which are exempt from tax after June 30, 1981.

10.3.2.1.a Alcoholic Liquor. - Sales of alcoholic liquors, as defined in Section 10.4.1.1, which are fit for beverage use, are subject to sales and service tax regardless of whether the primary purpose for making the purchase is to use the alcoholic liquor as a cooking or baking ingredient.

10.3.2.1.b Baking Soda. - When represented on or in the labeling of the package that the product is "baking soda," it is ordinarily sold for use as an ingredient of food intended for human consumption. Accordingly, sales of "baking soda" are exempt from sales and service tax after June 30, 1981, regardless of whether sold in a grocery-type store, drugstore or other retail store. However, when bicarbonate of soda is represented by the manufacturer either in the label or in the labeling that the product is for medicinal purposes, it is subject to sales and service tax, regardless of where sold.

10.3.2.1.c Cooking Oil and Lard. - Sales of oil with a vegetable or lard base, shortening and lard which are used in cooking or as an ingredient in foods such as bread and bakery products are eligible food items.

10.3.2.1.d Cooking Wines. - Cooking wines containing no alcoholic content are eligible food items.

10.3.2.1.e Pectin. - The term "pectin" is generic for products marketed under various brand names and is commonly used as a base in making jams and jellies. When it is incorporated into jams and jellies, it becomes part of food intended for human consumption. Accordingly, pectin is an eligible food item.

10.3.2.1.f Salted Wine. - Wine sold for use in cooking which is rendered unfit for beverage use by the adding of salt and which is withdrawn from storage under Section 5362(d) of the Internal Revenue Code of 1986, as amended, is an eligible food item.

10.3.2.2 Berries.

10.3.2.3 Bottled Drinking Water. - The term "bottled drinking water" means water that is sealed in bottles or other containers and which is intended for human consumption. This term includes distilled water and mineral water purchased for human consumption.

10.3.2.4 Candy and Confections.

10.3.2.4.a The term "candy" refers to all types of preparations commonly referred to as candy such as hard candy, caramel candy, chocolate candy, licorice, fudge and toffee, etc.

10.3.2.4.b The term "confection" means candy and other food products made with sweeteners and frequently prepared with colorings, flavorings, milk products, cocoa products, nuts, fruits, starches and other materials. Such foods include but are not limited to frostings, toppings, edible cake decorations, candy-coated peanuts, caramel-coated popcorn, cotton candy and candied apples.

10.3.2.4.c The term "candy and confections" does not include chewing gum, sauces, syrups, jellies, jams, preserves, cakes or cookies, although these products are also eligible food items. This term does not include candy-type laxatives, cough drops or lozenges which contain medication, or similar products, even though they may contain significant amounts of sugar and may be consumed for pleasure rather than for treatment. These products are subject to the sales and service tax.

10.3.2.4.d Cake Letters. - Birthday cake letters consisting of sugar, albumin, acetic acid and artificial coloring are exempt after June 30, 1981.

10.3.2.4.e Breath Mints. - Nonmedicated breath mints are eligible food items. These items are not considered to be medicated even though the manufacturer's claim that they prevent or lessen halitosis. Mints which contain aspirin, laxatives or anti-acidity qualities are considered to be medicated and are subject to the sales and service tax.

10.3.2.5 Cereals and Cereal Products.

10.3.2.6 Chewing Gum.

10.3.2.6.a The term "gum" refers to all preparations called gum such as chiclets, chewing gum and bubble gum.

10.3.2.6.b Gum containing aspirin or other medication is subject to the sales and service tax even though it may be chewed for pleasure rather than for treatment.

10.3.2.7 Cocoa and Cocoa Products. - The term "cocoa products" means any form of chocolate, chocolate products, cocoa or cocoa products. Such foods include but are not limited to cocoa nibs, sweet chocolate, milk chocolate, chocolate syrup and so forth.

10.3.2.8 Coffee and Coffee Substitutes. - The term "coffee" includes but is not limited to roasted coffee beans, ground coffee beans, decaffeinated coffee and instant coffee.

10.3.2.9 Condiments. - The term "condiments" includes food accessories or adjuncts which although having little or no nutritional value, are used extensively to give flavor to foods and to furnish pleasing variety. Examples include by way of illustration and not limitation:

- 10.3.2.9.a Flavorings and flavoring extracts.
- 10.3.2.9.b Food colorings.
- 10.3.2.9.c Food dressings.
- 10.3.2.9.d Glazes.
- 10.3.2.9.e Gravies.
- 10.3.2.9.f Herbs (for which no medicinal qualities are claimed).
- 10.3.2.9.g Marinades.
- 10.3.2.9.h Mustard.
- 10.3.2.9.i Pepper.
- 10.3.2.9.j Salt and salt substitutes.
- 10.3.2.9.k Sauces.
- 10.3.2.9.l Spices.
- 10.3.2.9.m Vinegar.

A list of condiments can be found in Appendix I. This list is intended to illustrate application of these terms and not to be an exhaustive list.

10.3.2.10 Desserts.

- 10.3.2.10.a Frozen Desserts. - The term "frozen desserts"

includes ice cream, frozen custard, french ice cream, french custard ice cream, ice milk, fruit sherberts and water ices.

10.3.2.10.b Dietetic Cakes and Cookies. - Dietetic cakes and cookies are not dietary supplements since they are not ". . . preparations in liquid, powdered, granular, tablet, capsule, lozenge or pill form."

10.3.2.11 Eggs and Egg Products.

10.3.2.12 Fish and Fish Products.

10.3.2.13 Flour and Flour Products.

10.3.2.14 Fresh and Salt Water Animal Products.

10.3.2.15 Fruit and Fruit Products.

10.3.2.16 Gelatins.

10.3.2.17 Meat and Meat Products.

10.3.2.18 Milk and Milk Products.

10.3.2.19 Mixes for Alcoholic and Nonalcoholic Beverages. - Mixes for alcoholic and nonalcoholic beverages, whether in liquid or powdered form, are eligible food products except when the mixer contains alcoholic liquor or is a dietary supplement, medicine or vitamin.

10.3.2.20 Mushrooms.

10.3.2.21 Nuts.

10.3.2.22 Oleomargarine.

10.3.2.23 Poultry and Poultry Products.

10.3.2.24 Relishes.

10.3.2.25 Seeds (edible).

10.3.2.26 Shortening.

10.3.2.27 Soft Drinks and Soft Drinks Mixes and Syrups. - The term "soft drinks" includes with those liquids and syrups commonly thought of as Tang, flavored Perrier, MicroShakes and non-alcoholic beer.

10.3.2.28 Spreads.

10.3.2.29 Sugar and Sugar Products. - The term "sugar and sugar products" includes granulated, powdered, confectioners, brown, raw, lump or maple sugars; liquid sugars such as cane syrup, corn syrup, maple syrup, molasses, sorghum syrup, table syrup; lactose; dried glucose syrup; glucose syrup; dextrose monohydrate and dextrose anhydrous.

10.3.2.30 Sugar Substitutes.

10.3.2.31 Tea (Except Medicinal or Dietary supplements).

10.3.2.31.a General. - Teas are eligible food products except those which claim medicinal qualities or otherwise indicate specifically on their labels or packaging that they are sold as dietary supplements.

10.3.2.31.b Ginseng Tea. - Teas made from ginseng roots are eligible food products provided no claims of medicinal qualities are made and the label or packaging does not specifically indicate that the product is sold as a medicine or dietary supplement.

10.3.2.32 Vegetable and Vegetable Products.

10.4 Not Included as Food. - The term "food" shall not include medicines, vitamins and dietary supplements whether in liquid, powdered, granular, tablet, capsule, lozenge, or pill form; spirituous, malt or vinous liquors or beer; ice unless it is subject to the exemption provided in Section 110-15-9.2.12 of these regulations; tobacco or tobacco products; vending machine sales; or food sold by a food-service establishment.

10.4.1 General. - Retail sales of the following items or products are subject to the sales and service tax, unless they may be lawfully purchased with food stamps as authorized Section 9.2.12 of these regulations.

10.4.1.1 Alcohol. - The term "alcohol" shall mean ethyl alcohol whatever its origin, and shall include synthetic ethyl alcohol but not denatured alcohol.

10.4.1.2 Alcoholic Liquor. - The term "alcoholic liquor" shall include alcohol, beer, wine and spirits, and any liquid or solid containing more than three and two-tenths percent of alcohol by weight and capable of being used as a beverage.

10.4.1.3 Beer. - The term "beer" shall mean any beverage obtained by the fermentation of barley, malt hops, or any other similar product or substitute regardless of whether categorized as "beer" or "nonintoxicating beer" under W. Va. Code § 60-1-5. Examples by way of illustration include ale, beer, lager beer, and malt liquor.

10.4.1.4 Dietary Supplements. - See Section 10.4.2.

10.4.1.5 Ice. - All sales of ice are subject to sales tax regardless of the purpose or intended use for which the ice is being purchased or whether the ice is in blocks, chunks, chips or cubes or in the form of an ice sculpture; Provided, That ice purchased after September 30, 1987, with food stamps is exempt from the sales and service tax, as provided in paragraph 9.2.12 of these regulations.

10.4.1.6 Malt Liquor. - See Alcoholic liquor.

10.4.1.7 Medicines. - See Section 10.4.3.

10.4.1.8 Seeds for Growing Fruits and Vegetables. - Seeds for growing fruits and vegetables are not exempt as food unless purchased after September 30, 1987, with food stamps, as provided in paragraph 9.1.24 of these regulations.

10.4.1.9 Spirituos Liquor. - The term "spirituous liquor" shall mean any alcoholic beverage obtained by distillation and mixed with potable water and other substances in solution and includes by way of illustration and not limitation, brandy, cordials, gin, rum, vodka and whiskey.

10.4.1.10 Vinous Liqueurs. - See Alcoholic liquor.

10.4.1.11 Vitamins. - See Section 10.4.4..

10.4.1.12 Wine. - The term "wine" shall mean any alcoholic beverage obtained by fermentation of the natural content of fruits, or other agricultural products, containing sugar.

10.4.2 Dietary Supplements.

10.4.2.1 Taxability. - Dietary supplements or adjuncts which are sold in liquid, powdered, granular, tablet, capsule, lozenge or pill form are subject to sales and service tax. Health foods and dietetic foods are generally not considered to be dietary supplements or adjuncts. Accordingly, most sales of health foods and dietetic foods will be exempt from sales tax after June 30, 1981. Special care must be exercised when the health food or dietetic food is in liquid, powdered, granular, tablet, capsule, lozenge or pill form. This is because eligible food items as well as dietary supplements, vitamins and medicines which are ineligible items may be purchased in one or more of these forms.

10.4.2.2 Definition of Dietary Supplement. - The term "dietary supplement" means and includes any product:

10.4.2.2.a That is represented to be for special dietary use;

10.4.2.2.b Which is or which contains any essential nutrient, natural or synthetic vitamin or mineral (or combination thereof); and

10.4.2.2.c Which is intended for ingestion in liquid, powdered, granular, tablet, capsule, lozenge or pill form.

Any product that does not meet all three of these criteria is not deemed to be a dietary supplement.

10.4.2.3 Representation That Product is for Special Dietary Use. - A product is represented as being for special dietary use when direct or implied representation is made on the label, in the labeling, or in advertising, that the product is a dietary supplement, or that the product is adequate or appropriate for supplementing the diet with essential nutrients, vitamins or minerals.

10.4.2.4 Application of Definition. - A product is considered to be a dietary supplement if it is in liquid, powdered, granular, tablet, capsule, lozenge or pill form and if it purports or represents that it is to be used:

10.4.2.4.a To supply a special dietary need that exists by reason of a physical, physiological, pathological or other condition, including but not limited to the condition of:

Disease,  
Convalescence,  
Pregnancy,  
Lactation,  
Infancy  
Allergic hypersensitivity to food,  
Underweight,  
Overweight; or

10.4.2.4.b To supply a vitamin, mineral or other ingredient for use to supplement the diet by increasing the total dietary intake of that vitamin, mineral or other ingredient to a total level per single serving which attains or exceeds fifty percent (50%) of the United States Recommended Daily Allowance for adults and children four (4) years or more of age.

10.4.2.5 When a Supplement is Intended for Ingestion in Liquid Form. - A dietary supplement is considered to be intended for ingestion in liquid form only if it is intended for ingestion in daily quantities measured in drops or other similar units of measure.

10.4.2.6 Examples of Nutrients and Dietary Supplements.

Ascorbic acid,  
Linoleic acid,  
Biotin,  
Calcium carbonate,  
Calcium citrate,  
Calcium glycerophosphate,  
Calcium oxide,  
Calcium pantothenate,  
Calcium phosphate,  
Calcium pyrophosphate,  
Calcium sulfate,  
Carotene,  
Choline bitartrate,  
Choline chloride,  
Copper gluconate,  
Cuprous iodide,  
Ferric phosphate,  
Ferric pyrophosphate,  
Ferric sodium pyrophosphate,  
Ferrous gluconate,  
Ferrous lactate,  
Ferrous sulfate,  
Inositol,  
Iron reduced,  
Magnesium oxide,  
Magnesium phosphate,  
Magnesium sulfate,  
Manganese chloride,  
Manganese citrate,  
Manganese gluconate,  
Manganese glycerophosphate,  
Manganese hypophosphate,  
Manganese sulfate,  
Manganese oxide,  
Niacin,  
Ciacinamide,  
D-Pantothenyl alcohol,  
Potassium chloride,  
Potassium glycerophosphate,  
Potassium iodide,  
Pyridoxine hydrochloride,  
Riboflavin,  
Riboflavin-5-phosphate,  
Sodium pantothenate,

Sodium phosphate,  
Thiamine hydrochloride,  
Thiamine mononitrate,  
Tocopherols,  
a-Tocopherol acetate,  
Vitamin A,  
Vitamin A acetate,  
Vitamin A palmitate,  
Vitamin B12,  
Vitamin D2,  
Vitamin D3,  
Zinc chloride,  
Zinc gluconate,  
Zinc oxide,  
Zinc stearate,  
Zinc sulfate.

10.4.2.7 Application of Regulations.

10.4.2.7.a Baby formula such as Similac, Enfamil, Prosobee, SMA and Neo-Mull Soy are exempt from sales and service tax after June 30, 1981.

10.4.2.7.b Dietetic foods which are represented as "low-calorie" foods and replace common food items, examples being dietetic candy, canned fruits, mayonnaise, salad dressing and canned vegetables, are exempt from sales and service tax after June 30, 1981.

10.4.2.7.c Dietetic foods which are represented as "low-sodium" foods and replace common food items, examples being low-sodium cookies, crackers, canned fruits, peanut butter, soups and canned vegetables, are exempt from sales and service tax after June 30, 1981.

