

## CHAPTER 5

### CONSUMER SALES AND SERVICE TAX AND USE TAX

By John A. Mairs  
Chris M. Hunter

*John A. Mairs and Christopher M. Hunter are members in the Charleston, West Virginia law firm of Jackson Kelly PLLC. Mr. Mairs's practice primarily involves representation of businesses with West Virginia and local tax issues. Mr. Hunter's practice includes representing West Virginia businesses on state and local tax issues and also involves representing businesses in various environmental matters.*

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## ¶ 501 History of the Sales Tax and the Use Tax

The West Virginia consumer sales and service tax (“Sales Tax”) was first adopted in West Virginia in 1933 as a temporary tax known as the general consumer sales tax. The Sales Tax was made permanent in 1937. In order to maintain the competitiveness of in-state sellers of goods and services with vendors operating solely out-of-state, a use tax (“Use Tax”) was enacted in 1951. The Sales Tax and the Use Tax are complementary laws and are construed so that a purchase from a vendor located outside of West Virginia will be subject to the Use Tax if the purchase is used in West Virginia, just as if the purchase would have been subject to the Sales Tax if it had been purchased from a vendor located in West Virginia. (W. Va. Code § 11-15-1a).

The Sales and Use Taxes were originally imposed only on sales of tangible personal property. Moreover, they were “consumer oriented,” providing for broad exemptions for business and intermediate purchasers for resale. The original Sales Tax rate was 2%. Over the years, the legislature has increased the Sales and Use Tax rates several times. The current applicable tax rate is 6% on most sales, except that the tax rate is 5% on the sale of certain motor vehicles and on gasoline and special fuel. Beginning July 1, 2013, the tax on certain sales of food intended for human consumption was abolished.

The last comprehensive reform of the Sales and Use Taxes was made over twenty years ago by the West Virginia Tax Reform Act of 1987 (“1987 Act”) which resulted in several major changes in the Sales and Use Taxes. The most significant revisions

were: (1) the inclusion of the sale of certain taxable services in the tax base; (2) the adoption of the “directly used or consumed” standard for the allowance of certain business purchase exclusions; and (3) the adoption and repeal of various other exemptions. The overall impact of the 1987 Act was to significantly broaden the tax base. Immediately following the 1987 Act, the number of exemptions from Sales and Use Taxes was 21. Today this number has expanded to at least 64. Since 2004, the Legislature has tended to enact new exemptions as new stand-alone sections of Chapter 15, rather than risk opening up W. Va. Code § 11-15-9 to further amendment. The rise in the number of exemptions continues to narrow the tax base, thus making the Sales and Use Tax laws less neutral and further complicating administration and enforcement.

In 2002, the legislature enacted the Simplified Sales and Use Tax Administration Act intending to further broaden the tax base by requiring out-of-state vendors of tangible personal property, custom software and taxable services to collect and remit Sales and Use Tax on sales to West Virginia customers. In 2003, that Act was renamed the Streamlined Sales and Use Tax Administration Act (“Streamlined Sales Tax Act”) and amended by incorporating the substantive conformity provisions of the Streamlined Sales and Use Tax Agreement, which is administered by the Streamlined Sales Tax Governing Board, Inc. into the Sales and Use Tax laws. West Virginia is a voting member of the Governing Board.

The purpose of the Streamlined Sales and Use Tax Agreement developed by the participating States is to simplify and modernize Sales and Use Tax administration in the member states in order to substantially reduce the burden of tax compliance. The Agreement focuses on improving Sales and Use Tax administration for all sellers and other types of commerce through the following:

- State level administration of sales and use tax collections.
- Uniformity in the state and local tax bases.
- Uniformity of major tax base definitions.
- Central, electronic registration system for all member states.
- Simplification of state and local tax rates.
- Uniform sourcing rules for all taxable transactions.
- Simplified administration of exemptions.
- Simplified tax returns.
- Simplification of tax remittances.
- Protection of consumer privacy.

The long-term goal of Governing Board is to achieve sufficient uniformity among the participating States and through the use of technology reduce the compliance burden for multistate vendors to encourage Congress to enact legislation requiring multistate vendors who do not have a physical presence in a particular state to collect that state’s sales and use taxes, when required, from their customers. Today, there are over 7,500 state and local jurisdictions that impose sales and use taxes in some form. Frequently definitions are different and tax bases are different from jurisdiction to jurisdiction even

within the same state. The Agreement requires that the tax base of a state and its political subdivision be identical and requires state-level administration of local sales taxes. Until such time as Congress acts to require certain multistate vendors to collect taxes for states in compliance with the Streamlined Sales and Use Tax Agreement, vendor compliance with those collection requirements will remain voluntary.

Numerous definitions and other provisions affecting Sales and Use Tax administration and collection are found in the Streamlined Sales Tax Act. (W. Va. Code § 11-15B-1 *et seq.*)

In 2015, the members of the West Virginia Legislature authorized the Joint Select Committee on Tax Reform to meet to study the West Virginia tax system for the purpose of preparing a report with its conclusions and recommendations for comprehensive tax reform, together with drafts of any legislation necessary to effectuate its recommendations. The Joint Select Committee has met regularly since April 2015. During the 2017 regular session, the Legislature considered SB 335, which would have broadened the tax base and raised the sales tax rate to 8%, while also phasing out the individual and corporate net income taxes. However, SB 335 died after the Department of Revenue presented a fiscal note to the Joint Select Committee in which it concluded that the enactment of SB 335 would result in a cumulative revenue loss of \$870 million by the end of FY 2021.

The State Tax Department has on several occasions promulgated regulations interpreting the Sales and Use Tax. The last time the State Tax Department promulgated comprehensive Sales and Use Tax regulations was in 1992. These regulations are now hopelessly out of date and in many cases cannot now be relied upon.

## **¶ 502 Overview of the Sales Tax**

*Law: W. Va. Code § 11-15-1 et seq.*

The Sales Tax is imposed upon the ultimate consumer. There is a presumption that all transactions involving the sale of tangible personal property, custom software or taxable services are subject to either the Sales Tax or Use Tax unless specifically exempted by statute. Thus by definition, sales of real property or intangible property are not subject to the Sales Tax or Use Tax. (See Chapter 6 for a discussion of the West Virginia transfer tax on real property.) There are three categories of exemptions from the Sales and Service Tax: (1) *per se* exemptions; (2) exemptions for which an exemption certificate is required; and (3) refundable exemptions. Both the seller and the purchaser have defined responsibilities that ensure the collection of the Sales and Service Tax. Ultimately each vendor is personally liable for the collection of the tax and its remittance to the state, unless the vendor takes an exemption certificate or direct pay permit from the purchaser. (W. Va. Code §§ 11-15-3; 11-15-4a; and 11-15-6). It is the consumer, however, who ultimately bears the burden of the tax which is added to the sale price. (W. Va. Code § 11-15-10).

### **¶ 503 Overview of the Use Tax**

*Law:* W. Va. Code § 11-15A-1 *et seq.*

The Use Tax is imposed upon the “use” of tangible personal property, custom software or taxable services in West Virginia. The Use Tax was enacted to prevent the avoidance of the Sales Tax by requiring taxpayers purchasing goods, custom software or taxable services out-of-state and using those goods, software or services in-state to pay the Use Tax on such purchases. Purchases which would be exempt from the Sales Tax if purchased in-state are also exempt from the Use Tax. The sale of tangible personal property for delivery in West Virginia is “*prima facie* evidence” that such tangible personal property was sold for use in West Virginia.

### **¶ 504 “Sale” Defined**

*Law:* W. Va. Code §§ 11-15-2(b)(17) and 11-15A-1(b)(9) and (10).

“Sale,” “sales” or “selling,” for Sales and Use Tax purposes, includes any transfer of possession or ownership of tangible personal property or custom software 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 or her agent for consumption or use or any other purpose. These definitions treat rentals and leases, conditional sales contracts, leases with options to purchase, and contracts where possession passes to the purchaser but title is retained by the vendor as security for the purchase price as sales for Sales and Use Tax purposes. (WVCSR §§ 110-15-2.15, 110-15-2.79.)

### **¶ 505 “Use” Defined**

*Law:* W. Va. Code §§ 11-15A-1(b)(15) and 11-15A-2.

The Use Tax applies when the tangible personal property is delivered in West Virginia and the sale is not subject to the Sales Tax. “Use” is defined as the exercise by any person of any right or power over tangible personal property or custom software incident to the ownership, possession or enjoyment of such property, or by any transaction in which possession of or the exercise of any right or power over tangible personal property, custom software or the result of a taxable service is acquired for a consideration, including any lease, rental or conditional sale of tangible personal property or custom software or the use or enjoyment in this state of the result of a taxable service. The Use Tax is designed to include purchases, transfers or exchanges which take place outside of West Virginia and are therefore not subject to the Sales Tax, provided such transactions would otherwise be taxable under the Sales Tax had the transaction taken place within West Virginia. The value of goods produced or manufactured, which are consumed by the producer or manufacturer, may also be subject to Use Tax (see ¶ 516 below).

### **¶ 506 “Gross Proceeds,” “Purchase Price” and “Sales Price” Defined**

*Law:* W. Va. Code §§ 11-15-2(b)(8), 11-15A-1(b)(6).

The computation of the Sales Tax and Use Tax are based upon the purchase price or upon the gross proceeds of sale, for persons producing or selling products or services. There is little distinction between the terms “gross proceeds” and “purchase price.”

“Gross proceeds” is defined as:

[T]he amount received in money, credits, property or other consideration from sales and services within this state, without deduction on account of the cost of property sold, amounts paid for interest or discounts or other expenses whatsoever. Losses shall not be deducted, but any credit or refund made for goods returned may be deducted.

“Purchase price” is defined as:

The total amount for which property, custom software or services are sold, valued in money, whether paid in money or otherwise: Provided, that cash discounts allowed and taken on sales shall not be included.

An alternative definition of “Purchase price” contained in the Streamlined Sales Tax Act, equates the measure of tax with the definition of “Sales price” therein which includes the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, without any deduction for the following:

- (i) The seller’s cost of the property sold;
- (ii) The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller and any other expense of the seller; and
- (iii) Charges by the seller for any services necessary to complete the sale, including delivery and installation changes.

“Sales price” does not include: discounts allowed by the seller; interest, financing and carrying charges from credit extended on the sales if separately stated and taxes imposed on the consumer. (W. Va. Code § 11-15B-2(b)(43) and (46))

Thus, the Sales Tax and Use Tax are levied based on the amounts of cash, property, credit or other property received by the vendor on a sale. However, a trade-in, which is credited against the purchase price or a rebate or discount allowed by the vendor for the item at the time the item is purchased is not included in gross proceeds. (WVCSR § 110-15-2.35.) The value of business stimulants, gifts or promotions designed to induce patronage are not considered to be discounts and do not reduce

the gross proceeds. The purchase price and hence gross proceeds is also not reduced by the amount of any “term discount.” Therefore, a discount allowed by a vendor to the purchaser if the total amount due is paid within a specified time does not reduce the purchase price. (WVCSR § 110-15-2.68.)

**Example:** If a credit sale provides for a 1% discount for payment received within ten days on a 30-day net credit sale, the 1% discount would not reduce the purchase price for the purposes of the sales tax if the purchaser paid the full price within ten days.

#### **¶ 507 Sales to Related Parties**

*Law:* W. Va. Code § 11-15-15.

