

AN ORDINANCE OF COUNCIL AMENDING, MODIFYING AND RE-ENACTING ARTICLE 776 OF THE CODIFIED ORDINANCES OF THE CITY OF HUNTINGTON, AS REVISED, CONCERNING MUNICIPAL SALES, SERVICES AND USE TAX.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF HUNTINGTON, CABELL AND WAYNE COUNTIES, WEST VIRGINIA, that Article 776 of the Codified Ordinances of the City of Huntington, as revised, are hereby **AMENDED, MODIFIED** and **RE-ENACTED** to read as follows:

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ARTICLE 776

MUNICIPAL SALES, SERVICES AND USE TAX

West Virginia Code Section 8-1-5a created a pilot program known as the Municipal Home Rule Pilot Program granting five selected Class I, Class II and/or Class III municipalities and/or metro governments the authority to enact any ordinances, acts, resolutions, rules and regulations not contrary to the constitutions of the United States or West Virginia, federal law or chapters sixty-a, sixty-one and sixty-two of the West Virginia Code. On or about December 21, 2007 the City of Huntington applied to the Municipal Home Rule Board to be selected as one of the five municipalities to be authorized to have a Municipal Home Rule Pilot Program. Thereafter the City was notified that it was selected to be one of the municipalities authorized to undertake a Municipal Home Rule Pilot Program.

West Virginia Code Section 8-1-5a provides that a pilot municipalities selected to participate in the pilot program shall have the following powers: (1) the authority to pass any ordinances, acts, resolutions, rules and regulations not contrary to the constitutions of the United States or West Virginia, federal law or chapters sixty-a, sixty-one and sixty-two of the West Virginia Code as specified in its written and approved plans: Provided, that the pilot municipalities may not adopt any ordinance, rule, regulation or resolution or take any action that would create a defined contribution employee pension or retirement plan for its employees currently covered by a defined benefit pensions plan; and (2) any other powers necessary to implement the provisions of its approved plan.

The City's Municipal Home Rule Pilot Program approved plan provides for the enactment of a municipal sales, service and use for the sale of all goods within the corporate limits.

776.01 General consumers sales, service and use tax imposed.

The purpose of this article is to impose a municipal sales, service and use tax in accordance with the Municipal Home Rule Pilot Program.

776.02 Findings.

The City Council hereby finds and declares that:

(1) It is the intent of the Council that the municipal sales, service and use tax imposed by the provisions of this article, be complementary laws and wherever possible be construed and applied to accomplish such intent as to the imposition, administration and collection of these taxes; and further, that the taxes imposed pursuant to this article shall be in all respects consistent with the imposition and collection of the state sales, service and use tax pursuant to articles 15, 15-a, and 15-b, Chapter eleven of the West Virginia Code.

(2) The Council understands that the collection of this tax will be accomplished through the voluntary and cooperative efforts of the State Tax Commissioner and his/her office and that the City of Huntington is without authority to compel the Tax Commissioner's cooperation in this regard. Further, remittance of all local sales, service and use taxes to the West Virginia Department of Revenue will allow for the efficient and consistent collection of local sales, service and use taxes for the state and its political subdivisions. Should any provision contained herein conflict with state law, the same shall be stricken and be of no further force and effect.

(3) On and after the first day of April, 2011, the taxes levied by this article shall also be administered and collected in accordance with the provisions of this article and state law.

(4) It is further the intention of Council to implement and enact Article 9a and 9b, Chapter 11 of the West Virginia Code, as enacted and amended, as if the same were included in their entirety herein.

776.03 Definitions.

(a) *General.* -- When used in this article, words defined in subsection (b) of this section have the meanings ascribed to them in this section, except in those instances where a different meaning is provided in this article or the context in which the word is used clearly indicates that a different meaning is intended by the Council.

(b) *Definitions.* --

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

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

(3) "Contracting":

(A) *In general.* -- "Contracting" means and includes the furnishing of work, or both materials and work, for another (by a sole contractor, general contractor, prime contractor, subcontractor or construction manager) in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any

part thereof, or for removal or demolition of a building or structure, or any part thereof, or for the alteration, improvement or development of real property. Contracting also includes services provided by a construction manager so long as the project for which the construction manager provides the services results in a capital improvement to a building or structure or to real property.