10.4.2.7.d Weight control products such as Slim-Fast Protein Formula, Metracal, Figurines, PFM Formula, etc., are exempt from sales and service tax after June 30, 1981.

10.4.2.7.e Products which do not replace common food items but supplement regular meals, such as Ayds diet candy, are sold primarily as a dietary supplement.

10.4.2.7.f Yeast. - When yeast is prepared, dried and sold in flaked, powdered or tablet form, it is usually sold as a dietary supplement and is subject to the sales and service tax. However, yeast sold in cakes and dry (granular) yeast sold in packages or envelopes is generally sold as a baking ingredient and is exempt from sales and service tax after June 30, 1981.

10.4.3 Medicines.

10.4.3.1 Taxability. - Patented medicines and other products used primarily as health aids or therapeutic agents are not "food" within the meaning of that term as defined in Section 11-15-11(c) of the West Virginia Code and these regulations. Accordingly, sales of medicines and over-the-counter drugs, whether in liquid, powdered, granular, tablet, capsule, lozenge or pill form are subject to sales and service tax, except where they are purchased under a prescription written by a medical practitioner licensed to write prescriptions. Sales of prescription medicines are exempt under Section 11-15-9(n) of the West Virginia Code.

10.4.3.2 Categories of Taxable Medicines and Health Aids. - Over-the-counter drugs can be classified as follows:

- Allergy treatment products,
- Analgesics,
- Antacids,
- Antidiarrheal products,
- Antiemetics,
- Antimicrobial products,
- Antipersperants,
- Antirheumatic products,
- Antiseptics,
- Antitussives,
- Bronchodilators,
- Cold remedies,
- Contraceptive products,
- Dandruff products,
- Dentifrices and dental products,
- Dermatologic products,
- Emetics,
- Hemorrhoidals,
- Hemorrhoidal products,
- Laxatives,
- Ophthalmic products,
- Oral hygiene products,
- Sedatives and sleeping aids,
- Stimulants,
- Sunburn prevention and treatment products,
- Vitamin - mineral products,
- Miscellaneous.

10.4.3.3 Application of Regulations.

10.4.3.3.a Any product used primarily for medicinal

purposes is subject to the sales and service tax, except when sold by prescription.

10.4.3.3.b All patented medicines or other products used as health aids are subject to the sales and service tax, except when sold by prescription.

10.4.3.3.c Bicarbonate of Soda. - Bicarbonate of soda when represented on the label or in the labeling of the package that it is "baking soda" is ordinarily sold for use as an ingredient of food intended for human consumption. Accordingly, "baking soda" is exempt from sales and service tax after June 30, 1981, regardless of whether sold in a grocery-type store, drugstore or other retail store. However, when bicarbonate of soda is represented by the manufacturer either on the label or in the labeling that the product is for medicinal purposes, it is subject to sales and service tax regardless of whether sold in grocery-type stores, drugstores or other retail stores. When sold for medicinal purposes, bicarbonate of soda is frequently in tablet form or in packets containing one-half (1/2) teaspoon of bicarbonate of soda.

10.4.3.3.d Products to Prevent Dehydration. - Products used to prevent dehydration and replace electrolytes lost in diarrheas and other cases of fluid loss are subject to the sales and service tax.

10.4.3.3.e See Appendix 2 for a list of taxable medicines and health aids. This list is intended to illustrate application of the sales and service tax law and is not intended to be a comprehensive listing.

#### 10.4.4 Vitamins and Minerals.

10.4.4.1 General. - Essential vitamins and minerals occur naturally in goods. Since a good diet will include a variety of foods that together will supply all the nutrients needed, a nutritionally adequate diet may be obtained without the use of specially formulated vitamin and mineral preparation or other specifically formulated therapeutic products. Accordingly, these products serve as deficiency correctors or therapeutic agents to supplement diets deficient in essential nutrition rather than as "food."

10.4.4.2 Taxability. - Vitamins and minerals, whether sold in liquid, powdered, granular, tablet, capsule, lozenge or pill form are subject to sales and service tax unless they are purchased under a prescription written by a medical practitioner licensed to write prescriptions. Vitamins sold under a prescription are exempt from sales and service tax under Section 11-15-9(n) of the West Virginia Code.

#### 10.4.4.3 Examples.

Cod liver oil  
Halibut oil  
Liquid vitamins  
Mineral oil  
Multiple vitamin tablets  
Vitamin tablets

Capsules advertised as being high in vitamin content and for use in eliminating hunger sensations normally encountered by persons on reducing diets are subject to the sales and service tax.

Wheat germ oil.

10.5 Definition of "Food-Service Establishment." - For purposes of this Section, and except as provided in Subsection 10.6, the term "food-service establishment" means any fixed or mobile restaurant, fast-food restaurant, coffee shop, cafe, cafeteria, drive-in, short-order cafe, luncheonette, grill, tearoom, sandwich shop, soda fountain, automat, tavern, bar, cocktail lounge, night club, industrial-feeding establishment, private, public or nonprofit organization or institution routinely serving food, catering operation, commissary or any other similar place in which food or drink is prepared for sale or for service on the premises or elsewhere; and any food-service establishment which operates for a limited period of time in connection with events such as, but not limited to, a fair, carnival, circus, public exhibition, athletic event, or similar gathering: Provided, That delicatessen, grocery, market, dairy or bakery stores shall not be considered food-service establishments within the meaning of this Section except for the sale of dinners, luncheons, barbecued chicken other than barbecued chicken sold whole and unsliced, sandwiches, snack bars, coffee shops or luncheon counters.

10.5.1 Special Rule for Delicatessens, Dairies and Bakery Stores. - A delicatessen, grocery, market, dairy or bakery store shall not be considered a food-service establishment as defined supra except for the sale of:

10.5.1.1 Dinners,

10.5.1.2 Luncheons,

10.5.1.3 Barbecued chicken (except whole barbecued chicken),

10.5.1.4 Sandwiches,

10.5.1.5 Snacks,

10.5.1.6 Hot Pizza, and

10.5.1.7 Other similar items which are commonly sold at snack bars, coffee shops or luncheon counters.

10.6 Not Included in Food-Service Establishment. - The term "food-service establishment" shall not include:

10.6.1 Sales by Public and Private Schools, Etc. - Food sold by public or private schools, school sponsored student organizations, or school sponsored parent-teacher associations to students enrolled in such school or to employees of such school during normal school hours; but not those sales of food made to the general public.

10.6.1.1 Organizations which may make such exempt sales are as follows:

10.6.1.1.a By a public, private, parochial or denominational school which is subject to regulation by the West Virginia State Board of Education;

10.6.1.1.b By an organization which is sponsored by a public, private, parochial or denominational school which is subject to regulation by the West Virginia State Board of Education; or

10.6.1.1.c By a parent-teacher association which is sponsored by a public, private, parochial or denominational school which is subject to regulation by the West Virginia State Board of Education.

10.6.1.2 The following sales of food or food products are subject to sales tax.

10.6.1.2.a Sales of food by vending machines regardless of where the machine is located, who owns the machine or the time of day when the sale occurs.

10.6.1.2.b Sales of food to students or employees at times other than during normal school hours.

10.6.1.2.c Sales of food to the general public.

10.6.1.2.d Athletic, Cultural and Social Events. - This exemption does not apply to sales of food items sold to students when sold within, and for consumption within, a place the entrance to which is subject to an admission charge. For example, when food items are sold on a repetitive basis by a student organization to students, or to both students and nonstudents, at an event which is subject to an admission charge, such as an athletic event, the sales to both students and nonstudents are subject to the sales and service tax.

10.6.1.3 "School Employee" Defined. - The term "school employee" includes all personnel employed by a school or by a county board of education

whether employed on a regular full-time basis, an hourly basis or otherwise. This includes all teachers, auxiliary personnel and service personnel defined as follows:

10.6.1.3.a Teacher. - The term "teacher" means teacher, supervisor, principal, superintendent, school librarian or any other person regularly employed for instructional purposes in a school in this State.

10.6.1.3.b Auxiliary Personnel. - The term "auxiliary personnel" means those persons selected and trained as monitor aide, clerical aide, classroom aide, or general aide.

10.6.1.3.c Service Personnel. - The term "service personnel" means those persons who serve the school in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch, etc.

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

10.6.2.1 "Contract Basis" Defined. - Food is sold on a contract basis only when a fixed price is paid for consumption of food products during a specific period of time without regard to the amount of food product actually consumed by the particular individual contracting for the purchase and no money is paid at the time the food product is served or consumed. The term "specific period of time" means a time period of not less than thirty (30) consecutive days.

10.6.2.2 Applications.

10.6.2.2.a College Operated Dormitory. - A public or private college subject to the control of the West Virginia Board of Regents operates a dormitory providing room and board to its students on a semester-by-semester basis. An itemization is made for room and for board. The price for board is determined regardless of the amount of food consumed by the student or the number of missed meals. The room charge is subject to sales and service tax.

10.6.2.2.b Lump Sum Charge for Room and Board. - If a lump sum is charged for room and board, the entire amount would be subject to sales and service tax.

10.6.2.2.c Food Furnished by Caterer. - If the food service is furnished by a caterer and the contract is between the student and the caterer, the food is not being sold by the college or the university and the sale is subject to sales and service tax.

10.6.2.2.d If under (c) above, the contract is between the student and the college or university, the sale is exempt from sales and service tax after June 30, 1981.

10.6.2.2.e Dormitory Operated by Private Person. - If room and board are furnished by a dormitory not operated by the college, the entire transaction is subject to sales and service tax.

10.6.2.2.f Fraternalities and Sororities. - Sales of food and meals on a "contract basis," as defined in Subsection 10.6.2.1, by student fraternities and sororities that are officially recognized by the college or university at which they are located, to a student enrolled at the college or university are exempt from sales and service tax after June 30, 1981. Food or meals sold to the general public or on any basis other than a "contract basis," are subject to sales and service tax.

10.6.3 Sales to Low Income Elderly Persons. - Food sold by a nonprofit organization or a governmental agency under a program funded by a state or the United States to low-income elderly persons at or below cost. All of the following conditions must be met in order to establish the exemption:

10.6.3.1 The purchaser is age 60 or older.

10.6.3.2 The purchaser is classified as having low income.

10.6.3.3 The sale is made by a nonprofit organization or governmental agency.

10.6.3.4 The sale is under a program funded by a state or the United States.

10.6.3.5 The sale is made at or below cost.

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

10.6.4.1 These sales are subject to tax in the following manner:

10.6.4.1.a Charitable Organization.

10.6.4.1.a.1 Occasional sales by a corporation or organization that is exemption from income tax under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, are exempt from sales and service tax.

10.6.4.1.a.2 The term "charitable organization" includes any corporation or organization which is organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the providing of athletic facilities or equipment), or for the prevention of cruelty to children or animals provided that no part of the net earnings of the organization inures to the benefit of any private shareholder or individual, that no substantial part of the activities of the organization is carrying on propaganda or otherwise attempting to influence legislation and that it does not participate in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office.

10.6.4.1.b Civic Organization Operated for Social Welfare.

10.6.4.1.b.1 Occasional sales by a corporation or organization that is exemption from income tax under Section 501(c)(4) of the Internal Revenue Code of 1986, as amended, are exempt from sales and service tax.

10.6.4.1.b.2 The term "civic league" includes any nonprofit civic organization that is operated exclusively for the promotion of social welfare.

10.6.4.1.b.3 Examples of organizations that may qualify.

- Educational radio stations
- Junior Chamber of Commerce
- Civic Improvement Association
- Volunteer fire department
- Volunteer rescue squad

10.6.4.1.c Nonprofit Organization.

10.6.4.1.c.1 Occasional sales by a nonprofit corporation or organization not included in Subdivisions 10.6.4.1.a and 10.6.4.1.b of Subsection 10.6.4.1 are exempt from sales and service tax.

10.6.4.1.c.2 The term "nonprofit organization" means a corporation or organization no part of the income or profit of which is distributed to its shareholders, members, directors or officers.

10.6.4.1.c.3 Examples of organizations that may qualify.

10.6.4.1.c.3.a Labor, agricultural or horticultural organizations such as those which could qualify under Section 501(c)(5) of the Internal Revenue Code of 1986, as amended.

10.6.4.1.c.3.b Business leagues, chambers of commerce and other organizations such as those which could qualify under Section 501(c)(6) of the Internal Revenue Code of 1986, as amended.

10.6.4.1.c.3.c Social clubs and clubs organized for pleasure, recreation and other nonprofit purposes such as those which qualify under Section 501(c)(7) of the Internal Revenue Code of 1986, as amended.

10.6.4.1.c.3.d Fraternal beneficiary societies, orders or associations such as those which qualify under Section 501(c)(8) of the Internal Revenue Code of 1986, as amended.

#### 10.6.4.2 "Occasional Sale of Food" Defined.

10.6.4.2.a Educational, charitable and nonprofit organizations who are exempt from the licensing provisions of W. Va. Code Article 16-6; when they make temporary sales of food not exceeding two weeks in length are deemed to be making only occasional sales of food. This would be true when temporary sales of food are made in connection with carnivals, church activities, banquets, fairs, etc., involving the community and public.

10.6.4.2.b Educational, charitable and nonprofit corporations are deemed to be making only occasional sales of food when the sale is an isolated transaction by a corporation or organization which does not hold itself out to be engaged in the business of selling food or food products.

10.6.5 Sales by Religious Organizations. - Food sold by any religious organization at a social or other gathering conducted by it or under its auspices, if the purpose in selling the food is to obtain revenue for the functions and activities of the organization and the revenue obtained from selling the food is actually used in carrying on such functions and activities. For the purpose of this Section, "religious organization" means any organization whose major activity is the furtherance of religious ideals and whose real and personal property is exempt from ad valorem property taxation under W. Va. Code § 11-3-9 and Article X, Section 1 of the West Virginia Constitution.

10.7 Application of Regulation to Specific Vendors.

10.7.1 Hospitals. - Food and meals furnished or sold by hospitals are taxable as follows.

10.7.1.1 Food and meals furnished to patients are not subject to sales and service tax. Food and food products purchased by the hospital to serve to its patients are exempt from sales and service tax after June 30, 1981, except when the food and meals are purchased from a caterer.

10.7.1.2 Food and meals sold to the general public and to employees of the hospital are subject to sales and service tax. When the hospital purchases food for sale in accordance with this paragraph, it may issue an exemption certificate because the food and food products are being purchased for resale.

10.7.2 Hotels, Motels, Tourist Homes and Rooming Houses. - Food and meals sold by hotels, motels, tourist homes and rooming houses are subject to sales and service tax. When the food and meals are furnished on a daily charge rate, sales and service tax shall be calculated on each daily charge. If separate charges are made for each meal, sales and service tax must be computed on each charge.