If the gross proceeds of sales between related taxpayers are not indicative of the true value of such sales, they may be subject to revaluation to reflect the true value of the item transferred. The Commissioner may adjust and revalue the gross proceeds of sales between affiliated companies or persons to correspond to the gross proceeds of sales of similar tangible personal property, custom software or taxable services between unrelated persons under similar circumstances. (WVCSR § 110-15-9d.2.) Sales of services by one corporation, partnership or limited liability company to another corporation, partnership or limited liability company when the entities are members of the same controlled group are exempt from Sales Tax. (W. Va. Code § 11-15-9(a)(23); See ¶ 512 below).

#### **¶ 508 Rates of the Sales Tax**

*Law:* W. Va. Code § 11-15-3.

The general Sales Tax rate is six cents per dollar (6%) of the purchase price. (W. Va. Code § 11-15-3). The tax rate on the sale of certain motor vehicles is five cents per dollar (5%). (W. Va. Code § 11-15-3c; see also ¶ 510 below). The Sales Tax is computed using a formula that multiplies the purchase price by the tax rate. The tax computation is required to be carried to the third decimal place, and the tax rounded up to the next whole cent whenever the third decimal place is greater than four and rounded down to the lower whole cent whenever the third decimal place is four or less. The vendor may elect to compute the tax due on a transaction on a per item basis or on an invoice basis provided the method used is consistently used during the reporting period.

Sales of gasoline and special fuels are subject to both to Sales Tax and Use Tax and to the Motor Fuels Excise Tax. (W. Va. Code §§ 11-15-18b and 11-14C-1 *et seq.*). The Motor Fuels Excise Tax consists of two components: a flat rate equal to \$.205 per gallon (or, in the case of alternative fuels, per gallon equivalent) plus a variable (Sales Tax) component equal to 5% of the average wholesale price of the fuel. (W. Va. Code §§ 11-15-18b and 11-14C-5). The Motor Fuel Excise Tax is imposed on the consumer of the fuel but is required to be paid at the time the fuel is imported into this state for

delivery to the consumer or retailer or when the fuel is removed from a bulk transfer/storage system location within this state. (W. Va. Code § 11-14C-6).

### **¶ 509 Rates of the Use Tax**

The Use Tax rate is the same as the Sales Tax rates as set forth at ¶ 508 above. The amount of Use Tax imposed on the use of any property or service is reduced by the amount of consumer sales tax lawfully paid to another state. (WVCSR § 110-15-3.3.)

### **¶ 510 Tax on Motor Vehicles**

*Law:* W. Va. Code § 11-15-3c.

*Effective July 1, 2008*, sales of motor vehicles to West Virginia residents became subject to the 5% Sales Tax imposed by W. Va. Code § 11-15-3c, and the rate increased to 6% beginning July 1, 2017. The sales price upon which the Sales Tax is imposed does not include that portion of the consideration for the sale represented by the exchange of other vehicles on which this tax or the Motor Vehicle Title Privilege Tax imposed by W. Va. Code § 17A-3-4 was imposed. This tax is imposed on motor vehicles purchased out-of-state by West Virginia residents.

The term “Motor vehicle” is defined in W. Va. Code § 11-15-3c and generally includes every propellable device upon which a person or property may be transported on a highway, including automobiles, buses, and recreational vehicles, such as motor boats, motor homes, all-terrain vehicles, snowmobiles and other similar vehicles which are not used primarily on the state’s highways, but which are moved occasionally on a state highway. The definition of Motor vehicles generally does not include mobile homes, modular and manufactured housing, certain commercial vehicles with a gross weight of 55,000 pounds or more and trailers with a gross weight of 2,000 pounds or more.

Exemptions from the Sales Tax on Motor vehicles include:

- (1) passenger vehicles offered for rent by daily passenger rental car businesses;
- (2) vehicles acquired by one corporation, partnership or limited liability company from an affiliated corporation, partnership or limited liability company;
- (3) vehicles acquired by tax exempt senior citizens service organizations;
- (4) vehicles acquired by active duty military personnel stationed outside of West Virginia within 9 months of their return to the state;

- (5) vehicles acquired by registered dealers for resale;
- (6) vehicles acquired by the state, any political subdivision thereof, tax exempt volunteer fire department or tax exempt rescue or ambulance squad;
- (7) vehicles acquired by an urban mass transit authority;
- (8) certain vehicles owned by persons who were not residents of this state at the time the vehicle was purchased;
- (9) certain registrations of exempt vehicles; and
- (10) special rules apply to certain vehicle leased for more than 30 days by West Virginia residents.

The motor vehicle Sales Tax imposed pursuant to W. Va. Code § 11-15-3c, is collected by the Division of Motor Vehicles and is dedicated to the State Road Fund.

#### **¶ 511 Per Se Exemptions**

*Law:* W. Va. Code § 11-15-9; Reg. § 110-15-9.2.

*Per se* exemptions are exemptions from the Sales Tax where the purchaser is not required to present an exemption certificate or a direct pay permit to avoid the collection of the tax by the seller. The Tax Commissioner has the authority to designate by rule which Sales Tax exemptions may be asserted without presentation of an exemption certificate or direct pay permit. (W. Va. Code § 11-15-9m). Transactions involving the following types of services and tangible personal property are *per se* exempted:

*Gas, steam or water:* Sales of gas, steam or water when delivered to consumers through mains or pipes are exempt; sales of bottled gas or water are not exempt.

*Electricity:* All sales of electricity are exempt.

*Public services regulated by the PSC:* Sales of services to the public if such services are regulated by the West Virginia Public Service Commission are exempt. (W. Va. Code § 11-15-8; Reg. § 110-15-8.1.3.)

*Textbooks:* Sales of textbooks required to be used in schools in West Virginia are exempt whether the textbooks are sold directly to the school or to students. The vendor must keep records to show that the books are required in a school and that the purchaser is a student.

*Isolated transactions:* Sales of tangible personal property which are not in the ordinary course of business of the vendor and which are isolated transactions are exempt from tax. To be an isolated transaction, there may not be more than four such transactions in a twelve-month period by the seller. (WVCSR § 110-15-2.39.)

*Delivered newspapers:* Sales of newspapers when delivered to consumers by route carriers are exempt. All other sales of newspapers are taxable.

*Prescription drugs; etc.:* Sales of prescription drugs; durable medical goods; mobility enhancing equipment; prosthetic devices and insulin for medical purposes are exempt. The following terms are defined in the Streamlined Sales Tax Act: "Prescription" (W. Va. Code § 11-15B-2(b)(38)); "Drug" (W. Va. Code § 11-15B-2(b)(15)); "Durable medical equipment" (W. Va. Code § 11-15B-2(b)(16)); "Mobility enhancing equipment" (W. Va. Code § 11-15B-2(b)(30)); and "Prosthetic device" (W. Va. Code § 11-15B-2(b)(40)). Sales of such items to consumers are *per se* exempt, whereas sales to health care providers are refundable exemptions. (W. Va. Code §§ 11-15-9i and 9j; WVCSR § 110-15C-1.) The exemption for durable medical goods is temporarily suspended for purchases by health care providers for the period July 1, 2016 through June 30, 2018.

*Day care centers:* Sales and services performed by licensed day care centers are exempt.

*Lottery tickets:* Sales of West Virginia lottery tickets and materials directly related to the lottery by licensed sales agents are exempt.

*Leases of motor vehicles:* Leases of 30 days or more of motor vehicles that are titled with the West Virginia Department of Motor Vehicles are exempt.

*Certain specific sales of food:* The following specific sales of food are exempt:

- (1) Food and food ingredients, as defined in W. Va. Code § 11-15B-2, intended for human consumption, except that purchases by consumers of prepared food, as defined in W. Va. Code § 11-15B-2, shall remain taxable;
- (2) Food purchased or sold by public or private schools or school sponsored organizations if the food is sold to students and employees during normal school hours;
- (3) Food purchased or sold by public or private colleges or universities or by a student organization if the food is sold on a contract basis for a specific period at a fixed price without regard to the quantity of the food consumed;

- (4) Food purchased or sold by nonprofit organizations or a government agency to low income persons if the food is sold at or below cost;
- (5) Food sold in an occasional manner by a charitable or nonprofit organization if the sale is to obtain revenue for the activities of the organization and the revenue is so expended. Occasional sales are not more than six sales in a 12-month period. A series of sales, such as an auction, which does not last for more than 84 hours is considered one sale;
- (6) Food sold by religious organizations at a gathering if the purpose of selling the food is to obtain revenue for the activities of the organization and the revenue is so expended;
- (7) Food sold by volunteer fire departments and rescue squads that are exempt for federal income taxes when the purpose of the sale is to obtain revenue for the activities of the organization and the revenue is so expended; and
- (8) Food sold by little leagues and other youth groups to obtain revenue for their activities and the revenue is so expended.

*Items purchased with food stamps:* Food and other items purchased with food stamps pursuant to the federal Food Stamp Program or with drafts under the West Virginia Supplemental Food Program are exempt.

*Tickets for school activities:* Sales of tickets to events sponsored directly by elementary and secondary schools located within the state are exempt.

*Advertisements:* Sales of radio and television broadcasting time for advertising and sales of space in circulars (excluding catalogs), magazines, newspapers and on billboards for advertising are exempt.

*Personal services:* The personal services rendered to a person which are not for the purpose of selling property to that person are exempt. It is necessary that there be continuous physical contact for the service to be a personal service. Personal services include barbering, massaging, nursing, shoe shining, manicuring, haircutting etc. Sales of tangible personal property by a person rendering personal services is a separate taxable transaction. (W. Va. Code § 11-15-8; WVCSR §§ 110-15-2.59, 110-15-8.1.2.)

*Professional services:* Professional services, including services rendered by physicians, attorneys, dentists, public accountants, architects, optometrists, professional engineers, registered professional nurses, veterinarians, licensed physical therapists, ophthalmologists, chiropractors, licensed real estate brokers, podiatrists, embalmers, osteopathic physicians and surgeons, registered sanitarians, pharmacists, psychiatrists, psychoanalysts, landscape architects, registered professional court reporters, licensed

social workers, licensed real estate appraisers, certified real estate appraisers licensed in accordance with W. Va. Code § 37-14-1 *et seq.*, and licensed professional counselors, are exempt. Nonprofessional services provided by professionals are subject to the sales and service tax. (W. Va. Code § 11-15-8; WVCSR § 110-15-8.11.) Professional services by a corporation through an employee who is licensed to provide such services are also exempt unless the corporation is prohibited by West Virginia law from providing a professional service.

Whether or not a service is professional has been the source of much litigation. The person claiming a professional exemption must “clearly establish” the occupation as a profession. For example, interior decorating is not a professional service because it lacks a general acceptance as a profession, standards of required study or specified attainments of special knowledge as distinguished from a skill. *Wooddell v. Dailey*, 160 W. Va. 65, 230 S.E.2d 466 (1976).

**Contracting:** Contracting services, including subcontracting and the services provided by a construction manager, are exempt. Contracting is defined as furnishing of labor, or both labor and materials, in the fulfillment of a written or oral contract for the construction, alteration, repair, or improvement of a new or existing building or structure or any part thereof, which results in a capital improvement to the property. Contracting also includes the removal or demolition of a building or structure or any part thereof. (W. Va. Code § 11-15-2(b)(3); WVCSR § 110-15-2.24.) If work is performed on personal property, rather than on a structure or real estate, it cannot be contracting.

**Example:** Work on a car by an auto mechanic along with any parts sold would be subject to the sales and service tax since the work is performed on personal property rather than real property and is not contracting.

The term “capital improvement” is defined as an improvement to a building or structure that is intended to last for at least a year without the necessity for regularly scheduled maintenance. (W. Va. Code § 11-15-2(b)(3)(C)(iv)).

