

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

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SECRETARY OF STATE

NOTICE OF AN EMERGENCY RULE

AGENCY: STATE TAX DEPARTMENT TITLE NUMBER: 110

CITE AUTHORITY: W. VA. CODE §§ 29A-3-15 AND 11-10-5

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES X, NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 15

TITLE OF RULE BEING AMENDED: CONSUMERS SALES AND SERVICE TAX AND USE TAX

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY:

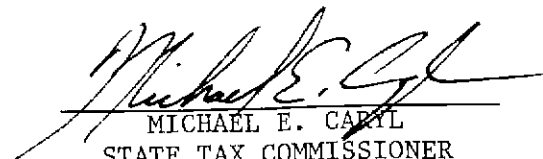
TITLE OF RULE BEING FILED AS AN EMERGENCY:

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

THE STATE TAX DEPARTMENT FILED IN THE STATE REGISTER ON JULY 1, 1987 THE CONSUMERS SALES AND SERVICE TAX AND USE TAX REGULATION. IT WAS FILED AS AN EMERGENCY LEGISLATIVE REGULATION AND IT REPEALED THE LEGISLATIVE REGULATION THEN IN EFFECT. THE PUBLIC COMMENT PERIOD COMMENCED WITH THE FILING AND ENDED ON JULY 31, 1987. AS A RESULT OF THE PUBLIC COMMENTS RECEIVED, THE EMERGENCY REGULATION WAS MODIFIED AND ON AUGUST 17, 1987, IT WAS FILED AS AN APPROVED PROPOSED LEGISLATIVE REGULATION WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE. IN ORDER TO REMEDY CONCERNS IDENTIFIED THROUGH PUBLIC COMMENTS, THE TAX DEPARTMENT IS NOW AMENDING THE EMERGENCY REGULATION.

Use Additional Sheets If Necessary.


MICHAEL E. CABIL
STATE TAX COMMISSIONER



State Tax Department
of West Virginia

Charleston 25305

ARCH A. MOORE, JR.
GOVERNOR

1987 AUG 20 10 12 AM '87
SECRETARY OF STATE
MICHAEL E. CARYL
COMMISSIONER

August 20, 1987


Honorable Ken Hechler
Secretary of State
State Capitol
Charleston, WV 25305

Dear Mr. Hechler:

Under the authority of W. Va. Code §§ 29A-3-15 and 11-10-5, the State Tax Department is hereby filing in the State Register the attached amended emergency legislative regulation amends the emergency legislative regulation which was filed on July 1, 1987 and titled Consumers Sales and Service Tax and Use Tax.

When the emergency legislative regulation was filed in the State Register on July 1, 1987, a public comment period commenced at that time and continued through July 31, 1987. The emergency regulation was modified subsequent to the public comment period and on August 17, 1987, it was filed as an approved proposed legislative regulation. In order to alleviate many of the concerns raised by the public, the approved proposed legislative regulation is now being filed as an amended emergency legislative regulations. Because a public comment period has been held on the emergency regulations, it is the Tax Department's position that another public comment period is not required. If you disagree with this position, please inform the Tax Department's Legal Division.

Very truly yours,


Michael E. Caryl
State Tax Department

jm/ss



1987

AUG 20 1987

WEST VIRGINIA
STATE TAX DEPARTMENT

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

Filed: August 20, 1987

CONSUMERS SALES AND SERVICE TAX
AND
USE TAX

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

CONSUMERS SALES AND SERVICE TAX
AND
USE TAX

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EMERGENCY
WEST VIRGINIA LEGISLATIVE REGULATIONS
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1987

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Filed: August 20, 1987

§ 110-15-1. General.

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

1.2 Scope. - These amended 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 amended 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 amended emergency legislative regulations amend the emergency legislative regulations which govern the Consumers Sales and Service Tax and Use Tax and which were promulgated and filed in the State Register on July 1, 1987.

1.5 Effective Date. - These amended emergency legislative regulations become effective immediately upon filing.

1.6 Citation. - These amended 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.

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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 while the shoes are being worn by the purchaser, 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 while the shoes are being worn by the purchaser, 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 personal property which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses, and includes tangible goods, wares and merchandise.

2.25.1 "Intangible personal property" means chattels, real and personal, money, credits, investments and the evidences thereof. See W. Va. Code § 2-2-10(q) (1973).

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

2.26 "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 or electronic data processing service provided for others. 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 of 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, the 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 Technical Assistance Advisory.

8.1.1.2 Services for which a professional license is required and which are provided by corporations, regardless of whether such corporations are professional or business, are not subject to the 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 The purveyors of 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 homesthat will be utilized by the purchasers as their principal year round residence are subject to the sales and service tax and use tax at the rate of three percent, if no activities except those considered to be "incidental to the sale" are performed as part of the transaction.

9.3.7.2 The sale of mobile, module, or manufactured homes that will not be utilized by the purchasers as their principal year round residence are subject to the sales and service tax and use tax at the rate of five percent, if no activities except those considered to be "incidental to the sale" are performed as part of the transaction.

9.3.7.3 The sale of mobile, modular, or manufactured homes where the dealer engages in activities beyond those considered to be "incidental to the sale" of the home is a contracting activity and the transaction is not subject to sales tax or use tax.

9.3.7.4 Activities considered to "be incidental to the sale" include mere delivery of the home to the site. Not included as "incidental to the sale" but considered to be contracting activities are activities such as hooking up utility lines to the home, the blocking up of the home, the underskirting of the home, attaching of the home to the foundation, the finishing of interior trim, or the joining of modules together, by the dealer or his subcontractor.

9.3.7.5 Dealer delivers the home and merely places the home on a foundation already constructed by the customer. The dealer or his subcontractor does not block up the home, hook up utility lines to the home, underskirt the home, finish interior trim, or join modules together. The activities engaged in by the dealer are considered to be "incidental to the sale." Sales tax or use tax must be collected or an exemption certificate must be obtained from the customer in this situation. If the home is to be used as a principal residence of the customer, the applicable sales tax rate is three percent. Otherwise, the applicable sales tax rate is five percent.

9.3.7.6 Dealer delivers and places the home on a foundation already constructed by the customer. In addition, the dealer or his subcontractor hooks up the utility lines to the home or underskirts the home or finishes interior trim, or blocks up the home, or joins modules together. The activities engaged in by the dealer are considered to be contracting activities. Sales tax or use tax is not imposed on this type of transaction and need not be collected.

9.3.7.7 Dealer delivers the home and places it on a foundation constructed by the dealer or at his direction through a subcontractor. The activities engaged in by the dealer are considered to be contracting activities. Sales tax is not imposed on this type of transaction and need not be collected.

9.3.7.8 Dealer or his subcontractor delivers a home in two or more sections and connects the sections together after placing the sections on a foundation constructed by the customer, the dealer, or a subcontractor. The activities engaged in by the dealer are considered to be contracting activities. Sales tax or use tax is not imposed on this type of transaction and need not be

collected.

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.

9.3.9.3 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 provided that the sales are not exempt under paragraph 9.3.9.2 of these regulations); and such taxes, after payment, shall, upon proper application therefor, be refunded or credited to the purchaser as provided in W. Va. Code §§ 11-15-9b and 11-15A-3b:

9.4.1 Sales of property or services to 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.

9.4.3.1.e Sales to contract miners to be directly used in the extraction of natural resources would be exempt while those purchases not directly used in that activity would be taxable. However, if a contract miner is subject to the Severance Tax, all purchases whether directly or not directly used in the extraction process are exempt. See Section 9.4.7 for additional information.

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. See also, § 110-15-55.

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.

9.4.4 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.

9.4.5 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.

9.4.6 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.

9.4.7 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 business 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.

9.4.7.1 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 uses of property or services stated in paragraph 2.7.2 of these regulations.

9.4.7.2 It should be noted that some entities may be engaged in many businesses, some of which are subject to the tax on gross receipts and some of which are not subject to the tax on gross receipts. Both those purchases directly or not directly used or consumed in businesses upon which the tax on gross receipts is imposed may qualify for this exemption. Purchases for the other businesses would be subject to this tax unless they qualified for another

exemption. If a purchaser will use the purchase in more than one business, the purchaser must comply with Section 110-15-9d of these regulations.

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

9.4.8 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. So long as the electronic data processing service is performed for another person who is in no manner a part of the entity performing the service, and provided that the charge is actually and only for the sale of electronic data processing services and does not include any charges for other activities, the exemption will apply.

9.4.8.1 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. 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 vendors and the assertion of all exemptions asserted with respect to purchases from vendors shall be made directly to the Tax Commissioner by the permit holder.

9c.1.1 The taxpayer is required to maintain an index of all vendors to whom the direct pay permit number is given and to make such index available to the Tax Department upon request.

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 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 Spirituous 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 Liquors. - 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 hypophosphite,
Manganese sulfate,
Manganous 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 stearage,
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, PVM 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,
- Hermatinics,
- 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 Fraternities 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) ASIM-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 except that for distributors and importers the tax shall be due on the twenty-fifth day of each month. Payment shall be by check, bank draft, certified check or money order, payable to the Tax Commissioner, and it shall be for the amount of tax due for the preceding quarter. 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 distributors and importers.

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

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 not 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 \$80.00. 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 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 an 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

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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.

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 Containers, Wrapping, Packing and Shipping Materials.

32.1 In General.

32.1.1 The sale to a vendor of boxes, cartons, containers, and wrapping and packaging materials and supplies, and components thereof, for use or consumption by that vendor in packaging or packing tangible personal property for sale, and actually transferred by that vendor to the purchaser, is exempt from consumers sales and service tax and use tax as a purchase for resale.

Example 1. A manufacturer sells goods in bulk and ships them in corrugated cardboard cartons to a retailer. The retailer after using the cartons as temporary storage containers removes the goods and discards the

cartons. The manufacturer's purchase of the cartons is exempt from consumers sales and use taxes as a purchase for resale.

Example 2. Wax tissue paper is sold to a bakery which uses it to pick cookies from a tray. The cookies and paper are then placed in bags or boxes. The wax paper and the bags and boxes are exempt from consumers sales and service tax and use tax as a purchase for resale.

Example 3. Purchases of egg cartons by persons engaged in the business of selling eggs are exempt from tax when such cartons become a part of the sale of the eggs to the customer.

32.1.2 The sale to a vendor of boxes, cartons, containers, and wrapping and packaging material and supplies, and components thereof, to a vendor which are actually transferred to a customer in conjunction with the performance of a taxable service are exempt from consumers sales and service tax and use tax as a purchase for resale.

Example 4. A watch repairman packs a watch in a box, with cushioning material, to return it to his customer. His purchase of the box and packing material is exempt as a purchase for resale.

Example 5. Purchases of packaging and packing materials by warehousemen and movers for use in the performance of storage or moving services are exempt if such materials are actually transferred to the customer in conjunction with the service being furnished.

32.1.3 The sale to a vendor of boxes, cartons, containers, and wrapping and packaging materials and supplies, and components thereof, which are not purchased for resale are taxable unless some other exemption applies.

32.2 Definitions.

32.2.1 "Packaging materials" includes, but is not limited to: bags, barrels, baskets, bindings, bottles, boxes, cans, carboys, cartons, cellophane, coating and preservative materials, cores, crates, cylinders, drums, excelsior, glue, gummed labels, gummed tape, kegs, lumber used for blocking, pails, pallets, reels, sacks, spools, staples, strapping, string, tape, time, wax paper, and wrapping paper actually transferred with the product to the purchaser.

32.2.2 "Purchaser" in this section refers to any person who purchases tangible personal property from a vendor, whether or not the purchaser is the ultimate consumer.

32.2.3 "Actually transferred" means that the packaging material is physically transferred to the purchaser, for whatever disposition the purchaser

wishes.

Example 6. Returnable soda bottles may be returned for refund of deposits or disposed of otherwise. Such bottle is actually transferred to the purchaser and is a purchase for resale except when sold to the ultimate consumer.

Example 7. If a beer keg is required to be returned to the vendor after its contents are used, ownership of this keg is not actually transferred to the purchaser-consumer of the beer. Kegs purchased by a vendor of kegged beer are taxable.

32.3 Returnable Containers. - Sales of returnable containers, such as drums, barrels, or acid carboys, to a purchaser/vendor who does not transfer ownership of the container, are taxable. Title to the container remains with the purchaser/vendor when possession of the container is transferred to one who purchases commodities contained therein and then returns the container to the seller for refilling.

32.3.1 Returnable Containers; Deposits.

32.3.1.1 Deposits charged by vendors for reusable containers are subject to tax when the purchasers of the property contained therein can, during the period the containers are in their possession, exercise such control over the containers as is ordinarily associated with ownership. Such amounts are a part of the sales price even though designated as a deposit for the containers.

32.3.1.2 When the vendor retains title to such containers and the vendor retains the right to control the use which vendee makes of the containers, the containers are not considered to be a part of the sale of the property. In such cases, amounts charged to the customers as security for the return of the containers are not subject to tax if such charges are shown separately from the sales price of the property on the customers' invoices and the security deposit is refunded to the customer when the container is returned. If such amounts are not separately stated, the total charge is subject to the tax.

32.3.2 Returnable Containers; Demurrage. - When a vendor sells tangible personal property in returnable containers without a charge being made for the use of the containers for a specified time but, at the expiration of the specified time, the containers enter a demurrage period and a penalty charge is made as an inducement for the return of the containers, such charges are not subject to the tax unless the penalty is computed on an hourly, daily or some other periodic basis, or payment of the penalty results in title to the container passing to the customer. When a vendor sells tangible personal property in returnable containers and a stated charge is made for the use of the containers throughout the period of retention by the customer, such charges are

deemed to be rentals and are taxable.

32.4 Other Containers. - Racks, trays or similar devices used to facilitate delivery of the vendor's product, if title to them is not transferred to the purchaser, are taxable.

Example 8. A baking company delivers bread to a grocer in plastic trays. After unloading the trays, the delivery person takes the trays with him. Sale of the trays to the baking company is taxable.

Example 9. A baking company delivers hamburger buns to a restaurant in stackable plastic trays. The filled trays are placed in the kitchen. The next time that buns are delivered, the empty trays are picked up and returned to the bakery. Sale of the trays to the bakery. Sale of the trays to the baking company is taxable.

32.5 Gift Wrapping. - When a vendor gift wraps an item which he sells, the paper, ribbon, and bow become a part of the sale of the item notwithstanding that the wrapping of the item may take place at the point of delivery thereof to the vendee or at one of the vendor's wrapping stations or that the vendor may make a charge for gift wrapping the item. The vendor's purchases of paper, ribbon and bows are purchases for resale and exempt from tax. If a separate charge is made for wrapping, it is deemed to be for services performed in wrapping the item rather than a separate sale of wrapping material, and consumers sales and service tax and use tax will be due on the wrapping charge. In this instance, the vendor's purchases of paper, ribbon and bows are exempt because they are used and consumed by the vendor in providing a taxable service.

32.5.1 In a case where an organization, as a means of raising funds, offers to wrap gift items the customer purchased from others, the organization is considered to be performing a wrapping services; and its purchases of paper, ribbon, and bows for use in the performance of the service are exempt from tax as provided in Sections 110-15-9, 110-15-9b and 110-15-9d of these regulations. Tax is due on the service charges unless the providing of the services is an occasional sale or isolated transaction as defined in Section 110-15-2 and exempt under Section 110-15-9 of these regulations.

32.6 Restaurants - Containers. - Containers of paper cups, plates and other nonreturnable containers purchased by restaurants and "other food service establishments," as defined in W. Va. Code § 11-15-11(e), for use as containers for food sold to customers are exempt from consumers sales and use taxes as a purchase for resale when the container is actually transferred to the customer in connection with the customer's purchase of food or drink. This includes, but is not limited to, cups, plates and containers for hot or cold drinks or food purchased for resale as a container of food or drink of any nature that is taxable under W. Va. Code § 11-15-11.

§ 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	Motorcycle repair
Alterations	Painting
Automobile repair	Photography
Billboards	Planing mills
Billiards, pool	Printing
Bowling alleys	Recapping
Business machine repair	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 is a part of the services rendered by hospitals. These sales and services are so interrelated with professional and personal services, that such sales and services rendered to patients by hospitals are not subject to the 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 Hospitals are engaged in the business of providing a professional service not subject to the sales and service tax. Therefore, they are taxable on purchases of property and services for use in the conduct of their professional services, and are not considered to be making purchases for resale.

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 unrelated to their personal services and strictly for the convenience of the patients, such as, toilet articles, etc., such sales are subject to tax. Also, meals served to residents of the home, if separately billed or invoiced, are subject to tax.

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 patient, 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 basis shall compute the sales and service tax upon the daily charge in the same manner as any other charge sale.

38.2 Persons primarily engaged in the business of renting rooms 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 purchases for the construction of or permanent improvement to real property.

38.3 Motels, hotels and rooming houses which rent rooms or apartments on a permanent basis to persons who make such rooms or apartments their permanent place of abode need not collect the sales and service tax on such rentals. However, the lessor of such rooms or apartments must pay on all purchases and services relative to such rooms and apartments.

38.4 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.

38.5 The term "permanent place of abode," as used in this regulation, means the lessee of such room or apartment shall occupy the premise in excess of three (3) consecutive months.

§ 110-15-39 Summer Camps, Camping.