10.7.3 Migrant Farm Workers. - Commercially operated camps for migrant farm workers are usually owned and operated by persons who house and feed workers on a contract basis. The amount charged the worker under this contract may be subject to tax depending upon the exact arrangements.

10.7.3.1 If the contract provides for both room and board to be furnished to the workers, both the room rent and the meals are taxable.

10.7.3.2 If the contract provides for the rental of individual houses or apartments for a period of time in excess of thirty (30) days, and the worker buys his own groceries and prepares his own meals, then no tax is due on the rental and the purchase of the groceries is exempt after June 30, 1981.

10.7.3.3 In those instances where the workers have an arrangement between themselves whereby they appoint one worker as cook to purchase and prepare all food and to present the grocery bills to the employer who then makes a payroll deduction from the workers' earnings on a pro rata basis, without any charge for housing, no tax is due on the housing or the meals. The food purchased by the worker-cook on behalf of the group is exempt after June 30, 1981.

10.7.3.4 If the cook is employed by the employer and he

purchases all groceries charging them to the employer who then charges the workers, the sale is subject to tax.

10.7.3.5 The sale of meals or food by an employer including sales where payment is made by payroll deduction is taxable.

10.7.4 Nursing and Convalescent Homes. - Food and meals furnished or sold by nursing and convalescent homes are taxable as follows.

10.7.4.1 Food and meals furnished to patients or residents of nursing homes or convalescent homes are not subject to sales and service tax except when the food and meals are separately billed to the patient or resident. Assuming that separate billing does not occur, the food and food products purchased by the nursing or convalescent homes to serve to their patients or residents are exempt from sales tax after June 30, 1981, except when the food and meals are purchased from a caterer.

10.7.4.2 Food and meals furnished to patients or residents of nursing or convalescent homes are subject to sales and service tax when the food and meals are separately billed to the patient or resident. When the billing is determined on a daily charge rate, sales and service tax shall be collected on the daily charge. Where separate charges are made for each meal or purchase, sales and service tax shall be collected on each charge.

10.7.4.3 Food and meals served to the general public and to employees of the nursing or convalescent home are subject to sales and service tax.

10.7.4.4 Exempt Purchase of Food. - When the nursing home or convalescent home purchases food for sale in accordance with Subsection 10.7.4.2 or 10.7.4.3, it may issue an exemption certificate because the food and food products are being purchased for resale.

10.7.5 Street Vendors. - Because of the nature of their operation, most street vendors must collect sales and service tax on all their sales. Exceptions include sales of the following products by street vendors or door-to-door vendors:

10.7.5.1 Sales of fruit or vegetables in bulk, by the pound (or fraction thereof) or dry measure.

10.7.5.2 Sales of prepackaged foods commonly sold in grocery-type stores without food-service sales.

10.7.5.3 Sales of eggs, meat and fish.

10.7.6 Summer Camps. - Food and meals sold or furnished by summer

camps to campers, employees or the general public are subject to sales and service tax, regardless of whether the camp is operated by governmental agency or unit, by a church or religious organization, by a school or college, by a charitable, educational or civic organization, by a nonprofit organization or corporation, or by any other person. When a summer camp purchases food and food products, it may issue an exemption certificate because the purchases are for resale subject to sales and service tax.

10.7.7 Youth Organizations. -- Food sold by organizations such as the YMCA and YWCA is subject to sales and service tax, except to the extent that Section 10.7.12 is applicable.

10.7.8 Grocery-type Store.

10.7.8.1 Taxability of Sales. - Retail sales by grocery-type stores of food and food products that are intended for human consumption and which are generally sold for home preparation or consumption (or both) are exempt from sales and service tax after June 30, 1981. Sales of other food or food products such as beer, ice and animal food, as examples, and sales of dietary supplements, medicines, vitamins and all nonfood commodities are subject to sales and service tax. Should the grocery-type store also sell dinners, luncheons, sandwiches, snacks, hot pizza and other similar items which are commonly sold at snack bars, coffee shops or luncheon counters, then as to these sales only, the grocery-type store is deemed to be a food-service establishment and such sales are subject to sales and service tax.

10.7.8.1.a Delicatessen, Section 10.7.9.

10.7.8.1.b Bakery or pastry shop, Section 10.7.10.

10.7.8.1.c Dairy store, Section 10.7.11.

10.7.8.1.d Grocery store taxable sales, Appendix 3.

10.7.8.2 Purchases for Use in Business or for Resale. - Grocery-type stores are exempt from the payment of sales and service tax and use tax, on all purchases of the following goods. However, in order to claim this exemption, the grocery-type store must present a signed exemption certificate to the vendor who is supplying the good.

10.7.8.2.a The purchase of food, food products and other tangible personal property for resale to consumers is exempt from tax.

10.7.8.2.b The purchase of tangible personal property or services for use or consumption in the business of selling food and food products as well as other tangible personal property to consumers is not exempt from tax.

Example 1. - A grocery-type store may not purchase refrigeration repairs without imposition of sales and service tax.

Example 2. - A grocery-type store that purchases building materials to enlarge or remodel its store or to construct a warehouse, etc., must pay sales and service tax when purchasing such materials.

#### 10.7.9 Delicatessen.

10.7.9.1 General. - In many cases a delicatessen operates both in the manner of a grocery-type store and that of a food-service establishment. Care must be exercised so that the sales and service tax is collected on all food-service establishment type sales.

10.7.9.2 Operation as a Grocery-Type Store. - When a delicatessen sells canned goods; fresh produce; frozen foods (dinners, meat pies, vegetables, etc.); cold cuts; unheated fish (including precooked or smoked products) and sells salads by weight or in prepackaged containers; or other food commonly sold in grocery stores (without delicatessens) for home preparation and consumption in the same manner and packaging as is done or found in grocery stores (without delicatessens), such sales are exempt from tax if made after June 30, 1981.

10.7.9.3 Operation as a Food-Service Establishment. - When a delicatessen sells dinners, luncheons, sandwiches, snacks and other similar products which are commonly sold at snack bars, coffee shops or luncheon counters whether with or without beverage (including coffee and tea) and regardless of whether for consumption on or off the premises of the vendor, it is operating as a food-service establishment and must collect sales and service tax on all such sales. All sales of hot food or drink are considered to be prepared for immediate consumption by virtue of their heated condition and are therefore subject to sales and service tax regardless of the nature of the business making the sale or when the food or drink is actually consumed. Examples of taxable sales include (by way of illustration and not limitation) the sale of:

10.7.9.3.a Food or drink prepared and served for immediate consumption on or near the premises of the seller.

10.7.9.3.b Food or drink prepared and sold on a "take-out" or "to-go" basis for immediate consumption on or off the premises of the seller.

10.7.9.3.c Hot prepared food (except barbecued chicken sold whole and unsliced).

10.7.9.3.d Hot drinks such as coffee, tea and cocoa.

10.7.9.3.e Cold drinks sold in paper cups or plastic cups, e.g., soft drinks, fruit juices and milk.

10.7.9.3.f Food or drink arranged on a tray, plate or platter, whether intended for individual or multiple servings and whether sold by the pound or by the serving, e.g., a deli tray of cold cuts and cheese.

10.7.9.3.g A sandwich, either hot or cold. A sandwich which is purchased in a frozen state and which is taken from the premises of the retailer in that state is exempt after June 30, 1981.

10.7.9.3.h A combination of hot foods, or a combination of cold foods, or a combination of both hot and cold foods, whether sold on a plate or in multiple containers, when a single price has been established for the meal or dinner, regardless of any itemization on the sales check.

10.7.9.4 Prepackaged Food Products. - The sale of prepackaged food products is exempt after June 30, 1981. The term "prepackaged food products" includes but is not limited to food packaged by the preparer or food processor and sold by the retailer in unopened original containers or packages. It also includes over-the-counter sales of food sold in bulk by weight or measure and packaged by the delicatessen, grocery, market, dairy or bakery store. This term does not include meals, snacks, sandwiches and beverages, etc., sold over-the-counter by these establishments.

10.7.9.5 Definitions.

10.7.9.5.a Food Sold For Immediate Consumption. - The term "food sold for immediate consumption" means those sales of food which ordinarily are sold for immediate consumption at or near the premises of the seller and which are taxable even though the food is sold on a "take-out" or "to-go" order and is actually bagged, packaged or wrapped and taken from the premises of the seller. Where and when the customer actually eats the food is immaterial.

10.7.9.5.b Hot Prepared Food. - The term "hot prepared food" means those products, items or components which have been prepared for sale in a heated state and which are sold at any temperature which is higher than the air temperature of the room or place where they are sold.

10.7.9.5.b.1 Food is prepared for sale in a heated state if the vendor attempts to maintain the food at a temperature which is warmer than the surrounding air temperature by using heat lamps, warming trays, steam trays, ovens or similar units, or cooks the food to order, whether by microwave oven or more conventional means.

10.7.9.5.b.2 If the sale is intended to be of a hot food product, the sale is of a hot food product regardless of any cooling which may incidentally occur.

10.7.9.5.b.3 Example. - The sale of a toasted sandwich intended to be in a heated state when sold, such as a fried ham sandwich on toast, is a sale of a hot prepared food even though it may have cooled due to delay.

10.7.9.5.c Single Sales Price for Meal. - A single sales price is established for a combination of hot or cold foods (or both hot and cold foods) when a single price for the combination is listed on a menu, or wall sign, or is otherwise established.

10.7.9.5.d Sandwich. - The term "sandwich" includes anything commonly thought of as a sandwich including an open-faced sandwich, Poor Boy, submarine, hoagie, or hero sandwich and, for purposes of these regulations, a hamburger, cheeseburger, barbecue, fish sandwich, hot dog, sloppy joe and other similar sandwiches.

#### 10.7.9.6 Applications.

10.7.9.6.a A customer orders a sandwich and eats it on the premises. -- Taxable.

10.7.9.6.b A customer orders a sandwich "to go." -- Taxable.

10.7.9.6.c A customer orders a sandwich "to go" and also buys a fountain soft drink. -- All taxable.

10.7.9.6.d A customer orders a sandwich "to go" and also buys a pound of potato salad. -- The sandwich is taxable while the potato salad is exempt.

10.7.9.6.e A customer orders two sandwiches, two fountain soft drinks and a pound of potato salad "to go." -- The sandwiches and soft drinks are taxable while the potato salad is exempt.

10.7.9.6.f A customer orders one sandwich "to go," one cup of coffee, one pound of sliced bologna, one-half pound of cheese and one pound of potato salad. -- the sandwich and coffee are taxable while the bologna, cheese and salad are exempt.

10.7.9.6.g A customer orders two sandwiches "to go," one cup of coffee, one small soft drink (in paper cup), one pound of sliced bologna,

one-half pound of cheese and a pound of potato salad. -- The sandwiches, coffee and soft drink are subject to tax while the bologna, cheese and salad are exempt.

10.7.9.6.h A customer purchases a loaf of bread, one-half pound of salami, one quarter pound of swiss cheese, a bag of potato chips and a canned soft drink, all of which he takes with him. - This entire transaction is exempt.

10.7.9.6.i Sales of hot pretzels and hot popcorn are subject to tax.

10.7.9.6.j A customer orders a sandwich "to go" and a soft drink which is sold in a can. -- The sandwich is subject to tax. The canned soft drink is exempt except when it is sold in a paper or plastic cup.

10.7.9.6.k A delicatessen advertises the sale of a hot ham and cheese sandwich, an order of potato salad and a canned soft drink for \$3.50. Although the vendor places the potato salad in a separate container and the soft drink is sold in a can, the entire sales price of \$3.50 is subject to sales tax because all three (3) items are sold as components of an advertised meal.

10.7.9.7 Purchase for Use in Business or for Resale. - Delicatessens are exempt from the payment of sales and service tax and use tax, on all purchases of the following goods. However, in order to claim this exemption, the delicatessen must present a signed exemption certificate to the vendor who is supplying the good.

10.7.9.7.a The purchase of food, food products and other tangible personal property for resale to consumers is exempt from tax.

10.7.9.7.b The purchase of tangible personal property or services for use or consumption in the business of selling food and food products as well as other tangible personal property to consumers is not exempt from tax.

Example 1. A delicatessen may not purchase refrigeration repairs without imposition of sales tax.

Example 2. A delicatessen that purchases building materials to enlarge or remodel its store or to construct a warehouse, etc., must pay sales and service tax when purchasing such materials.

#### 10.7.10 Bakery Store or Pastry Shop.

10.7.10.1 Taxability. - Sales by bakery stores or pastry shops

which sell their products in the same manner as a grocery-type store selling baked goods and pastries made by a third party, are exempt from tax after June 30, 1981, except when their products are sold as provided in Subsection 10.7.10.2.

10.7.10.2 Bakeries Which are Also Food-Service Establishments. - Bakery stores which also have food-service facilities, whether they be limited to sales of hot coffee, tea or cocoa and bakery products or include a larger menu, and regardless of whether the bakery has facilities for on-premise consumption or all orders are sold on a "to go" basis, must collect and remit tax on all such food-service sales.

10.7.10.3 Application.

10.7.10.3.a A customer has a doughnut and coffee at the lunch counter of a donut shop and also purchases a dozen doughnuts. -- The coffee and doughnut are subject to sales and service tax while the dozen doughnuts are exempt after June 30, 1981.

10.7.10.3.b A customer orders one or more doughnuts which are served to him at the lunch counter of a bakery store. -- This sale is taxable.

10.7.10.3.c A customer orders one or more doughnuts to take with him. -- This sale is exempt from sales and service tax after June 30, 1981.

10.7.10.3.d A customer orders a cup of coffee "to go" and a dozen doughnuts. -- The coffee is subject to the sales service tax while the doughnuts are exempt after June 30, 1981.

10.7.10.3.e A customer orders a cup of coffee "to go" and a doughnut. -- The coffee is subject to tax while the doughnut is exempt after June 30, 1981.

10.7.10.3.f A customer orders a cup of coffee "to go" and a doughnut and also an apple pie. -- The coffee is subject to tax while the doughnut and apple pie are exempt after June 30, 1981.

10.7.10.4 Prepackaged Food Products. - The sale of prepackaged food products is exempt after June 30, 1981. The term "prepackaged food products" includes but is not limited to food packaged by the preparer or food processor and sold by the retailer in unopened original containers or packages. It also includes over-the-counter sales of food sold in bulk by weight or measure and packaged by the delicatessen, grocery, market, dairy or bakery store. This term does not include meals, snacks, sandwiches and beverages, etc., sold over-the-counter by these establishments.

10.7.10.5 Purchases For Use in Business or For Resale. - Bakery stores or pastry shops are exempt from the payment of consumers sales and service tax and use tax, on all purchases of the following goods. However, in order to claim this exemption, the bakery store or pastry shop must present a signed exemption certificate to the vendor who is supplying the good.