In order for work to be considered contracting, it must entail a significant improvement to a structure or real estate as opposed to a minor repair. (WVCSR § 110-15-116.) A minor repair to a structure, building or real estate is not contracting since it is not considered to be a capital improvement. If a subcontractor cannot determine whether the *work* to be performed constitutes a capital improvement, the subcontractor may obtain a “Certificate of Capital Improvement” from the contractor, on the form provided by the State Tax Department, which will relieve the subcontractor from any obligation to collect the sales and service tax. The form used for a Certificate of Capital Improvement is set forth at ¶ 540 below.

**Example:** Replacement of the roof of a building as well as any roofing materials installed is exempt as contracting even though done on a time and material basis since the work is on a structure and it constitutes a capital improvement.

**Example:** The replacement of a kitchen faucet is not contracting, since this does not result in a significant improvement to the building.

On the other hand, the remodeling of a kitchen including the replacement of the faucet is considered contracting since it is work on a building and constitutes a significant (capital) improvement thereto.

Contracting does not include work on a structure or real property if the work is part of and “incidental to the sale of tangible personal property” by a vendor in the business of selling that property. Work is considered to be part of a sale if the installation is arranged by the seller. Installation of the following types of tangible personal property is always considered to be incidental, whether the installation is done by the merchant or a third party: wall to wall carpeting, mobile homes, window air conditioners, dishwashers, washing machines or dryers or other household appliances, drapery rods, window shades, venetian blinds, canvas awnings, freestanding commercial equipment and freestanding industrial equipment. (WVCSR § 110-15-8a.6.)

**Example:** An electrical appliance store sells a dishwasher for \$600 and arranges for its installation by an independent electrical contractor for \$75. The sale of the dishwasher and the service charge for its installation are subject to tax even though the installation exceeds the 5% of sales price since installation of dishwashers is always incidental to their sale.

Contractors are required to pay the Sales Tax on purchases of tangible personal property or taxable services in fulfillment of a construction contract. (W. Va. Code § 11-15-8a). Effective July 1, 2007, this rule does not apply to purchases by contractors in fulfillment of contracts with taxpayers entitled to claim the refundable exemption provided by W. Va. Code § 11-15-9(b)(2). Effective July 1, 2009, this rule does not apply to purchases by contractors in fulfillment of contracts with taxpayers entitled to claim the high-technology business exemption provided by W. Va. Code § 11-15-9h. (W. Va. Code § 11-15-8d). Effective July 1, 2011, this rule applies to purchases by contractors for purchases to be directly used in the construction, alteration, repair or improvement to a new or existing natural gas compressor station or gas transmission line that has a diameter of twenty inches or more, even though the purchaser would be able to claim the refundable exemption provided by W. Va. Code § 11-15-9(b)(2) if it had purchased the goods or services directly. Contractors may also assert the exemption provided by W. Va. Code § 11-15-9n, for new or expanded warehouse or distribution facilities. Effective July 1, 2012, the sales tax is not imposed upon a contractor’s purchases of services, building materials, and tangible personal property (except purchases of gasoline and special fuel) relating to the construction, alteration, repair, or improvement of a structure if the purchaser of the contracting services is a nonprofit youth organization that would be entitled to claim the exemption under W. Va. Code § 11-15-9(a)(6)(E) had it purchased the services, machinery, supplies, or materials. This exception terminates June 30, 2022.

Effective, March 9, 2018, this exemption no longer applies to purchases by road construction contractors.

*Services for an employer.* Services rendered by an employee to his or her employer are exempt, but services not within the scope of the employee-employer relationship and services rendered by independent contractors are not exempt. (W. Va. Code § 11-15-2(b)(18)). In determining whether an individual is an independent contractor or employee, the “right to control” standard is used. Other factors that may be considered, but are not dispositive, include: whether a worker is required to comply with instructions; whether a worker received training; whether a worker’s services are integrated into the operation of the business; whether there is a continuing work relationship; whether the hours are set by the worker himself; whether there are written reports; whether payment is by the hour, week or month; whether a worker furnishes his own tools and materials; whether a worker is subject to risk of economic loss in performing his job; whether a worker is performing jobs for more than one business at the same time; and a number of other factors. (WVCSR § 110-15-60.1 *et seq.*)

*Sales prohibited from taxation by law.* Sales which are prohibited from taxation by federal or state law are exempt, but the vendor must keep records to verify that a sale is to a person not subject to tax.

*Charges for room and board by fraternities and sororities to their members:* Food and rooms provided by fraternities and sororities on a fixed contract price are exempt.

*Charges for transportation of passengers in interstate commerce:* Sales of tickets to passengers for transportation in interstate commerce are exempt.

*Casual and occasional sales by and sales to certain exempt organizations:* Sales at fund raisers are exempt when of limited duration (not more than 84 hours) and no more than six are held during any 12-month period, if such fund raisers are held by one of the following types of IRC § 501(c)(3) or 501(c)(4) organizations:

- (1) A church or association of churches;
- (2) A public or private elementary or secondary school;
- (3) An organization which annually receives more than 50% of its support from grants, charitable contributions or membership fees;
- (4) An organization which has no employees and its net income from fund raisers is donated to an organization exempt under IRC § 501(c)(3) or § 501(c)(4); or
- (5) A youth organization such as the Boy Scouts and Girl Scouts.

Sales of tangible personal property and services to the organizations described above are exempt if used or consumed in the activities for which the organizations were formed.

*Tuition charged by educational summer camps:* Tuition charged for summer camps which are primarily educational is exempt. Camps which are primarily athletic or recreational are not exempt. This exemption does not extend to the sale of services and tangible personal property by an educational summer camp.

*Sales of motor vehicles:* The taxation of sales of motor vehicles is discussed in ¶ 510.

*Charges for opening and closing burial lots:* Charges for opening and closing a burial lot are exempt.

*Sales of farm products and livestock:* Sale of farm products by farmers (such as roadside sales) are exempt if the farmer is not otherwise engaged in retail sales and adequate records are maintained; sales of livestock at auctions or through breeder associations are exempt.

*Charges for memberships in health and fitness clubs:* Sales of memberships in health and fitness organizations are exempt.

*Charges for babysitting services:* Charges for babysitting services by an individual are exempt if they do not exceed \$5,000 in any one year.

*Public libraries:* Sales of services by public libraries or libraries at educational institutions are exempt.

*Manufacturer's representatives:* Commissions received by manufacturer's representatives are exempt.

*Opinion polls:* Sales of primary opinion research services are exempt when the services are provided to clients located outside of West Virginia.

*Value-added products from raw agricultural products:* Sales of property and services to persons for the production of value-added products. However, this exemption may not be claimed by any one purchaser for more than five consecutive years. Value-added products include producing the following products derived from processing a raw agricultural product: Lumber into furniture, toys, etc.; fruit or honey into wine; wool into fabric; hides into leather; milk into cheese; drying, canning or freezing of fruits or vegetables; raising feeder cattle; or drying, canning, cooking or freezing poultry or aquatic animals.

*Music instruction and artistic performances:* Music instruction by a music teacher and artistic services or performances by artists and entertainers are exempt. Sales of tickets to artistic performances are not exempt pursuant to this provision. Nude dancers or strippers are not considered to be entertainers for purposes of this exemption.

*Charges by tax exempt IRC § 501(c)(3) or 501(c)(6) membership organizations:* Charges by exempt membership organizations to their members for membership, newsletters, continuing education seminars, workshops, lectures, conventions and similar services. This exemption does not apply to separately stated charges for meals, lodging, entertainment or transportation, but the membership organization may elect to pay the tax on purchases for which a separate charge could apply and not charge any Sales Tax to its members.

*County assessors, sheriffs, and clerks:* Sales of governmental services or materials by county assessors, sheriffs and clerks in the normal course of governmental operation are exempt.

*West Virginia magazines:* Sales of magazines and subscriptions by the Division of Natural Resources and Division of Culture and History are exempt.

*Car washes:* Sales of soap to be used at car washes is exempt.

*Travel agencies:* Commissions received by travel agencies from out of state vendors are exempt.

*Environmental evaluations:* The service of providing technical evaluations for compliance with federal and state environmental standards, if performed by environmental and industrial consultants certified by the West Virginia Department of Environmental Protection or Bureau of Public Health is exempt. This exemption includes the cost of tangible personal property use to provide the service. (W. Va. Code § 11-15-9c).

*Volunteer fire departments and rescue squads:* Sale of tangible personal property by volunteer fire departments and rescue squads that are exempt under IRC § 501(c)(3) and (c)(4) to obtain revenue for the functions of the organization are exempt.

*Lodging franchise fees:* Fees imposed by a lodging franchiser as a condition of the franchise agreement are exempt.

*Flags:* Sales of regulation sized United States and West Virginia flags are exempt.

*Special district excise tax:* Sales upon which the special district excise tax, imposed by to W. Va. Code §§ 7-22-12, 8-13B-11 or 8-38-12, is paid are exempt from the Sales Tax. (W. Va. Code § 11-15-9f).

*Exemptions for certain high tech and internet business sales:* In order to modernize the Sales Tax exemptions as a result of technological advances and expanded role of computers in manufacturing, internet and communications business and to encourage

computer hardware and software developers to locate and expand their businesses in West Virginia, the following sales are exempt:

- (1) Computer hardware and software for incorporation into a manufactured product;
- (2) Computer hardware and software directly used in communication activity;
- (3) Electronic data processing services;
- (4) Educational software to be used in the public schools or non-profit educational institution in this state;
- (5) Internet advertising;
- (6) High-technology business services sold to federal, state or local governments for use in fulfilling a government contract; or
- (7) Software, computers, computer hardware, servers, building materials and tangible personal property to be installed in a building or facility used in a high-technology or internet advertising business. (W. Va. Code § 11-15-9h).

*Clothing and accessories sold by exempt organizations:* Sales of clothing and clothing accessories by organizations exempt under IRC §§ 501(c)(3) and (c)(4) and that have annual revenue from such sales of less than \$40,000 are exempt: provided that the clothing and clothing accessories are obtained solely by donation.

#### **¶ 512 Exemptions for Which Exemption Certificate is Required**

*Law:* W. Va. Code §§ 5B-2B-5, 11-15-9, 11-15-9c.

Certain sales of tangible personal property or services are exempt from the collection of Sales Tax only if Form F0003, Certificate of Exemption is presented to the vendor at the time of the sale. The following exemptions may be asserted with an exemption certificate:

*Sales to state and federal governments:* Sales to the state, its subdivisions and agencies and to the United States government, its subdivisions and agencies are exempt. Sales to another state, its subdivisions and agencies are exempt if that state grants a similar exemption for sales to West Virginia. If a governmental entity fails to present an exemption certificate, the books and records of the seller must show that the purchase was billed directly to such agency even though an exemption certificate was not obtained. Sales to government employees are not exempt unless billed to the government.

*Sales to churches and charitable organizations:* Sales (except for purchases of gasoline or special fuels) to churches and bona fide charitable organizations are exempt if such services or property are directly used or consumed by the church or charitable organizations and the church or organization makes no charge whatsoever for the services they render.

*Sales of property and services for resale:* Sales (except for purchases of gasoline or special fuels) of tangible personal property to a purchaser for resale are exempt. However, if an item is purchased for resale as part of the purchaser's business but is withdrawn from the purchaser's inventory and consumed by the purchaser, it is subject to the Use Tax at that time.

**Example:** A wholesale office supply company may purchase office supplies and, if an exemption certificate is presented, no Sales Tax will be collected by the seller. However, if the office supply company withdraws from its inventory a portion of its supplies to use in its own office, it becomes liable for the Use Tax at that time. Also, if the office supply company purchases janitorial services or equipment repairs from a third party, these would be subject to the Sales Tax at the time of the purchase, since these are not purchased for resale.