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 making sales of tangible personal property through the facilities of leased departments are required to collect and remit sales and service tax due on such sales. The lessor of such leased departments is not responsible for collecting the tax on such sales and may not file returns on behalf of his lessee.

44.2 Persons making sales of tangible personal property through the facilities of leased departments can issue an exemption certificate for purchases of property for resale, but must pay tax on other purchases for use in their business.

44.3 Persons who lease departments on a permanent basis are not required to pay sales and service tax on the rental fee. However, should they make any improvements to the real property being leased, they are required to pay the tax on property purchased to make such improvements.

§ 110-15-45 Rentals.

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. For example, the rental of an automobile from a lessor within this State is taxable in its entirety even though the lessee may use the vehicle for travel outside this State and irregardless of where payment is made.

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

45.3 An exception to the preceding is a lease-purchase agreement of an automobile. When the lessee exercises his option to purchase the vehicle, the remaining balance or sale price is not subject to tax; for the lessee will be subject to the motor vehicle privilege tax.

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

45.5 The renting or leasing of tangible personal property is considered to be a sale of tangible personal property. Thus, purchases for use in the business are taxable, except for purchases for resale, for which an exemption certificate may be issued.

45.6 Effective July 1, 1987, leases of automobiles for a period of thirty or more consecutive days are exempt from tax. This exemption applies 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.

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

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 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.

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

46.4 Purchases of parts and machines dispensing tangible personal property are subject to sales and service tax when purchased.

46.5 Purchases of parts and machines dispensing taxable services are not subject to sales and service tax at the time of purchase, i.e., washing and drying machines at a laundromat, coin-operated amusement machines.

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

47.1 Persons engaged in the business of repairing tangible personal property for others are engaged in a service business. The rendering of this service is subject to sales and service tax or use tax. If materials are also provided as part of the repair, the person is engaged both in the selling of tangible personal property and the rendering of a service, which are both activities subject to the sales and service tax and use tax.

47.2 Persons engaged in multiple business activities will pay tax on their purchases for use in their overall business operation on an apportionment basis. A person engaged in the business of selling a taxable service who also sells taxable tangible personal property is only taxable on his purchases to the extent they are used in that portion of his business of selling the tangible personal property, or on purchases that are used or consumed in the permanent improvement to real property, or on purchases of gasoline and/or special fuel.

47.3 For example, a person who has gross receipts of \$600,000 derived from selling taxable services and \$400,000 of gross receipts from sales of tangible personal property and who buys an adding machine for use in his business will only pay tax on 40% ($\$400,000 \div \$1,000,000$ gross business) of the purchase price of the adding machine. If purchases for use in business can be identified as used exclusively in one or the other business activities, then the purchase may be totally taxable or totally exempt, depending on its use. Other methods of apportionment may also be used as long as they are reasonable for the situation. The method shown above is only one method of apportionment and may not be reasonable in all situations.

47.4 Purchases of tangible personal property or services not for resale

that are used or consumed in the business of selling tangible personal property are subject to the sales and service tax and use tax.

47.5 Purchases of tangible personal property or services consumed or used in the business of dispensing a service subject to the sales and service tax are exempt, except for purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property, and purchases of gasoline and special fuel.

47.6 Persons who must pay tax on their purchases on an apportionment basis may wish to obtain a direct pay permit. A direct pay permit or an exemption certificate may be used to purchase goods for resale without imposition of the tax at the time of sale. By the fifteenth of each month, a direct pay permit consumers sales tax return and a direct pay use tax return must be filed by the direct pay permit user, together with any tax due on taxable purchases made using the direct pay permit during the previous month.

§ 110-15-48 Radio and Television Broadcasting Stations.

48.1 Radio and television broadcasting stations who render advertising services, such as layouts or artwork, are engaged in rendering a service subject to the sales and service tax and use tax. However, sales of radio and television broadcasting time are exempt from the sales and service tax and use tax.

48.2 Radio and television broadcasting stations are primarily engaged in a communications business. Purchases for direct use in a communications business are exempt from sales and service tax and use tax. Other items which are not integral or essential to the communications activity, but which are instead considered to be incidental, convenient or remote to the communications activity, are taxable. Guidelines for determining what is considered to be directly used are given in Subsection 2.7 of these regulations.

48.3 Persons engaged in a communications activity must either pay the tax and request a refund or credit or use a direct pay permit to obtain exemption on goods and services directly used in their communications activity. An exemption certificate, as well as a direct pay permit, may be used to obtain an exemption on purchases of goods and services for resale.

48.4 If a direct pay permit is presented to the vendor, no tax is charged on the sale of tangible personal property or service rendered to the purchaser. The person using the direct pay permit must keep a record of the purchases made using the direct pay permit and whether the items purchased were used in an exempt or taxable manner.

48.5 By the fifteenth of each month, a direct pay permit sales and service tax return and a direct pay use tax return must be filed by the direct pay

permit use, together with the tax due on taxable purchases made using the direct pay return during the previous month.

48.6 Radio and television broadcasting stations who also render taxable services such as layouts or artwork are engaged in multiple business activities. Persons engaged in multiple business activities will pay tax on their purchases for use in their overall business operation on an apportionment basis. Some items may be used in both the activities of rendering a taxable service and communications. These items may be totally taxable or exempt or partially taxable or exempt depending on their use. If an item is used in the activity of rendering a taxable service and is also directly used in the communications activity, such items would be totally exempt. However, items which are used in the activity of rendering a taxable service and indirectly used in the communications activity, such as office furniture or supplies, would be partially taxable. To determine how much tax should be remitted, the purchase price must be apportioned between taxable and nontaxable activities. Any reasonable method of apportionment, such as gross receipts from activities, will be acceptable. Documentation as to the apportionment method used should be retained for audit purposes.

§ 110-15-49 Printers.

49.1 Persons engaged in the business of printing, who provide materials and labor to produce printed products are considered to be manufacturers and must collect and remit sales and service tax and use tax on sales of such products, or in lieu of the tax, receive a valid exemption certificate or direct pay number. Persons who provide printing services on materials owned by their customers are considered to be rendering a taxable service and must also collect and remit the tax, or in lieu of the tax, receive a valid exemption certificate or direct pay permit number.

49.2 Persons engaged in the business of printing who provide materials and labor to produce printed products are considered to be manufacturers and must pay sales and service tax on their purchases, except those purchases of goods and services directly used in the manufacturing activity. Other items which are not integral or essential to the manufacturing activity, but which are instead considered to be incidental, convenient or remote to the manufacturing activity, are taxable. Guidelines for determining what is considered to be directly used are given in Subsection 2.7 of these regulations.

49.3 Persons engaged in a manufacturing activity must either pay the tax and request a refund or credit or use a direct pay permit to obtain exemption on goods and services directly used in their manufacturing activity. An exemption certificate, as well as a direct pay permit, may be used to obtain an exemption on purchases of goods and services for resale.

49.4 If a direct pay permit is presented to the vendor, no tax is charged

on the sale of tangible personal property or service rendered to the purchaser. The purchaser using the direct pay permit must keep a record of the purchases made using the direct pay permit and whether the items purchased were used in an exempt or taxable manner.

49.5 By the fifteenth of each month, a direct pay permit consumers sales tax return and a direct pay use tax return must be filed by the direct pay permit user, together with the tax due on taxable purchases made using the direct pay permit during the previous month.

49.6 Persons who provide printing services on materials owned by their customers are considered to be engaged in a service activity and may issue exemption certificates on purchases for use in their business, except for the purchase of materials and labor to be used in the construction of or permanent improvement to real property or purchases of gasoline or special fuels.

49.7 Printers who engage in manufacturing and who also render taxable services are engaged in multiple business activities. Persons engaged in multiple business activities will pay tax on their purchases for use in their overall business operation on an apportionment basis. Some items may be used in both the activities of rendering a taxable service and manufacturing. These items may be totally taxable or exempt or partially taxable or exempt depending on their use. If an item is used in the activity of rendering a taxable service and is also directly used in the manufacturing activity, such items would be totally exempt. However, items which are used in the activity of rendering a taxable service and indirectly used in the manufacturing activity, such as office furniture or supplies, would be partially taxable. To determine how much tax should be remitted, the purchase price must be apportioned between taxable and nontaxable activities. Any reasonable method of apportionment, such as gross receipts from activities, will be acceptable. Documentation as to the apportionment method used should be retained for audit purposes.

§ 110-15-50 Newspapers and Magazines.

50.1 Persons engaged in the printing and sale of newspapers or magazines must collect and remit sales and service tax on the sale of such newspapers and magazines made to ultimate consumers, such as over the counter sales, sales made through vending boxes and subscription sales made to customers located in West Virginia. Sales made to news dealers for resale or to government agencies such as libraries are also taxable unless a valid exemption certificate is obtained. Sales of newspapers to consumers delivered by route carriers are specifically exempted from the tax. The sale of advertising space by newspapers and magazines is also specifically exempt.

50.2 Persons engaged in the printing and sale of newspapers and magazines are considered to be manufacturers and must pay the tax on purchases for use in their business, except for those purchases of goods and services directly used

in the activity of printing or preparing the newspaper or magazine. Other items which are not integral or essential to the manufacturing activity, but which are instead considered to be incidental, convenient or remote to the manufacturing activity, are taxable. Guidelines for determining what is considered to be directly used are given in Subsection 2.7 of these regulations.

50.3 Persons engaged in a manufacturing activity must either pay the tax and request a refund or credit or use a direct pay permit to obtain exemption on goods and services directly used in their manufacturing activity. An exemption certificate, as well as a direct pay permit, may be used to obtain an exemption on purchases of goods and services for resale.

50.4 If a direct pay permit is presented to the vendor, no tax is charged on the sale of tangible personal property or service rendered to the purchaser. The person using the direct pay permit must keep a record of the purchases made using the direct pay permit and whether the items purchased were used in an exempt or taxable manner.

50.5 By the fifteenth of each month, a direct pay permit consumers sales tax return and a direct pay use tax return must be filed by the direct pay permit user, together with the tax due on taxable purchases made using the direct pay permit during the previous month.

§ 110-15-51 Florist.

51.1 Florists are required to collect and remit sales and service tax and use tax upon their gross receipts from sales of flowers, wreaths, soil, etc., and services. Those florists who participate in Florists Telegraph Delivery Association or a similar arrangement shall be governed by the following rules:

(a) the West Virginia florist who takes orders for flowers, etc., shall collect sales and service tax or use 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 or use tax liability on such sale irrespective of the fact that the order may be transmitted from a florist in another state.

51.2 Florists are engaged in the business of selling tangible personal property. Thus, the purchases of items for use in their business are taxable, except for purchases for resale, for which they may issue an exemption certificate.

§ 110-15-52 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, video machines, 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, 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., on other than a casual and occasional basis 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 are provided. The term "admission" includes regular dues or membership fees which entitle members to usual club or similar organization privileges.

52.5 Sales of tickets for activities sponsored by elementary and secondary schools located within this State are exempt from consumers sales and service tax. All other receipts from admissions to places of amusement or entertainment conducted by the State of West Virginia or any political subdivision, which are in competition with others, are taxable.

52.6 Purchases for use or consumption in the business of selling tangible personal property are subject to the sales and service tax. For example, the purchase of a popcorn machine for use in business is taxable.

52.7 Purchases of materials or services for use or consumption in the business of dispensing a service subject to sales and service tax are exempt, except for purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property, and purchases of gasoline and special fuel.

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

52.9 A person engaged in the business of selling a taxable service who also

sells taxable tangible personal property is only taxable on his purchases to the extent they are used in that portion of his business of selling the tangible personal property, or on purchases for use or consumption in the construction of or permanent improvement to real property, or on purchases of gasoline and/or special fuel.

52.10 For example, a person who has gross receipts of \$600,000 derived from selling taxable services and \$400,000 of gross receipts from sales of tangible personal property and who buys an adding machine for use in his business will only pay tax on 40% ($\$400,000 \div \$1,000,000$ gross business) of the purchase price of the adding machine. If purchases for use in business can be identified as used exclusively in one or the other business activities, then the purchase may be totally taxable or totally exempt, depending on its use. Other methods of apportionment may also be used as long as they are reasonable for the situation. The method shown above is only one method of apportionment and may not be reasonable in all situations.

52.11 Persons who must pay tax on their purchases on an apportionment basis may wish to obtain a direct pay permit. A direct pay permit or an exemption certificate may be used to purchase goods for resale without imposition of the tax, at the time of sale. By the fifteenth of each month, a direct pay permit sales and service tax return and a direct pay use tax return must be filed by the direct pay permit user, together with the tax due on taxable purchases made using the direct pay permit during the previous month.

§ 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 speculative builders and services rendered for them, and use tax

is applicable to their purchases from outside the State.

55.2 If a speculative or operative builder begins to build a house and midway through construction enters into a contract for the sale of the house, he is then engaged in a contracting activity from the date of the contract. Purchases for direct use in a contracting activity are exempt from sales and service tax and use tax. Other items which are not integral or essential to the contracting activity, but which are instead considered to be incidental, convenient or remote to the contracting activity, are taxable. Guidelines for determining what is considered to be directly used are given in Subsection 2.7 of these regulations.

55.3 Persons engaged in a contracting activity must either pay the tax and request a refund or credit or use a direct pay permit to obtain exemption on goods and services directly used in their contracting activity. An exemption certificate, as well as a direct pay permit, may be used to obtain an exemption on purchases of goods and services for resale.

55.4 If a direct pay permit is presented to the vendor, no tax is charged on the sale of tangible personal property or service rendered to the purchaser. The person using the direct pay permit must keep a record of the purchases made using the direct pay permit and how whether the items purchased were used in an exempt or taxable manner.

55.5 By the fifteenth of each month, a direct pay permit consumers sales tax return and a direct pay use tax return must be filed by the direct pay permit user, together with the tax due on taxable purchases made using the direct pay return during the previous month.

55.6 If a builder enters into a contract with a sales corporation to build a house for the sales corporation, such activity will not be considered speculative building if the contract is a true arms-length contract.

§ 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

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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.

§ 110-15-61 Country Clubs, Golf Courses.

61.1 The total receipts from the operation of country clubs and golf courses are subject to sales and service tax. Taxable sales and services include membership dues, green fees, driving range fees, golf cart rentals, swimming pool admissions, tennis court fees, charges for use of banquet facilities, ballroom rental, food and beverage sales, and pro shop sales. Gratuities collected on behalf of employees serving banquet meals are not subject to sales and service tax, if the full amount of gratuities collected are distributed to the employees who served at the banquet.

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

61.3 A person engaged in the business of selling a taxable service who also sells taxable tangible personal property is only taxable on his purchases to the extent they are used in that portion of his business of selling the tangible personal property, or on purchases for use or consumption in the construction of or permanent improvement of real property, or on purchases of gasoline or special fuel.

61.4 For example, a person who has gross receipts of \$600,000 derived from selling taxable services and \$400,000 of gross receipts from sales of tangible personal property and who buys an adding machine for use in his business will only pay tax on 40% (\$400,000 - \$1,000,000 gross business) of the purchase price of the adding machine. If purchases for use in business can be identified as used exclusively in one or the other business activities, then the purchase may be totally taxable or totally exempt, depending on its use. Other methods of apportionment may also be used as long as they are reasonable for the situation.

The method shown above is only one method of apportionment and may not be reasonable in all situations.

61.5 Purchases of tangible personal property or services, except for purchases for resale, that are used or consumed in the business of selling tangible personal property are subject to the consumers tax.

61.6 Purchases of tangible personal property or services consumed or used in the business of dispensing a service subject to the consumers tax are exempt, except for purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property, and purchases of gasoline and special fuel.

61.7 Persons who must pay tax on their purchases on an apportionment basis may wish to obtain a direct pay permit. A direct pay permit or an exemption certificate may be used to purchase goods for resale without imposition of the tax at the time of sale. By the fifteenth of each month, a direct pay permit sales and service tax return and direct pay use tax return must be filed by the direct pay permit user, together with any tax due on taxable purchases made using the permit during the previous month.

§ 110-15-62 Doctors, Dentists, Dental Laboratories, Optometrists, Opticians.

62.1 Doctors are engaged in the business of rendering a professional service exempt from the imposition of sales and service tax and use tax.

62.2 Purchases for use in the business of rendering a professional service are subject to the sales and service tax and use tax.

62.3 Doctors who engage in a manufacturing activity, such as dentists who operate their own dental lab and make their own dentures, crowns, bridges, etc. or optometrists who operate their own optical shop and grind their own lenses, will be subject to the following rules:

62.3.1 A dentist who operates his own dental lab is exempt from paying tax when he purchases materials to be directly used in making dentures, crowns, bridges, etc. However, the fair market value of such products which are made and consumed in rendering services to his patients will be subject to the imposition of use tax.

62.3.2 An optometrist who operates his own optical shop is exempt from paying tax when he purchases materials to be directly used in making eyeglasses. However, the fair market value of the eyeglasses, including frames, which are made and consumed in rendering services to his patients will be subject to the imposition of use tax.

62.3.3 If an outside patient comes to the optometrist's optical

shop with a prescription from another optometrist, then the eyeglasses, including frames, are not subject to the sales and service and use tax upon sale because they are dispensed pursuant to a prescription. In this case, the owner of the optical shop, even though he is an optometrist, need not remit use tax on the fair market value of the eyeglasses because he is not using these glasses in the rendition of his professional service.