(B) *Form of contract not controlling.* -- An activity that falls within the scope of the definition of contracting constitutes contracting regardless of whether the contract governing the activity is written or verbal and regardless of whether it is in substance or form a lump sum contract, a cost-plus contract, a time and materials contract, whether or not open-ended, or any other kind of construction contract.

(C) *Special rules.* -- For purposes of this definition:

(i) The term "structure" includes, but is not limited to, everything built up or composed of parts joined together in some definite manner and attached or affixed to real property or which adds utility to real property or any part thereof or which adds utility to a particular parcel of property and is intended to remain there for an indefinite period of time;

(ii) The term "alteration" means, and is limited to, alterations which are capital improvements to a building or structure or to real property;

(iii) The term "repair" means, and is limited to, repairs which are capital improvements to a building or structure or to real property;

(iv) The term "decoration" means, and is limited to, decorations which are capital improvements to a building or structure or to real property;

(v) The term "improvement" means, and is limited to, improvements which are capital improvements to a building or structure or to real property;

(vi) The term "capital improvement" means improvements that are affixed to or attached to and become a part of a building or structure or the real property or which add utility to real property, or any part thereof, and that last or are intended to be relatively permanent. As used herein, "relatively permanent" means lasting at least a year in duration without the necessity for regularly scheduled recurring service to maintain the capital improvement. "Regular recurring service" means regularly scheduled service intervals of less than one year;

(vii) Contracting does not include the furnishing of work, or both materials and work, in the nature of hookup, connection, installation or other services if the service is incidental to the retail sale of tangible personal property from the service provider's inventory: *Provided*, That the hookup, connection or installation of the foregoing is incidental to the sale of the same and performed by the seller thereof or performed in accordance with arrangements made by the seller thereof. Examples of transactions that are excluded from the definition of contracting pursuant to this subdivision include, but are not limited to, the sale of wall-to-wall carpeting and the installation of wall-to-wall carpeting, the sale, hookup and connection of mobile homes, window air conditioning units, dishwashers, clothing washing machines or dryers, other household appliances, drapery rods, window shades, venetian blinds, canvas awnings, free-standing industrial or commercial equipment and other similar items of tangible personal property. Repairs made to the foregoing are within the definition of contracting if the repairs involve permanently affixing to or improving real property or something attached thereto which extends

the life of the real property or something affixed thereto or allows or intends to allow the real property or thing permanently attached thereto to remain in service for a year or longer; and

(viii) The term "construction manager" means a person who enters into an agreement to employ, direct, coordinate or manage design professionals and contractors who are hired and paid directly by the owner or the construction manager. The business activities of a "construction manager" as defined in this subdivision constitute contracting, so long as the project for which the construction manager provides the services results in a capital improvement to a building or structure or to real property.

(4) "Directly used or consumed" in the activities of manufacturing, transportation, transmission, communication or the production of natural resources means used or consumed in those activities or operations which constitute an integral and essential part of the activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the activities.

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

(i) In the case of tangible personal property, physical incorporation of property into a finished product resulting from manufacturing production or the production of natural resources;

(ii) Causing a direct physical, chemical or other change upon property undergoing manufacturing production or production of natural resources;

(iii) Transporting or storing property undergoing transportation, communication, transmission, manufacturing production or production of natural resources;

(iv) Measuring or verifying a change in property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

(v) Physically controlling or directing the physical movement or operation of property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

(vi) Directly and physically recording the flow of property undergoing transportation, communication, transmission, manufacturing production or production of natural resources;

(vii) Producing energy for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

(viii) Facilitating the transmission of gas, water, steam or electricity from the point of their diversion to property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

(ix) Controlling or otherwise regulating atmospheric conditions required for transportation, communication, transmission, manufacturing production or production of natural resources;

(x) Serving as an operating supply for property undergoing transportation, manufacturing production or production of natural resources, or for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

(xi) Maintaining or repairing of property, including maintenance equipment, directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

(xii) Storing, removal or transportation of economic waste resulting from the activities of manufacturing, transportation, communication, transmission or the production of natural resources;

(xiii) Engaging in pollution control or environmental quality or protection activity directly relating to the activities of manufacturing, transportation, communication, transmission or the production of natural resources and personnel, plant, product or community safety or security activity directly relating to the activities of manufacturing, transportation, communication, transmission or the production of natural resources; or

(xiv) Otherwise using as an integral and essential part of transportation, communication, transmission, manufacturing production or production of natural resources.