Services which are subcontracted are not considered to be services subject to the sales and service tax. (WVCSR § 110-15-2.83.)

**Example:** A customer takes his car to a service station to have his brakes realigned. The service station, not having the proper equipment, takes the drums to another station which does part of the work. The service performed by the other service station is a service purchased for resale which is not subject to tax.

Charges for building materials and supplies which are purchased by a contractor to use in work on a structure or real estate are not exempt as a purchase for resale. However, since charges by the contractor to his customer for materials and labor are classified as "contracting" and are exempt (see ¶ 510 above), there is only one layer of Sales Tax on the materials purchased for contracting.

The resale exemption does not apply to purchases by private clubs of liquor and wines for resale. (W. Va. Code § 11-15-9a).

*Purchases of materials for a government contract:* For materials purchased on or after October 1, 1990, purchases of materials by a contractor are taxable if used to fulfill a written contract with the United States, the State of West Virginia, or any political subdivision thereof, for the construction or improvement of a structure or real property which will be used by the government. (W. Va. Code § 11-15-8c).

*Sales to schools:* Sales (except for purchases of gasoline or special fuels) to an in-state college or university, which is governed by the West Virginia Board of Trustees and which is exempt from federal and state income taxes, are exempt.

*Sales of mobile, modular and other manufactured homes:* The sales of mobile homes which will be utilized by the purchasers as their principal year-round residence are subject to tax at the rate of 3%. The vendor should have the purchaser execute a Certificate of Principal Use on the form provided by the State Tax Department. Activities incidental to the sale of such homes, such as the delivery of a mobile home to its site, which are not included in the sales price, are taxed at the rate of 6%. Activities which are incidental to the sale include: readying the home at its site for occupancy by hooking up utility lines; attaching the home to a foundation; underskirting the home; joining the units together; etc. Activities beyond those which are incidental to the sale of such homes generally are considered contracting activities and are exempt under the contracting exemption previously discussed. The manufacture, sale and installation of modular and manufactured housing are treated in a manner similar to the construction of conventional housing. Only the value of building supplies and materials used in the manufacture and installation of such housing are subject to the Sales and Use Taxes. The value of such building supplies and materials shall be actual cost to the manufacturer as delineated on the invoice to purchaser. If actual cost information is not available, the cost of materials shall be 60% of the cost of the modular dwelling. (W. Va. Code § 11-15-7a). In addition to the Sales Tax, a \$20 fee is also imposed on all sales of factory-built homes, which is to be deposited in the West Virginia affordable Housing Trust Fund. (W. Va. Code § 11-15-4c).

*Sales of propane for poultry house heating:* These sales are exempt when the propane is exclusively used to heat a poultry house.

*Sales to be used in agricultural production:* Sales of property and services (except gasoline or special fuels) which are used in commercial agricultural production are exempt. Therefore, a farmer does not pay a tax on his purchases of feed, seed, fertilizer, repairs to farming equipment, etc. Sales of tangible personal property or services to a farmer to be used in the construction or permanent improvement of real estate are taxable.

*Sales to certain exempt organizations:* Purchases (except for purchases of gasoline and special fuels) by an organization exempt from federal income tax under IRC § 501(c)(3) or 501(c)(4) and having a current registration certificate issued under W. Va. Code § 11-12-1 *et seq.*, which purchases are directly used in its charitable activity, are exempt if the organization is one of the following:

- (1) A church or association of churches;
- (2) A public or private elementary or secondary school;
- (3) An organization which annually receives more than 50% of its support from grants, charitable contributions or membership fees;

- (4) An organization which has no employees and its net income from fund raisers is donated to an organization exempt under IRC § 501(c)(3) or § 501(c)(4); or
- (5) A youth organization such as the Boy Scouts and Girl Scouts.

*Electronic data processing services:* Sales of data processing services including key punching, sorting, rearranging, verification, data entry, etc. and providing access to computer equipment for a third party are exempt. The exemption also applies to related software. This exemption does not apply to the sale of computer hardware or software not used for processing another's data.

*Services performed within a controlled group of entities:* Services performed by one corporation, partnership, or limited liability company for another corporation, partnership, or limited liability company when the entities are within the same controlled group are exempt. "Control" means direct or indirect ownership of stock or equity ownership controlling 50% or more of the total voting power of all classes of stock or equity ownership representing 50% or more of the value of the combined entities.

*Aircraft repair services and tools used to provide such services:* Sales of aircraft repair, remodeling and maintenance services for licensed aircraft carriers are exempt as well as sales of parts incorporated into such aircraft; the sale of tools to be directly and exclusively used in repair, remodeling and maintenance of licensed aircraft carriers is exempt. In 2018, the legislature also exempted from consumers sales and service tax repair, remodeling, and maintenance services on air craft operated under a fractional ownership program, as that terms is defined in W. Va. Code § 11-15-9p(c).

*Motion picture films and video arcade games:* Sales of motion picture films to exhibitors are exempt if the sale of tickets or admission charge to the film is taxable. Sales of video arcade machines or games to persons engaged in providing such games to the public for a charge upon which the Sales Tax is imposed are exempt.

### **¶ 513 Records of Using Exemption Certificates**

*Law:* W. Va. Code § 11-15-6.

The burden of proving that a sale or service was exempt from Sales Tax is on the vendor. It is presumed that all sales are subject to tax unless the vendor takes and retains an executed exemption certificate from the purchaser. Vendor is required to retain the exemption certificate for a period of three years or so long as the tax period is open for assessment or refund. The purchaser is also separately liable for Sales or Use Taxes on goods or services that it purchases. (W. Va. Code § 11-15-4b). The claiming of an exemption is strictly construed against the taxpayer. *Wooddell v. Dailey*, 160 W. Va. 65, 230 S.E.2d 466 (1976).

### **¶ 514 Refundable Exemptions**

*Law:* W. Va. Code §§ 11-15-9; 11-15-9d; WVCSR § 110-15-9.4.

The purchaser in the following transactions must pay Sales Tax or Use Tax to the vendor and then may apply to the Tax Commissioner for a refund or credit of the Sales Tax or Use Tax collected by a vendor, unless the purchaser provides the vendor with a copy of its West Virginia direct pay permit at the time of sale.

*Sales to be directly used in manufacturing, transportation, transmission, communication, production of natural resources, gas storage, production of electricity or public utility business:* Sales (except sales of gasoline or special fuels) to businesses engaged in manufacturing, transportation, transmission, communication, production of natural resources, gas storage, production of electricity or public utility business are exempt if the services or items purchased are “directly used or consumed” in such activities. Purchases that are not directly used or consumed in these activities are taxable.

**Example:** The sale of janitorial services to a business which manufactures chemicals is not exempt, since such services are not directly used in manufacturing. However, the sale of raw materials utilized in the chemical manufacturing process is exempt, since they are directly used in the manufacturing process.

One does not have to be a “producer” liable for the severance tax to be considered in the business of producing a natural resource. A contract miner is not ordinarily subject to the severance tax since he is not the producer of the mineral, but his purchase of materials directly used in mining would be exempt from the sales tax since he is engaged in the business of the production of natural resources.

*Definition of “production of natural resources”:* Production of natural resources includes exploring, developing, severing, extracting, reducing to possession, loading for shipment, shipment, sale, reclamation, waste disposal, and environmental activities associated with the production of natural resources. Production of natural resources also includes certain limited construction activities relating to the construction of ventilation structures, mine shafts, slopes, boreholes, dewatering structures and associated facilities. One does not have to be a “producer” liable for the severance tax to be considered in the business of producing a natural resource. A contract miner, who is not subject to severance tax is nevertheless considered to be engaged in the production of natural resources. However, a contractor who works on a facility used in the production of natural resources is not considered to be engaged in production, unless engaged in fabricating structures that are specifically exempt.

*Directly used or consumed:* Sales of property or services to persons engaged in the foregoing businesses are exempt only if the services, machinery, supplies and materials are directly used or consumed in the exempt business activity. West Virginia has adopted a broad construction of the direct use standard by adopting the integrated plant rule of direct use. The integrated plant rule focuses on the necessity of the item to the manufacturing process, its physical and causal relationship to the finished product and

whether the item is part of the exempt machinery as to form an integrated and synchronized system.

Generally, in West Virginia, activities and operations which constitute an integral and essential part of such activities and not those which are incidental, convenient or remote are exempt. Examples of uses of property or services which are not directly used or consumed are: heating and illumination of office buildings; janitorial or general cleaning services; personal comfort of personnel; production planning; scheduling of work; inventory control; marketing; general management; supervision; finance; training; accounting and administration; or any other activity incidental or convenient rather than an integral and essential part of such activities. (W. Va. Code § 11-15-2(b)(5); WVCSR § 10-15-2.9.)

*Sales to nationally chartered fraternal and social organizations:* Sales (except sales of gasoline or special fuels) to nationally chartered fraternal or social organizations are exempt if the purchases are for the sole purpose of free distribution in public welfare or relief work.

*Sales to volunteer fire departments:* A refundable exemption exists for sales of firefighting and station house equipment to volunteer fire departments are exempt.

*Sales of building materials to charities:* A refundable exemption exist for sales of building materials to an organization exempt from federal income tax under IRC § 501(c)(3) or (4) are exempt if such materials are incorporated into a building which is to be operated by the organization as permanent low income housing, transitional housing, emergency homeless shelter, domestic violence shelter or emergency youth shelter.

*Sales to charities which make no charge for their services:* A refundable exemption exist for sales (except sales of gasoline or special fuels) to charities which make no charge for their services are exempt if the items or services sold are directly used or consumed by such organization in the charitable activity.

*Highway projects:* A refundable exemption exists for sales of construction and maintenance materials acquired by a second party for use in a state highway project are exempt. However, in lieu of issuing a refund or credit to the person that paid the tax, the Tax Department will pay the refund to the Division of Highways for deposit into the State Road Fund.

*Research and development expenditures:* A refundable exemption exists for sales of tangible personal property and services directly used or consumed in research and development activities are exempt. Research and development is defined as systematic scientific, engineering or technological study and investigation in a field of knowledge in the physical, computer or software sciences, for the purpose of increasing scientific knowledge which may lead to the development of new or enhanced products. Research and development includes, but is not limited to, design,

refinement and testing of prototypes of new or improved products or manufacturing processes before commercial sales have begun. (W. Va. Code § 11-15-9b).

*New or Expanded Warehouse or Distribution Facility:*

W. Va. Code § 11-15-9n(b) authorizes a refundable exemption from Sales Tax for qualified purchases of computers and computer software, primary materials handling equipment, racking and racking systems, and components thereof, building materials and tangible personal property installed into or directly used or consumed in the construction, addition, alteration or improvement of a qualified, new or expanded warehouse or distribution facility, provided that the taxpayer's investment in the new or expanded facility is at least \$50 million and the facility creates at least three hundred full-time equivalent West Virginia jobs. The exemption created herein is limited to purchases made during an "Expansion Period", which is a period of time beginning one year prior to the start of the construction or expansion of the qualified, new or expanded warehouse or distribution facility, and ending one year after the substantial completion of the construction or expansion of the facility.

To qualify for the exemption, the taxpayer is required to submit to the Tax Commissioner an application for certification of the exemption, with a plan describing the investment to be made. The application for certification of the exemption and the plan must be filed on or before the start of the construction or expansion of the proposed facility. If the taxpayer fails to timely file the application for certification of the exemption, on or before the start of the construction or expansion, the exemption will not be available for any purchases that were made prior to the filing date of the application and no refund will be issued for any such purchase.