62.3.4 Persons engaged in a manufacturing activity must either pay the tax and request a refund or credit or use a direct pay permit to obtain exemption on goods and services directly used in their manufacturing activity. Other items which are not integral or essential to the manufacturing activity, but which are instead considered to be incidental, convenient or remote to the manufacturing activity, are taxable. Guidelines for determining what is considered to be directly used are given in Subsection 2.7 of these regulations.

62.3.5 If a direct pay permit is presented to the vendor, no tax is charged on the sale of tangible personal property or service rendered to the purchaser. The person using the direct pay permit must keep a record of the purchases made using the direct pay permit and whether the items purchased were used in an exempt or taxable manner.

62.3.6 By the fifteenth of each month, a direct pay permit consumers sales tax return and a direct pay use tax return must be filed by the direct pay permit user, together with the tax due on taxable purchases made using the direct pay return during the previous month.

§ 110-15-63 Warranties.

63.1 Warranties offered with the sale of tangible personal property where no separate charge is made for the warranty are not subject to sales and service tax or use tax.

63.2 When a charge is made for the warranty or when an extended warranty is offered and billed separately then the warranty sale is subject to sales and service tax or use tax.

63.3 Warranty parts and labor billed by a retailer to a manufacturer are subject to sales and service tax or use tax.

63.4 For example, a customer buys a television set from a retailer. While still under warranty the television needs repaired, the retailer repairs the television and bills the manufacturer for the parts and labor. The charge made to the manufacturer for the parts and labor are subject to sales and service tax or use tax. If there is a charge to the customer for a deductible amount provided under the warranty contract then this charge is subject to sales and service tax or use tax.

§ 110-15-64 Boat and Aircraft Dealers.

64.1 Sales of boats and aircraft are subject to sales and service tax and use tax. Any trade-in value is not credited against the price paid. To illustrate: the purchase price of a boat is \$25,000 and the purchaser has a boat with a trade-in value of \$10,000. The sales and service tax or use tax would be computed on the full \$25,000 purchase price.

64.2 When a licensed boat or aircraft dealer makes purchases of parts and materials to repair or recondition vehicles held in his inventory for sale, the purchases are considered to be purchases for resale and exempt from tax if the parts or materials do not lose their identity when used to repair the vehicle, but could be reclaimed as a separate part from the vehicle. For example, a used car dealer purchases tires and a battery to repair a car that he will later sell. These items are considered to be purchases for resale and are exempt from tax. However, the purchase of paint or oil and grease will be taxable, since these items lose their separate identity when used.

64.3 Sales of parts and services to customers are subject to sales and service tax and use tax. Any trade-in value of parts is not credited against the price paid.

64.4 Any income derived from storing or docking an airplane or boat is subject to sales and service tax and use tax.

64.5 Repairs of boats and airplanes performed under warranties and billed to the manufacturer are taxable. See Subsection 63.3 of these regulations.

64.6 When a boat or aircraft dealer repairs boats or planes for individuals, he is engaged in the business of selling tangible personal property and rendering taxable services.

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

64.8 A person engaged in the business of selling a taxable service who also sells taxable tangible personal property is only taxable on his purchases to the extent they are used in that portion of his business of selling the tangible personal property, or on purchases for use or consumption in permanent improvement to real property, or on purchases of gasoline and/or special fuel.

64.9 For example, a person who has gross receipts of \$600,000 derived from selling taxable services and \$400,000 of gross receipts from sales of tangible personal property and who buys an adding machine for use in his business will only pay tax on 40% ($\$400,00 \div \$1,000,000$ gross business) of the purchase price of the adding machine. If purchases for use in business can be identified as used exclusively in one or the other business activities, then the purchase may

be totally taxable or totally exempt, depending on its use. Other methods of apportionment may also be used as long as they are reasonable for the situation. The method shown above is only one method of apportionment and may not be reasonable in all situations.

64.10 Purchases of tangible personal property or services not for resale that are used or consumed exclusively in the business of selling tangible personal property are subject to the consumers tax.

64.11 Purchases of tangible personal property or services consumed or used exclusively in the business of dispensing a service subject to the consumers tax are exempt, except for purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property, and purchases of gasoline and special fuel.

64.12 Persons who must pay tax on their purchases on an apportionment basis may wish to obtain a direct pay permit. A direct pay permit or an exemption certificate may be used to purchase goods for resale without imposition of the tax.

§ 110-15-65 Motor Vehicle Dealers.

65.1 Sales of motor vehicles which are titled by the Department of Motor Vehicles and which are subject to the tax imposed by W. Va. Code § 17A-3-4 are exempt from sales and service tax.

65.2 Accessories which are purchased from the dealer after the title and possession of the motor vehicle have been transferred to the purchaser are subject to the sales and service tax and use tax.

65.3 As a practical application of this rule, the dealer's sales invoice will be accepted as the basis for determining the tax applicable.

65.4 Sales of parts and services to customers are subject to sales and service tax and use tax. Any trade-in value of parts is not credited against the price paid.

65.5 When a licensed motor vehicle dealer repairs vehicles for individuals, he is engaged in the business of selling tangible personal property and rendering a taxable service. Persons engaged in multiple business activities will pay tax on their purchases for use in their overall business operation on an apportionment basis.

65.6 A person engaged in the business of selling a taxable service who also sells taxable tangible personal property is only taxable on his purchases to the extent they are used in that portion of his business of selling the tangible personal property, or on purchases for use or consumption in the construction of

or permanent improvement of real property, or on purchases of gasoline or special fuel.

65.7 For example, a person who has gross receipts of \$600,000 derived from selling taxable services and \$400,000 of gross receipts from sales of tangible personal property and who buys an adding machine for use in his business will only pay tax on 40% ($\$400,000 \div \$1,000,000$ gross business) of the purchase price of the adding machine. If purchases for use in business can be identified as used exclusively in one or the other business activities, then the purchase may be totally taxable or totally exempt, depending on its use. Other methods of apportionment may also be used as long as they are reasonable for the situation. The method shown above is only one method of apportionment and may not be reasonable in all situations.

65.8 Persons who must pay tax on their purchases on an apportionment basis may wish to obtain a direct pay permit. A direct pay permit or an exemption certificate may be used to purchase goods for resale without imposition of the tax at the time of sale. By the fifteenth of each month, a direct pay permit sales and service tax return and a direct pay permit use tax return must be filed by the direct pay permit user, together with the tax due on taxable purchases made using the direct pay permit during the previous month.

65.9 When a licensed dealer in motor vehicles make purchases of parts and materials to repair or recondition vehicles held in his inventory for sale, the purchases are considered to be purchases for resale and exempt from tax if the parts or materials do not lose their identity when used to repair the vehicle, but could be reclaimed as a separate part from the vehicle. For example, a used motor vehicle dealer purchases tires and a battery to repair a car that he will later sell. These items are considered to be purchases for resale and are exempt from tax. However, the purchase of paint or oil and grease will be taxable, since these items lose their separate identity when used.

65.10 Repairs of cars performed under warranties and billed to the manufacturer are taxable. See Subsection 63.3 of these regulations.

65.11 Towing charges, if regulated by the Public Service Commission, are exempt from consumers sales tax.

§ 110-15-66 Well Servicing.

66.1 Persons engaged in the business of well servicing are performing a service subject to the sales and service tax and use tax. Tangible personal property consumed in this activity is not considered to be a sale of tangible property, but is deemed to be consumed in the rendition of the well service and is part of the service activity. Sales of tangible personal property apart from the rendering of well services are also subject to the sales and service tax and use tax.

66.2 However, if the purchaser properly executes an exemption certificate or direct pay permit number, the vendor is relieved from collection of the sales and service tax and use tax.

66.3 Purchases of tangible personal property or services for use or consumption in the business of selling a taxable service are exempt from the sales and service and use tax. However, purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property and purchases of gasoline and special fuel shall not be exempt.

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

66.5 A person engaged in the business of selling a taxable service who also sells taxable tangible personal property is only taxable on his purchases to the extent they are used in that portion of his business of selling the tangible personal property, or on purchases for use or consumption in the construction of or permanent improvement of real property, or on purchases of gasoline or special fuel.

66.6 For example, a person who has gross receipts of \$600,000 derived from selling taxable services and \$400,000 of gross receipts from sales of tangible personal property, who buys an adding machine for use in his business will only pay tax on 40% ($\$400,000 \div \$1,000,000$ gross business) of the purchase price of the adding machine. If purchases for use in business can be identified as used exclusively in one or the other business activities, then the purchase may be totally taxable or totally exempt, depending on its use. Other methods of apportionment may also be used as long as they are reasonable for the situation. The method shown above is only one method of apportionment and may not be reasonable in all situations.

66.7 Purchases of tangible personal property or services not for resale that are used or consumed exclusively in the business of selling tangible personal property are subject to the consumers tax.

66.8 Purchases of tangible personal property or services consumed or used exclusively in the business of dispensing a service subject to the consumers tax are exempt, except for purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property, and purchases of gasoline and special fuel.

66.9 Persons who must pay tax on their purchases on an apportionment basis may wish to obtain a direct pay permit. A direct pay permit or an exemption certificate may be used to purchase goods for resale without imposition of the tax at the time of sale. By the fifteenth of each month, a direct pay permit

sales and service tax return and a direct pay permit use tax return must be filed by the direct pay permit user, together with any tax due on taxable purchases made using the direct pay permit during the previous month.

§ 110-15-67 Laundries, Laundromats and Dry Cleaning.

67.1 Persons engaged in the operation of laundries, dry cleaning, and related activities, are rendering a service subject to the sales and service tax and use tax. Sales of tangible personal property or services through the use of coin-operated machines and devices are subject to the sales and service tax.

67.2 However, if the purchaser properly executes an exemption certificate or direct pay permit number, the vendor is relieved from collection of the sales and service tax.

67.3 Purchases of coin-operated devices which dispense tangible personal property are subject to the sales and service tax and use tax.

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

67.5 A person engaged in the business of selling a taxable service who also sells taxable tangible personal property is only taxable on his purchases to the extent they are used in that portion of his business of selling the tangible personal property, or on purchases for use or consumption in the permanent improvement of real property, or on purchases of gasoline or special fuel.

67.6 For example, a person who has gross receipts of \$600,000 derived from selling taxable services and \$400,000 of gross receipts from sales of tangible personal property and who buys an adding machine for use in his business will only pay tax on 40% (\$400,000 + \$1,000,000 gross business) of the purchase price of the adding machine. If purchases for use in business can be identified as used exclusively in one or the other business activities, then the purchase may be totally taxable or totally exempt, depending on its use. Other methods of apportionment may also be used as long as they are reasonable for the situation. The method shown above is only one method of apportionment and may not be reasonable in all situations.

67.7 Purchases of tangible personal property or services not for resale that are used or consumed exclusively in the business of selling tangible personal property are subject to the consumer tax.

67.8 Purchases of tangible personal property or services consumed or used exclusively in the business of dispensing a service subject to the consumers tax are exempt, except for purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property, and purchases of gasoline and special fuel.

67.9 Persons who must pay tax on their purchases on an apportionment basis may wish to obtain a direct pay permit. A direct pay permit or an exemption certificate may be used to purchase goods for resale without imposition of the tax at the time of sale. By the fifteenth of each month, a direct pay permit sales and service tax return and a direct pay permit use tax return must be filed by the direct pay permit user, together with any tax due on any taxable purchases made using the direct pay permit during the previous month.

§ 110-15-68 Photographers, Film Developers.

68.1 Persons engaged in the business of taking photographs, who do not develop the film are performing a service subject to the sales and service tax and use tax. Tax must be collected unless the purchaser properly executes an exemption certificate or presents a direct pay permit number.

68.2 Purchases of tangible personal property or services for use or consumption in the business of selling a taxable service are exempt from tax except for purchases for permanent improvement to real property or purchases of gasoline or special fuel.

68.3 Persons engaged in the business of taking photographs and who also develop the film are engaged in a manufacturing activity.

68.4 Persons engaged in a manufacturing activity are taxable on their purchases except for items directly used in the manufacturing activity. Other items which are not integral or essential to the manufacturing activity, but which are instead considered to be incidental, convenient or remote to the manufacturing activity, are taxable. Guidelines for determining what is considered to be directly used are given in Subsection 2.7 of these regulations.

68.5 Persons engaged in a manufacturing activity must either pay the tax and request a refund or credit or use a direct pay permit to obtain exemption on goods and services directly used in their manufacturing activity. An exemption certificate, as well as a direct pay permit, may be used to obtain an exemption on purchases of goods and services for resale.

68.6 If a direct pay permit is presented to the vendor, no tax is charged on the sale of tangible personal property or service rendered to the purchaser. The person using the direct pay permit must keep a record of the purchases made using the direct pay permit and how whether the items purchased were used in an exempt or taxable manner.

68.7 By the fifteenth of each month, a direct pay permit consumers sales tax return and a direct pay use tax return must be filed by the direct pay permit holder, together with the tax due on taxable purchases made using the direct pay return during the previous month.

§ 110-15-69 Parking.

69.1 Persons engaged in the business of offering parking spaces for rent are performing a service subject to the sales and service tax and use tax. Tax must be collected unless the purchaser presents a properly executed exemption certificate or direct pay permit number. City parking garages which compete with private businesses are also rendering a service subject to the sales and service tax and use tax.

69.2 Purchases of tangible personal property or services for use or consumption in the business of selling a taxable service are exempt from the sales and service tax. However, purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property and purchases of gasoline and special fuel are not exempt.

§ 110-15-70 Fraternity and Sorority Houses.

70.1 A fraternity or sorority house selling meals or renting rooms may be engaged in activities that are subject to the sales and service tax and use tax.

70.2 Sales of food and meals, if rendered on a "contract basis" by student fraternities and sororities, that are officially recognized by the college or university, are exempt from the sales and service tax.

70.3 The term "contract basis" is defined as food sold on a contract basis, where a fixed price is paid for consumption of food products during a specific period of time without regard to the amount of food product actually consumed by the particular individual contracting for the purchase, and there is no money paid at the time the food product is served or consumed. The term "specific period of time" means a time period of not less than thirty (30) consecutive days.

70.4 Persons engaged in the operation of a fraternity or sorority house may be engaged in both the rendering of a taxable service and the selling of tangible personal property.

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

70.6 A person engaged in the business of selling a taxable service who also sells taxable tangible personal property is only taxable on his purchases to the extent they are used in that portion of his business of selling the tangible personal property, or are for use or consumption in the construction of or permanent improvement to real property or are of gasoline and special fuel.

70.7 For example, a person who has gross receipts of \$600,000 derived from

selling taxable services and \$400,000 of gross receipts from sales of tangible personal property an who buys an adding machine for use in his business will only pay tax on 40% ($\$400,000 \div \$1,000,000$ gross business) of the purchase price of the adding machine. If purchases for use in business can be identified as used exclusively in one or the other business activities, then the purchase may be totally taxable or totally exempt, depending on its use. Other methods of apportionment may also be used as long as they are reasonable for the situation. The method shown above is only one method of apportionment and may not be reasonable in all situations.

70.8 Purchases of tangible personal property or services that are used or consumed solely in the business of selling tangible personal property are subject to the sales and service tax and use tax except for purchases for resale.

70.9 Purchases of tangible personal property or services to be used or consumed solely in the business of dispensing a service subject to the consumers tax are exempt, except for purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property, and purchases of gasoline and special fuel.

70.10 Persons who must pay tax on their purchases on an apportionment basis may wish to obtain a direct pay permit. A direct pay permit or an exemption certificate may be used to purchase goods for resale without imposition of the tax at the time of sale. By the fifteenth of each month, a direct pay permit sales and service tax return and a direct pay use tax return must be filed by the direct pay permit user, together with any tax due on taxable purchases made using the direct pay permit during the previous month.

§ 110-15-71 Advertising Agencies

71.1 Advertising agencies render services, such as layout and artwork services, which are subject to the sales and service tax and use tax and, in some instances, also engage in the selling of tangible personal property.

71.2 Advertising agencies who purchase items on behalf of their clients, and receive a fee or commission for such services, must collect sales and service tax or use tax on such fee or commission unless the client may issue an exemption certificate or direct pay permit.

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

71.4 A person engaged in the business of selling a taxable service who also sells taxable tangible personal property is only taxable on his purchases to the extent they are used in that portion of his business of selling the tangible personal property, or on purchases for use or consumption in the construction of

or permanent improvement of real property, or on purchases of gasoline or special fuel.

71.5 For example, a person who has gross receipts of \$600,000 derived from selling taxable services and \$400,000 of gross receipts from sales of tangible personal property and who buys an adding machine for use in his business will only pay tax on 40% ($\$400,000 \div \$1,000,000$ gross business) of the purchase price of the adding machine. If purchases for use in business can be identified as used exclusively in one or the other business activities, then the purchase may be totally taxable or totally exempt, depending on its use. Other methods of apportionment may also be used as long as they are reasonable for the situation. The method shown above is only one method of apportionment and may not be reasonable in all situations.

71.6 Purchases of tangible personal property or services not for resale that are used or consumed exclusively in the business of selling tangible personal property are subject to the sales and service tax.

71.7 Purchases of tangible personal property or services consumed or used exclusively in the business of dispensing a service subject to the sales and service tax are exempt, except for purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property, and purchases of gasoline and special fuel.

71.8 Persons who must pay tax on their purchases on an apportionment basis may wish to obtain a direct pay permit. A direct pay permit or an exemption certificate may be used to purchase goods for resale without imposition of the tax.