10.7.10.5.a The purchase of food, food products and other tangible personal property for resale to consumers is exempt from tax.

10.7.10.5.b The purchase of tangible personal property or services for use or consumption in the business of selling food and food products as well as other tangible personal property to consumers is not exempt from tax.

Example 1. A bakery store or pastry shop may not purchase refrigeration repairs without imposition of sales and service tax.

Example 2. A bakery store or pastry shop that purchases building materials to enlarge or remodel its store or to construct a warehouse, etc., must pay sales and service tax when purchasing such materials.

10.7.11 Dairy Store.

10.7.11.1 Taxability. - Retail sales by dairy stores of milk and milk products that are intended for human consumption and which are generally sold for home consumption are exempt from sales and service tax after June 30, 1981.

10.7.11.2 Sales of Ice Cream. - Ice cream and other frozen milk products (including frozen yogurt and frozen custard) which are sold in bulk; that is, in pints, quarts and half-gallons, are exempt from tax after June 30, 1981. Products such as ice cream cakes, ice cream pies and ice cream cake rolls, when sold whole and unsliced are eligible food items. Sales of ice cream and other frozen milk products (including frozen yogurt and frozen custard) are subject to tax when sold:

- 10.7.11.2.a in cones, cups, dishes or on plates;
- 10.7.11.2.b as sundaes and banana splits, etc.;
- 10.7.11.2.c as waffles and ice cream;
- 10.7.11.2.d as a milkshake; or
- 10.7.11.2.e as a piece of ice cream cake or pie.

10.7.11.3 Sales of Other Food Products. - If the dairy store sells other food and food products such as those generally sold in a grocery-type store (without a delicatessen), these sales are exempt from tax after June 30, 1981. If the dairy store makes sales of dinners, luncheons, sandwiches, snacks, hot pizza or other similar items which are commonly sold at snack bars, coffee shops or luncheon counters, these sales are subject to sales and service tax.

10.7.11.4 Prepackaged Food Products. - The sale of prepackaged food products is exempt after June 30, 1981. The term "prepackaged food products" includes but is not limited to food packaged by the preparer or food processor and sold by the retailer in unopened original containers or packages. It also includes over-the-counter sales of food sold in bulk by weight or measure and packaged by the delicatessen, grocery, market, dairy or bakery store. This term does not include meals, snacks, sandwiches and beverages, etc., sold over-the-counter by these establishments. Examples include (by way of illustration and not limitation) the sale of:

10.7.11.4.a Popsicles, ice cream cones and ice cream sandwiches which are prepackaged by the manufacturer.

10.7.11.4.b Products packaged and sold in the same form as commonly found in grocery-type stores.

10.7.11.5 Purchases for Use in Business or for Resale. - Dairy stores are exempt from the payment of consumers sales and service tax and use tax, on all purchases of the following goods. However, in order to claim this exemption, the dairy store must present a signed exemption certificate to the vendor who is supplying the good.

10.7.11.5.a The purchase of food, food products and other tangible personal property for resale to consumers is exempt from tax.

10.7.11.5.b The purchase of tangible personal property or services for use or consumption in the business of selling food and food products as well as other tangible personal property to consumers is not exempt from tax.

Example 1. A dairy store may not purchase refrigeration repairs without imposition of sales and service tax.

Example 2. A dairy store that purchases building materials to enlarge or remodel its store or to construct a warehouse, etc., must pay sales and service tax when purchasing such materials.

10.7.12 Other Retailers of Food.

10.7.12.1 Taxability. - Stores such as department stores, discount stores, variety stores, drugstores, gas stations and any other place of business that sells tangible personal property at retail are generally required to collect sales and service tax on all sales except when the sale is specifically made exempt from tax by law or when the purchaser presents a valid exemption certificate.

10.7.12.2 Sales of Food. - Retail sales of food and food products that are intended for human consumption and which are generally sold for home preparation or consumption (or both) are exempt from sales tax after June 30, 1981. Sales of other food or food products such as beer, ice and animal food, as examples, and sales of dietary supplements, medicines, vitamins and all nonfood commodities are subject to sales and service tax. Should the retailer also sell dinners, luncheons, barbecued chicken (except when sold whole and unsliced), sandwiches, snacks, hot pizza and other similar items which are commonly sold at snack bars, coffee shops or luncheon counters, then as to these sales only, the retailer is deemed to be a food-service establishment. The following is provided as guidance for determining sales subject to sales and service tax.

10.7.12.2.a All sales from vending machines are subject to sales and service tax.

10.7.12.2.b All restaurant, cafeteria, snack bar and luncheon counter-type sales are subject to sales and service tax regardless of whether the food is consumed on the premises or is ordered "to go."

10.7.12.2.c Delicatessen-type sales are subject to the sales and service tax.

10.7.12.2.d Sales of doughnuts, cup cakes, pies, cakes and other baked goods in the same manner as a bakery store or pastry shop, are subject to the sales and service tax.

10.7.12.2.e Sales of ice cream and ice cream products in the same manner as a dairy store, are subject to the sales and service tax.

10.7.12.2.f Sales of food and food products such as candy bars, peanuts, and other grocery-type store items are subject to the sales and service tax.

10.7.12.2.g Sales of "hot peanuts" are subject to sales and service tax. However, sales of freshly roaster peanuts which are not intended to be sold in a heated state are exempt after June 30, 1981, even though they may be in a heated state when sold. The criteria here is whether after roasting, the vendor maintains the peanuts in a heated state.

10.7.12.2.h Sales of "hot pretzels" are subject to sales

and service tax. However, sales of freshly baked pretzels which are not intended to be sold in a heated state are exempt after June 30, 1981, even though they may be in a heated state when sold. The criteria here is whether after baking, the vendor maintains the pretzels in a heated state.

10.7.13 Sales of Food From Vending Machines. - All sales of tangible personal property (including sales of food and food products) from vending machines are subject to sales and service tax, regardless of who owns the machine or where it is located in this State. Tax applies to each individual purchase which is for an amount in excess of five cents (\$0.05).

10.7.14 Caterers and Catering Operations.

10.7.14.1 Taxability. - The law provides that sales of food by a "food-service establishment" are subject to sales and service tax. The term "food-service establishment" is defined in W. Va. Code § 11-15-11(e) to include a catering operation.

10.7.14.2 Definition of "Caterer". - The term "caterer" means one primarily engaged in the selling, providing or furnishing of food and beverages which are essentially prepared and usually ready-to-eat. This food and beverage is usually intended for immediate consumption or for consumption at a specific meal, affair or social function, and generally is served at the premises of one other than the caterer. The sale is taxable regardless of whether or not the food and beverage are delivered to those premises by the caterer or whether food service is also provided by the caterer.

10.7.14.3 Application of Tax.

10.7.14.3.a Tax applies to the total charges made by caterers for serving meals, food and drink, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for labor of serving meals.

10.7.14.3.b Tax applies to charges made by caterers for preparing and serving meals and drinks even though the food is not provided by the caterers.

10.7.14.3.c Tax also applies to charges made by caterers for rental of dishes, silverware, glasses, etc., if no food is provided or served by caterers in connection with the rental.

10.7.14.3.d Tax applies to the labor of serving meals, whether performed by himself or by his employees or subcontractors.

10.7.14.3.e Tax applies to charges made by caterers for preparing and serving meals and drinks even though the food is not provided by

the caterers.

10.7.14.3.f Sales of meals by caterers to social clubs, fraternal organizations, or other persons are sales for resale if such social clubs, fraternal organizations, or other persons are the retailers of the meals subject to tax.

10.7.14.3.g If a caterer makes sales to a school, or to a church, no tax would be due irrespective of location or place of sale.

10.7.14.3.h Sales of meals by caterers to social clubs, fraternal organizations or other persons are sales for resale, even though prepared and served by the caterer. If such clubs, fraternal organizations, or other persons are retailers of the meals and can give a valid exemption certificate to the caterer, the sale is exempt from tax. Otherwise, the sale is subject to sales and service tax unless for some other reason the purchaser can give a valid exemption certificate.

10.7.14.3.i Where the sales agreement does not require the caterer to prepare and serve the food as meals but rather to serve the food buffet style, tax nevertheless applies to the total charge.

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

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

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

11.1.2 Upon Whom Tax Imposed. - The sales and service tax and use tax imposed on the sale or use of gasoline and special fuel within this State shall be collected on the metered quantity withdrawn from storage within this State. For periods beginning on or after October 1, 1987, the quantity delivered shall be either the actual metered gallons delivered or the quantity delivered being calculated by converting to 60° F. the quantity transferred by means of either temperature compensating meters approved by the West Virginia Department of Labor, Weights and Measures Division, or by mathematical conversion using American Petroleum Institute (API) ASTM-IP Petroleum Measurement Tables for specific gravity and temperature. This measure shall be the same as that required for calculation of the Gasoline and Special Fuel Excise Tax imposed by W. Va. Code § 11-14-1 et seq. and § 11-14A-1 et seq. If the metered quantity delivered is not determined by temperature compensating meter, as aforesaid, and the taxpayer does not convert said gallons delivered to temperature adjusted gallons or, after making a mathematical conversion fails to keep and maintain records to support and substantiate the conversion, then the amount of tax due shall be determined by the number of metered gallons of gasoline or special fuel delivered without adjustment for temperature. Any taxpayer using the conversion method for determining the quantity delivered must record the conversion adjustment on each invoice and must continue to use that method for the entire tax year for the sales and service tax and the use tax.

11.2 Measure of Tax. - The measure of tax on sales of gasoline or special fuel by distributors or importers shall be the average wholesale price as defined and determined in Section 11.4 of these regulations. It is recognized that the sales and service tax and use tax is generally imposed on gross proceeds from sales to ultimate consumers, while the sales and service tax and use tax on gasoline and special fuel is imposed on the average wholesale price of such gasoline and special fuel; as a result, for the purposes of either the sales and service tax or the use tax, the average wholesale price shall not be less than ninety-seven cents per gallon of gasoline or special fuel for all gallons of gasoline and special fuel sold during the reporting period.

11.3 Definitions. - For purposes of this Section:

11.3.1 "Aircraft" shall include any airplane or helicopter that lands in this State on a regular or routine basis, and transports passengers or freight.

11.3.2 "Aircraft fuel" shall mean gasoline and special fuel suitable for use in any aircraft engine.

11.3.3 "Distributor" shall mean and include every person:

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

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

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

11.3.4 "Gasoline" shall mean and include any product commonly or commercially known as gasoline, regardless of classification, suitable for use as fuel in an internal combustion engine, except special fuel as hereinafter defined, including any product obtained by blending together any one or more products, with or without other products, if the resultant product is capable of the same use.

11.3.5 "Importer" shall mean and include every person, resident or nonresident, other than a distributor, who receives gasoline or special fuel outside this State for use, sale or consumption within this State, but shall not include the fuel in the supply tank of a motor vehicle that is not a motor carrier.

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

11.3.7 "Motor vehicle" shall mean and include automobiles, motor carriers, motor trucks, motorcycles and all other vehicles or equipment, engines or machines which are operated or propelled by combustion of gasoline or special fuel.

11.3.8 "Retail dealer of gasoline or special fuel" shall mean and include any person not a distributor who sells gasoline or special fuel from a fixed location in this State to users.

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

11.3.10 "Supply tank" shall mean any receptacle on a motor vehicle from which gasoline or special fuel is supplied for the propulsion of the vehicle or equipment located thereon, exclusive of a cargo tank. A supply tank

includes a separate compartment of a cargo tank used as a supply tank, and any auxiliary tank or receptacle of any kind or cargo tank, from which gasoline or special fuel is supplied for the propulsion of the vehicle, whether or not such tank or receptacle is directly connected to the fuel supply line of the vehicle.

11.3.11 "Tank wagon" shall mean and include any motor vehicle or vessel with a cargo tank or cargo tanks ordinarily used for making deliveries of gasoline or special fuel, or both, for sale or use.

11.3.12 "Taxpayer" shall mean any person liable for the sales and service and use tax imposed on the sale of gasoline and special fuel.

11.3.13 "User" shall mean any person who purchases gasoline or special fuel for use or consumption.

#### 11.4 Determination of Average Wholesale Price.

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

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

11.4.3 All actions of the Tax Commissioner in acquiring data necessary to establish and determine the average wholesale price of gasoline and special fuel, in providing notification of his determination prior to the effective date of any change in rate, and in establishing and determining the average wholesale price of gasoline and special fuel, may be made by the Tax

Commissioner without compliance with the provisions of W. Va. Code § 29A-3-1 et seq.

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

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

11.5.1 The total amount of gasoline or special fuel used in the operation of the motor carrier within this State shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this State (whether loaded or not), that the total number of miles traveled within this State bears to the total number of miles traveled within and without this State. Separate miles must be computed for any motor carrier operated in tandem or in series. Air carrier operations may be calculated and determined by the use of an hour meter.

11.5.2 A motor carrier shall first determine the gross amount of tax due under this Section on the average wholesale value, determined under Subsection 11.4, of all gasoline and special fuel used in the operation of the motor carrier within this State during the preceding quarter, as if all gasoline and special fuel had been purchased outside this State.

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

11.5.4 The difference between the foregoing Subsection 11.5.2 and Subsection 11.5.3 is the amount of use tax due when Subsection 11.5.2 is greater than Subsection 11.5.3, or the amount to be refunded or credited to the motor carrier when Subsection 11.5.3 is greater than Subsection 11.5.2, which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by W. Va. Code § 11-14A-1 et seq.

11.6 Return and Payment of Tax. - The sales and service tax imposed on the sales of gasoline and special fuel and the use tax imposed on the use or consumption in this State of gasoline or special fuel shall be paid by each taxpayer on or before the twenty-fifth day of January, April, July and October of each year. Payment shall be by check, bank draft, certified check or money order, payable to the Tax Commissioner, and it shall be for the amount of tax

due for the preceding quarter. Every taxpayer shall make and file a properly completed return as the Tax Commissioner may require and with such return, remit such tax as shown thereon, if any.

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

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

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

11.10 Dedication of Tax to Highways. - All sales and service tax and use tax collected on the sale and use of gasoline and special fuel, after deducting the amount of any refunds lawfully paid, shall be deposited in the "Road Fund" in the State Treasurer's Office. The funds so deposited shall be used only for the purpose of construction, reconstruction, maintenance and repair of highways, and payment of principal and interest on State bonds issued for highway purposes.

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

§ 110-15-12- Collection of Tax.

12.1 Tax Paid by Ultimate Consumer. - It is the intent of W. Va. Code § 11-15-1 et seq. that the sales and service tax levied thereunder shall be passed on to and be paid by the ultimate consumer. The amount of the tax shall be added to the sales price, and shall constitute a part of that price and be collectible as such.