W. Va. Code § 11-15-8d(b), which otherwise limits the right of a contractor to assert a Sales Tax exemption on behalf of its principal, has been amended to allow contractors to assert the refundable exemption under Section 11-15-9n. Purchases of gasoline and special fuel are not exempt pursuant to this section.

W. Va. Code § 11-15-9n(e) provides additional restrictions on taxpayers claiming this exemption.

(1) Over the counter sales restrictions.

A taxpayer will be disqualified from using the exemption available under Section 11-15-9n if within 10 years after the end of the Expansion Period, over the counter sales are made, in any one calendar year, from a qualified warehouse or distribution facility which in the aggregate, exceed 5% of the total revenues of the warehouse or distribution facility during the same calendar year. In such a situation, the taxpayer will be subject to assessment for any tax, penalty or interest that would otherwise have been due had the exemption never been applied. This over the counter sales restriction will not apply to any year subsequent to the end of the tenth year after the end of the expansion period.

(2) Fabrication and Assembly Restriction.

If during any calendar year within ten years after the end of the Expansion Period, the building or facility for which qualification for exemption was originally established is used for manufacturing, fabrication or assembly of tangible personal property, the taxpayer will be disqualified from receiving the exemption. The taxpayer will be subject to assessment for any tax, penalty or interest that would otherwise have been due had the exemption never been applied. This restriction against manufacturing, fabrication and assembly will not apply to any year subsequent to the tenth year after the end of the Expansion Period.

(3) Minimum employment restriction.

“Qualified, new or expanded warehouse or distribution facility” does not include a building or facility where the average monthly full time employment (including full time equivalent employees) for each calendar year at the facility is less than 300 West Virginia domiciled, West Virginia residents. If during any calendar year within 10 years after the end of the Expansion Period, the average monthly full time employment at the building or facility for which qualification for exemption was originally established, is fewer than 300 qualified West Virginia employees, then the taxpayer will be disqualified from receiving the exemption. The taxpayer shall be subject to assessment for any tax, penalty or interest that would otherwise have been due had the exemption never been applied. This restriction against having fewer than 300 qualified West Virginia employees shall not apply to any year subsequent to the tenth year after the end of the Expansion Period.

Any statute of limitations set forth in W. Va. Code § 11-10-1 *et seq.*, for assessment of any tax, penalty or interest provided for above shall not close until 5 years subsequent to the end of the first calendar year in which prohibited over-the-counter sales or manufacturing occurred or in which the average monthly full time employment at the facility fell to less than 300 qualified West Virginia employees.

**¶ 515 Agents and Contractors Assertion of Principal’s Exemption**

*Law:* W. Va. Code § 11-15-8d.

As a general rule, an agent cannot assert an exemption to the Sales and Use Tax to which his principal is entitled. This provision was intended to eliminate the practice of contractors purchasing materials as agent to be used on a job because the business having the contracting done could have asserted an exemption if it purchased the materials. As a result, manufacturers, natural resource producers, public utilities and other businesses, exempt from Sales Tax, pursuant to W. Va. Code § 11-15-9(b)(2), began to avoid the requirement that their contractors pay the Sales Tax on construction contracts by separately purchasing the materials themselves and hiring the contractor to provide only the labor required to complete the work on the contract.

The Legislature recognized the futility of requiring exempt taxpayers to specifically structure their transactions to avoid the Sales Tax. Effective July 1, 2007, the Legislature revised W. Va. Code § 11-15-8d to allow contractors to purchase services, machinery, supplies and materials to be directly used or consumed in a construction contract for a principal entitled to claim the refundable exemption provided by W. Va. Code § 11-15-9(b)(2), exempt from Sales Tax. Contractors engaged in construction, alteration, repair or improvement of a new or existing natural gas compressor station or gas transmission line having a diameter of twenty inches or more are not entitled to assert this exemption even though the purchaser would be able to claim the refundable exemption provided by W. Va. Code § 11-15-9(b)(2) if it had purchased the goods or services directly. Contractors may also assert the exemption provided by W. Va. Code § 11-15-9n, for new or expanded warehouse or distribution facilities. Effective July 1, 2012, the sales tax is not imposed upon a contractor's purchases of services, building materials, and tangible personal property (except purchases of gasoline and special fuel) relating to the construction, alteration, repair, or improvement of a structure if the purchaser of the contracting services is a nonprofit youth organization that would be entitled to claim the exemption under W. Va. Code § 11-15-9(a)(6)(E) had it purchased the services, machinery, supplies, or materials. This exception terminates June 30, 2022. The exemption is asserted by the contractor, by giving their vendors a copy of their principal's direct pay permit, which the principal provides to the contractor by giving the contractor Form CST-286, Special Contractors Exempt Purchase Certificate. Contractor will be required to file Form CST-210, Direct Pay Consumers Sales and Use Tax Returns with the Tax Commissioner to assert this exemption. (See: Administrative Notice 2007-19)

The sales tax is not imposed upon purchases made by an employee, partner or corporate officer; provided that the purchase is invoiced and paid by the employer, partnership, corporation or unincorporated organization.

#### **¶ 516 Methods for Claiming Refundable Exemptions (Refund or Credit)**

*Law:* W. Va. Code §§ 11-10-14, 11-15-9b.

Generally, refundable exemptions are asserted on the sales tax return by a purchaser who has obtained a direct pay permit (see ¶ 517 below). When a direct pay permit is not used and the vendor collects the Sales Tax or Use Tax from a purchaser within one of the refundable exemption categories, the purchaser may file a claim for a refund or credit with the State Tax Department. The amount of the tax may then either be refunded or applied as a credit against other taxes due or payable. (WVCSR § 110-15-9a.) The taxes which can be offset by a credit, in the order in which the credit must be applied are: consumer sales tax due with direct pay return, use tax with direct pay return, consumer sales tax collections, use tax collections, business and occupation tax, severance tax, corporation net income tax, estimated personal income tax, business franchise tax and personal income tax. (WVCSR § 110-15-9a.5.2.) The time limitation for filing a claim for refund is three years from the due date of the return or two years after the tax is paid. The time limitation for filing a claim for a credit is one

year after payment of the tax by the purchaser to the vendor. (WVCSR §§ 110-15-9a.7, 110-15-9a.8.)

### **¶ 517 Direct Pay Permits**

Law: W. Va. Code §§ 11-15-9d, 11-15A-3d.

Certain purchasers may present a direct pay permit in lieu of paying the Sales Tax or Use Tax to the vendor. A direct pay permit is obtained from the Tax Commissioner. The holder of a direct pay permit is required to retain records of purchases; as is a vendor who sells to a purchaser who presents a direct pay permit. (WVCSR § 110-15-14.2.1.) The permit holder then asserts any refundable exemption on the next direct pay permit return. Any purchaser entitled to claim one of the refundable exemptions described in ¶ 513 above may apply for a direct pay permit by filing Form CST-250, Consumers Sales and Use Tax Application for Direct Pay Permit. Taxpayers purchasing items using a direct pay permit are required to periodically file Form CST-210, Direct Pay Consumers Sales and Use Tax Returns with the Tax Commissioner.

A direct pay permit may not be used to purchase food or as a substitute for an exemption certificate. (WVCSR § 110-15-9c.) An example of an application for a direct pay permit is set forth at ¶ 540 below.

### **¶ 518 Materials Produced or Manufactured By a Contractor**

Law: W. Va. Code § 11-15-8a.

Materials purchased for use or consumption in contracting are generally taxable to the contractor. Similarly, materials produced or manufactured by contractors and then used in fulfilling a construction contract are also subject to Sales Tax. The tax is on the gross value of the natural resource produced or manufactured product used or consumed by the contractor, so that the contractor is treated as if these materials were purchased. If a contractor enters into a separate arm's length contract for the sale of the materials he produces or manufactures, the gross value of such materials will not be subject to tax, but presumably the contractor will be required to collect the Sales Tax from the purchaser unless the sale is otherwise exempt. When the contractor produces or manufactures a product on the job site, it is considered to be part of his contracting activity, and the gross value of the product is not subject to tax; the value of the raw materials used in the contracting activity is taxable and the purchase is not exempt as materials used or consumed in manufacturing or the production of natural resources (see ¶ 513 above). (WVCSR § 110-15-112.) Since the regulations were issued, the law has changed. At present, contractors can (in some circumstances) use their principal's direct pay permits to avoid paying the tax on materials purchased for contracts with taxpayers who are exempt from Sales Tax under W. Va. Code § 11-15-9(b)(2). (See ¶ 514 above). In such cases the change in the law supersedes the regulations and such purchases are exempt.

**Example 1:** An asphalt company enters into a contract for the paving of a shopping mall and moves its portable asphalt plant to the job site. The asphalt mix which the

company purchases and uses in its plant is taxable since it is material used in a contracting activity but the gross value of the asphalt produced is not taxable.

**Example 2:** An asphalt company enters into a contract for the paving of a small parking lot and manufactures the asphalt at its plant which it then ships to the job site. The asphalt company is not taxed on the materials which it used or consumes in its manufacturing activity since this is a refundable exemption. The asphalt company is taxed on the gross value on the asphalt used in performing its contract.

**Example 3:** An asphalt company sells asphalt to other contractors who use the asphalt in the performance of their contracts. These sales are taxable, but the materials purchased by the asphalt company which are used in producing asphalt are exempt since they are materials directly used or consumed in a manufacturing activity.

### ¶ 519 Apportionment

*Law:* W. Va. Code § 11-15-9e.

Persons engaged in exempt and nonexempt transactions or persons who use goods or services for exempt and nonexempt purposes are required to make an apportionment between exempt and nonexempt purchases and uses. Similarly, a business which as a consumer has both exempt and nonexempt business enterprises must apportion between each business enterprise. Any method of apportionment may be used as long as it is reasonable. If a business fails to keep records sufficient to justify its apportionment, all its transactions will be subject to tax. (WVCSR § 110-15-9d.)

## ¶ 520 Use Tax Exemptions

*Law:* W. Va. Code §§ 11-15A-2, 11-15A-3, 11-15A-3a, 11-15A-3b, 11-15A-3c, 11-15A-10a.

All the tangible personal property and taxable services which are exempt from imposition of the Sales Tax are also exempt from the Use Tax. The methods for claiming exemptions are the same as those for claiming sales and service tax exemptions. (WVCSR §§ 110-15-9a, 110-15-9c.) If the Sales Tax has been imposed and paid on tangible personal property or taxable services, then the property or service is not taxable under the Use Tax. Also not subject to the Use Tax are: property of a nonresident temporarily in West Virginia; property or services not taxable under the Sales Tax (for instance, professional services of a certified public accountant in Ohio for a West Virginia resident are not subject to the Use Tax); purchases by county and municipal governments - "some use of equipment" owned by the federal government. (WVCSR § 110-45-9.5.) If a person moves his residence or a business moves its operations into West Virginia, no Use Tax is imposed on the tangible personal property moved as part of such business or residence if the property was purchased at least six months before being brought into West Virginia. (WVCSR §110-15-9.7.)

## ¶ 521 Credit Against the Use Tax for Sales Tax Paid to Another State

*Law:* W. Va. Code § 11-15A-10a.

A credit may be applied against the Use Tax for any Sales Tax properly paid to another state. Historically, the Tax Department's position has been that no credit, may be claimed for sales taxes paid to a political subdivision of another state. However, see *Matkovich v. CSX Transportation, Inc.*, 238 W. Va. 238, 793 S.E.2d 888 (2016), in which the West Virginia Supreme Court of Appeals held that the sales tax credit granted by W. Va. Code § 11-15A-10a(a) provides a credit for sales tax paid both to other states and to the subdivisions and municipalities of other states.