71.9 Purchases made by advertising agencies on behalf of a client may or may not be subject to sales and service tax and use tax. Purchases of radio and broadcasting time, preprinted advertising circulars, newspaper and outdoor advertising space for the advertisement of goods or services are exempt from the sales and service tax and use tax. However, the purchase of other items such as posterboards and signs may be taxable unless the client can issue an exemption certificate or direct pay permit.

§ 110-15-72 Organizations Which Qualify or are Qualified Under Sections 501(c)(4) and 501(c)(4) of the Internal Revenue Code.

72.1 Sales of property or services to corporations or organizations qualified under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or under Section 501(c)(4) of the Internal Revenue Code of 1986, as amended, who make casual and occasional sales not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character, are exempt.

72.2 Entitlement to use this exemption depends upon the corporation or organization having first received a determination of exemption from the Internal Revenue Service or from the State Tax Commissioner. No corporation or organization may avail itself of this exemption unless it has obtained a written ruling from the Tax Commissioner or has, in fact been qualified as a Section 501(c)(3) or Section 501(c)(4) corporation or organization by the Internal Revenue Service.

72.2.1 Where the taxpayer has received a determination or ruling from the Internal Revenue Service that it is exempt from tax under either Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code of 1986, as amended, it shall file a copy of such ruling or determination with the West Virginia State Tax Commissioner.

72.2.2 If the taxpayer is not, in fact, qualified with the federal government, but does, in fact, meet the requirements for qualification, then such corporation or organization shall file with the State Tax Commissioner a statement, in writing, verified under oath setting forth such information as the Tax Commissioner shall need to make a determination. Such written statement shall be supported by a copy of the corporation's articles of incorporation and by-laws or similar documents in the case of a non-incorporated organization. If the Tax Commissioner believes such proof to be sufficient, he will issue a written ruling granting exemption to such corporation or organization.

72.3 Even though a corporation or organization has received a determination or ruling from the Internal Revenue Service that it is exempt from federal income tax under Section 501(c)(3) or Section 501(c)(4), it will not be exempt from sales and use taxes if it makes sales of tangible personal property or services which are other than casual and occasional sales of property or services not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character. For example, a hospital may have a determination that it is exempt from federal income tax under Section 501(c)(3). Such hospital still will not qualify for exemption under this provision.

72.4 Organizations qualifying under Section 501(c)(3) include "corporations, and any community chest, fund, or foundation, 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 provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in Subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf

of any candidate for public office."

72.5 Organizations qualifying under Section 501(c)(4) include "civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

§ 110-15-73 Distributors of Gasoline and/or Special Fuel.

73.1 Persons engaged in the business of distributing gasoline and/or special fuel must collect sales and service tax and use tax upon the sale of such products unless he receives an exemption certificate from the purchaser. Direct pay permits may not be used by a purchaser to obtain an exemption from sales and service tax or use tax on gasoline and/or special fuel.

73.2 Purchases for use in business by a distributor of gasoline or special fuel are taxable except for purchases for resale, for which an exemption certificate may be issued.

§ 110-15-74 Bonafide Charitable Organizations.

74.1 Bonafide charitable organizations who make no charge whatsoever for the services they render are exempt from the sales and service tax and use tax. This exemption shall apply only to services, equipment, supplies and materials directly used or consumed by the charitable organization.

74.2 If such an organization would become engaged in an activity of repeated sales or services for a fee (for example, dinners or events where admissions are charged) these activities are subject to sales and service tax and/or use tax on the gross sales amount.

§ 110-15-75 Maintenance Contracts.

75.1 There are basically three types of maintenance contracts:

75.1.1 Service Maintenance Contracts - contracts for services rendered on real property,

75.1.2 Service Maintenance Contracts - contracts for services rendered on tangible personal property.

75.1.3 Contracting Maintenance Contracts - contracts for materials/labor rendered on real property.

75.2 The first type of service maintenance contract is performed on real

property and is a service activity subject to the collection of sales and service tax upon the entire gross amount. The service maintenance contract would allow for only preventative maintenance service to real property. (Example, a service maintenance contract on an elevator - the preventative maintenance services rendered would be on site inspection of elevator, applying grease to the cables, oil doors and up-down buttons and minor adjustments as needed.) An example of some of the items that would be included in a service maintenance contract would be that the agreement would state a specified time period for the service maintenance contract to be in force, the number of inspections to be made and a check list of items to inspect. A service maintenance contract of this type includes within its scope only items which are consumed in the rendering of preventative maintenance, such as oil or grease. It does not include items that can be reclaimed as a separate component, such as a motor. Should the need for any repair be discovered during the routine inspection, the repair would be negotiated under a completely different agreement than the service maintenance contract.

75.3 The second type of service maintenance contract is performed on tangible personal property and is a service subject to the collection of sales and service tax and use tax. This does not include service maintenance contracts on "structures" as defined in Subsection 2.6 of these regulations. For example, a service maintenance contract on a typewriter or calculator, in which some of the services rendered might be cleaning, oiling, adjusting, replacing worn parts and all necessary functions to keep the equipment in top working condition. Some of the items that might be included in a service maintenance contract of this type are: Time period covered by contract, parts not covered by contract, number of service calls (maximum - minimum) loaner available, renewal option, etc.

75.4 Purchases for use in rendering the service activities identified in the foregoing paragraphs 75.2 and 75.3 are exempt, except for purchases for permanent improvement to real property and gasoline or special fuel.

75.5 The third type of maintenance contract is known as a contracting maintenance contract. Contracting shall mean 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. "Structure" shall include, but not be limited to, everything built up on 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. If the activity fits the definition given above, it is exempt from the sales and service tax. Only purchases of services, machinery, supplies and materials directly used or consumed in a contracting activity are exempt from sales and service tax and/or use tax. See Subsection 2.7 of these regulations for

guidelines on what is considered to be directly used in a contracting activity.

§ 110-15-76 Electronic Data Processing Services and Related Software.

76.1 Sales of electronic data processing services and related software to others are exempt from sales and service tax and/or use tax. For purposes of this exemption, electronic data processing services means (1) the processing of another's data, including all processing such as key punching, keystroke verification, rearranging, or sorting of previously documented data for the purpose of data entry or automatic processing, and changing the medium on which data is sorted, 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.

76.2 Purchases for use in rendering electronic data processing services for others and the sale of related software are taxable, except for purchases for resale, for which an exemption certificate may be rendered.

§ 110-15-77 Sales of Data Processing Equipment.

77.1 Sales of electronic data processing equipment, accessories, related materials, and/or supplies which do not become a part of real property or structure are considered to be sales of tangible personal property and thereby are subject to the sales and service tax and use tax laws, unless the purchaser presents a direct pay permit and/or a properly executed exemption certificate.

77.2 A seller of tangible personal property is exempt from sales and service tax and/or use tax only on items purchased for resale for which an exemption certificate may be issued. All other purchases for use in business are taxable.

§ 110-15-78 Physical Fitness Centers.

78.1 Physical fitness centers and gymnasiums are engaged in the business of sales of tangible personal property and the rendering of personal services if they meet the requirements set forth in Subsection 8.1.2.3 of these regulations.

78.2 Memberships sold by physical fitness centers and gymnasiums, who met the guidelines set forth in Subsection 8.1.2.3 of these regulations, would not be subject to the sales and service tax because they are for services considered to be "personal services." However, sales of tangible personal property such as sweatshirts and other items are taxable.

78.3 Persons who are engaged in selling memberships are taxable on their purchases for use in the personal service portion of their business. Purchases for use in the portion of the business related to the selling of tangible personal property are also taxable, except for purchases for resale, for which

an exemption certificate may be issued.

§ 110-15-79 Tanning Salons.

79.1 Persons engaged in the business of selling tanning sessions are renting tangible personal property. Rentals of tangible personal property are considered to be sales of tangible personal property and are subject to the sales and service tax and use tax.

79.2 Persons engaged in the selling of tanning sessions are taxable on their purchases for use in business, except for any purchases for resale, for which an exemption certificate may be issued.

79.3 A tanning session, as commonly performed within the industry, is not a personal service. A tan is provided solely by the tanning bed with no interaction or contact from the attendant. The actual service is performed by the machine. A service performed solely by a machine cannot be rendered from one person to another, and, thus is not a personal service.

§ 110-15-80 Masseuses.

80.1 Massaging is considered to be a personal service. Therefore, the masseuse would not collect sales and service tax on the activities of kneading, rubbing or manipulating to the condition the body. However, should the masseuse in the course of his or her business sell tangible personal property, such as oils, towels, or sheets to their clients, these sales would be subject to sales and service tax.

80.2 Persons engaged in providing masseuse services are taxable on their purchases for use in the personal service portion of their business. Purchases for use in the portion of the business related to the selling of tangible personal property are also taxable, except for purchases for resale, for which an exemption certificate may be issued.

§ 110-15-81 Travel Agencies.

81.1 Services provided by travel agencies such as arrangement for motel accommodations, meal accommodations, reservation of rental cars, booking cruises, reserving airline tickets, arranging bus tours or reserving passage on international tours for their clients are subject to tax.

81.2 A travel agency that arranges group tours should pay tax on items purchased on behalf of their clients at the time of purchase and should collect and remit sales and service tax on any gross profit realized on the package. For example, tax should be paid on the purchase of hotel rooms on behalf of clients at the time of purchase.

81.3 A travel agency that earns commissions from the arranging of reservations with various businesses, such as hotels, airlines, and bus lines are also rendering a marketing service subject to sales and service and use tax. These persons should either collect and remit the tax due on these services or obtain a direct pay permit from the entity for whom the service was rendered.

81.4 Persons engaged in rendering travel agency services are providing a taxable service and, thus, are exempt on their purchases for use in business, except for purchases for use or consumption in the construction of or permanent improvement to real property and gasoline or special fuel.

§ 110-15-82 Barber and Beauty Shops.

82.1 Barber and beauty shop operators are engaged primarily in a personal service occupation, and thus, are not required to collect sales and service tax on such services. However, barbers, beauticians, manicurists, etc., consume various items of tangible personal property and services, in the rendition of their personal services. The purchases of all such services and property, including equipment, are subject to the sales and service tax.

82.2 If, apart from rendering personal services, barbers, beauticians, manicurists, etc., are engaged in selling to the public such articles as shampoos, conditioners, styling aids and accessories, and the like, they are vendors and must collect the sales and service tax on all such sales. Barbers, beauticians, manicurists, etc., can issue an exemption certificate for purchases of property for resale to customers.

§ 110-15-83 Private Music Instruction.

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

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

83.3 Purchases of tangible personal property or services used or consumed in the business of rendering professional services are taxable, except for purchases of property or services for resale. An exemption certificate can be issued for purchases of items for resale.

§ 110-15-84 Interior Decorating.

84.1 Persons engaged in the performance of interior decorating are considered to be rendering a service subject to the sales and service tax and use tax and must collect and remit tax on these services. Interior decorators 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. This exemption will not apply to purchases for use or consumption in the construction of or permanent improvement of real property or to purchases of gasoline and special fuel.

§ 110-15-85 Bookkeeping.

85.1 A person who performs general bookkeeping and accounting services for businesses or other individuals, who is neither a certified public accountant or licensed public accountant, is considered to be rendering a service subject to the sales and service tax and use tax.

85.2 Bookkeepers, however, 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 businesses, with the exception of purchases for use or consumption in the construction of or permanent improvement of real property, and purchases of gasoline and special fuel.

§ 110-15-86 Auctioneers, Auction Sales, Auctions.

86.1 An auctioneer when commissioned to sell property on behalf of another is providing a service which is subject to the sales tax.

86.2 Auctioneers who, in the conduct of their business, hold repeated auction sales at their place of business are responsible for collection and remittance of sales and service tax, irrespective of whether the merchandise sold belongs to them or to another person.

86.3 In those instances in which a person hires an auctioneer to auction the furnishings from the owner's farm or home, the sales are exempt as isolated transactions. The same is true of sheriffs' and constables' sales and sales under chattel deeds of trust. In order to qualify as an isolated transaction, the sale must be on premises owned or provided by the owner of the tangible personal property being sold, not the auctioneer, and the sales must not occur more than four times a year.

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

86.5 A person engaged in the business of selling a taxable service who also sells taxable tangible personal property is only taxable on his purchases to the extent they are used in that portion of his business of selling the tangible personal property, or on purchases for use or consumption in the construction of

or permanent improvement of real property, or on purchases of gasoline or special fuel.

86.6 For example, a person who has gross receipts of \$600,000 derived from selling taxable services and \$400,000 of gross receipts from sales of tangible personal property and who buys an adding machine for use in his business will only pay tax on 40% ($\$400,000 \div \$1,000,000$ gross business) of the purchase price of the adding machine. If purchases for use in business can be identified as used exclusively in one or the other business activities, then the purchase may be totally taxable or totally exempt, depending on its use. Other methods of apportionment may also be used as long as they are reasonable for the situation. The method shown above is only one method of apportionment and may not be reasonable in all situations.

86.7 Purchases of tangible personal property or services not for resale that are used or consumed exclusively in the business of selling tangible personal property are subject to the sales and service tax.

86.8 Purchases of tangible personal property or services consumed or used exclusively in the business of dispensing a service subject to the sales and service tax are exempt, except for purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property, and purchases of gasoline and special fuel.

86.9 Persons who must pay tax on their purchases on an apportionment basis may wish to obtain a direct pay permit. A direct pay permit or an exemption certificate may be used to purchase goods for resale without imposition of the tax at the time of sale. By the fifteenth of each month, a direct pay sales and service tax return and a direct pay use tax return must be filed by the direct pay permit user, together with any tax due on taxable purchases made using the direct pay permit during the previous month.

§ 110-15-87 Real Estate Brokers.

87.1 Any real estate broker who is licensed in West Virginia who is rendering services which require a license is providing professional services excepted from the imposition of the sales and service tax and use tax.

87.2 Purchases for use in rendering professional services are subject to the sales and service tax and use tax, except for purchases for resale, for which an exemption certificate may be issued.

87.3 However, persons engaged in the business of appraising real estate, who do not hold a valid West Virginia real estate license, and cannot render certified appraisals, will continue to be required to collect sales and service tax and use tax on their services.

87.4 Purchases for use in business made by persons rendering taxable

services, who do not hold a valid West Virginia real estate license, are exempt from the sales and service tax and use tax, except for purchases for use or consumption in the construction of or permanent improvement of real property and purchases of gasoline and/or special fuel.

§ 110-15-88 Commodity Brokers.

88.1 Fees or commissions earned from transacting business as a commodity broker are services which are subject to the collection of sales and service tax and use tax. The fact that these fees may be computed as a percentage of sales has no bearing on their taxability. These fees or commissions are not considered to be directly used or consumed in the businesses of transportation, production of natural resources, transmission, communication, manufacturing and contracting. See Subsection 2.7.2 of these regulations.

§ 110-15-89 Delivery Charges.

89.1 Separately stated delivery charges are subject to the sales and service tax, unless the delivery service is provided by a common carrier subject to regulation by the Public Service Commission.

§ 110-15-90 Jewelry, Furniture, Hardware, Dry Goods, Apparel Stores.

90.1 Jewelry, furniture, hardware, dry goods and apparel stores are all persons making sales of tangible personal property that are subject to sales and service tax and use tax.

90.2 Any trade-in value given by the customer is not a credit against the price paid. To illustrate: The purchase price of a sofa is \$800 and the purchaser has a sofa with a trade-in value of \$50. The sales and service tax would be computed on the full \$800 purchase price.

90.3 Purchases for use solely in the business of selling tangible personal property are taxable except for purchases for resale, for which an exemption certificate may be issued. Purchases for use solely in the business of rendering taxable services are exempt, except for purchases for use or consumption in the construction of or permanent improvement of real property and purchases of gasoline and special fuel.

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

90.5 A person engaged in the business of selling a taxable service who also sells taxable tangible personal property is only taxable on his purchases to the extent they are used in that portion of his business of selling the tangible personal property, or on purchases for use in the permanent improvement to real property, or on purchases of gasoline or special fuels.

90.6 For example, a person who has gross receipts of \$600,000 derived from selling taxable services and \$400,000 of gross receipts from sales of tangible personal property and who buys an adding machine for use in his business will only pay tax on 40% ($\$400,000 \div \$1,000,000$ gross business) of the purchase price of the adding machine. If purchases for use in business can be identified as used exclusively in one or the other business activities, then the purchase may be totally taxable or totally exempt, depending on its use. Other methods of apportionment may also be used as long as they are reasonable for the situation. The method shown above is only one method of apportionment and may not be reasonable in all situations.

90.7 Persons who must pay tax on their purchases on an apportionment basis may wish to obtain a direct pay permit. A direct pay permit or an exemption certificate may be used to purchase goods for resale without imposition of the tax at the time of sale. By the fifteenth of each month, a direct pay permit sales and service tax return and a direct pay permit use tax return must be filed by the direct pay permit user, together with any tax due on taxable purchases made using the direct pay permit during the previous month.

§ 110-15-91 Restaurants and Bars.

91.1 All sales of food and beverages, and cover charges made by a restaurant or bar are subject to sales and service tax. Banquet gratuities, which are fully distributed to employees, are not subject to sales and service tax.