12.2 Tax as Debt. - The amount of sales and service tax and use tax required to be collected by any vendor or retailer is deemed to be held in trust for the State of West Virginia (See W. Va. Code § 11-10-5j) and any sales and service tax and use tax collected by any vendor or retailer shall constitute a debt owed to this State.

12.3 Conditional Sales, Credit Sales, Etc. - A vendor or retailer doing business wholly or partially on a credit basis shall require the purchaser to pay the full amount of tax due upon a credit sale at the time such sale is made or within thirty days thereafter.

12.3.1 Cash and Credit Sales. - Those sales transactions in which the purchase price is paid upon delivery of the merchandise to the purchaser, or prior thereto, and those rental transactions in which the rental is paid either upon delivery of the rented property to the lessee or the return of such property, or in advance of either of these events, are cash sales. All other sales and rental transactions are credit sales.

12.3.1.1 If the sale is a cash sale, the vendor shall require the purchaser to pay the tax at the time of making the sale. If the sale is a credit sale, the vendor shall require the purchaser to pay the tax at the time such sale is made, or within thirty days thereafter.

12.3.1.2 When several items are purchased simultaneously, the tax may be computed on the total sale price of the items so purchased. This is the only situation in which purchases may be aggregated in the computation of the tax. Separate sales transactions may not be aggregated.

12.3.1.3 For example, if merchandise is purchased at the cosmetic counter, delivered to the purchaser and a purchase price of sixty cents paid, this is a complete sale and three cents tax must be collected. If the same purchaser goes to the candy counter and makes a ten-cent purchase, there is a new sale and one cent tax must be collected thereon. The cosmetic sale and the candy sale may not be aggregated so as to permit the payment of three cents tax instead of four cents.

#### 12.3.2 Conditional Sales.

12.3.2.1 For the purpose of obtaining uniformity and consistency among all vendors in the administration of the sales and service tax and use tax

with respect to conditional sales, a conditional sale is defined to mean an agreement for the sale of tangible personal property pursuant to which possession is delivered to the buyer, but title is retained by the seller until the performance of some condition, usually the payment of the purchase price. A conditional sale shall be considered to be a sale made at the time of, and at the place of, acceptance of the purchase offer by the seller. The tax applies to conditional sales as of the time the sale is made and must be collected in the same manner as for charge sales, i.e., within thirty days from the time sale is consummated.

12.3.2.2 Purchases under conditional sales contracts with out-of-state retailers are subject to the use tax. If the conditional sale is made by an out-of-state vendor who is not authorized to collect use tax, the purchaser is required to pay such use tax to the Tax Department on or before the fifteenth day of the month next succeeding the quarterly period in which the purchase was made. If a conditional sale is made by an out-of-state retailer who is authorized to collect use tax, five percent of that portion of the purchase price actually received during a quarterly period shall be remitted to the Tax Department by the retailer.

12.3.3 Sales on Approval. - If a consideration is given therefore, sales of tangible personal property on approval are subject to the tax. Sales with agreements to repurchase and sales for cash on delivery also are subject to such tax.

12.3.4 Lease-Purchase Sales. - So-called "leases" of tangible personal property wherein title is passed to the "lessee" upon completion of purchase price payments are sales, and the full tax must be collected and paid at or prior to the delivery of the tangible personal property to the purchaser or within thirty days after delivery.

12.3.5 Finance and Carrying Charges. - The sale price upon which the sales and service tax or use tax is to be computed shall include carrying charges, finance charges or similar items. For example, a sewing machine priced at \$80.00 is sold under a conditional sales contract which provides for deferred monthly payments. A carrying charge of \$5.00 is added to the sale price to cover the cost of recording the contract and billing the purchaser, thus making the total cost to the purchaser \$85.00. The tax is to be computed on \$85.00.

12.3.6 Discounts. - Any discount allowed at the time of sale which establishes the final selling price for the article at that time may be deducted in arriving at the base price subject to the tax. Discounts which are allowed after the sale is made or upon conditions or events happening at some future time, such as a certain percentage discount being allowed if paid within a specified period, are not deductible in determining the tax base for the sales and service tax or use tax liability.

12.3.7 Exchanged Merchandise. - When merchandise, the sale of which has been taxed under the sales and service tax or use tax, is exchanged, the value of the merchandise exchanged may be deducted from the sale price of the article purchased and tax collected upon the balance.

12.3.8 Rebates and Trade-ins. - When merchandise is taken as a trade-in for the purpose of reducing the price the purchaser must pay, the value of the item shall not be applied in such a way so as to reduce the amount subject to tax. Likewise, the amount of any rebate available to entice the purchase of the item shall not be applied so as to reduce the amount of the sale price subject to tax. In other words, the sale price shall not be reduced by the value of any item traded-in or by the amount of any rebate.

12.3.8.1 Example 1. - A person owns a 16-foot boat with a value of \$2,500.00 but seeks to purchase an 18-foot boat which will sell for \$10,000.00. The \$2,500.00 value of the trade-in may not be applied to reduce the amount of the sale price subject to tax; therefore, the entire \$10,000.00 will be subject to tax.

12.3.8.2 Example 2. - In order to increase sales, a manufacturer offers a \$10.00 rebate on the purchase of a \$50.00 power saw. The entire \$50.00 will be subject to tax. However, a rebate offered by a retailer to his customer is treated as a cash discount.

12.3.9. Merchandise Held or Laid Away. - When merchandise is held or laid away by the vendor pending a payment of all or part of the purchase price, the sale for sales and service tax or use tax purposes occurs when the merchandise is delivered to the purchaser. If an unpaid balance remains at the time the merchandise is delivered, the sale is to be treated as a charge sale.

12.3.10 Barter. - When instead of money, the consideration for a sale is tangible personal property or services, the tax is to be computed upon the sales value of the article or articles sold or the services provided.

12.3.11 Sales Which are Rescinded - Returned or Damaged Merchandise. - When a sale upon which tax was collected is rescinded, the tax shall be refunded to the purchaser unless it has previously been remitted to the Tax Department. The sales and service tax must generally be remitted on or before the fifteenth (15th) day of the month next succeeding the month in which the tax accrued. Collected use taxes must be remitted on or before the fifteenth (15th) day of the month next succeeding the calendar quarter in which the tax accrued.

§ 110-15-13 - Filing Tax Returns.

13.1 Sales and Service Tax Return and Payment; Exception. - Except as otherwise required under Subsection 9c.2, 11.6 and 13.1.3 of these regulations,

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

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

13.1.1 Other Times for Filing Returns. - The Tax Commissioner may, upon written request, authorize a taxpayer whose books and records are not kept on a monthly basis to file returns at times other than those specified in the foregoing Subsection 13.1, but in no event shall a taxpayer make less than one return a calendar month, except as provided in the following Subsection 13.1.2 or as may be authorized in writing by the Tax Commissioner. In order to receive such permission or authorization, the taxpayer must show that the monthly filing otherwise required will impose an undue hardship.

13.1.2 Quarterly Return. - Except as otherwise required under Subsections 9c.2, 11.6 and 13.1.3 of these regulations, when the total tax for which a person is liable does not exceed \$50.00 for any month, he may make a quarterly return on or before the fifteenth day of the first month in the next succeeding quarter in lieu of monthly returns. Quarterly returns are due on or before April 15, July 15, and October 15.

13.1.3 Annual Return; Extension of Time. - On or before the end of the calendar year, each person liable for the payment of sales and service tax shall file an annual return. The form of such return shall be as follows:

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

13.1.3.2 For taxpayers filing on a quarterly basis, such annual return shall show the total gross proceeds of business and the gross proceeds of business upon which the tax is based for the calendar quarter ending December

thirty-first together with any other information which the Tax Commissioner may require.

13.1.3.3 An annual return may not be filed unless all previous monthly or quarterly returns have been filed and tax due, if any, has been paid.

13.1.3.5 Consolidated Returns. - A person operating two or more places of business of like character from which are made or dispensed sales or services which are subject to the sales and service tax shall file consolidated returns covering all such sales or services. Whenever a consolidated monthly return is filed, a schedule shall be attached showing, for each place of business, total sales and charges for rendering services, total transactions subject to the sales and service tax and total sales and service tax collections.

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

13.1.3.7 Extension of Time. - The Tax Commissioner for good cause shown and on written application of a taxpayer, may extend the time for making any return required by the provisions of W. Va. Code § 11-15-1 et seq.

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

13.1.4 Liability of Successor.

13.1.4.1 The successor in business of any person who sells out a business or stock of goods, or ceases doing business, shall be personally liable for the payment of tax, additions to tax, penalties and interest unpaid after expiration of the thirty day period allowed for payment by the predecessor.

13.1.4.2 The term "successor" refers to any person who directly or indirectly purchases, acquires, or succeeds to the business or the stock of goods of any person quitting, selling, or otherwise disposing of a business or stock of goods. The purchase or acquisition of a business may give rise to successor liability whether the consideration is money, property, assumption of liabilities or cancellation of indebtedness.

13.1.4.3 The liability of a successor arises from any sale, transfer, assignment or other acquisition of a business or stock of goods. A person who purchases or acquires a portion of a business or stock of goods may become liable as a successor where he purchases or acquires substantially all of

the business assets or stock of goods.

13.1.4.4 The business assets include the assets of a business pertaining directly to the conduct of the business. Business assets include real property or any interest therein; tangible personal property, including fixtures, equipment and vehicles; and intangible property, including accounts receivable, contracts, business name, business goodwill, customer lists, delivery routes, patents, trademarks or copyrights.

13.1.4.5 If any taxpayer operates more than one business at separate locations, each business location is a separate business and has a separate stock of goods for purposes of determining successor liability. A successor of the business or stock of goods of any business location is subject to liability as a successor with respect to the tax attributable to that location even if he does not purchase the business or stock of goods of all the locations.

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

13.1.4.7 Successor liability does not arise in connection with sales or transfers pursuant to assignments for the benefit of creditors, deeds of trust, or security interest, statutory liens, judgment liens unless the previous owner receives purchase money from the transfer or sale. Any business operated under Chapter 11 of the United States Code, which is purchased or acquired by another person, shall not give rise to successor liability.

13.1.4.8 The purchaser or transferee of the business or stock of goods will be released from liability if he withholds from the purchase price an amount sufficient to cover the tax liability of the seller or predecessor, or if he obtains a certificate from the Tax Department stating that no taxes are due from the seller or predecessor. purchase price is not limited to cash transferred to the seller, but includes any consideration flowing directly or indirectly to a seller or predecessor.

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

13.1.4.10 The liability of a successor extends to taxes incurred in the course of operation of the business by the predecessor, or any prior

predecessor. The liability includes all taxes, interest, and additions to tax, whether assessed or unassessed against the predecessor, and without regard to whether a tax lien has been issued or perfected against the predecessor. If any predecessor is given a certificate relating to the tax liability of a prior predecessor, then the successor shall only be liable for the tax liability of his immediate predecessor.

13.2 Use Tax Return and Payment; Exception. - Except as otherwise required under Subsections 9c.2 and 11.6 of these regulations, each retailer required or authorized by W. Va. Code §§ 11-15A-6 or 11-15A-7 to collect the use tax, shall be required to pay to the Tax Commissioner the amount of such tax collected, with that amount being due and payable on or before the fifteenth day of the month next succeeding each quarterly period. At such time, each retailer shall file with the Tax Commissioner a return for the preceding quarterly period in such form as may be prescribed by the Tax Commissioner. The form shall show the sales price of any or all tangible personal property and taxable services sold by the retailer during such preceding quarterly period, the use of which is subject to the use tax, and such other information as the Tax Commissioner may deem necessary. The return shall be accompanied by a remittance of the amount of such tax for the period covered by the return: Provided, That where tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof is extended over a period longer than sixty days from the date of the sale, the retailer may collect and remit for each quarterly period that portion of the tax equal to five percent of the portion of the purchase price actually received during such quarterly period. The Tax Commissioner, if he deems it necessary in order to insure payment to the State of the amount of such use tax, may in any or all cases require returns and payments of such amount to be made for other than quarterly periods. The Tax Commissioner may, upon request and a proper showing of the necessity therefor, grant an extension of time not to exceed thirty days for making any return and payment; Provided, such request is received by the Tax Department prior to the due date of the return. Returns shall be signed by the retailer or his duly authorized agent, and must be certified by him to be correct. An unsigned return will be deemed incomplete and may be returned to the taxpayer as improperly filed.

§ 110-15-14 Maintenance of Records.

14.1 Sales and Service Tax Records.

14.1.1 Keeping and Preserving Records. - Each person shall keep complete and accurate records of taxable sales and of charges, together with a record of the tax collected thereon, and shall keep all invoices, bills of lading and such other pertinent documents in such form as the Tax Commissioner may require. Such records and other documents shall be preserved for a period of time not less than three years, unless the Tax Commissioner shall consent in writing to their destruction within that period or by order require that they be

kept longer. Records must be kept so long as the period is open to assessment or refund. Any person who fails to maintain appropriate records shall be subject to the provisions of W. Va. Code § 11-9-1 et seq.

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

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

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

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

#### 14.2 Use Tax Records.

14.2.1 Keeping and Preserving Records. - Every retailer required or authorized to collect use taxes and every person using in this State tangible personal property or taxable services in this State, shall keep such records, receipts, invoices, and other pertinent papers as the Tax Commissioner shall require and in such form as the Tax Commissioner shall require. For those transactions in which the retailer provides to the vendor the direct payment permit number, the vendor shall retain a record copy of the invoice with the direct payment permit number entered thereon. Any person who fails to maintain appropriate records shall be subject to the provisions of W. Va. Code § 11-9-1 et seq.

14.2.2 Examination of Records. - In addition to the Tax

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

14.2.2.1 Is selling tangible personal property or taxable services; or

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

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

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

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

§ 110-15-17 Liability and Penalties.

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

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

§ 110-15-18 Transition Rules. - For all transactions involving sales or leases of tangible personal property or rendering of taxable services which were not subject to the sales and service tax or the use tax prior to July 1, 1987, but which will become subject to such tax on that date, the following transition rules are in effect.

18.1 For transactions which have been completed before July 1, 1987, except for billing and/or payment of the sale price, such transactions will not be subject to the sales and service tax or the use tax.

18.2 For transactions under binding executory contracts which require one payment at commencement of the contract with the contract commencing before and

extending beyond July 1, 1987, such transactions will not be subject to the sales and service tax or the use tax.

18.3 For transactions under contracts which require multiple payments over the length of the contract for sales, leases or services which occur over the length of the contract, such contract performance commencing before and extending beyond July 1, 1987, those sales which are completed before July 1, 1987, except for billing and payment will not be subject to the sales and service tax or the use tax; moreover, performance under such contracts which is completed on or after July 1, 1987, will also not be subject to such tax.