## ¶ 522 Collection of the Sales Tax

*Law:* W. Va. Code §§ 11-10-5j, 11-15-5, 11-15-10, 11-15-13.

The Sales Tax is intended to be passed onto or paid by the consumer who purchases the property or service. After the vendor or retailer collects the tax, he retains the collected funds in trust until he is required to remit the tax. The tax due is considered a debt owed to the state. On cash sales, the tax is due at the consummation of the sale. On credit sales, the vendor must remit the tax due on the return filed for the month in which the credit sale occurred. On conditional sales, where possession is delivered to the buyer and title is retained by the seller, the tax must be collected within 30 days of the transfer of possession. (WVCSR § 110-15-4.4.1.) If the sale is a lease, the sales and service tax is to be computed and collected upon each rental payment. Where the lessee exercises an option to purchase the property leased, the tax must be collected on the remaining portion of the sale price. (WVCSR § 110-15-4.4.2.)

## **¶ 523 Collection of the Use Tax**

*Law:* W. Va. Code §§ 11-15A-1, 11-15A-6, 11-15A-7, 11-15A-22.

An out-of-state retailer engaging in business in West Virginia (meaning a retailer with an office or other place of business, subsidiary or agent in West Virginia) is required to collect the Use Tax on sales of tangible personal property, custom software and services for delivery into West Virginia which is intended for use in West Virginia. An out-of-state retailer who does not engage in business in the state may be authorized by the Commissioner to collect the Use Tax if the retailer furnishes adequate security that the tax collected will be paid. (WVCSR § 110-15-4.4.)

An out-of-state retailer engaging in business in West Virginia means a retailer with an office or other place of business, subsidiary, or agent in West Virginia. Effective January 1, 2014, an out-of-state retailer engaging in business in West Virginia also includes any retailer that is related to (or part of a unitary business with) a person, entity or business that is a subsidiary of the retailer, or is related to (or unitary with) the retailer as a related entity, a related member or part of a unitary business that meets one of these four additional criteria: (1) maintains an office, distribution house, sales house, warehouse or other place of business in-state pursuant to an agreement with or in cooperation with the related retailer; (2) performs services in-state in connection with tangible personal property or services sold by the retailer, or any related entity, related member or part of the unitary business; (3) performs services in-state (by any agent, or representative (by whatever name called), or employee) in connection with tangible personal property or services sold by the retailer, or any related entity, related member or part of the unitary business; or (4) solicits business in-state for or on behalf of the retailer, or any related entity, related member or part of the unitary business, directly, or through or by an agent, representative or employee located in, or present in-state.

The retailer may also collect a certificate of exemption or direct pay permit in lieu of the tax. (WVCSR § 110-15-4.3.) Each retailer engaging in business in West Virginia is required to submit to the Tax Commissioner a list of the agents operating in West Virginia and any places of business located in West Virginia. A permit issued to a retailer to collect the Use Tax may be cancelled or revoked for failure to comply with the West Virginia law. (WVCSR § 110-15-16.)

## **¶ 524 Bond Required of Nonresident Contractors for Payment of Use Tax**

*Law:* See W. Va. Code § 11-15-8b.

Every nonresident contractor who is to perform a contract within the state must register with the State Tax Commissioner and deposit into the Contractor's Use Tax Fund an amount equal to 6% of the total amount the contractor will receive for performance of his contract. This amount will be held until completion of the contract and the determination of the Use Tax due from such contractor. In lieu of a cash deposit, a contractor may provide a corporate surety bond in form and amount which the Commissioner deems is sufficient to guarantee the payment of any Use Tax the contractor may owe on contract. If a foreign contractor has a number of contracts in the

state, the Commissioner may allow a contractor to post an umbrella corporate surety bond in an amount and form which the Commissioner deems sufficient. (WVCSR § 110-15-8b.) Purchases made out-of-state and used in-state by nonresident contractors are subject to the Use Tax. If a nonresident contractor brings machinery, materials, supplies or equipment into the state for the performance of a job, he must pay Use Tax on such assets. To compute the purchase price subject to tax, the purchase price is apportioned according to the proportion of the useful life of the equipment that it is “used” in the state. “Used in the state” includes the time that the property is present in the state. (WVCSR §110-15-110.)

### **¶ 525 Collection of Use Tax from Certain Out-of-State Volume Retailers**

*Law:* W. Va. Code § 11-15A-6a.

Mail order houses are generally not “doing business” in West Virginia under the general definition. However, such foreign retailers are considered to be “doing business” in the state and must collect the Use Tax if a retailer engages in any of the following activities within West Virginia:

- (1) Soliciting orders by television shopping network or orders taken by mail or phone where such shopping system is broadcast by an in-state cable network;
- (2) Soliciting orders by television or radio broadcasts or by printed material where such broadcasts or printing is done within the state and intended primarily for residents of the state (advertising in radio, television and newspapers located in the state is presumed to be primarily directed at in-state residents);
- (3) Soliciting orders by mail if such solicitations are “substantial and reoccurring” and if the retailer benefits from any banking, financial, debt collection, telecommunication or marketing activities occurring in this state or from an authorized installation, servicing or repair facility in the state (whether such facility is operated by the retailer, a related or unrelated party);
- (4) If an out-of-state retailer sells products in West Virginia and has a franchisee or licensee in this State under the retailer’s trade name, the franchisee or licensee may be required to collect the tax; and
- (5) A retailer who contracts with an in-state cable television network and solicits orders by means of such cable network.

To assure constitutionality, all of the above activities are subject to the proviso that the retailer must have a “physical presence in this state in the form of employees, officers, agents, or sales outlets in this state, or any other presence that provides the necessary minimum contacts for a constitutionally sufficient nexus for a state to require

such a retailer to collect and *remit* use taxes.” However, the legislature may modify or eliminate the “physical presence” language as a result of the June 21, 2018 decision by the United States Supreme Court in *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2018 WL 3058015 (June 21, 2018) available at [https://www.supremecourt.gov/opinions/17pdf/17-494\\_j4el.pdf](https://www.supremecourt.gov/opinions/17pdf/17-494_j4el.pdf). In *Wayfair*, the U.S. Supreme Court overturned the prohibition on states requiring businesses to collect and remit sales taxes on transactions within a state unless the business has a physical presence within the state. With the “physical presence” test gone, many states will likely pass laws requiring out-of-state retailers with no physical presence in the state to collect sales tax on sales to residents within the state in order to increase tax revenue. In response to the *Wayfair* decision, however, Governor Jim Justice made a public statement saying that he does not support any further taxation of the state’s residents. Governor Justice stated that, if there would be any changes to the way West Virginia collects sales taxes, it would be a job for the state legislature. See *also* Jackie Whetzel, Governor, Finance chair do not support internet sales tax, HEARLD-DISPATCH (Jun. 22, 2018), [http://www.register-herald.com/legislature/governor-finance-chair-do-not-support-internet-sales-tax/article\\_dc36200a-7667-11e8-81e6-d34db8ba33b7.html](http://www.register-herald.com/legislature/governor-finance-chair-do-not-support-internet-sales-tax/article_dc36200a-7667-11e8-81e6-d34db8ba33b7.html)).

Also see the discussion of out-of-state retailer engaging in business in this state in ¶ 523 above.

#### **¶ 526 Vendor Liability for the Sales Tax**

*Law:* W. Va. Code §§ 11-9-1 *et seq.*, 11-15-4a, 11-15-6.

If a vendor or retailer fails to collect and remit the Sales Tax, he is personally liable and subject to penalties, except that persons entitled to a credit for taxes paid on purchases may apply the credit against the amount of tax collected. (WVCSR §§ 110-15-4.5, 110-15-5.2.) The vendor has the burden of showing that the tax should not have been collected on a transaction, unless the vendor in good faith takes from the purchaser a direct pay permit or exemption certificate. (WVCSR § 110-15-6.1.) There is a presumption that a sale is taxable if the vendor is unable to produce a direct pay permit or exemption certificate. (WVCSR § 110-15-6.)

#### **¶ 527 Consumer Liability for the Sales Tax**

*Law:* W. Va. Code §§ 11-10-7, 11-10-8, 11-15-4b.

A purchaser is personally liable for payment of the Sales Tax. The Tax Commissioner may make an assessment against the purchaser, but the vendor may be relieved of liability only upon notification in writing to the Commissioner of a purchaser’s refusal to pay the Sales Tax or failure to sign or present a proper direct pay permit or exemption certificate. (WVCSR § 110-15-4.8.)

#### **¶ 528 Liability for the Use Tax**

*Law:* W. Va. Code §§ 11-9-1 *et seq.*, 11-15A-9, 11-15A-10a, 11-15A-11, 11-15A-18

The user of tangible personal property, custom software or taxable services in this state is liable for the Use Tax and is responsible for paying the tax. Liability is not extinguished until the tax is paid. (WVCSR § 110-15-6.1.1.) The purchaser or user can avoid tax liability by producing a receipt which shows the tax was paid or by presenting evidence that the purchase was exempt. A retailer who collects the Use Tax is liable for the amount collected and the retailer has the burden of proving that a sale was not taxable. If a retailer is required to collect the Use Tax and fails to do so, the retailer is personally liable for the uncollected tax. (WVCSR § 110-15-6.)

## **¶ 529 General Transaction Sourcing Rules**

*Law:* W. Va. Code §§ 11-15B-14 through 11-15B-18.

West Virginia has adopted the sourcing rules of the Streamlined Sales Tax Agreement. For Sales and Use Tax purposes retail sales of tangible personal property, custom software and taxable services (hereinafter sometimes collectively referred to as “Product”) are sourced as follows:

- (1) When the Product is received by purchaser at seller’s business location, it is sourced to that location;
- (2) When the Product is not received by purchaser at seller’s business location, it is sourced where received by purchaser or purchaser’s representative;
- (3) When subsections (1) and (2) above do not apply, the sale is sourced to purchaser’s address; and
- (4) When none of the previous subsections apply, the sale is sourced to the location from which the Product shipped.

For purposes of these sourcing rules, the terms “Receive” and “Receipt” mean: taking possession of tangible personal property; making first use of services and taking possession or making first use of computer software or digital goods. These terms do not include possession by a shipping company on behalf of purchaser. The general sourcing rules apply to vendors for use in determining where to source the sale of a Product. They do not affect purchaser’s obligation to remit Use Tax and do not apply to telecommunication services.

Leases or rentals of tangible personal property, other than vehicles or transportation equipment, which require periodic rent payments, are sourced to the primary property location of the leased property at the time of each payment. Leases or rentals that do not require periodic rent payments are sourced according to the rules applicable to sales. Leases or rentals of motor vehicles, trailers, semi-trailers and aircraft that do not qualify as transportation equipment are sourced to the primary location of the leased property if the lease requires periodic payments or at the point of delivery to lessee, if the lease does not required periodic lease payments. Leases of transportation equipment are sourced the same as retail sales. Transportation

equipment is defined as: a) locomotives and rail cars; b) trucks and truck-tractors with a gross vehicle weight of over ten thousand pounds, trailers, semitrailers and buses; and c) aircraft, licensed and used to carry persons or property in interstate commerce.

Telecommunication services are generally sourced to the place of customer's primary use. Prepaid phone cards and prepaid wireless services are generally sourced to the location the sale. (W. Va. Code § 11-15B-19).

### **¶ 530 Sale of Entire Business**

*Law:* W. Va. Code §§ 11-10-11(f), 11-9-7.