91.2 Persons engaged in the business of operating a restaurant or bar are considered to be retailers, and, thus, their purchases for use in business are subject to sales and service tax, except for purchases for resale, for which an exemption certificate may be issued. Purchases for resale include items which are primarily intended to be transferred to the customer as part of the sale, such as paper bags, food containers, paper cups, straws, disposable napkins, and plastic forks, knives, and spoons. Items which are reusable such as cloth napkins, ceramic plates and metal silverware are not purchases for resale. See Subsection 32.6 of these regulations.

§ 110-15-92 Drugs.

92.1 Sales of drugs dispensed upon prescription and sales of insulin to consumers for medical purposes are exempt from sales and service tax. The term "drug" shall include all sales of drugs or appliances to a purchaser, upon prescription of a physician or dentist and any other professional person licensed to prescribe. "Professional persons" shall include but not be limited to surgeons, chiropractors, physical therapists, optometrists, ophthalmologists, audiologists and veterinarians. Prescriptions must be in writing. This is a per se exemption and no exemption certificate or direct pay permit is needed to

obtain the exemption.

92.2 Drugs sold to hospitals, licensed physicians, nursing homes, etc., which are to be consumed in the performance of a professional service are subject to sales and service tax.

92.3 Sales to consumers of non-prescription drugs are subject to sales and service tax.

§ 110-15-93 Farm Equipment.

93.1 Sales of farm equipment (tractors, tractor implements, combines, seeders, thrashing machines, etc.) to persons engaged in the commercial production of an agricultural product are exempt from sales and service tax. An exemption certificate can be issued by a commercial producer to obtain this exemption.

93.2 The phrase "commercial production of an agricultural product" means a farming operation undertaken for profit by raising crops or livestock. Production of agricultural products begins with the cultivation of land previously cleared for planting of crops or with the purchase or breeding of livestock or domesticated fowl. The production of agricultural products ceases when an agricultural product has been transported to the point where it will be sold by the farmer or processed.

93.3 This exemption does not apply to purchases for use or consumption in the construction of or permanent improvement to real property or to purchases of gasoline or special fuel.

§ 110-15-94 Service Station.

94.1 Persons engaged in the business of operating a gasoline service station and making automotive repairs are making sales of tangible personal property and rendering services subject to sales and service tax and use tax.

94.2 Automotive repairs which include parts and installation labor are subject to tax. Parts sold without installation or labor are also subject to tax. Tax must be collected unless an exemption certificate or direct pay permit is given by the customer.

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

94.4 A person engaged in the business of selling a taxable service who also sells taxable tangible personal property is only taxable on his purchases to the extent they are used in that portion of his business of selling the tangible personal property, or on purchases for use or consumption in the construction of

or permanent improvement to real property, or on purchases of gasoline and/or special fuel.

94.5 For example, a person who has gross receipts of \$600,000 derived from selling taxable services and \$400,000 of gross receipts from sales of tangible personal property and who buys an adding machine for use in his business will only pay tax on 40% ($\$400,000 \div \$1,000,000$ gross business) of the purchase price of the adding machine. If purchases for use in business can be identified as used exclusively in one or the other business activities, then the purchase may be totally taxable or totally exempt, depending on its use. Other methods of apportionment may also be used as long as they are reasonable for the situation. The method shown above is only one method of apportionment and may not be reasonable in all situations.

94.6 Purchases of tangible personal property or services not for resale that are used or consumed exclusively in the business of selling tangible personal property are subject to the sales and service tax.

94.7 Purchases of tangible personal property or services consumed or used exclusively in the business of dispensing a service subject to the sales and service tax are exempt, except for purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property, and purchases of gasoline and special fuel.

94.8 Persons who must pay tax on their purchases on an apportionment basis may wish to obtain a direct pay permit. A direct pay permit or an exemption certificate may be used to purchase goods for resale without imposition of the tax at the time of sale. By the fifteenth of each month, a direct pay permit sales and service tax return and a direct pay use tax return must be filed by the direct pay permit user, together with any tax due on taxable purchases made using the direct pay permit during the previous month.

§ 110-15-95 Grocery Store Coupons.

95.1 Since a store is reimbursed by the manufacturer for the amount of a manufacturer's coupon, the sales and service tax is computed on the gross sales price without any deduction for the coupon. To illustrate: A container of laundry detergent sells for \$2.50 and the purchaser has a manufacturer's coupon worth \$.50. the sales and service tax is computed on the gross sales price of \$2.50.

95.2 In the case of coupons issued by a grocery-type store for its own product, the amount of the coupon is not subject to sales and service tax. To illustrate: A container of laundry detergent sells for \$2.50 and the purchaser has a coupon issued by that store worth \$.50. The sales and service tax is computed on the net sales amount of \$2.00. This is considered to be a discount given by the store.

§ 110-15-96 Royalties.

96.1 Owners of minerals in place who lease the right to another party to mine the minerals are receiving a royalty, which is payment for an intangible, and are not liable for the collection of sales and service tax or use tax.

§ 110-15-97 Trailer Parks.

97.1 Persons operating trailer parks who lease space on a temporary basis must collect and remit sales and service tax on such rental fees. However, fees charged for the leasing of space on a permanent basis are not subject to the tax. For purposes of this regulation, leasing on a permanent basis is defined as a leasing of space for a period exceeding three months. Where a person leasing space provides other services to the lessees, that person must collect and remit sales and service tax on charges for such services regardless of whether the space is being leased on a temporary or permanent basis.

§ 110-15-98 Medical Laboratories.

98.1 Medical laboratories operated under the direction of professional physicians are deemed to be providing professional services and thus are not required to collect and remit sales and service tax on their fees. However, medical laboratories are required to pay sales and service tax on purchases for use in their business, except for purchases for resale for which an exemption certificate may be issued.

§ 110-15-99 Professionals - Lawyers, Doctors, Etc.

99.1 Persons who are engaged in a business and are deemed to be professionals, such as lawyers, doctors, and any other person considered to be a professional under West Virginia law, are not required to collect and remit sales and service tax on their services rendered or on any sales of tangible personal property incidental to such services. However, such professionals must pay sales and service tax on all purchases for use in their business, except for purchases for resale, for which an exemption certificate may be issued.

§ 110-15-100 Flight Instruction.

100.1 Fees charged for instructing students to fly are services which are exempt from the sales and service tax. Sales of textbooks required for the course are also exempt. However, receipts from the sales of instructional aids are taxable. Examples of taxable receipts are sales of textbooks not required to be used in the course of instruction and sales of navigation plotters, calculators, etc.

100.2 All purchases of property or services for use in conduct of this

type of business are taxable, except for purchases for resale for which an exemption certificate may be issued.

§ 110-15-101 Ballroom Dancing.

101.1 Income received for instruction in ballroom dancing is a personal service exempt from sales and service tax.

101.2 Sales and service tax must be paid on all purchases of tangible personal property and services which are used or consumed in this type of business, except for purchases for resale for which an exemption certificate may be issued.

§ 110-15-102 Consultants.

102.1 Persons engaged in the business of providing consulting services, who are considered professionals in their fields, such as doctors, lawyers or any other activity deemed to be professional, are not required to collect and remit sales and service tax on their fees charged for such services. Consultants not considered to be professional are responsible for collecting and remitting the tax on their services. Services provided by consultants, who are considered to be professionals, which do not fall within the scope of the consultant's professional expertise are subject to the tax.

102.2 For example, the service of making copies or conducting survey polls would not require a professional expertise, and would, therefore, be subject to tax.

102.3 Consultants who are considered to be professionals are required to pay sales and service tax and use tax on all purchases for use in their business, except for those purchases which are made for use in rendering a nonprofessional service subject to the tax. Consultants who are not considered professional may issue exemption certificates for purchases for use in their business, except for purchases of material and labor used for the construction of or permanent improvement of real property and purchases of gasoline and special fuel.

§ 110-15-103 Exterminators.

103.1 Persons engaged in the business of exterminating insects, rodents, or other pests are engaged in rendering a service subject to sales and service tax and use tax. When tangible personal property is transferred to the customer in the rendition of such services, the tax must be computed upon the total price or charge.

103.2 Persons engaged in repairing or replacing real property damaged by insects, rodents, etc., may be engaging in contracting activity exempt from

the sales and service tax and use tax.

103.3 Purchases of tangible personal property or services consumed or used in the business of dispensing a service subject to the sales and service tax are exempt, except for purchases of tangible personal property and services to be used or consumed in the construction of permanent improvement to real property, and purchases of gasoline and special fuel.

103.4 Purchases for use in business made by exterminators, who also engage in contracting activities, may be totally taxable or exempt or partially taxable or exempt depending on their use. If an item is used in the service activity and directly used in the contracting activity, it would be totally exempt. However, items which are used in the service activity and indirectly used in the contracting activity, such as office furniture or supplies, would be partially taxable. To determine how much tax should be remitted, the purchase price must be apportioned between taxable and nontaxable activities.

103.5 Persons rendering exterminating services and engaged in contracting time shall maintain separate charges in order that sales and service tax may be computed on the exterminating services and omitted on the contracting charges.

§ 110-15-104 Plane and Boat Rides.

104.1 Fees charged for the transportation of individuals on excursions, sight-seeing trips, business trips and the like by persons, who are not subject to regulation by the West Virginia Public Service Commission, are subject to the sales and service tax.

104.2 Purchases of tangible personal property or services for use or consumption in the business of selling a service subject to the sales and service tax are exempt from the sales and service tax, except for purchases of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property, and purchases of gasoline and special fuel.

§ 110-15-105 Insurance Agencies.

105.1 Sales tax does not apply to sales of insurance by insurance agencies. The sale of insurance is a sale of an intangible and, thus, is not subject to the sales and service tax and use tax.

105.2 Purchases for use in business made by insurance agencies are subject to sales and service tax and use tax. Also, insurance agencies are subject to sales and service tax on purchases related to any rental of real property or other type non-taxable service that they may provide.

§ 110-15-106 Natural Resource Brokers.

106.1 Fees or commissions earned from transacting business as a natural resource broker are subject to the sales and service tax and use tax.

106.2 Tax must be collected on these fees unless a direct pay permit is presented by the purchaser.

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

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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

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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

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Cassia, Padang or Batavia
Cassia, Saigon
Cayene pepper
Celery seed
Chervil
Chives
Cinnamon, Ceylon
Cinnamon, Chinese
Cinnamon, Saigon
Clary (clary sage)
Clover
Cloves
Corlander
Cumin (cummin)
Cumin, black (black caraway)
Elder flowers
Fennel, common
Fennel, sweet (finocchio, Florence fennel)
Fenugreek
Galanga (galangal)
Geranium
Ginger
Glycyrrhiza
Grains of paradise
Horehound (hoarhound)
Horseradish
Hyssop
Lavender
Licorice
Linden flowers
Mace
Marjoram
Mustard, black or brown
Mustard, brown
Mustard, white or yellow
Nutmeg
Oregano (oreganum, Mexican oregano, Mexican sage, origan)
Paprika
Parsley
Pepper, black
Pepper, cayenne
Pepper, red
Pepper, white
Peppermint
Poppy seed
Rosemary
Saffron

Sage
Sage, Greek
Savory, summer
Savory, winter
Sesame
Spearmint
Star anise
Tarragon
Thyme
Thyme, wild or creeping
Turmeric
Vanilla
Zedoary

1.15 Vinegar.

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

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Bromo Seltzer
Bufferin
Burn ointment and lotion
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
Cumlars
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

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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, neutralizers
Peroxide

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Pessaries
Petroleum jelly
Pile ointments
Rectal preparations
Roloids
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.

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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 dishwater 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

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Plant supplies (pots, food)
Plastic products (trash bags, waste cans, storage containers)
Potted plants
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
Waves and polishes

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(Plus all the volunteer
help we can get)

August 12, 1987

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

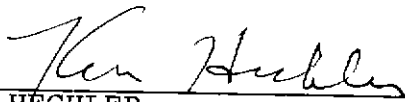
AGENCY: Tax Department

RULE: Repeal and Replace Series 15, Consumer Sales and Service
Tax and Use Tax

DATE FILED AS AN EMERGENCY RULE: July 1, 1987

DECISION NO. 14-87

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved. A copy of the complete decision with required findings is available from this office.


KEN HECHLER
Secretary of State

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Aug 12, 1987
ADMINISTRATIVE LAW DIVISION

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STATE OF WEST VIRGINIA
SECRETARY OF STATE

Charleston 25305

DECISION

Emergency Rule Decision
(ERD 14-87)

AGENCY: Tax Department
RULE: Repeal and Replace Series 15, Consumer Sales and Service Tax and Use Tax

FILED AS AN EMERGENCY RULE: July 1, 1987

- par. 1 The Tax Department has filed as an emergency rule the above titled rule repealing and replacing Series 15.
- par. 2 West Virginia Code 29A-3-15A requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [29A-3-15a(a)].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the ERD is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Tax Department has filed this emergency rule with supporting documents with the Secretary of State on July 1, 1987, and with the LRMRC on July 8, 1987.

par. 7 It is the determination of the Secretary of State that the Tax Department has complied with the procedural requirements of WV Code §29A-3-15.

par. 8 (B) Statutory Authority -- WV Code §11-10-5 reads in part
§11-10-5. General power; regulations and forms.

The tax commissioner shall administer and enforce each tax to which this article applies and, in connection therewith, shall prescribe all necessary forms. The tax commissioner may make all needful rules and regulations for the taxes to which this article applies as provided in the State Administrative Procedures Act in chapter twenty-nine-a (§29A-1-1 et seq.) of this code: Provided, That all rules and regulations of the tax commissioner presently in effect on the effective date of this article (July 1, 1986) shall remain in full force and effect until amended or repealed by the tax commissioner in the manner prescribed by law.

par. 9 See also SB 760 passed June 14, 1987 to take effect July 1, 1987.

par. 10 It is the determination of the Secretary of State that the Tax Department has not exceeded its statutory authority in the promulgation of these emergency rules.

par. 11 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 12 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 13 The facts and circumstances as presented by the Tax Department are as follows:

On March 19, 1987, the Legislature passed S.B. 536 to take effect on July 1, 1987. S.B. 536 made substantial changes to the sales and service tax and the use tax. On June 14, 1987, the Legislature passed S.B. 760 to take effect on July 1, 1987. S.B. 760 made additional change in the referenced taxes as well as changing some aspects of S.B. 536. Because of the broad nature of the amendments to the referenced taxes, the current regulations are repealed and reenacted in the form of these emergency regulations. The emergency is based on the fact that the changes affect most aspects of the business community and there is considerable confusion among taxpayers. This proposed rule should alleviate the confusion.

par. 14 With the advent of major changes to the tax laws, it is necessary to clarify and administer such changes through rules.

par. 15 As stated in ERD 16-86, par 16, when a rule is needed to implement a new program, which is reflected by the major changes adopted this legislative session, that such rules be adopted as soon as possible to the effective date of the statute.

par. 16 It is the decision of the Secretary of State that this proposal by the Tax Department is in procedural compliance with WV Code 29A-3-15; does not exceed the statutory authority of the Tax Department; and that the facts and circumstances presented constitute an emergency. Therefore, the Secretary of State decides that this emergency rule should be approved.

par. 17 This decision shall be cited as Emergency Rule Decision 14-87 or ERD 14-87 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the Tax Department, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER
SECRETARY OF STATE

FILED IN THE OFFICE OF
THE SECRETARY OF STATE

Entered _____

THIS DATE

Aug 12, 1987

ADMINISTRATIVE LAW DIVISION

ENROLLED
Senate Bill No. 760

(Originating in the Committee on Finance)

[Passed June 14, 1987, to take effect July 1, 1987]

AN ACT to amend and reenact sections two, nine, nine-b, nine-c and nine-d, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article by adding thereto a new section, designated section nine-e; to amend and reenact sections three, three-b, three-c and three-d, article fifteen-a of said chapter; and to amend section six, article twenty-four of said chapter, all relating to revision of state tax laws; refining the definitions of certain direct use items and the definition of "transmission" for consumers sales and service tax and use tax purposes; amending the consumers sales and service tax exemption applicable to certain service providers and persons engaged in the business of commercial production of an agriculture product; clarifying and specifying the intended broad exemption to be applicable to businesses subject to gross receipts taxes for their purchases used either directly or indirectly in business in lieu of any limited exemption based on purchases directly used in business; providing for use of exemption certificates being furnished to vendors by persons engaged in the commercial production of an agricultural product, engaged in a business dispensing taxable services, by persons relying on advertising exemptions, or by purchasers of propane for

poultry house heating purposes; authorizing tax commissioner to identify exempt purchases for which even furnishing of exemption certificates not required; requiring issuance by tax commissioner or direct pay permits, temporary or permanent with payment being made to the tax commissioner rather than vendors; providing for apportionment of gross proceeds in respect of sales of property or service partly eligible for exemption and partly for nonexempt use in order to determine tax liability; providing for existing purchase contracts, executed and binding before date of terminated exemption and payments to be subsequently made or prepaid for subsequent periods on and after such termination date to remain exempt, with only new contracts entered into on and after the specified date to be subject to tax; deleting obsolete language from certain exemption in use tax law and that use tax law fully complement consumers sales tax law; and specifying applicability of obligations or securities of the United States or authorized for issuance by specified entities by the United States Congress for adjustment purposes under corporation net income tax law.

Be it enacted by the Legislature of West Virginia:

That sections two, nine, nine-b, nine-c and nine-d, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said article be further amended by adding thereto a new section, designated section nine-e; that sections three, three-b, three-c and three-d, article fifteen-a of said chapter be amended and reenacted; and that section six, article twenty-four of said chapter be amended and reenacted, all to read as follows:

ARTICLE 15. CONSUMERS SALES TAX.