18.4 For transactions under contracts with contract performance commencing before and extending beyond July 1, 1987, and which require installment-type of payments over the length of the contract, no payments under the contract shall be subject to the sales and service tax or the use tax.

18.5 For transactions which are leases under contracts with contract performance commencing before and extending beyond July 1, 1987, and which require monthly, quarterly or annual payments over the length of the contract, those payments made on and after July 1, 1987, will not be subject to the sales and service tax and the use tax.

§ 110-15-19 General Procedure and Administration. - Each and every provision of the "West Virginia Tax Procedure and Administration Act" set forth in W. Va. Code § 11-10-1 et seq. shall apply to the sales and service tax imposed by W. Va. Code § 11-15-1 et seq. and the use tax imposed by W. Va. Code § 11-15A-1 et seq. with like effect as if said Act were applicable only to the taxes imposed by and set forth in extenso in such Articles.

§ 110-15-20 through 110-15-29 are reserved for future use.

§ 110-15-30 Sales to and Purchases by Nonresident Individuals.

30.1 Any person who makes sales within this State of tangible personal property or services to nonresident individuals must charge and collect the sales and service tax from such individuals. If the purchaser takes possession of the property at the time of the sale, it is considered prima facie evidence that such sale was consummated within this State and is subject to the sales and service tax. The burden to prove the contrary shall rest upon the vendor. Sales otherwise taxable are not exempt because such are made to nonresidents, except sales of tangible personal property or services that are completed outside this State.

30.2 Any sale of tangible personal property within this State to a nonresident which is delivered by the vendor to such purchaser outside this State shall not relieve the vendor from the responsibility of collecting the sales and service tax unless the vendor's books, records and other evidence show

that such delivery was indispensable to the sale and that the sale was consummated outside this State. The fact that a purchaser has an out-of-state address and the property was mailed or delivered to such address is not sufficient to relieve imposition of the sales and service tax; nor does such fact establish consummation of sale outside this State.

30.3 Vendors who complete sales of tangible personal property outside this State to nonresidents of this State are not required to collect West Virginia sales and service tax but may subject themselves to sales tax liability to the state of which the purchaser is a resident. Of course, the purchaser may be subjected to use tax in his home state.

30.4 Services performed within West Virginia for nonresidents are subject to the sales and service tax. If a West Virginia serviceman or repairman performs a service outside this State, said person is not required to collect the tax.

Example 1. X, a resident of Ohio, visits a West Virginia furniture store and purchases furniture for \$500. X makes payment, and the vendor delivers the goods to the purchaser in Ohio. Said sale is taxable for the sales and service tax and the vendor must collect that tax in the amount of \$25.00, unless the vendor can show (via a written sales contract, etc.) that the delivery was not incidental to the sale and was, in fact, indispensable and that the sale was consummated in Ohio.

Example 2. A resident of Virginia takes a toaster into West Virginia and has the same repaired by a serviceman. The person performing the service must collect the sales and service tax. However, if the person performing the services goes to the purchaser's home in Virginia to repair the appliance, no such tax is applicable.

Example 3. A repairman travels to Virginia and takes possession of an appliance which he takes to his shop in West Virginia. After making the repairs at his place of business, the serviceman then delivers the appliance to the owner's residence in Virginia. The serviceman must charge and collect West Virginia sales and service tax on his services, inasmuch as such services were performed within this State.

§ 110-15-31 Banking Business.

31.1 Generally, banks, state and national, are not exempt from the imposition of the sales and service tax or use tax on their purchases, inasmuch as banks are the ultimate consumers of such purchases. Banks are only exempt on purchases of property and services that are resold, subject to tax, to consumers.

31.2 Banks shall collect tax from consumers on the following sales and

services:

31.2.1 Charges made for real estate management,

31.2.2 Any payment received after July 1, 1987, for rental of safety deposit boxes regardless of the fact that a rental or lease agreement may have been executed prior to July 1, 1987.

31.2.3 Fees received for collecting notes and accounts of others,

31.2.4 Sales to consumers of promotional items, such as, glassware, silverware, appliances, etc., and

31.2.5 Sales to consumers of checks, checkbooks and money bags.

31.3 The above enumerations do not constitute a complete list of items or services on which banks must charge and collect sales and service tax. Unless expressly exempted, all sales and services by banks are subject to tax.

31.4 Any purchases by banks of tangible personal property or services directly used or consumed in providing a taxable service or for resale, relative to those activities enumerated above, are not subject to the sales and service tax or use tax.

§ 110-15-32 Container Deposits.

32.1 The sales and service tax does not apply to a container deposit (bottle, steel drum, etc.), provided that the amount of the deposit is separately stated on the invoice or sales slip.

32.2 In no event will the vendor be permitted to deduct from the sale price of an item of tangible personal property the cost of the container, unless the transaction contemplates the return of the container.

§ 110-15-33 Persons Rendering Services.

33.1 Persons engaged in any of the activities set out below or any similar or analogous activities are rendering a service subject to the sales and service tax and use tax unless the transaction is subject to an express exemption:

Airplane pleasure trips  
Alterations  
Automobile repair  
Billboards  
Billiards, pool  
Bowling alleys  
Business machine repair

Motorcycle repair  
Painting  
Photography  
Planing mills  
Printing  
Recapping  
Sewing

Cleaning, pressing, dyeing	Shoe repair
Creosoting	Storage warehouse and storage lockers
Delivering	Termite and pest control
Engraving	Tin and sheet metal repair shops
Foundries	Warehouses
Furniture repair	Washing cars
Hotels, motels, tourist homes, rooming houses	Watch repair
House moving	Weighing
Jewelry repair	Welding
Laundries	Well drillers
Machine operators	Wrapping merchandise
Meat cutting	
Motor repair	

33.2 This does not constitute a complete list. Other activities not appearing on the foregoing list may also be subject to the sales and service tax and use tax.

§ 110-15-34 Sales By the State, Counties and Municipalities.

34.1 Governmental units which render services subject to competition from other persons are required to collect sales and service tax upon rendering such services to consumers. For example, the operation of a municipal parking facility in competition with others is subject to sales and service tax. Sales of admission tickets to a municipally owned or operated swimming pool are subject to sales and service tax, if such pool competes with the activities of privately owned swimming pools. Fees received by a municipality from on-street parking meters are not subject to sales and service tax.

34.2 Governmental units which sell tangible personal property to consumers must collect tax thereon. For example, sales of city maps, sales of gifts and souvenirs, sales of food from city operated concessions at stadiums, ballparks, auditoriums, etc., are subject to tax.

34.3 Providing public services for which a charge is made, such as sewage fees, license fees, fire service fees, inspection fees and the like are not subject to tax.

§ 110-15-35 Personal Services and Sales to Persons Rendering Such Services. -

35.1 The sales and service tax does not apply to the charge for personal services rendered by barbers, beauticians, manicurists, etc. Personal services include those rendered to the person of an individual. If, apart from their personal services, such individuals also are engaged in selling to the public such articles as hair tonic, soap, hair nets, and the like, they are vendors and must collect the sales and service tax on all such sales.

35.2 Barbers, beauticians, manicurists, etc., are the consumers of the various items of tangible personal property and services which they use in the rendition of their personal services, and the sales and service tax and use tax will apply upon their purchases of all such services and property, including equipment. However, articles purchased for resale to consumers may be purchased without imposition of tax by barbers, beauticians, etc.

§ 110-15-36 Hospitals.

36.1 The serving of meals, rental of rooms, sale of drugs, blood, oxygen, dressings, appliances and other tangible personal property to patients as a part of the services rendered by hospitals are so interrelated with professional and personal services, that such sales and services rendered to patients by hospitals are not subject to the sales and service tax.

36.2 If hospitals operate cafeterias or restaurants through which meals are sold for cash or credit to nurses, doctors, visitors and others, such sales are subject to the sales and service tax.

36.3 If meals are included in the wage agreement and are not deducted from the earnings of employees, the sales and service tax is not applicable.

36.4 Since hospitals are engaged in the business of selling tangible personal property and services not subject to the sales and service tax, they are not exempt from payment of the sales and service tax and use tax on purchases of property and services for use in the conduct of the business.

36.5 Purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement of real property by hospitals shall be subject to the sales and service tax and use tax.

§ 110-15-37 Nursing and Convalescent Homes.

37.1 Persons who operate nursing or convalescent homes are rendering personal services which are not subject to sales and service tax. If such persons make sales of tangible personal property, such as, toilet articles, etc., to consumers, such sales are subject to tax. Also, meals served to residents of the home, if separately billed or invoiced, are subject to tax.

37.2 Purchases of tangible personal property and services for use or consumption in the operation of such homes are subject to the consumer sales and service tax and use tax. However, any item purchased for resale, on which tax is collected on the sale to the consumer, may be purchased by such homes without imposition of tax.

§ 110-15-38 Hotels, Motels, Tourist Homes and Rooming Houses.

38.1 Persons engaged in renting rooms in hotels, motels, tourist homes and rooming houses on a daily charge rate shall compute the sales and service tax upon the daily charge in the same manner as any other charge sale. If meals are served and separate charges are made for each meal, the tax must be computed upon each sale. Motels and hotels which rent rooms or apartments on a permanent basis to persons who make such rooms or apartments their permanent place of abode need not collect the sales and service tax on such rentals. The rental period must be in excess of three months in order for the rental fee to not be subject to the sales and service tax. Therefore, the lessor of such rooms or apartments must pay tax on all purchases and services relative to such rooms and apartments.

38.2 The term "rooming house," as used in this regulation, means any establishment furnishing rooms to three or more individuals by the week or month at a specified rate. Persons who operate rooming houses are required to collect and remit sales and service tax. The tax may be computed on the total amount of the weekly or monthly charge.

38.3 Persons primarily engaged in the business of renting rooms or serving meals, and collecting tax thereon are exempt from the payment of sales and service tax and use tax on their purchases of tangible personal property and services for use in the conduct of their business; however, this exemption will not apply to the construction of or permanent improvement of real property.

§ 110-15-39 Summer Camps, Camping and Trailer Parks.

39.1 The amounts derived as compensation for the services rendered and tangible personal property sold to campers in the operation of a summer camp are subject to sales and service tax.

39.2 The temporary leasing of space upon which to park a trailer or camper is an activity which is subject to the sales and service tax. If the lessor renders services for the lessees of such space, the tax applies to such services. If a total charge is made which includes the charge for services, the sales and service tax must be computed on such total charge. Persons who provide services to campers must collect sales and service tax on charges made for such services. Service which may be provided by such persons are electrical hookups, temporary renting of space, water, etc.

39.3 Persons who lease space on a permanent basis to situate mobile homes are leasing real estate and are not required to collect sales and service tax on such leases. However, any services rendered by the lessor to the lessee for which a separate charge is made is subject to tax.

§ 110-15-40 Elementary and Secondary Schools.

40.1 All elementary and secondary schools should file sales and service tax returns in accordance with this regulation.

40.1.1 Exempt Sales by Schools:

40.1.1.1 Food sales to students within the schools as a part of the hot lunch program on a nonprofit basis for the health and welfare of the students.

40.1.1.2 School textbooks, workbooks, instructional aids, standardized examination material required to be used in any schools of this State.

40.1.1.3 School papers and yearbooks, compiled and edited by students of the school and sold only to students.

40.1.1.4 Sales of tickets for activities sponsored by elementary and secondary schools.

40.1.1.5 Rental of locks, lockers, storage space, clothing, other materials and equipment owned by schools and furnished solely to students.

40.1.1.6 Class dues and library fines.

40.1.1.7 Tuition payments.

40.1.2 Taxable Sales and Services by Schools.

40.1.2.1 Sales at concession stands and snack bars.

40.1.2.2 Sales of school supplies at bookstores except as exempted under Section 40.1.1.2 above.

40.1.2.3 Sales through the use of vending machines; the tax must be computed on each sale.

40.1.2.4 Sales of class jewelry, pictures, banners, etc.

40.1.2.5 Sale of food not exempt under Subsection 40.1.1 above, for consumption in the school or in the home.

40.1.2.6 Sales by and activities of the Parent Teachers Association (P.T.A.), booster groups, etc.

40.1.2.7 School papers, yearbooks, etc., sold to nonstudents.

40.2 Purchases of food, materials and supplies sold on a nonprofit basis

for the health and welfare of students are exempt. Purchases of school textbooks, workbooks, instructional aids, standardized examinations and other materials are exempt. All purchases of property and services by schools which are institutions of this State are not subject to tax.

In lieu of payments of sales and service tax on those purchases, a school should issue a properly executed exemption certificate.

40.3 Private schools, trade schools, vocational schools, business colleges or other schools which are not institutions of this State in that they do not qualify for exemption under Subsection 9.2.4 of these regulations are subject to tax on all purchases of property or services for use in conduct of business, with the exception of purchases of property or services which are resold subject to sales and service tax and use tax.

§ 110-15-41 Churches.

41.1 Sales to Churches and Religious Groups.

41.1.1 Except for purchases of gasoline and special fuel sales to and services for churches are exempt when the purchase price is paid from the church treasury.

41.1.2 Except for purchasers of gasoline and special fuel, sales to religious groups which are bona fide charitable organizations who make no charge whatsoever for their services, as defined under Subsection 9.3.3 of these regulations, are exempt so long as the item or services purchased are directly used and consumed by said religious groups.

41.2 Sales by Churches and Religious Groups. - Sales by churches and religious groups are subject to the sales and service tax unless the sale can qualify as an isolated sale transaction. Religious groups which sell meals are required to collect the sales and service tax thereon.

§ 110-15-42 Nonprofit Organizations.

42.1 Nonprofit organizations and institutions are not, by reason of their nonprofit status alone, exempt from the sales and service tax or use tax unless otherwise exempt. They are required to comply with the provisions of the laws pertaining to the filing of returns and making payments of the taxes due on sales or on purchases.

§ 110-15-43 Out-Of-State Purchases.

43.1 In the computation of the use tax, credit may be taken for sales or use taxes paid in another state up to the amount of tax due this State. The use tax is due even though sales or use tax has been paid on the purchase or use of

the same property in another state if the tax paid is less than the use tax due this State.

43.2 The use tax shall be computed on the sale price of the article or articles, which sale price shall not include any sales tax which may have been added to the cost of the article or articles.

43.3 Many out-of-state retailers are not authorized by the State of West Virginia to collect the use tax. It is the responsibility of the purchaser to know whether his retailer is authorized to collect the tax. Tax paid to an unauthorized retailer may not be returned to the State. If that occurs, the State will look to the purchaser to pay the tax again. Payment of the tax to a retailer authorized to collect use tax relieves the purchaser from any further liability for the tax.

§ 110-15-44 Leased Departments.