The successor in business of a person who sells out his business or stock of goods or who ceases doing business is liable for the payment of any Sales or Use Tax, plus any penalties and interest. (WVCSR § 110-15-4.9.) The purchase or acquisition of a business or substantially all of its assets gives rise to successor liability whether the consideration is money, property, assumption of liabilities or cancellation of indebtedness. (WVCSR §§ 110-15-4.9.1, 110-15-4.9.2.) Successor liability does not attach to sales or transfers pursuant to assignments for the benefit of creditors, to deeds of trusts, security interests, or certain liens unless the previous owner receives money. (WVCSR § 110-15-4.9.6.) The purchaser of a business may retain a portion of the purchase price to absolve the tax liability or obtain a certificate from the Tax Department that no Sales or Use Tax is due. (WVCSR § 110-15-4.9.7.)

### **¶ 531 Drop Shipments**

*Law:* W. Va. Code § 11-15-3, 11-15B-24(a)(8)

Drop shipments are the logistical arrangement where a seller of a good, either manufacturer or wholesaler, delivers the good at the behest of a third party to the third party's customer. Drop shipments are viewed as two transactions: (1) the sale between the manufacturer and the retailer or wholesaler as the third party vendor; and (2) the sale from the retailer or wholesaler as the third party vendor to the customer. The West Virginia Tax Code allows the third party vendor to claim a resale exemption via an exemption certificate provided by its customer. For the second transaction between the third party vendor and the customer, the vendor is required to collect the tax from the purchaser and pay that amount to the Tax Commissioner.

### **¶ 532 Bundled Transactions**

*Law:* W. Va. Code § 11-15B-2(b), W. Va. Code R. §110-15-114.2.

A bundled transaction is a sale involving two or more products sold for one non-itemized price, often combining the sale of a good with an essential service, such as installation. A bundled transaction also occurs where there is a sale of both taxable and tax-exempt goods and the purchase price of the taxable product is *de minimis*. If the true object of the transaction is the purchase of the tangible personal property or taxable services, the entire charge is taxable.

### **¶ 533 Sales Tax or Use Tax Cannot Be Assumed by Vendor**

*Law:* W. Va. Code §§ 11-9-7, 11-15A-8.

It is unlawful for a vendor or retailer to advertise or represent to the public or any particular purchaser that the vendor or retailer will assume or absorb any part or all of the Sales or Use Tax. (WVCSR § 110-15-4.6.) Any person found guilty of absorbing or assuming any part of a tax required to be collected is guilty of a misdemeanor and will be fined not less than \$100 or more than \$1,000 or imprisoned in the county jail for not more than six months or both. (WVCR § 110-15-4.6.) The regulations recognize that under some circumstances, it is not practical for the vendor to add the Sales Tax to the purchase price, in which case the tax may be added to the purchase price: provided, that proper signage is posted to notify customers that the tax is included in the purchase price.

### **¶ 534 Gasoline and Special Fuel**

*Law:* See §§ 11-15-3, 11-15-18b, 11-15A-13.

Sales of gasoline and special fuels in West Virginia are subject to the Motor Fuels Excise Tax (see ¶ 1005, chapter 10 of this Guidebook) which consist of a flat rate component of 20.5¢ per gallon (or, in the case of alternative fuels, per gallon equivalent), imposed by W. Va. Code § 11-14C-5, plus a variable rate component imposed by W. Va. Code §§ 11-15-18b or 11-15A-13a. The variable rate component is imposed at the rate of 5% of the average per gallon price of motor fuel. The variable component is based on the average wholesale price of gasoline and special fuel as determined by the State Tax Commissioner on or before the first day of December each year. Pursuant to Senate Bill 1006, which passed in the First Special Session of the 83<sup>rd</sup> Legislature in 2017, beginning July 1, 2017 the variable component of the tax may not be less than 15.2 cents per gallon of motor fuel. Typically, any change in rate is effective each January 1 and the new rates remain in place for the calendar year; however, the increase in the rate change made by Senate Bill 1006 became effective July 1, 2017 and those rates will remain in place until December 31, 2017. Sales Tax is imposed at the wholesale level when fuel is sold and delivered in West Virginia by a distributor or importer, unless it is delivered to another distributor for resale within West Virginia. Gasoline or special fuel contained in motor carriers or in construction equipment, mining equipment, track maintenance equipment or similar; equipment brought into West Virginia is subject to use tax, with credit allowed for Sales Tax paid to another state. Gasoline and special fuel upon which Sales or Use Taxes have been paid are not subject to tax.

### **¶ 535 Sales Tax Returns**

*Law:* W. Va. Code §§ 11-15-16, 11-15-19, 11-15-20, 11-15-21.

A vendor liable for the Sales Tax is required to file a return before the 20th day of each month for monies collected during the preceding month. The return is required to show the business's total gross proceeds, gross proceeds on which the tax is based, the amount of liability and any further information necessary to the computation and

collection of the tax. The requirement that monthly returns be filed may be changed by agreement with the Tax Commissioner. If the tax liability does not exceed an average monthly amount of \$250, the taxpayer may file quarterly returns. An annual return must also be submitted presenting the same information as required on the monthly returns.

*Accelerated payment.* Beginning June 20, 2015, and each June 20<sup>th</sup> thereafter, if a vendor's tax liability exceeds an average monthly amount of \$100,000 during the preceding calendar year, the vendor must remit the tax attributable to the first fifteen days of June by June 20. At the election of the vendor, the vendor may remit an additional 50% of the taxes due for the month of May. A special rule is provided for businesses that were not in business for all of the preceding calendar year. A taxpayer required to make an accelerated payment by June 20 may take a credit for the amount of the accelerated payment on its July return

### **¶ 536 Use Tax Returns**

*Law:* W. Va. Code §§ 11-15-16, 11-15A-10.

Effective July 1, 2008, the filing of combined Sales Tax and Use Tax returns has been required. A retailer liable to collect the Use Tax is required to file returns showing the same information as and on the same schedule as set forth in ¶ 533 above.

### **¶ 537 Maintenance of Records**

*Law:* W. Va. Code §§ 11-15-14, 11-15-23, 11-15-25, 11-15A-21.

The records of taxable sales and exchanges under the Sales Tax and the Use Tax must be maintained for at least three years or so long as the records are applicable to an assessment or refund if that is longer. (WVCSR § 110-15-14.1.1.) Separate records must be maintained where a vendor is engaged in taxable and nontaxable businesses. Failure to do so will result in a tax on the entire gross proceeds of the business. (WVCSR § 110-15-14.1.2.) Nonresidents doing business in West Virginia are required to maintain records of the Sales Tax collected, and retailers required to collect the Use Tax must account for their computation and collection. (WVCSR §§ 110-15-14.1.4, 110-15-14.2.) A retailer engaged in business in West Virginia cannot remove the records from West Virginia. A nonresident retailer or foreign corporation not doing business in West Virginia is required to make the records available to the Commissioner for examination in West Virginia or pay the traveling expenses of the Commissioner's representatives to the out-of-state place of business to examine the records. (WVCSR §§ 110-15-14.1.4, 110-15-14.2.2.)

### **¶ 538 Officer's Liability and Penalties**

*Law:* W. Va. Code § 11-15-17.

Officers of a corporation or association are personally, jointly and severally liable for nonpayment of the Sales Tax and any penalties, interest or additions. (WVCSR § 110-15-17.1.)

## ¶ 539 Procedure and Administration

*Law:* W. Va. Code §§ 11-15-32, 11-15A-28.

The West Virginia Tax Procedure and Administration Act discussed in Chapter 9 of this Guidebook applies to the consumers sales and use taxes.

## ¶ 540 Miscellaneous Examples of the Sales Tax and the Use Tax

*Law:* WVCSR §§ 110-15-8.1, 110-15-8a, 110-15-31, 110-15-129.

The regulations set forth a number of examples illustrating how various sales of properties and services are taxed. A summary of these examples follows:

*Services excepted from tax:* The following services are not subject to tax: contracting services, professional services, personal services, services by an employee for his employer, public utility services, and services purchased for resale.

*Advertising agencies:* Sales of advertising services are generally taxable. Materials and services purchased for use in providing advertising services may also be taxable unless some specific exemption applies to such purchases.

*Auctioneers and auctions:* The commissions earned by an auctioneer are subject to tax. Auctions are generally exempt as isolated transactions if conducted on the premises of the owner of the property auctioned.

*Banking:* Banks are generally exempt from tax on services rendered to their customers since they constitute professional services, consideration for the extension of credit, charges related to the transfer of intangible property, or electronic data processing services for others. The following is a complete list of the property or services for which a bank must collect Sales Tax, unless the purchaser is exempt: charges for real estate management, payments received for rental of safety deposit boxes, fees for the collection of notes and accounts of others, sales of promotional items, sales of checkbooks and similar items, and charges for research and copying.

*Beauty and barber shops:* Barber and beauty shop operators are rendering a personal service which is exempt.

*Boat and aircraft dealers:* Sales of boats not subject to the motor vehicle title tax are taxable. Sales of aircraft also are taxable.

*Bookkeeping:* A person who performs general bookkeeping and accounting services but who is not a certified public accountant is subject to tax on charges for his services.

*Coin-operated machines, vending machines:* Sales of tangible personal property or services through the use of coin-operated machines are subject to tax. The person who has control of the machine is responsible for paying the tax.

*Collection agencies:* Fees earned by a collection agency are taxable without deduction for any amounts paid to other agencies which assisted them.

*Commodity brokers:* The commissions earned from commodity brokering are subject to tax.

*Consultants:* Consultants are required to collect a tax on their fees charged unless the consultants are rendering a professional service such as doctors, lawyers, etc.

*Containers, wrapping and shipping materials:* The sale of boxes, wrapping, packaging materials, etc. to a vendor who uses such material in packing items for sale to customers is exempt as a purchase for resale. Sales of returnable containers are taxable if title does not pass to the purchaser of the material or liquid in the container.

*Country clubs:* Dues for a membership alone are not taxable but dues which are for services by a club are taxable. A safe harbor has been created and the Sales Tax is payable on 40% of the dues paid to a country club unless the club can prove to the Tax Commissioner that a lesser percentage is justified in the particular circumstances. (See, W.Va. Adm. Notice 91-16.)

*Coupons:* Store coupons, for which vendor receives no reimbursement, are treated as discounts and excluded from taxable gross proceeds of sales for sales tax purposes. Manufacturer's coupons for which the vendor is reimbursed by the manufacturer do not reduce the gross proceeds of sales and the sales tax is computed on the gross sales price without any deduction for the coupon.

*Delivery charges:* Separately stated delivery charges are subject to tax unless provided by a common carrier subject to regulation by the Public Service Commission.

*Dentists, dental laboratories, optometrists and opticians:* Services by dentists and optometrists are professional services and are exempt.

*Employee meals:* Meals served by employers as part of an employee's wages are not taxable.

*Exterminators:* Exterminators are considered to be rendering a service subject to tax.

*Farm equipment:* Sales to farmers of farm equipment are exempt if used for the commercial production of an agricultural product. Production of agricultural products ceases when the product has been transported to the sales point.

*Florists:* Sales by florists are taxable.

*Funeral directors:* Services by funeral directors directly relating to the disposition of the body of the deceased are professional services which are exempt. The sales of caskets, vaults, and other services and material not directly relating to the body of the deceased are taxable.

*Gasoline distributors:* Distributors of gas and special fuels are subject to tax upon sale of their products unless the purchaser is exempt.