§11-15-2. Definitions.

- 1 For the purpose of this article:
- 2 (a) "Persons" shall mean any individual, partnership,
- 3 association, corporation, municipal corporation, guardian,
- 4 trustee, committee, executor or administrator.
- 5 (b) "Tax commissioner" shall mean the state tax
- 6 commissioner.
- 7 (c) "Gross proceeds" shall mean the amount received in

8 money, credits, property or other consideration from sales
9 and services within this state, without deduction on
10 account of the cost of property sold, amounts paid for
11 interest or discounts or other expenses whatsoever. Losses
12 shall not be deducted, but any credit or refund made for
13 goods returned may be deducted

14 (d) "Sale," "sales" or "selling" shall include any
15 transfer of the possession or ownership of tangible personal
16 property for a consideration, including a lease or rental,
17 when the transfer or delivery is made in the ordinary course
18 of the transferor's business and is made to the transferee or
19 his agent for consumption or use or any other purpose.

20 (e) "Vendor" shall mean any person engaged in this
21 state in furnishing services taxed by this article or making
22 sales of tangible personal property.

23 (f) "Ultimate consumer" or "consumer" shall mean a
24 person who uses or consumes services or personal property.

25 (g) "Business" shall include all activities engaged in or
26 caused to be engaged in with the object of gain or economic
27 benefit, direct or indirect, and all activities of the state and
28 its political subdivisions which involve sales of tangible
29 personal property or the rendering of services when those
30 service activities compete with or may compete with the
31 activities of other persons.

32 (h) "Tax" shall include all taxes, interest and penalties
33 levied hereunder.

34 (i) "Service" or "selected service" shall include all
35 nonprofessional activities engaged in for other persons for a
36 consideration, which involve the rendering of a service as
37 distinguished from the sale of tangible personal property,
38 but shall not include contracting, personal services or the
39 services rendered by an employee to his employer or any
40 service rendered for resale.

41 (j) "Purchaser" shall mean a person who purchases
42 tangible personal property or a service taxed by this article.

43 (k) "Personal service" shall include those:

44 (1) Compensated by the payment of wages in the
45 ordinary course of employment; and

46 (2) Rendered to the person of an individual without, at
47 the same time, selling tangible personal property, such as
48 nursing, barbering, shoe shining, manicuring and similar
49 services.

50 (l) "Taxpayer" shall mean any person liable for the tax
51 imposed by this article.

52 (m) "Drugs" shall include all sales of drugs or
53 appliances to a purchaser, upon prescription of a physician
54 or dentist and any other professional person licensed to
55 prescribe.

56 (n) (1) "Directly used or consumed" in the activities of
57 contracting, manufacturing, transportation, transmission,
58 communication or the production of natural resources shall
59 mean used or consumed in those activities or operations
60 which constitute an integral and essential part of such
61 activities, as contrasted with and distinguished from those
62 activities or operations which are simply incidental,
63 convenient or remote to such activities.

64 (2) Uses of property or consumption of services which
65 constitute direct use or consumption in the activities of
66 contracting, manufacturing, transportation, transmission,
67 communication or the production of natural resources shall
68 include only:

69 (A) In the case of tangible personal property, physical
70 incorporation of property into a finished product resulting
71 from manufacturing production or the production of natural
72 resources or resulting from contracting activity;

73 (B) Causing a direct physical, chemical or other change
74 upon property undergoing manufacturing production or
75 production of natural resources or which is the subject of
76 contracting activity;

77 (C) Transporting or storing property undergoing
78 transportation, communication, transmission,
79 manufacturing production, or production of natural
80 resources or which is the subject of contracting activity;

81 (D) Measuring or verifying a change in property directly
82 used in transportation, communication, transmission,
83 manufacturing production or production of natural
84 resources or contracting activity;

85 (E) Physically controlling or directing the physical
86 movement or operation of property directly used in
87 transportation, communication, transmission,
88 manufacturing production or production of natural
89 resources or contracting activity;

90 (F) Directly and physically recording the flow of
91 property undergoing transportation, communication,

92 transmission, manufacturing production or production of
93 natural resources or which is the subject of contracting
94 activity;

95 (G) Producing energy for property directly used in
96 transportation, communication, transmission,
97 manufacturing production or production of natural
98 resources or contracting activity,

99 (H) Facilitating the transmission of gas, water, steam or
100 electricity from the point of their diversion to property
101 directly used in transportation, communication,
102 transmission, manufacturing production or production of
103 natural resources or contracting activity;

104 (I) Controlling or otherwise regulating atmospheric
105 conditions required for transportation, communication,
106 transmission, manufacturing production or production of
107 natural resources or contracting activity;

108 (J) Serving as an operating supply for property
109 undergoing transmission, manufacturing production or
110 production of natural resources or which is the subject of
111 contracting activity or for property directly used in
112 transportation, communication, transmission,
113 manufacturing production or production of natural
114 resources or contracting activity;

115 (K) Maintenance or repair of property directly used in
116 transportation, communication, transmission,
117 manufacturing production or production of natural
118 resources or contracting activity;

119 (L) Storage, removal or transportation of economic
120 waste resulting from the activities of contracting,
121 manufacturing, transportation, communication,
122 transmission or the production of natural resources;

123 (M) Pollution control or environmental quality or
124 protection activity directly relating to the activities of
125 contracting, manufacturing, transportation,
126 communication, transmission or the production of natural
127 resources and personnel, plant, product or community
128 safety or security activity directly relating to the activities
129 of contracting, manufacturing, transportation,
130 communication, transmission or the production of natural
131 resources; or

132 (N) Otherwise be used as an integral and essential part
133 of transportation, communication, transmission,

134 manufacturing production or production of natural
135 resources or contracting activity.

136 (3) Uses of property or services which would not
137 constitute direct use or consumption in the activities of
138 contracting, manufacturing, transportation, transmission,
139 communication or the production of natural resources shall
140 include, but not be limited to:

141 (A) Heating and illumination of office buildings;

142 (B) Janitorial or general cleaning activities;

143 (C) Personal comfort of personnel;

144 (D) Production planning, scheduling of work, or
145 inventory control;

146 (E) Marketing, general management, supervision,
147 finance, training, accounting and administration; or

148 (F) An activity or function incidental or convenient to
149 transportation, communication, transmission,
150 manufacturing production or production of natural
151 resources or contracting activity, rather than an integral
152 and essential part of such activities.

153 (o) "Contracting" shall mean the furnishing of work, or
154 both materials and work, in fulfillment of a contract for the
155 construction, alteration, repair, decoration or improvement
156 of a new or existing building or structure, or any part
157 thereof, or for removal or demolition of a building or
158 structure, or any part thereof, or for the alteration,
159 improvement or development of real property. For
160 purposes of this definition, the term "structure" shall
161 include, but not be limited to, everything built up or
162 composed of parts joined together in some definite manner
163 and attached to real property, or which adds utility to a
164 particular parcel of property and is intended to remain
165 there for an indefinite period of time.

166 (p) "Manufacturing" shall mean a systematic operation
167 or integrated series of systematic operations engaged in as a
168 business or segment of a business which transforms or
169 converts tangible personal property by physical, chemical
170 or other means into a different form, composition or
171 character from that in which it originally existed.

172 (q) "Transportation" shall mean the act or process of
173 conveying, as a commercial enterprise, passengers or goods
174 from one place or geographical location to another place or
175 geographical location.

176 (r) "Transmission" shall mean the act or process of
177 causing liquid, natural gas or electricity to pass or be
178 conveyed from one place or geographical location to
179 another place or geographical location through a pipeline
180 or other medium for commercial purposes.

181 (s) "Communication" shall mean all telephone, radio,
182 light, light wave, radio telephone, telegraph and other
183 communication or means of communication, whether used
184 for voice communication, computer data transmission or
185 other encoded symbolic information transfers and shall
186 include commercial broadcast radio, commercial broadcast
187 television and cable television.

188 (t) "Production of natural resources" shall mean the
189 performance, by either the owner of the natural resources or
190 another, of the act or process of exploring, developing,
191 severing, extracting, reducing to possession and loading for
192 shipment for sale, profit or commercial use of any natural
193 resource products and any reclamation, waste disposal or
194 environmental activities associated therewith.

§11-15-9. Exemptions.

1 The following sales and services shall be exempt:

2 (a) Sales of gas, steam and water delivered to consumers
3 through mains or pipes, and sales of electricity;

4 (b) Sales of textbooks required to be used in any of the
5 schools of this state;

6 (c) Sales of property or services to the state, its
7 institutions or subdivisions, and to the United States,
8 including agencies of federal, state or local governments for
9 distribution in public welfare or relief work;

10 (d) Sales of motor vehicles which are titled by the
11 department of motor vehicles and which are subject to the
12 tax imposed by section four, article three, chapter
13 seventeen-a of the code;

14 (e) Sales of property or services to churches and bona
15 fide charitable organizations who make no charge
16 whatsoever for the services they render: *Provided*, That the
17 exemption herein granted shall apply only to services,
18 equipment, supplies and materials directly used or
19 consumed by these organizations, and shall not apply to
20 purchases of gasoline or special fuel;

21 (f) Sales of property or services to corporations or
22 organizations qualified under section 501(c)(3) of the

23 Internal Revenue Code of 1986, as amended, or under
24 section 501(c)(4) of the Internal Revenue Code of 1986, as
25 amended, who make casual and occasional sales not
26 conducted in a repeated manner or in the ordinary course of
27 repetitive and successive transactions of like character:

28 *Provided*, That the exemption herein granted shall apply
29 only to services, equipment, supplies and materials directly
30 used or consumed in the activities for which such
31 organizations qualify as tax exempt organizations under
32 the Internal Revenue Code by these organizations and shall
33 not apply to purchases of gasoline or special fuel;

34 (g) Sales of property or services to persons engaged in
35 this state in the business of contracting, manufacturing,
36 transportation, transmission, communication or in the
37 production of natural resources: *Provided*, That the
38 exemption herein granted shall apply only to services,
39 machinery, supplies and materials directly used or
40 consumed in the businesses or organizations named above,
41 and shall not apply to purchases of gasoline or special fuel:

42 *Provided, however*, That on and after the first day of July,
43 one thousand nine hundred eighty-seven, the exemption
44 provided in this subsection shall apply only to services,
45 machinery, supplies and materials directly used or
46 consumed in the activities of contracting, manufacturing,
47 transportation, transmission, communication or the
48 production of natural resources in the businesses or
49 organizations named above and shall not apply to
50 purchases of gasoline or special fuel;

51 (h) An isolated transaction in which any tangible
52 personal property is sold, transferred, offered for sale or
53 delivered by the owner thereof or by his representative for
54 the owner's account, such sale, transfer, offer for sale or
55 delivery not being made in the ordinary course of repeated
56 and successive transactions of like character by such owner
57 or on his account by such representative;

58 (i) Sales of tangible personal property and services
59 rendered for use or consumption in connection with the
60 business of dispensing a service subject to tax under this
61 article and sales of tangible personal property and services
62 rendered for use or consumption in connection with the
63 commercial production of an agricultural product the
64 ultimate sale of which will be subject to the tax imposed by
65 this article or which would have been subject to tax under

66 this article but for the exemption for food provided in
67 section eleven of this article. *Provided*, That sales of
68 tangible personal property and services to be used or
69 consumed in the construction of or permanent
70 improvement to real property and sales of gasoline and
71 special fuel shall not be exempt;

72 (j) Sales of tangible personal property for the purpose of
73 resale in the form of tangible personal property: *Provided*,
74 That sales of gasoline and special fuel by distributors and
75 importers shall be taxable except when the sale is to
76 another distributor for resale;

77 (k) Sales of property or services to nationally chartered
78 fraternal or social organizations for the sole purpose of free
79 distribution in public welfare or relief work: *Provided*,
80 That sales of gasoline and special fuel shall be taxable;

81 (l) Sales and services, fire fighting or station house
82 equipment, including construction and automotive, made
83 to any volunteer fire department organized and
84 incorporated under the laws of the state of West Virginia:
85 *Provided*, That sales of gasoline and special fuel shall be
86 taxable;

87 (m) Sales of newspapers when delivered to consumers
88 by route carriers;

89 (n) Sales of drugs dispensed upon prescription and sales
90 of insulin to consumers for medical purposes,

91 (o) Sales of radio and television broadcasting time, pre-
92 printed advertising circulars, and newspaper and outdoor
93 advertising space for the advertisement of goods or
94 services;

95 (p) Sales and services performed by day care centers;

96 (q) Casual and occasional sales of property or services
97 not conducted in a repeated manner or in the ordinary
98 course of repetitive and successive transactions of like
99 character by corporations or organizations qualified under
100 section 501(c)(3) of the Internal Revenue Code of 1986, as
101 amended, or under section 501(c)(4) of the Internal Revenue
102 Code of 1986, as amended;

103 (r) Sales of property or services to a school which has
104 approval from the West Virginia board of regents to award
105 degrees, which has its principal campus in this state, and
106 which is exempt from federal and state income taxes under
107 section 501(c)(3) of the Internal Revenue Code of 1986, as

108 amended: *Provided*, That sales of gasoline and special fuel
109 shall be taxable;

110 (s) Sales of mobile homes to be utilized by purchasers as
111 their principal year-round residence and dwelling:

112 *Provided*, That these mobile homes shall be subject to tax at
113 the three percent rate;

114 (t) Sales of lottery tickets and materials by licensed
115 lottery sales agents and lottery retailers authorized by the
116 state lottery commission, under the provisions of article
117 twenty-two, chapter twenty-nine of this code,

118 (u) Leases of motor vehicles titled pursuant to the
119 provisions of article three, chapter seventeen-a of this code
120 to lessees for a period of thirty or more consecutive days.
121 This exemption shall apply to leases executed on or after the
122 first day of July, one thousand nine hundred eighty-seven,
123 and to payments under long-term leases executed before
124 such date, for months thereof beginning on or after such
125 date;

126 (v) Notwithstanding the provisions of subsection (g) of
127 this section or any provisions of this article to the contrary,
128 sales of property and services to persons subject to tax
129 under articles thirteen, thirteen-a or thirteen-b of this
130 chapter: *Provided*, That the exemption herein granted shall
131 apply both to property or services directly or not directly
132 used or consumed in businesses, the gross receipts from
133 which are subject to tax under such articles but shall not
134 apply to purchases of gasoline or special fuel;

135 (w) Sales of propane to consumers for poultry house
136 heating purposes, with any seller to such consumer who
137 may have prior paid such tax in his price, to not pass on the
138 same to the consumer, but to make application and receive
139 refund of such tax from the tax commissioner, pursuant to
140 rules and regulations which shall be promulgated by the tax
141 commissioner; and notwithstanding the provisions of
142 section eighteen of this article or any other provisions of
143 such article to the contrary;

144 (x) Any sales of tangible personal property or services
145 purchased after the thirtieth day of September, one
146 thousand nine hundred eighty-seven, and lawfully paid for
147 with food stamps pursuant to the federal food stamp
148 program codified in United States Code, 2011, et seq., as
149 amended,

150 (y) Sales of tickets for activities sponsored by

151 elementary and secondary schools located within this state;
152 and

153 (z) Sales of electronic data processing services and
154 related software: *Provided*, That for the purposes of this
155 subsection (z) "electric data processing services" means (1)
156 the processing of another's data, including all processes
157 incident to processing of data such as keypunching,
158 keystroke verification, rearranging or sorting of previously
159 documented data for the purpose of data entry or automatic
160 processing, and changing the medium on which data is
161 sorted, whether these processes are done by the same person
162 or several persons; and (2) providing access to computer
163 equipment for the purpose of processing data or examining
164 or acquiring data stored in or accessible to such computer
165 equipment.

**§11-15-9b. Method for claiming exemptions, refunds of tax,
credit against other taxes.**

1 (a) Any person having a right or claim to any exemption
2 set forth in section nine of this article except those
3 exemptions set forth in subsections (a), (b), (c), (d), (h), (i), (j),
4 (m), (n), (o), (p), (r), (s), (t), (u), (w), (x) and (y) of said section
5 nine or the exemption of sales of property or services to
6 churches under subsection (e) of said section nine shall pay
7 to the vendor the tax imposed by this article and may
8 exercise or assert such exemption only in accordance with
9 subsection (b) or subsection (c) of this section.