44.1 Persons who operate leased departments in which merchandise is sold or services rendered are required to collect and remit sales and service tax. Such persons are required to file returns and remit tax separately from their lessors. The lessor is not permitted to file returns and pay sales and service taxes in behalf of his lessee.

§ 110-15-45 Rentals.

45.1 The definition of "sale" includes the transfer of possession of tangible personal property for a consideration and includes a lease or rental. Thus, renting or leasing tangible personal property is an activity subject to sales and service tax and use tax. The tax applies, if the rental occurs in West Virginia, irrespective of where the lessee makes use of the property.

45.2 When there is an agreement for lease or rental of tangible personal property which grants to the lessee an option to purchase the property, the tax shall be computed upon each payment. If, at any time during the agreement, the lessee exercise the option on either a cash or charge basis, the tax must be collected on the remaining portion of the sale price at the time of option or within thirty days.

45.3 The sales and service tax is not applicable to the rental of apartments, houses, offices or other real estate.

§ 110-15-46 Coin-Operated Machines and Devices.

46.1 Sales of tangible personal property or services through the use of coin-operated machines and devices are subject to the sales and service tax. Machines and devices included in this regulation are vending machines, storage lockers, toilet lockers, telescopes, radios, television sets, automatic washers,

photographic machines, music machines, amusement machines, and any other coin-operated machines or devices. Machines used in the conduct of a business subject to the control of the Public Service Commission are not included.

46.2 The sales and service tax shall not apply to individual sales or services rendered through machines which offer merchandise or a service at a cost of five cents or less. The sales and service tax must be collected on each sale or service by a machine which offers merchandise or a service at a cost in excess of five cents. The term "machine" shall include any mechanism which functions independently. For example, a match-vending machine which has its own coin slot and delivery mechanism is a separate machine from the cigarette vending machine, although the two may be in the same unit.

46.3 The person who has control of the machine, i.e., the one who has the key, fills the machine, etc., is responsible for returning and remitting the sales and service tax.

46.4 Merchandise-vending-machine operators are required to maintain accurate records of all of their purchases of merchandise for resale. All persons doing business through coin-operated machines are required to maintain accurate records of any commission or percentage paid in connection with the operation of such machines.

§ 110-15-47 Repairs to Tangible Personal Property.

47.1 Persons engaged in the business of repairing property for others are engaged in a service business, the gross receipts from which are subject to the sales and service tax. Those persons engaged in a repair service who are required to furnish tangible personal property which will be transferred to the purchaser shall include in their total charge, separately stated, the sale price of tangible personal property as subject to the tax. Those repairmen who are qualified vendors, when purchasing tangible personal property, a part of which they will use directly in their repair work and a part of which they will sell to their customers are able to issue an exemption certificate for those purchases of tangible personal property.

§ 110-15-48 Advertising Agencies, Radio and Television Broadcasting Stations.

48.1 Advertising agencies furnish services subject to the sales and service tax. Where the agency does not purchase the advertising for resale, it shall collect and pay sales and service tax on fees, retainers and commissions charged, unless otherwise exempt under provisions of the sales and service tax law. Where the agency purchases the advertising in any form for resale, it shall omit the consumers sales tax on such resale and for the remainder of the transaction either collect the tax or take a direct pay permit number from the purchaser.

48.2 Radio and television broadcasting stations which render advertising services for a fee to consumers shall charge sales and service tax on such services. However, the cost of broadcasting time is exempt from the sales and service tax.

48.3 Radio and television broadcasting stations which accept orders for merchandise (records, tapes, etc.) for foreign retailers must collect and remit use tax on all such orders. In this situation, the broadcaster is deemed to be an agent of the foreign retailer.

§ 110-15-49 Printers, Lithographers, Mimeographers, Multigraphers.

49.1 Persons engaged in the business of printing, lithographing, mimeographing, multigraphing, and the like, are engaged in selling tangible personal property and rendering a service subject to the sales and service tax.

49.2 The following representative items of tangible personal property and the services employed in the preparation of the items are taxable: stationery, envelopes, folders, bond and stock certificates, circulars, abstracts, law briefs, business cards, matches, mechanical pencils, campaign posters, banners, etc.

49.3 If a customer furnishes his own paper, the services and materials used to imprint thereon the name, address, telephone number, etc., constitute a service subject to tax.

49.4 Persons engaged in the business of printing, etc., are exempt from the tax on their purchases of tangible personal property and services for use in the conduct of their business.

§ 110-15-50 Newspapers and Magazines.

50.1 Sales of newspapers, magazines and periodicals by persons operating newsstands, bookstores, cigar stores, drugstores, depot newsstands, and the like, are subject to sales and service tax if the individual sale transaction is in excess of five cents.

50.2 When newspapers are sold on a subscription basis for delivery by mail, the tax must be collected on the total subscription price. However, the subscription will not be subject to tax if the sale is to an out-of-state subscriber and delivery is a condition of the sale. Sales of newspapers delivered to consumers by route carriers are not subject to sales and service tax.

50.3 Advertising space sold to consumers by newspapers and magazines is exempt from the sales and service tax and use tax.

§ 110-15-51 Florist.

51.1 Florists are required to collect and remit sales and service tax upon their gross receipts from sales of flowers, wreaths, soil, etc., and services. Those florists who participate in Florists Telegraph Delivery Association or a similar arrangement shall be governed by the following rules: (a) the West Virginia florist who takes orders for flowers, etc., shall collect sales and service tax irrespective of the fact that the flowers may be delivered in another state; (b) a West Virginia florist who receives an order transmitted from another florist has no sales and service tax liability on such sale irrespective of the fact that the order may be transmitted from a florist in another state.

§ 110-15-52 Places of Amusement.

52.1 All sales and services rendered in the operation of a place of amusement or entertainment are subject to the sales and service tax, including receipts from hat-check services, toilet services, sales of popcorn, candies, cold drinks, programs, souvenirs and novelties, as well as receipts from admissions.

52.2 Places of amusement or entertainment include, but are not limited to, theaters, motion picture shows, auditoriums where lectures and concerts are given, amusement parks, fairgrounds, racetracks, baseball parks, football stadiums, athletic events, swimming pools, street fairs, carnivals, dance halls, cabarets, night clubs, golf courses, skating rinks, art exhibits, gymnasiums, riding courses, and the like. Places of amusement or entertainment also include all places where the public is charged a fee for admission to see any kind of a display or hear any kind of a program or to participate in sports, such as golf, tennis, badminton, and games of skill, such as billiards.

52.3 Nonprofit, charitable and religious organizations which sponsor amusements, entertainment, athletic events, lectures, etc., are making sales within the meaning of the sales and service tax law and must collect the tax upon all sales.

52.4 The sales and service tax applies to the receipts from the sale of admissions, by tickets or fixed-fee donations whether by a season subscription or by single ticket purchases, to places at which amusements, entertainment, sports events, seasonal and exhibition games or recreation is provided. The term "admission" includes regular dues or membership fees which entitle members to usual club or similar organization privileges.

§ 110-15-53 Employees' Meals.

53.1 Meals served by employers as part of the employee's wages are not taxable sales. If, however, a separate charge is made for the meals by the

employer, which is paid by the employee or deducted from his wages, the transaction is a sale and subject to sales and service tax.

§ 110-15-54 Building Materials.

54.1 Sales of building materials, including such items as heating plants, electrical equipment or supplies, plumbing fixtures or supplies, lumber, miscellaneous hardware, prefabricated houses, roofing, cinder or concrete blocks, cement, pipes, tile and other materials used in building, construction, or repair trades are subject to the sales and service tax and use tax.

§ 110-15-55 Speculative Builders.

55.1 Speculative or operative builders are engaged primarily in the construction or repair of real property for sale or rent and are deemed to be the ultimate consumers of all supplies, materials, or equipment used in the conduct of their business. Therefore, sales and service tax is applicable to sales to such operative builders and services rendered for them, and use tax is applicable to their purchases from outside the State.

§ 110-15-56 Trading Stamps, Coupons and Meal Tickets.

56.1 The exchange of merchandise or prizes for trading stamps, coupons, etc., shall be considered a sale of those goods. The vendor shall collect the sales and service tax based upon the value of the merchandise or prize.

56.2 A person who sells meal tickets does not charge sales and service tax on such sale. However, when such person redeems the meal ticket or portion thereof, the vendor shall charge and collect tax on that particular sale. To illustrate: X purchases a meal ticket with a face value of \$10.00 from Y for \$8.50. Y charges no tax on the sale of the meal ticket. X purchases a \$2.00 meal with a portion of his ticket. On this \$2.00 purchase, Y will collect sales and service tax. If the next day, X purchases an \$8.00 meal with the remainder of the ticket, Y will collect tax on the \$8.00 sale. Therefore, tax is eventually collected on the full face value or redemption value of the ticket, if and when redeemed.

§ 110-15-57 Public Assistance.

57-1 Persons who are the recipients of funds distributed by federal, state or local governments in public welfare or relief work are not exempt from sales and service tax. However, where the purchases are made by the federal, state and local government agencies for a person or persons in need of public assistance, the sales are exempt.

§ 110-15-58 Collection Agencies.

58.1 Collection agencies are required to collect sales and service tax on the commissions or consideration it receives as a fee for services rendered on collection transactions which originated within this State. The tax base for the collection of this tax shall be the amount of consideration received by the agency without deducting any amount paid by the collection agency to other collection agencies which may be involved in the collection process. For example: A doctor who resides and practices medicine in Clarksburg, West Virginia, is owed \$200 by a patient who refuses to pay. The doctor refers the matter to a West Virginia collection agency to effect collection of the debt and which agrees that its fee will be 50% of the amount collected. The agency is successful in its efforts and collects the full \$200; therefore, it must bill its client, the doctor, its fee of \$100 and the applicable amount of consumers sales tax on such fee. In this particular case, the agency will retain or the doctor will pay to the agency, whichever the case may be, \$105.

58.2 Any collection transaction originating outside this State will not be taxable even though a West Virginia collection agency may be involved in the collection process, and even though such local agency may receive some consideration for work which it does in the collection of a particular debt.

§ 110-15-59 Funeral Directors.

59.1 Taxable Sales. - The following sales of tangible personal property or services by funeral directors or embalmers are subject to the West Virginia Consumers Sales and Service Tax because they are not sufficiently related to or do not constitute exempt professional services:

- Sales of caskets
- Sales of burial vaults or boxes
- Sales of clothing for dressing the deceased
- Sales or rentals of folding chairs to be used at funerals or other services
- Sales or rentals of tarpaulins for use at funerals or services
- Sales or rentals of candelabra for use at funerals or services
- Sales or rentals of candles for use at funerals or services
- Sales of wreaths or door sprays
- Sales or rentals of funeral cars or the providing of funeral car services
- Sales or rentals of limousines or the service of providing limousines for transportation to the cemetery or to other memorial or similar services
- Sales or rentals of flower cars or the providing of flower car services
- Sales of the service of procuring burial permits
- Sales of the service of procuring, obtaining or providing certified copies of death certificates
- Sales of pall bearer service
- Sales of chapel service or the service of procuring such service
- Sales of flowers or the service of providing, procuring or handling of flowers
- Rental of tents for use at the funeral or at other memorial or similar

services

- Rentals of temporary vaults
- Rentals of, or sales of the service of providing, lowering devices for use at the grave
- Sales of the service of arranging or providing the services of clergymen, singers, organists or other similar services
- Billings for reimbursement of out-of-town funeral director's charges
- Sales of the service of placing of death notices in newspapers or in other media

59.2 Exempt Sales. - The following sales of tangible personal property or services by funeral directors or embalmers are not subject to the West Virginia Consumers Sales and Service Tax either because they are part of or directly related to, or themselves constitute professional services or constitute alterations to realty:

- Sales of the service of embalming bodies
- Sales of the service of dressing bodies
- Sales of the service of providing automobiles for transportation of the deceased to railroads, air carriers or other carriers
- Sales of the service of taking the remains to or getting remains from railroads, air carriers or other carriers or transporters of the body
- Sales of the service of attendance at coroner's inquests
- Removal charges
- Sales of the service of cremation
- Sales of the service of opening or closing of graves or tombs
- Sales of the service of lining graves
- Reimbursement for air, railroad or truck transportation of bodies or reimbursement for tickets for travel by the funeral director or embalmer director or embalmer directly related to and a part of the professional service
- Telegram, telephone, cable or radio charge reimbursements to the funeral director or embalmer directly related to and a part of professional service

§ 110-15-60 Employee or Independent Contractor

60.1 Services rendered by an employee to his or her employer are exempt from the sales and service tax and use tax. On the other hand, services rendered by an employee to his or her employer which do not fall within the scope of the employee-employer relationship or the contract of employment, and services rendered by independent contractors are subject to the sales and service tax and use tax when some other exemption provision in Section 11-15-9 of these regulations applies.

60.2 There may be situations where the issue is whether a person is an employee or an independent contractor. Generally, the relationship is that of employer-employee if the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the

result to be accomplished by the work, but also as to the details and means by which the result is accomplished.

60.3 Following are factors to be considered when determining the nature of the relationship. The factors are designed to be only guides and where deemed to be appropriate, the Tax Department will look beyond the formal aspects of the relationship to determine its substance.

60.3.1 Instructions. - A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee.

60.3.2 Training. - Requiring a worker to receive training that shows that the person or persons for whom the services are performed want the services performed in a particular way.

60.3.3 Integration. - Integrating the worker's services into the business operations generally shows that the worker is subject to direction and control.

60.3.4 Services Rendered Personally. - This shows the person for whom the services are performed is interested in the methods used to accomplish the work as well as the results.

60.3.5 Hiring, Supervising, and Paying Assistants. - If a person for whom services are performed hires, supervises, and pays assistants, this generally shows control over the workers on the job. But if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, then this indicates an independent contractor status.

60.3.6 Continuing Relationship. - This indicates an employer-employee relationship. It may exist where work is performed at frequently recurring although irregular intervals.

60.3.7 Set Hours of Work. - this is a factor indicating control.

60.3.8 Full Time Required. - Shows control over the amount of time the worker spends working and impliedly restricts the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.

60.3.9 Doing Work on Employer's Premises. - Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as

required.

60.3.10 Order or Sequence Set. - If the person for whom the services are performed has the right to establish the routines and schedules to be followed.

60.3.11 Oral or Written Reports. - A requirement that the worker submit regular or written reports to the person for whom services are rendered indicates a degree of control.

60.3.12 Payment By Hour, Week, Month. - this indicates an employer-employee relationship provided it's not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.

60.3.13 Payment of Business and/or Traveling Expenses. - An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

60.3.14 Furnishing Tools and Materials. - Tends to show an employer-employee relationship.

60.3.15 Significant Investment. - If a worker invests in facilities that he uses in performing service that he uses in performing services and that are not typically maintained by employees (such as maintaining an office rented at fair market value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. Special scrutiny is required for certain types of facilities, such as home offices.