*Hospitals:* Hospitals are considered to provide a professional service and are, therefore, exempt. Also, meals, drugs, and other items given to patients as part of a hospital's services are exempt, since they are part of the hospital's professional service. Hospitals are taxable on their purchases consumed in providing their services as these are not considered to be purchased for resale.

*Hotels, motels, and rooming houses:* Renting of rooms in hotels, motels, and rooming houses is subject to tax unless as a permanent place of abode for at least 30 consecutive days.

*Insurance agencies:* Insurance is an intangible and a tax is not imposed on sales of insurance by insurance agencies.

*Interior decorating:* Persons performing interior decorating are subject to tax on their charges.

*Jewelry, furniture, hardware, dry goods and apparel stores:* Sales by jewelry, furniture, hardware, dry goods and apparel stores are subject to tax. Customer trade-ins must be credited against the purchase price.

*Laundries, Laundromats, dry-cleaning:* Persons engaged in the operation of laundries, dry-cleaning and related activities are rendering a service subject to tax.

*Masseuses:* Masseuses are considered to be rendering a personal service which is exempt.

*Motor vehicle dealers:* Repair services and sales of parts are subject to Sales and Use Tax. Accessories purchased after obtaining title and possession of a car are also taxable.

*Newspapers and magazines:* The sale of newspapers and magazines is taxable unless delivered by route carrier. Purchases directly used in the printing and sale of newspapers and magazines are exempt since the business is considered to be a manufacturing activity.

*Nursing and convalescent homes:* Persons who operate nursing and convalescent homes may be rendering a personal service which is exempt from tax.

*Parking:* Rental of parking spaces is subject to tax.

*Photographers and film developers:* Persons taking photographs who develop their own film are engaged in a manufacturing activity. Their purchases are exempt only to the extent that they are *directly* used in such manufacturing activity.

*Places of amusement:* Sales by places of amusement are taxable.

*Prescription and other drugs:* Sales of prescription drugs and insulin to consumers for medical purposes are exempt from tax. Sales of non-prescription drugs are subject to tax. Drugs sold to hospitals and other health care providers for professional use are exempt.

*Printers:* Printers are considered to be manufacturers and their sales are taxable. Goods and services purchased for direct use in printing are exempt.

*Private music instruction, flight instruction and dance instruction:* Private instruction by a certified music teacher is considered to be a professional service and is exempt. Flight instruction also is considered to be a professional service and therefore exempt. Dance instruction is not considered a professional service and is subject to tax.

*Private schools:* Private schools not otherwise exempt are considered to be rendering a professional service and their fees are exempt.

*Radio and television broadcasting stations:* Sales of radio and television broadcasting time as well as advertising services rendered therewith to prepare such ads are exempt. Purchases directly used in the communication activity are likewise exempt.

*Real estate brokers:* Licensed real estate brokers are exempt from paying a tax on their commissions since they are considered to be professionals.

*Repairs to tangible personal property:* The services of persons engaged in the business of repairing tangible personal property are subject to tax.

*Restaurants and bars:* All sales of food and beverages and cover charges made by bars and restaurants are subject to tax. All purchases made by restaurants and bars are subject to tax unless they are purchases for resale.

*Royalties:* Royalty payments with respect to mineral interests are not subject to tax.

*Sales by state and local government:* State governmental units which render services that are in competition with businesses are required to collect the tax from the consumers. Also, governmental units which sell personal property to consumers must collect the tax thereon unless otherwise exempt.

*Sales to persons rendering personal services:* Sales to persons rendering personal services such as barbers, beauticians, etc. are subject to tax if used in providing their services, but are exempt if resold to customers in a separate transaction which is subject to tax.

*Service stations:* Persons operating a gasoline service station are generally taxable on the services they render.

*Sight-seeing trips, plane and boat rides:* Fees charged for sight-seeing trips, plane and boat rides in West Virginia are subject to tax unless regulated by the Public Services Commission or unless for tourism or pleasure.

*Summer camps, camping:* Fees charged by non-educational summer camps are subject to Sales and Use Tax as is the leasing of space for a trailer or camper. Fees charged by educational summer camps are exempt.

*Tanning salons:* Charges made by tanning salons are taxable.

*Trading stamps, coupons and meal tickets:* The exchange of goods for trading stamps, coupons, etc. is considered the sale of these goods and the seller shall collect the tax. The sale of a meal ticket is not taxable. However, tax is due when the meal ticket is redeemed.

*Trailer parks:* Rental spaces for trailers in a trailer park are subject to tax if leased for less than 30 days.

*Travel agencies:* A travel agency's commissions for arranging reservations are subject to tax. A travel agency that arranges group or package tours is taxable on the gross profit realized on such group package or tour. However, commissions received by travel agents from out-of-state vendors are exempt. (W. Va. Code § 11-15-9(a)(45))

*Warranties:* Warranties sold separately are subject to tax.

*Well servicing:* Well servicing, including tangible personal property consumed in such activity, constitutes a service on which a tax must be collected.

## **¶ 541 Local Sales and Use Taxes**

*Law:* W. Va. Code §§ 7-22-7, 7-22-9, 7-25-12, 8-1-5a, 8-13C-1, et seq., 11-10-11c.

Municipalities in the state that do not impose a municipal business and occupation tax, or which have repealed or reduced their existing business and occupation tax, are authorized to impose an Alternative Municipal Sales and Use Tax at a rate not to exceed 1%, to be collected on transactions occurring within the corporate boundary of the municipality.

The transactions upon which the municipal sales and use taxes imposed pursuant to Chapter 8, Article 13C are collected are identical to the tax base of the state Sales Tax imposed pursuant to Chapter 11, Article 15, except that the municipal tax does not apply to sales of motor vehicles and motor fuel or to charges for satellite television service. All exemptions from the state Sales Tax also apply to the alternative municipal sales and use tax. All municipal sales and use taxes are required to be collected by the State Tax Department which distributes the proceeds to the municipality imposing the tax.

In addition, "Qualified Municipalities" are authorized to impose a Pension Relief Municipal Sales and Use Tax at a rate not to exceed 1%, without having to repeal their existing business and occupation tax. For purposes of this tax, the term Qualified Municipality includes a municipality where the weighted average of the percentages to which its policeman's and fireman's pension relief funds are fully funded is 3 percent or less. In addition, the municipality must present to the Legislature's, Joint Committee on Government and Finance a plan to remove the unfunded liabilities in its policeman and fireman pension and relief plans. The proceeds from a Pension Relief Municipal Sales and Use Tax must be dedicated to reducing the unfunded liabilities in the municipality's pension and relief plans.

In 2007, the Legislature established the Municipal Home Rule Pilot Program for five municipalities pursuant to which municipalities participating in the program may adopt ordinances, acts, resolutions, rules and regulations they are otherwise prohibited from adopting. For example, municipalities that impose a business and occupation tax may not impose a sales tax unless they repeal their business and occupation tax.

In 2013, the Legislature extended the Municipal Home Rule Pilot Program for another five years and allowed an additional 16 municipalities to participate in the Pilot Program. The 2013 legislation provided that municipalities participating in Phase II of the Pilot Program may impose no new taxes except that they may impose a sales tax, at a rate not to exceed 1%, if they reduce their business and occupation tax. In 2015, the Legislature amended the Municipal Home Rule Pilot Program to allow up to 34 municipalities to participate in the Program.

As of July 1, 2018, forty-two West Virginia municipalities impose 1% sales and use taxes pursuant to either W. Va. Code § 8-1-5a or W. Va. Code § 8-13C-14 and 15. These municipalities are Athens, Beckley, Bluefield, Bolivar, Bridgeport, Charles Town, Charleston, Clarksburg, Davis, Dunbar, Elizabeth, Elkins, Fairmont, Follansbee, Grafton, Harpers Ferry, Harrisville, Huntington, Martinsburg, Milton, Moundsville, New Cumberland Nitro, Parkersburg, Pennsboro, Princeton, Quinwood, Ranson, Romney, Rupert, Saint Albans, Shepherdstown, Sistersville, South Charleston, Thomas, Vienna, Wayne, Weirton, Weston, Wheeling White Hall and Williamstown. Additionally, the town of Moorefield imposes a 0.5% sales and use tax.

The West Virginia Tax Commissioner has the exclusive responsibility for administering, collecting, and enforcing local sales and use taxes and excise taxes, and

the State Tax Department may assess a fee (not to exceed 5% of total collections) for its administration, collection, and enforcement of such taxes. The tax base for state and municipal sales and use taxes must be identical except that municipal sales/use taxes may not be imposed on sales of motor fuel, motor vehicles and satellite television service. To calculate the tax, the combined rate is applied to the taxable sales price and rounded to the nearest full cent. The Department points out that taxpayers should report local sales and use taxes when electronically filing the West Virginia combined sales and use tax return and that the local tax is reported on the return's municipal schedules. The Department, on its website, also provides guidance about who is required to collect, exemptions, and when to charge a local tax. Examples are given describing when state taxes and local taxes apply.

Resort area districts may levy a resort service fee on purchases of certain goods and services. The rate of a resort service fee shall not exceed 5% of the purchase price of the goods or services upon which the resort service fee is levied.

A county commission may levy a special district excise tax on sales of tangible personal property and services made within the boundaries of economic opportunity development districts approved by the Legislature (W. Va. Code § 7-22-12) and municipalities may do the same (W. Va. Code § 8-38-9). Proposed economic opportunity development districts must meet several statutory requirements, including a threshold capital investment amount of more than \$75 million. The three approved economic opportunity development districts under W. Va. Code § 7-22-12 are the Fort Henry Economic Opportunity Development District, in Ohio County; the Charles Pointe Economic Development District, in Harrison County; and the University Town Centre Economic Development District, in Monongalia County. The one approved economic opportunity development districts under W. Va. Code § 8-38-9 is the South Charleston Park Place Economic Opportunity Development District. The tax base and tax rate of the special district excise tax are identical to that of the state sales and use tax.

## ¶ 542 Sales Tax And Use Tax Forms

At the time of publication of this chapter, the following Sale Tax and Use Tax forms were available at the Tax Commissioner's website at:

<http://tax.wv.gov/Business/SalesAndUseTax/Pages/SalesAndUseTax.aspx>

<b>Form</b>	<b>Description</b>
CST-AF2	Claim for Refund or Credit of Sales Tax Paid to the State Tax Department
CST-200CU	West Virginia Combined Sales and Use Tax Return Effective July 1, 2017 (form for prior periods also available)
CST-210	Direct Pay Consumers Sales and Use Tax Return for Filing Periods Prior to October 1, 2011
CST-220	Use Tax Return - For filing periods prior to July 1, 2008
CST-240	Claim for Refund or Credit of Sales Tax Paid to a Vendor/Reseller
CST-250	Consumers Sales and Use Tax Application for Direct Pay Permit

CST-270 Liquor / Wine Distribution Return (various effective dates)  
CST-281 Factory Built Homes Certificate of Principal Use - Relates to TSD-315  
CST-282 Nonresident Contractors Consumer Sales and Service Tax and Use Tax  
Bond  
CST-283 Nonresident Contractor Consumer Sales and Service Tax and Use Tax  
Cash Bond  
CST-284 Tangible Personal Property Listing For Non-Resident Contractor  
CST-286 Special Contractors Exempt Purchases Certificate  
CST-290 Consumers Sales and Use Tax Certificate of Capital Improvement  
F0003 Certificate of Exemption - New form: Replaces WV-2c-280. Instructions  
FBH-100 Factory-Built Homes Fee  
FSF-200 West Virginia Fireworks Safety Fee Return  
RTL Various Special District Excise Tax Forms (RTL-002, RTL-006, RTL-007)

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