10 (b) Any person who has paid the tax imposed by this
11 article and who may lawfully claim exemption from the tax
12 under a subsection of section nine of this article not
13 enumerated in subsection (a) of this section may exercise or
14 assert such claim by filing a claim for refund of consumers
15 sales and service tax overpayments on such form and in
16 such manner as the tax commissioner may require and in
17 accordance with the requirements of this section. The tax
18 commissioner shall cause a refund to be made within thirty
19 days of receipt of a lawful and accurate claim

20 (c) In lieu of filing a claim for refund of consumers sales
21 and service tax overpayments, the taxpayer may, at his
22 option, file a claim for credit on such form and in such
23 manner as the tax commissioner may require and credit the
24 amount of consumers sales and service tax overpayments

25 against certain payments of tax due in accordance with the
26 requirements of this section as follows:

27 (1) If the taxpayer is required to remit the tax imposed
28 under this article or article fifteen-a of this chapter
29 pursuant to section five or subsection (b) of section nine-d
30 of this article or subsection (b) of section three-d of said
31 article fifteen-a, the taxpayer may credit the amount of
32 consumers sales and service tax overpayments against the
33 remittance of the tax imposed under said articles otherwise
34 due;

35 (2) If the taxpayer is subject to the tax imposed under
36 article thirteen of this chapter, the taxpayer may credit the
37 amount of consumers sales and service tax overpayments
38 remaining after application of part (1) of this subsection
39 against the taxpayer's quarterly or monthly remittance of
40 the tax imposed under said article thirteen otherwise due;
41 or

42 (3) If the taxpayer is subject to the tax imposed under
43 article twelve-a of this chapter, the taxpayer may credit the
44 amount of consumers sales and service tax overpayments
45 remaining after application of parts (1) and (2) of this
46 subsection against the taxpayer's annual or semiannual
47 remittance of the tax imposed under said article twelve-a
48 otherwise due; or

49 (4) If the taxpayer is subject to the tax imposed under
50 article thirteen-a of this chapter, the taxpayer may credit
51 the amount of consumers sales and service tax
52 overpayments remaining after application of parts (1), (2)
53 and (3) of this subsection against the taxpayer's quarterly or
54 monthly remittance of the tax imposed under said article
55 thirteen-a otherwise due; or

56 (5) If the taxpayer is subject to the tax imposed under
57 article thirteen-b of this chapter, the taxpayer may credit
58 the amount of consumers sales and service tax
59 overpayments remaining after application of parts (1), (2),
60 (3) and (4) of this subsection against the taxpayer's
61 quarterly or monthly remittance of the tax imposed under
62 said article thirteen-b otherwise due; or

63 (6) If the taxpayer is subject to the tax imposed under
64 article twenty-four of this chapter, the taxpayer may credit
65 the amount of consumers sales and service tax
66 overpayments remaining after application of parts (1), (2),

67 (3), (4) and (5) of this subsection against the taxpayer's
68 installment of estimated tax imposed under said article
69 twenty-four and otherwise due under section seventeen,
70 article twenty-four of this chapter; or

71 (7) If the taxpayer is subject to the tax imposed under
72 article twenty-one of this chapter, the taxpayer may credit
73 the amount of consumers sales and service tax
74 overpayments remaining after application of parts (1), (2),
75 (3), (4), (5) and (6) of this subsection against the taxpayer's
76 installment of estimated tax imposed under said article
77 twenty-one and otherwise due under section fifty-six,
78 article twenty-one of this chapter; or

79 (8) If the taxpayer is subject to the tax imposed under
80 article twenty-three of this chapter, the taxpayer may
81 credit the amount of consumers sales and service tax
82 overpayments remaining after application of parts (1), (2),
83 (3), (4), (5), (6) and (7) of this subsection against the
84 taxpayer's annual remittance of the tax imposed under said
85 article twenty-three and otherwise due; or

86 (9) If the taxpayer is required to deduct and withhold
87 tax under article twenty-one of this chapter, the taxpayer
88 may credit the amount of consumers sales and service tax
89 overpayments remaining after application of parts (1), (2),
90 (3), (4), (5), (6), (7) and (8) of this subsection against the
91 taxpayer's monthly remittance of the tax withheld under
92 said article twenty-one and otherwise due.

93 (d) Any person asserting or exercising a claim of
94 exemption from the tax imposed by this article under
95 subsections (b) or (c) of this section shall file with the tax
96 commissioner an application for exemption in such form as
97 the tax commissioner shall prescribe and such affidavits,
98 invoices, sales slips, records or documents as the tax
99 commissioner may require to prove or verify the taxpayer's
100 right and entitlement to such exemption. The tax
101 commissioner may inspect or examine the records, books,
102 papers, documents, affidavits, sales slips and invoices of a
103 taxpayer or any other person to verify the truth and
104 accuracy of any report or return or to ascertain whether the
105 tax imposed by this article has been paid.

106 In addition to the powers of the tax commissioner set
107 forth in article ten of this chapter, as a further means of
108 obtaining the records, books, papers, documents, affidavits,

109 sales slips or invoices of a taxpayer or any other person and
110 ascertaining the amount of taxes paid or due under this
111 article or any report, form, document or affidavit required
112 under this article, the commissioner shall have the power to
113 examine witnesses under oath, and if any witness shall fail
114 or refuse at the request of the commissioner to grant access
115 to the books, records, papers, documents, affidavits, sales
116 slips or invoices requested by the commissioner, the
117 commissioner shall certify the facts and the names to the
118 circuit court of the county having jurisdiction over the
119 party and such court shall thereupon issue a subpoena
120 duces tecum to such party to appear before the
121 commissioner, at a place designated within the jurisdiction
122 of such court, on a day fixed.

123 (e) All claims for refund of consumers sales and service
124 tax overpayments under subsection (b) of this section shall
125 be filed within the time limitation for filing claims for
126 refund set forth at section fourteen, article ten of this
127 chapter. Any claim for such refund or claim of entitlement
128 to such refund made or asserted after the said time
129 limitation shall be null and void, and if the consumers sales
130 and service tax overpayment has not otherwise been
131 credited against tax remittances in accordance with this
132 section, the said claims shall be forfeited.

133 (f) Any credit of consumers sales and service tax
134 overpayments against taxes under subsection (c) of this
135 section shall be taken within one year after the payment of
136 the said consumers sales and service tax by the consumer to
137 the vendor. Any such credit or claim of entitlement to such
138 credit made or asserted more than one year after the
139 payment of such tax by the consumer to the vendor shall be
140 null and void, and such consumers sales and service tax
141 overpayments shall be forfeited unless refunded under
142 subsection (b) of this section.

143 (g) Any assignment of the right or entitlement to a
144 refund or credit arising under this section shall be subject to
145 strict proof, and any assignee claiming a right or
146 entitlement to an assigned refund or credit shall submit an
147 affidavit in such form as the tax commissioner shall
148 prescribe signed by the assignor acknowledging the
149 assignment. The assignee shall attest to the assignment and
150 the terms thereof on his signed application filed under

151 subsection (d) of this section for refund or credit, and will be
152 subject to the penalties provided under West Virginia law
153 for perjury for any falsehood set forth therein and will be
154 subject to the penalties set forth in article nine of this
155 chapter for any violation thereof. Except as provided in this
156 subsection (g), no payment of a refund arising under this
157 section shall be made to any person other than the taxpayer
158 making the original overpayment of consumers sales and
159 service tax.

160 (h) No refund shall be due and no credit shall be allowed
161 under this section unless the taxpayer or assignee shall have
162 filed a claim for refund or a claim for credit, as appropriate,
163 with the tax commissioner in accordance with this section.

164 (i) Any claim for a refund of consumers sales and service
165 tax overpayments or for a tax credit for consumers sales and
166 service tax overpayments which is not timely filed or not
167 filed in proper form or in accordance with the requirements
168 of this section shall not be construed to constitute a moral
169 obligation of the state of West Virginia for payment. No
170 overpayment of consumers sales and service tax made
171 under this section shall be subject to subsection (d), section
172 seventeen, article ten of this chapter or paragraph (e)(1),
173 section seventeen, article ten of this chapter.

174 (j) The provisions of this section become effective after
175 the thirtieth day of June, one thousand nine hundred
176 eighty-seven

§11-15-9c. Delivery of a certificate of exemption in lieu of tax.

1 Persons having a right or claim to any exemption set forth
2 in subsections (a), (b), (c), (d), (h), (i), (j), (m), (n), (o), (p), (r),
3 (s), (t), (u), (w), (x) and (y) of section nine of this article shall,
4 in lieu of paying the tax imposed by this article, execute a
5 certificate of exemption in such form as the tax
6 commissioner may require, and such executed exemption
7 certificate shall be delivered to the vendor in such manner
8 as the tax commissioner may require: *Provided*, That the
9 tax commissioner may identify exemptions for which
10 exemption certificates are not required and as soon as
11 practical may specify by regulation exemptions for which
12 exemption certificates are not required.

§11-15-9d. Direct pay permits.

1 (a) Notwithstanding any other provision of this article,

2 the tax commissioner shall, pursuant to rules and
3 regulations promulgated as soon as practical by the tax
4 commissioner in accordance with article three, chapter
5 twenty-nine-a of this code, authorize a person (as defined in
6 section two) that is a user, consumer, distributor or lessee to
7 which sales or leases of tangible personal property are made
8 or services provided, to pay any tax levied by this article or
9 article fifteen-a of this chapter directly to the tax
10 commissioner and waive the collection of the tax by that
11 person's vendor. No such authority shall be granted or
12 exercised except upon application to the tax commissioner
13 and after issuance by the tax commissioner of a direct pay
14 permit, except that a temporary permit may immediately
15 and provisionally be authorized by the tax commissioner in
16 respect of any interim or transitional period, with either
17 termination of such temporary permit thereafter or a
18 permanent permit to subsequently issue as promptly as
19 practicable, for purchases made from the vendor or vendors
20 identified or specified in a manner acceptable to and as
21 authorized by the tax commissioner. Upon issuance of such
22 direct pay permit, payment of the tax imposed or assertion
23 of the exemptions allowed by this article or article fifteen-a
24 of this chapter on sales and leases of tangible personal
25 property and sales of taxable services from such vendors
26 shall be made directly to the tax commissioner by the
27 permit holder.

28 (b) On or before the fifteenth day of each month, every
29 permit holder shall make and file with the tax
30 commissioner a return for the preceding month in the form
31 prescribed by the tax commissioner showing the total value
32 of the tangible personal property so used, the amount of
33 taxable services purchased, the amount of tax due from the
34 permit holder, which amount shall be paid to the tax
35 commissioner with such return, and such other information
36 as the tax commissioner deems necessary. The tax
37 commissioner, upon written request by the permit holder,
38 may grant a reasonable extension of time for the making
39 and filing of returns and paying the tax. Interest on such tax
40 shall be chargeable on every such extended payment at the
41 rate determined in accordance with section seventeen,
42 article ten of this chapter.

43 (c) A permit issued pursuant to this section shall
44 continue to be valid until expiration of the business's

45 registration year under article twelve of this chapter. This
46 permit shall automatically be renewed when the business's
47 business registration certificate is issued for the next
48 succeeding fiscal year, unless the permit is surrendered by
49 the holder or canceled for cause by the tax commissioner.

50 (d) Persons who hold a direct payment permit which has
51 not been canceled shall not be required to pay the tax to the
52 vendor as otherwise provided in this article or article
53 fifteen-a of this chapter. Such persons shall notify each
54 vendor from whom tangible personal property is purchased
55 or leased or from whom services are purchased of their
56 direct payment permit number and that the tax is being
57 paid directly to the tax commissioner. Upon receipt of such
58 notice, such vendor shall be absolved from all duties and
59 liabilities imposed by this chapter for the collection and
60 remittance of the tax with respect to sales, distributions,
61 leases or storage of tangible personal property and sales of
62 services to such permit holder. Vendors who make sales
63 upon which the tax is not collected by reason of the
64 provisions of this section shall maintain records in such
65 manner that the amount involved and identity of each such
66 purchaser may be ascertained.

67 (e) Upon the expiration, cancellation or surrender of a
68 direct payment permit, the provisions of this chapter,
69 without regard to this section, shall thereafter apply to the
70 person who previously held such permit, and such person
71 shall promptly so notify in writing vendors from whom
72 purchases, leases and storage of tangible personal property
73 are made of such cancellation or surrender. Upon receipt of
74 such notice, the vendor shall be subject to the provisions of
75 this chapter, without regard to this section, with respect to
76 all sales, distributions, leases or storage of tangible
77 personal property, thereafter made to or for such person.

**§11-15-9e. Apportionment of purchase price; existing
contracts protected.**

1 Whenever a purchaser will use acquired tangible
2 personal property, a service, or the results of a service for
3 both exempt and nonexempt purposes, the gross proceeds
4 of such sale paid to the vendor for such property or service
5 shall be apportioned between the exempt and nonexempt
6 uses, in a manner established as reasonable by the tax
7 commissioner, by regulations the tax commissioner may

8 prescribe, for the purpose of determining the tax liability in
9 respect of such purchase.

10 Contracts existing, executed and binding prior to the first
11 day of July, one thousand nine hundred eighty-seven for the
12 purchase of tangible personal property or services, by lease
13 or otherwise, and in connection with which an exemption
14 from tax was applicable to such purchase prior to such date
15 but terminated on and after the same; no new tax liability
16 shall arise in respect of payments to be subsequently made
17 under such a contract nor to payments prepaid thereunder
18 for any periods subsequent to such date, but only new
19 contracts entered into on and after the first day of July, one
20 thousand nine hundred eighty-seven, shall be liable for tax
21 under the provisions of this article or of article fifteen-a of
22 this chapter where such a prior applicable exemption has
23 been so terminated.

ARTICLE 15A. USE TAX.

§11-15A-3. Exemptions.

1 (a) The use in this state of the following tangible
2 personal property and services is hereby specifically
3 exempted from the tax imposed by this article to the extent
4 specified:

5 (1) All articles of tangible personal property brought
6 into the state of West Virginia by a nonresident individual
7 thereof for his or her use or enjoyment while temporarily
8 within this state or while passing through this state, except
9 gasoline and special fuel. *Provided*, That fuel contained in
10 the supply tank of a motor vehicle that is not a motor carrier
11 shall not be taxable

12 (2) Tangible personal property or services, the gross
13 receipts from the sale of which are exempt from the sales
14 tax by the terms of article fifteen, chapter eleven of the code
15 of West Virginia, one thousand nine hundred thirty-one, as
16 amended, and the property or services are being used for the
17 purpose for which it was exempted.

18 (3) Tangible personal property or services, the gross
19 receipts or the gross proceeds from the sale of which are
20 required to be included in the measure of the tax imposed by
21 article fifteen, chapter eleven of the code of West Virginia,
22 one thousand nine hundred thirty-one, as amended, and
23 upon which the tax imposed by said article fifteen has been
24 paid.

25 (4) Tangible personal property or services, the sale of
26 which in this state is not subject to the West Virginia
27 consumers sales tax.

28 (5) Mobile homes utilized by the owners thereof as their
29 principal year-round residence and dwelling. *Provided,*
30 That use of these mobile homes shall be subject to tax at the
31 three percent rate.

32 (b) The provisions of this section, as amended, shall
33 apply on and after the first day of July, one thousand nine
34 hundred eighty-seven.

**§11-15A-3b. Method for claiming exemptions, refunds of tax,
credit against other taxes.**

1 (a) Any person having a right or claim to an exemption
2 from the tax imposed by this article by reason of any
3 exemption set forth in section nine, article fifteen of this
4 chapter except those exemptions set forth in subsections
5 (a), (b), (c), (d), (h), (i), (j), (m), (n), (o), (p), (r), (s), (t), (u), (w),
6 (x) and (y) of said section nine shall pay to the vendor the tax
7 imposed by this article and may exercise or assert such
8 exemption only in accordance with subsection (b) or
9 subsection (c) of this section.

10 (b) Any person who has paid the tax imposed by this
11 article and who may lawfully claim under section three of
12 this article any exemption set forth under a subsection of
13 section nine of article fifteen not enumerated in subsection
14 (a) of this section may exercise or assert such claim by filing
15 a claim for refund of use tax overpayments on such form
16 and in such manner as the tax commissioner may require
17 and in accordance with the requirements of this section.

18 (c) In lieu of filing a claim for refund of use tax
19 overpayments, the taxpayer may, at his option, file a claim
20 for credit on such form and in such manner as the tax
21 commissioner may require and credit the amount of use tax
22 overpayments against certain payments of tax due in
23 accordance with the requirements of this section as follows:

24 (1) If the taxpayer is required to remit the tax imposed
25 under this article or article fifteen of this chapter pursuant
26 to section five or subsection (b) of section nine-d of said
27 article fifteen or subsection (b) of section three-d of this
28 article, the taxpayer may credit the amount of use tax
29 overpayments against the remittance of the tax imposed
30 under said articles otherwise due;

31 (2) If the taxpayer is subject to the tax imposed under
32 article thirteen of this chapter, the taxpayer may credit the
33 amount of use tax overpayments remaining after
34 application of part (1) of this subsection against the
35 taxpayer's quarterly or monthly remittance of the tax
36 imposed under said article thirteen otherwise due; or

37 (3) If the taxpayer is subject to the tax imposed under
38 article twelve-a of this chapter, the taxpayer may credit the
39 amount of use tax overpayments remaining after
40 application of parts (1) and (2) of this subsection against the
41 taxpayer's annual or semiannual remittance of the tax
42 imposed under said article twelve-a otherwise due; or

43 (4) If the taxpayer is subject to the tax imposed under
44 article thirteen-a of this chapter, the taxpayer may credit
45 the amount of use tax overpayments remaining after
46 application of parts (1), (2) and (3) of this subsection against
47 the taxpayer's quarterly or monthly remittance of the tax
48 imposed under said article thirteen-a otherwise due; or

49 (5) If the taxpayer is subject to the tax imposed under
50 article thirteen-b of this chapter, the taxpayer may credit
51 the amount of use tax overpayments remaining after
52 application of parts (1), (2), (3) and (4) of this subsection
53 against the taxpayer's quarterly or monthly remittance of
54 the tax imposed under said article thirteen-b otherwise
55 due; or

56 (6) If the taxpayer is subject to the tax imposed under
57 article twenty-four of this chapter, the taxpayer may credit
58 the amount of use tax overpayments remaining after
59 application of parts (1), (2), (3), (4) and (5) of this subsection
60 against the taxpayer's installment of estimated tax imposed
61 under said article twenty-four and otherwise due under
62 section seventeen, article twenty-four of this chapter; or

63 (7) If the taxpayer is subject to the tax imposed under
64 article twenty-one of this chapter, the taxpayer may credit
65 the amount of use tax overpayments remaining after
66 application of parts (1), (2), (3), (4), (5) and (6) of this
67 subsection against the taxpayer's installment of estimated
68 tax imposed under said article twenty-one and otherwise
69 due under section fifty-six, article twenty-one of this
70 chapter; or

71 (8) If the taxpayer is subject to the tax imposed under
72 article twenty-three of this chapter, the taxpayer may

73 credit the amount of use tax overpayments remaining after
74 application of parts (1), (2), (3), (4), (5), (6) and (7) of this
75 subsection against the taxpayer's annual remittance of the
76 tax imposed under said article twenty-three and otherwise
77 due; or

78 (9) If the taxpayer is required to deduct and withhold
79 tax under article twenty-one of this chapter, the taxpayer
80 may credit the amount of use tax overpayments remaining
81 after application of parts (1), (2), (3), (4), (5), (6), (7) and (8) of
82 this subsection against the taxpayer's monthly remittance
83 of the tax withheld under said article twenty-one and
84 otherwise due.