60.3.16 Realization of Profit or Loss. - For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor.

60.3.17 Working For More Than One Firm at a Time. - This generally indicates an independent contractor status. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

60.3.18 Making Service Available to General Public. - Doing so on a regular and consistent basis indicates an independent contractor relationship.

60.3.19 right to Discharge. - This is a factor indicating that the worker is an employee and the person possessing the right to discharge is an employer. An independent contractor cannot be fired so long as he produces a result that meets the contract specifications.

60.3.20 Right to Terminate. - If a worker has the right to quit at any time without incurring liability, this indicates an employer-employee relationship.

Appendix 1. List of Condiments.

This list of condiments which are eligible food items is intended to illustrate application of these terms and is not intended to be a comprehensive listing.

1.1 Essential Oils, Oleoresins (Solvent-Free) and Natural Extractives.

Alfalfa  
Allspice  
Almond, bitter (free from prussic acid)  
Ambrette (seed)  
Angelica root  
Angelica seed  
Angelica stem  
Angostura (cusparia bark)  
Anise  
Asafetida  
Balm (lemon balm)  
Balsam of Peru  
Basil  
Bay leaves  
Bay (myrcia oil)  
Bergamot (bergamot orange)  
Bitter almond (free from prussic acid)  
Bols de rose  
Cacao  
Camomile (chamomile) flowers, Hungarian  
Camomile (chamomile) flowers, Roman or English  
Cananga  
Capsicum  
Caraway  
Cardamom seed  
Carbo bean  
Carrot  
Cascarilla bark  
Cassis bark, Chinese  
Cassia bark, Padang or Batavia  
Cassia bark, Saigon  
Celery seed  
Cherry, wild, bark  
Chervil

Chicory  
Cinnamon bark, Ceylon  
Cinnamon bark, Chinese  
Cinnamon bark, Saigon  
Cinnamon leaf, Ceylon  
Cinnamon leaf, Chinese  
Cinnamon leaf, Saigon  
Citronella  
Citrus peels  
Clary (clary sage)  
Clove bud  
Clove leaf  
Clove stem  
Clover  
Coca (decocainized)  
Coffee  
Cola nut  
Coriander  
Corn silk  
Cumin (cummin)  
Curacao orange peel (orange, bitter peel)  
Cusparia bark  
Dandelion  
Dandelion root  
Dog grass (quackgrass, triticum)  
Elder flowers  
Estragole (esdragol, esdragon, tarragon)  
Estragon (tarragon)  
Fennel, sweet  
Fenugreek  
Galanga (galangal)  
Geranium  
Geranium, East Indian  
Geranium, rose  
Ginger  
Glycyrrhiza  
Glycyrrhizin, ammoniated  
Grapefruit  
Guava  
Hickory bark  
Horehound (hoarhound)  
Hops  
Horsemint  
Hyssop  
Immortelle  
Jasmine  
Juniper (berries)

Kola nut  
Laurel berries  
Laurel leaves  
Lavender  
Lavender, spike  
Lavandin  
Lemon  
Lemon balm (see balm)  
Lemon grass  
Lemon peel  
Licorice  
Lime  
Linden flowers  
Locust bean  
Lupulin  
Mace  
Malt (extract)  
Mandarin  
Marjoram, sweet  
Mate  
Melissa (see balm)  
Menthol  
Menthyl acetate  
Molasses (extract)  
Mustard  
Naringin  
Netroli, bigarade  
Nutmeg  
Onion  
Orange, bitter, flowers  
Orange, bitter, peel  
Orange leaf  
Orange, sweet  
Orange, sweet, flowers  
Orange, sweet, peel  
Origanum  
Palmarosa  
Paprika  
Parsley  
Pepper, black  
Pepper, white  
Peppermint  
Peruvian balsam  
Pettigrain  
Pettigrain lemon  
Pettigrain mandarin or tangerine  
Pimenta

Pimenta leaf  
Pipcissewa leaves  
Pomegranate  
Prickly ash bark  
Rose absolute  
Rose (otto of roses, attar of roses)  
Rose buds  
Rose flowers  
Rose fruit (hips)  
Rose geranium  
Rose leaves  
Rosemary  
Saffron  
Sage  
Sage, Greek  
Sage, Spanish  
St. John's bread  
Savory, summer  
Savory, winter  
Schinus molle  
Sloe berries (balckthorn berries)  
Spearmint  
Spike lavender  
Tamarind  
Tangerine  
Tannic acid  
Tarragon  
Tes  
Thyme  
Thyme, white  
Thyme, wild or creeping  
Triticum (seed or grass)  
Tuberose  
Turmeric  
Vanilla  
Violet flowers  
Violet leaves  
Biolet leaves absolute  
Wild cherry bark  
Ylang-ylang  
Zedoary bark

1.2 Flavorings and Flavoring Extracts.

Oil of Lemon  
Vanilla extract  
Vanilla flavoring

Vanilla powder  
Vanilla - vanillin extract  
Vanilla - vanillin flavoring  
Vanilla - vanillin powder

1.3 Food Colorings.

1.4 Food Dressings.

French dressing  
Mayonnaise  
Mayonnaise dressing  
Salad dressing

1.5 Glazes.

1.6 Gravies.

1.7 Herbs (For Which No Medicinal Qualities Are Claimed).

Angelica  
Anise  
Bee balm  
Bays  
Borage  
Bunnet  
Camomile  
Capers  
Caraway  
Celenes  
Chervil  
Chives  
Corriander  
Dill  
Fennels  
Genugreek  
Geranium  
Horehound  
Horseradish  
Hyssop  
Lavender  
Leeks  
Lemon Verbena  
Lovage  
Marigold  
Mayorame  
Mints

Mustards  
Nasturtium  
Onion  
Parsleys  
Peppers, red and green  
Ramps  
Rosemary  
Rue  
Sage  
Savories  
Scallions  
Sesame  
Shallots  
Sorrels  
Sweet Woodruff  
Tarragon  
Thymes  
Waldmeister  
Wild leeks

1.8 Marinades.

1.9 Mustard.

1.10 Natural Substances and Extractions (Solvent-Free) Used in Conjunction  
With Spices, Seasonings and Flavorings.

Algae, brown  
Algae, red  
Apricot kernel (persic oil)  
Dulse  
Kelp (see algae, brown)  
Peach kernel (persic oil)  
Peanut stearine  
Persic oil (see apricot kernel and peach kernel)  
Quince seed

1.11 Pepper.

Black pepper  
Cayenne pepper  
Red pepper  
White pepper

1.12 Salt and Salt Substitutes.

Coarse or kosher salt

Cooking or table salt  
Dairy salt  
Monozodium glutamate  
Pickling salt  
Seasoned salt - These are usually a combination of vegetable salts, spices and monozodium glutomates.  
Smoked salt  
Sour salt  
Vegetable salt - These are sodium chloride with added vegetable extracts, celery and onion.  
Salt substitute - These are chlorides in which sodium is replaced by calcium, potassium or ammonium.

1.13 Sauces.

Worcestershire sauce  
Soy sauce  
A-1 steak sauce  
Barbecue sauce  
Shrimp cocktail sauce

1.14 Spices and Other Natural Seasonings and Flavorings.

Alfalfa herb and seed  
Allspice  
Ambrette seed  
Angelica  
Angelica root  
Angelica seed  
Anise  
Anise, star  
Balm (lemon balm)  
Basil, bush  
Basil, sweet  
Bay  
Calendula  
Camomile (chamomile), English or Roman  
Camomile (chamomile), German or Hungarian  
Capers  
Capsicum  
Caraway  
Caraway, black (black cumin)  
Cardamon  
Bassia, Chinese  
Cassia, Padang or Batavia  
Cassia, Saigon  
Cayene pepper

Celery seed  
Chervil  
Chives  
Cinnamon, Ceylon  
Cinnamon, Chinese  
Cinnamon, Saigon  
Clary (clary sage)  
Clover  
Cloves  
Coriander  
Cumin (cummin)  
Cumin, black (black caraway)  
Elder flowers  
Fennel, common  
Fennel, sweet (finocchio, Florence fennel)  
Fenugreek  
Galanga (galangal)  
Geranium  
Ginger  
Glycyrrhiza  
Grains of paradise  
Horehound (hoarhound)  
Horseradish  
Hyssop  
Lavender  
Licorice  
Linden flowers  
Mace  
Marjoram  
Mustard, black or brown  
Mustard, brown  
Mustard, white or yellow  
Nutmeg  
Oregano (oreganum, Mexican oregano, Mexican sage, origan)  
Paprika  
Parsley  
Pepper, black  
Pepper, cayenne  
Pepper, red  
Pepper, white  
Peppermint  
Poppy seed  
Rosemary  
Saffron  
Sage  
Sage, Greek  
Savory, summer

Savory, winter  
Sesame  
Spearmint  
Star anise  
Tarragon  
Thyme  
Thyme, wild or creeping  
Turmeric  
Vanilla  
Zedoary

1.15 Vinegar.

Appendix 2. List of Taxable Medicines and Health Aids.

This list of taxable medicines and health aids is intended to illustrate application of these terms and is not intended to be a comprehensive listing.

Absorbine Jr.  
Acne preparations  
Alka Seltzer  
Alphen pills  
Anacin  
Analgesics  
Antacids  
Anti-perspirants  
Antiseptics  
Appetite builders  
Appetite reducers  
Aromatic lozenges (SEN-SEN)  
Aspergum  
Aspirin  
Athlete's foot preparations  
Bay lotions, ointments and powder  
Back plasters  
Bactine  
Beauty creams, mask preparations, etc.  
Bengay  
Benzoin (tinctine)  
Bisodol  
Boric acid ointment  
Breath sweeteners  
Brewer's yeast  
Brioschi  
Bromo Seltzer  
Bufferin  
Burn ointment and lotion

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Calamine Lotion  
Callus plasters  
Campho-Phenique  
Camphor ice  
Castor oil  
Cathartics  
Chocks  
Chooz  
Clearasil  
Cleansing creams and lotions  
Cocoa butter (for healing)  
Cod liver oil  
Cold creams  
Cold tablets  
Colognes  
Contraceptive creams and jellies  
Corn pads  
Cosmetic stocking preparations  
Cosmetics  
Cotton  
Cough and cold items  
Cough drops  
Cough syrups  
Cumlens  
Cuprex  
Curlers  
Cuticle softeners and removers  
Dandruff shampoos  
Decongestants  
Dental floss  
Dentifrice  
Denture adhesives, liners, stain removers  
Deodorants  
Depilatories  
Desenex  
Disinfectants  
Epsom Salts  
Eucalyptus oil  
Ex-Lax  
Eye cosmetics  
Eye ointment  
Eye washes  
Face creams, lotions, packs, powders  
Facial oils  
Feen-a-Mint  
Fleet enema  
Foot deodorizers, lotions

Foundation makeup film  
Freckle removers  
Gelusil  
Geritol  
Glycerine  
Glycerine suppositories  
Hair bleaches, dyes, rinses, tints  
Hair removers, restoratives, straighteners  
Hair sprays  
Hand creams, lotions  
Henna  
Infrarub  
Inhalants  
Insect repellents  
Iodine  
Isodine  
Laxatives  
Leg makeup  
Lip ices and salves  
Lipsticks, refills  
Liquid lip color  
Liquid stockings  
Listerine  
Manicure preparations  
Mascara  
Massage creams  
Mercurochrome  
Merthiolate  
Milk of Magnesia  
Milk or Magnesia tablets  
Mineral oil  
Moth balls  
Mouthwashes  
Mustache wax  
Mustard plasters  
Musterole  
Nail bleaches, whiteners  
Noxema  
Nupercainal ointments  
Oil of wintergreen (for medicinal purposes)  
Olive oil (for medicinal purposes)  
Perfumes  
Permanent waving creams, lotions, naturalizers  
Peroxide  
Pessaries  
Petroleum jelly  
Pile ointments

Rectal preparations  
Rolaids  
Rose water  
Rouges  
Rubbing alcohol  
Sachets  
Salt (for purposes other than human consumption)  
Sanitary napkins  
Scalp lotions and ointments  
Shampoos  
Shaving preparations  
Skin balms, bleaches, creams fresheners, lotions, oils, stain removers,  
tonics, whiteners  
Soap  
Soda mint tablets  
Stain removers  
Styptic pencils  
Sumburn remedies  
Suppositories  
Talcum powder  
Texture creams  
Tincture iodine  
Tissue creams  
Toilet ammonia, creams, lanolin, waters  
Toothache drops  
Toothbrushes  
Toothpaste and tooth powder  
Tums  
Unguentine  
Vaginal preparations  
Vanishing creams  
Vaseline  
Vitamin A-D ointment  
Vitamins  
Water softeners  
Wave sets  
Witch hazel  
Zinc-oxide ointment

Appendix 3. Grocery Store Taxable Sales.

The following list is comprised of items commonly sold by grocery stores and which are subject to tax at the five percent (5%) tax rate. This list gives examples and is not all inclusive.

Air fresheners and deodorizers  
Ale and beer

Aluminum foil  
Anti-perspirants and deodorants  
Automotive supplies  
Baby bottles  
Batteries  
Beauty supplies (hand lotion, bath oil)  
Bird feeders  
Bleach  
Brooms, brushes and mops  
Canning supplies (jars, lids)  
Candles and party supplies  
Charcoal briquettes and lighter  
Cigar, cigarettes and tobacco  
Cleaning supplies (Lysol, Pine-Sol)  
Clothes pins and clothes line  
Cosmetics  
Dental Hygiene products  
Dietary supplements (Ayds)  
Dishes and cooking pans  
Dishwashing liquid and dishwasher detergent  
Dyes  
Electric light bulbs  
Extension cords  
Feminine hygiene products  
Fertilizer  
First aid supplies  
Fuses  
Glassware and mugs  
Greeting cards  
Hardware supplies (screwdriver, hammer)  
Household glue and cement  
Insect and pest repellent  
Hair products (hair color, sprays, permanents)  
Hair removal products (Nair, Zip)  
Hosiery  
Kitchen utensils  
Laundry supplies (detergent, starch, fabric softeners)  
Matches  
Medicines  
Mens toiletries (shaving cream)  
Mouthwash  
Paper products  
Pet food and supplies  
Picture frames  
Plant supplies (pots, food)  
Plastic products (trash bags, waste cans, storage containers)  
Potted plants

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Razor blades and razors  
Sandpaper  
School supplies  
Scouring agents (SOS, brillo pads)  
Scouring powders  
Sewing supplies  
Shoe laces and shoe care products  
Soap and soap products  
Sponges  
Suntan lotions, oils, creams and screens  
Thermometers  
Toys  
Towels (dish, hand)  
Vacuum clean bags  
Vegetable seeds  
Vitamins  
Waxes and polishes

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