85 (d) Any person asserting or exercising a claim of
86 exemption from the tax imposed by this article under
87 subsections (b) or (c) of this section shall file with the tax
88 commissioner an application for exemption in such form as
89 the tax commissioner shall prescribe and such affidavits,
90 invoices, sales slips, records or documents as the tax
91 commissioner may require to prove or verify the taxpayer's
92 right and entitlement to such exemption. The tax
93 commissioner may inspect or examine the records, books,
94 papers, documents, affidavits, sales slips and invoices of a
95 taxpayer or any other person to verify the truth and
96 accuracy of any report or return or to ascertain whether the
97 tax imposed by this article or article fifteen of this chapter
98 has been paid.

99 In addition to the powers of the tax commissioner set
100 forth in article ten of this chapter, as a further means of
101 obtaining the records, books, papers, documents, affidavits,
102 sales slips or invoices of a taxpayer or any other person and
103 ascertaining the amount of taxes paid or due under this
104 article or article fifteen of this chapter or any report, form,
105 document or affidavit required under this article or article
106 fifteen of this chapter, the commissioner shall have the
107 power to examine witnesses under oath; and if any witness
108 shall fail or refuse at the request of the commissioner to
109 grant access to the books, records, papers, documents,
110 affidavits, sales slips or invoices requested by the
111 commissioner, the commissioner shall certify the facts and
112 the names to the circuit court of the county having
113 jurisdiction of the party, and such court shall thereupon
114 issue a subpoena duces tecum to such party to appear before

115 the commissioner, at a place designated within the
116 jurisdiction of such court, on a day fixed.

117 (e) All claims for refund of use tax overpayments under
118 subsection (b) of this section shall be filed within the time
119 limitation for filing claims for refund set forth at section
120 fourteen, article ten of this chapter. Any claim for such
121 refund or claim of entitlement to such refund made or
122 asserted after the said time limitation shall be null and void,
123 and if the use tax overpayment has not otherwise been
124 credited against tax remittances in accordance with this
125 section, the said claims shall be forfeited.

126 (f) Any credit of use tax overpayments against taxes
127 under subsection (c) of this section shall be taken within one
128 year after the payment of the tax by the taxpayer to the
129 vendor. Any such credit or claim of entitlement to such
130 credit made or asserted more than one year after the
131 payment of such tax by the taxpayer to the vendor shall be
132 null and void, and such tax overpayments shall be forfeited.

133 (g) Any assignment of the right or entitlement to a
134 refund or credit arising under this section shall be subject to
135 strict proof, and any assignee claiming a right or
136 entitlement to an assigned refund or credit shall submit an
137 affidavit in such form as the tax commissioner shall
138 prescribe signed by the assignor acknowledging the
139 assignment. The assignee shall attest to the assignment and
140 the terms thereof of his signed application filed under
141 subsection (c) of this section for refund or credit, and will be
142 subject to the penalties provided under West Virginia law
143 for perjury for any falsehood set forth therein and will be
144 subject to the penalties set forth in article nine of this
145 chapter for any violation thereof. Except as provided in
146 subsection (h), no payment of a refund arising under this
147 section shall be made to any person other than the taxpayer
148 making the original overpayment of consumers sales and
149 service tax.

150 (h) No refund shall be due and no credit shall be allowed
151 unless the taxpayer or assignee shall have filed a claim for
152 refund or a claim for credit, as appropriate, with the tax
153 commissioner in accordance with this section.

154 (i) Any claim for a refund of use tax overpayments or a
155 tax credit for use tax overpayments which is not timely filed
156 or not filed in proper form or in accordance with the

157 requirements of this section shall not be construed to
158 constitute a moral obligation of the state of West Virginia
159 for payment. No overpayment of use tax made under this
160 section shall be subject to subsection (d), section seventeen,
161 article ten of this chapter, or paragraph (c)(1), section
162 seventeen, article ten of this chapter.

163 (j) The provisions of this section become effective after
164 the thirtieth day of June, one thousand nine hundred
165 eighty-seven.

§11-15A-3c. Delivery of a certificate of exemption in lieu of tax.

1 Persons having a right or claim under section three of this
2 article, to any exemption set forth in subsections (a), (b), (c),
3 (d), (h), (i), (j), (m), (n), (o), (p), (r), (s), (t), (u), (w), (x) and (y) of
4 section nine of article fifteen of this chapter shall, in lieu of
5 paying the tax imposed by this article, execute a certificate
6 of exemption in such form as the tax commissioner may
7 require, and such executed exemption certificate shall be
8 delivered to the vendor in such manner as the tax
9 commissioner may require. *Provided*, That the tax
10 commissioner may identify exemptions for which
11 exemption certificates are not required and as soon as
12 practical may specify by regulation exemptions for which
13 exemption certificates are not required.

§11-5A-3d. Direct pay permits.

1 (a) Notwithstanding any other provision of this article,
2 the tax commissioner shall, pursuant to rules and
3 regulations promulgated as soon as practical by the tax
4 commissioner in accordance with article three, chapter
5 twenty-nine-a of this code, authorize a person (as defined in
6 section two of article fifteen) that is a user, consumer,
7 distributor or lessee to which sales or leases of tangible
8 personal property are made or services provided to pay any
9 tax levied by this article or article fifteen of this chapter
10 directly to the tax commissioner and waive the collection of
11 the tax by that person's vendor. No such authority shall be
12 granted or exercised except upon application to the tax
13 commissioner and after issuance by the tax commissioner of
14 a direct pay permit, except that a temporary permit may
15 immediately and provisionally be authorized by the tax

16 commissioner in respect of any interim or transitional
17 period, with either termination of such temporary permit
18 thereafter or a permanent permit to subsequently issue as
19 promptly as practicable, for purchases made from the
20 vendor or vendors identified or specified in a manner
21 acceptable to and as authorized by the tax commissioner.
22 Upon issuance of such direct pay permit, payment of the tax
23 imposed or assertion of the exemptions allowed by this
24 article or article fifteen of this chapter on sales and leases of
25 tangible personal property and sales of taxable services
26 from such vendors shall be made directly to the tax
27 commissioner by the permit holder.

28 (b) On or before the fifteenth day of each month, every
29 permit holder shall make and file with the tax
30 commissioner a return for the preceding month in the form
31 prescribed by the tax commissioner showing the total value
32 of the tangible personal property so used, the amount of
33 taxable services purchased, the amount of tax due from the
34 permit holder, which amount shall be paid to the tax
35 commissioner with such return, and such other information
36 as the tax commissioner deems necessary. The tax
37 commissioner, upon written request by the permit holder,
38 may grant a reasonable extension of time for the making
39 and filing of returns and paying the tax. Interest on such tax
40 shall be chargeable on every such extended payment at the
41 rate determined in accordance with section seventeen,
42 article ten of this chapter

43 (c) A permit issued pursuant to this section shall
44 continue to be valid until expiration of the business's
45 registration year under article twelve of this chapter. This
46 permit shall automatically be renewed when the business's
47 business registration certificate is issued for the next
48 succeeding fiscal year, unless the permit is surrendered by
49 the holder or canceled for cause by the tax commissioner.

50 (d) Persons who hold a direct payment permit which has
51 not been canceled shall not be required to pay the tax to the
52 vendor as otherwise provided in this article or article fifteen
53 of this chapter. Such persons shall notify each vendor from
54 whom tangible personal property is purchased or leased or
55 from whom services are purchased of their direct payment
56 permit number and that the tax is being paid directly to the
57 tax commissioner. Upon receipt of such notice, such vendor
58 shall be absolved from all duties and liabilities imposed by

59 this chapter for the collection and remittance of the tax
60 with respect to sales, distributions, leases or storage of
61 tangible personal property and sales of services to such
62 permit holder. Vendors who make sales upon which the tax
63 is not collected by reason of the provisions of this section
64 shall maintain records in such manner that the amount
65 involved and identity of each such purchaser may be
66 ascertained.

67 (e) Upon the expiration, cancellation or surrender of a
68 direct payment permit, the provisions of this chapter,
69 without regard to this section, shall thereafter apply to the
70 person who previously held such permit, and such person
71 shall promptly so notify in writing vendors from whom
72 purchases, leases and storage of tangible personal property
73 are made of such cancellation or surrender. Upon receipt of
74 such notice, the vendor shall be subject to the provisions of
75 this chapter, without regard to this section, with respect to
76 all sales, distributions, leases or storage of tangible
77 personal property, thereafter made to or for such person.

ARTICLE 24. CORPORATION NET INCOME TAX.

§11-24-6. Adjustments in determining West Virginia taxable income.

1 (a) *General.* — In determining West Virginia taxable
2 income of a corporation, its taxable income as defined for
3 federal income tax purposes shall be adjusted and
4 determined before the apportionment provided by section
5 seven of this article, by the items specified in this section.

6 (b) *Adjustments increasing federal taxable income.* —
7 There shall be added to federal taxable income, unless
8 already included in the computation of federal taxable
9 income, the following items except that adjustment (5) shall
10 be required only with respect to tax periods ending after the
11 thirty-first day of December, one thousand nine hundred
12 eighty-one:

13 (1) Interest or dividends on obligations or securities of
14 any state or of a political subdivision or authority thereof;

15 (2) Interest or dividend income on obligations or
16 securities of any authority, commission or instrumentality
17 of the United States which the laws of the United States
18 exempt from federal income tax but not from state income
19 taxes;

20 (3) Income taxes imposed by this state or any other
21 taxing jurisdiction, to the extent deductible in determining
22 federal taxable income and not credited against federal
23 income tax, and the taxes imposed by this state for which
24 credit against the taxes imposed by section four is allowed
25 by section nine; and

26 (4) The deferral value of certain income that is not
27 recognized for federal tax purposes, which value shall be an
28 amount equal to a percentage of the amount allowed as a
29 deduction in determining federal taxable income pursuant
30 to the accelerated cost recovery system under section 168 of
31 the Internal Revenue Code for the federal taxable year, with
32 the percentage of the federal deduction to be added as
33 follows with respect to the following recovery property:
34 three-year property — no modifications; five-year property
35 — ten percent; ten-year property — fifteen percent; fifteen-
36 year public utility property — twenty-five percent; and
37 fifteen-year or eighteen-year real property — thirty-five
38 percent: *Provided*, That this modification shall not apply to
39 any person whose federal deduction is determined by the
40 use of the straight line method, or to any taxable year
41 beginning after the thirtieth day of June, one thousand nine
42 hundred eighty-seven.

43 (c) *Adjustments decreasing federal taxable income.* —
44 There shall be subtracted from federal taxable income:

45 (1) Any gain from the sale or other disposition of
46 property having a higher fair market value on the first day
47 of July, one thousand nine hundred sixty-seven, than the
48 adjusted basis at said date for federal income tax purposes:
49 *Provided*, That the amount of this adjustment is limited to
50 that portion of any such gain which does not exceed the
51 difference between such fair market value and such
52 adjusted basis;

53 (2) The amount of any refund or credit for overpayment
54 of income taxes imposed by this state or any other taxing
55 jurisdiction, to the extent properly included in gross income
56 for federal income tax purposes;

57 (3) The amount of dividends received, to the extent
58 included in federal taxable income: *Provided*, That this
59 modification shall not be made for taxable years beginning
60 after the thirtieth day of June, one thousand nine hundred
61 eighty-seven;

62 (4) Thirty-seven and one-half percent of the excess of
63 net long-term capital gain over net short-term capital loss
64 as defined in the laws of the United States: *Provided*, That
65 this modification shall not be made for taxable years
66 beginning after the thirtieth day of June, one thousand nine
67 hundred eighty-seven;

68 (5) The amount added to federal taxable income due to
69 the elimination of the reserve method for computation of
70 the bad debt deduction; and

71 (6) The full amount of interest expense actually
72 disallowed in determining federal taxable income which
73 was incurred or continued to purchase or carry obligations
74 or securities of any state or of any political subdivision
75 thereof.

76 (d) *Adjustment resulting from recomputation of net*
77 *operating loss deduction* — In determining the West
78 Virginia taxable income of a corporation entitled to a net
79 operating loss deduction for the taxable year for federal
80 income tax purposes, there shall be added to or subtracted
81 from the federal taxable income the amount of an
82 adjustment reflecting a recomputation of such net
83 operating loss deduction in which the adjustments required
84 by subsections (b) and (c) are made for each taxable year
85 involved in the computation of such net operating loss
86 deduction.

87 (e) *Special adjustments for expenditures for water and*
88 *air pollution control facilities.*

89 (1) If the taxpayer so elects under subdivision (2) of this
90 subsection, there shall be:

91 (A) Subtracted from federal taxable income the total of
92 the amounts paid or incurred during the taxable year for the
93 acquisition, construction or development within this state
94 of water pollution control facilities and air pollution
95 control facilities as defined in section 48 (h) (12) (B) and (C)
96 of the Internal Revenue Code, and

97 (B) Added to federal taxable income the total of the
98 amounts of any allowances for depreciation and
99 amortization of such water pollution control facilities and
100 air pollution control facilities, as so defined, to the extent
101 deductible in determining federal taxable income.

102 (2) The election referred to in subdivision (1) of this
103 subsection shall be made in the return filed within the time

104 prescribed by law (including extensions thereof) for the
105 taxable year in which such amounts were paid or incurred.
106 Such election shall be made in such manner, and the scope
107 of application of such election shall be defined, as the tax
108 commissioner may by regulations prescribe, and shall be
109 irrevocable when made as to all amounts paid or incurred
110 for any particular water pollution control facility or air
111 pollution control facility.

112 (3) Notwithstanding any other provisions of this
113 subsection or of section seven to the contrary, if the
114 taxpayer's federal taxable income is subject to allocation
115 and apportionment under section seven, the adjustments
116 prescribed in paragraphs (A) and (B), subdivision (1) of this
117 subsection shall (instead of being made to the taxpayer's
118 federal taxable income before allocation and
119 apportionment thereof as provided in section seven) be
120 made to the portion of the taxpayer's net income, computed
121 without regard to such adjustments, allocated and
122 apportioned to this state in accordance with the amounts of
123 any allowances for depreciation and amortization of such
124 water pollution control facilities and air pollution control
125 facilities, as so defined, to the extent deductible in
126 determining federal taxable income.

127 (f) *Allowance for certain government obligations and*
128 *obligations secured by residential property.* — The West
129 Virginia taxable income of a taxpayer subject to this article
130 as adjusted in accordance with parts (b), (c), (d) and (e) of
131 this section shall be further adjusted by multiplying such
132 taxable income after such adjustment by parts (b), (c), (d)
133 and (e) by a fraction equal to one minus a fraction:

134 (1) The numerator of which is the sum of the average of
135 the monthly beginning and ending account balances during
136 the taxable year (account balances to be determined at cost
137 in the same manner that such obligations, investments and
138 loans are reported on Schedule L of the Federal Form 1120)
139 of the following:

140 (A) Obligations or securities of the United States, or of
141 any agency, authority, commission or instrumentality of the
142 United States and any other corporation or entity created
143 under the authority of the United States Congress for the
144 purpose of implementing or furthering an objective of
145 national policy;

146 (B) Obligations or securities of this state and any
147 political subdivision or authority thereof;

148 (C) Investments or loans primarily secured by
149 mortgages, or deeds of trust, on residential property located
150 in this state and occupied by nontransients; and

151 (D) Loans primarily secured by a lien or security
152 agreement on residential property in the form of a mobile
153 home, modular home or double-wide, located in this state
154 and occupied by nontransients.

155 (2) The denominator of which is the average of the
156 monthly beginning and ending account balances of the total
157 assets of the taxpayer which are shown on Schedule L of
158 Federal Form 1120, which are filed by the taxpayer with the
159 Internal Revenue Service.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....
Chairman Senate Committee

.....
Chairman House Committee

Originated in the Senate.

To take effect July 1, 1987.

.....
Clerk of the Senate

.....
Clerk of the House of Delegates

.....
President of the Senate

.....
Speaker House of Delegates

The within this the
day of, 1987.

.....
Governor