(B) Uses of property or services which do not constitute direct use or consumption in the activities of manufacturing, transportation, transmission, communication or the production of natural resources include, but are not limited to:

(i) Heating and illumination of office buildings;

(ii) Janitorial or general cleaning activities;

(iii) Personal comfort of personnel;

(iv) Production planning, scheduling of work or inventory control;

(v) Marketing, general management, supervision, finance, training, accounting and administration; or

(vi) An activity or function incidental or convenient to transportation, communication, transmission, manufacturing production or production of natural resources, rather than an integral and essential part of these activities.

(5) "Directly used or consumed" in the activities of gas storage, the generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business means used or consumed in those activities or operations which constitute an integral and essential part of those activities or operation, as contrasted with and distinguished from activities or operations which are simply incidental, convenient or remote to those activities.

(A) Uses of property or consumption of services which constitute direct use or consumption in the activities of gas storage, the generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business include only:

(i) Tangible personal property, custom software or services, including equipment, machinery, apparatus, supplies, fuel and power and appliances, which are used immediately in production or generation activities and equipment, machinery, supplies, tools and repair parts used to keep in operation exempt production or generation devices. For purposes of this subsection, production or generation activities shall commence from the intake, receipt or storage of raw materials at the production plant site;

(ii) Tangible personal property, custom software or services, including equipment, machinery, apparatus, supplies, fuel and power, appliances, pipes, wires and mains, which are used immediately in the transmission or distribution of gas, water and electricity to the public, and equipment, machinery, tools, repair parts and supplies used to keep in operation exempt transmission or distribution devices, and these vehicles and their equipment as are specifically designed and equipped for those purposes are exempt from the tax when used to keep a transmission or distribution system in operation or repair. For purposes of this subsection, transmission or distribution activities shall commence from the close of production at a production plant or wellhead when a product is ready for transmission or distribution to the public and shall conclude at the point where the product is received by the public;

(iii) Tangible personal property, custom software or services, including equipment, machinery, apparatus, supplies, fuel and power, appliances, pipes, wires and mains, which are used immediately in the storage of gas or water, and equipment, machinery, tools, supplies and repair parts used to keep in operation exempt storage devices;

(iv) Tangible personal property, custom software or services used immediately in the storage, removal or transportation of economic waste resulting from the activities of gas storage, the generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business;

(v) Tangible personal property, custom software or services used immediately in pollution control or environmental quality or protection activity or community safety or security directly relating to the activities of gas storage, generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business.

(B) Uses of property or services which would not constitute direct use or consumption in the activities of gas storage, generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business include, but are not limited to:

(i) Heating and illumination of office buildings;

(ii) Janitorial or general cleaning activities;

(iii) Personal comfort of personnel;

(iv) Production planning, scheduling of work or inventory control;

(v) Marketing, general management, supervision, finance, training, accounting and administration; or

(vi) An activity or function incidental or convenient to the activities of gas storage, generation or production or sale of electric power, the provision of public utility service or the operation of a utility business.

(6) "Gas storage" means the injection of gas into a storage reservoir or the storage of gas for any period of time in a storage reservoir or the withdrawal of gas from a storage reservoir engaged in by businesses subject to the business and occupation tax imposed by sections two and two-e, article thirteen of this chapter.

(7) "Generating or producing or selling of electric power" means the generation, production or sale of electric power engaged in by businesses subject to the business and occupation tax imposed by section two, two-d, two-m or two-n, article thirteen, chapter eleven of the West Virginia Code.

(8) "Gross proceeds" means the amount received in money, credits, property or other consideration from sales and services within this city, without deduction on account of the cost of property sold, amounts paid for interest or discounts or other expenses whatsoever. Losses may not be deducted, but any credit or refund made for goods returned may be deducted.

(9) "Includes" and "including", when used in a definition contained in this article, does not exclude other things otherwise within the meaning of the term being defined.

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

(11) "Person" means any individual, partnership, association, corporation, limited liability company, limited liability partnership or any other legal entity, or the guardian, trustee, committee, executor or administrator of any person.

(12) "Personal service" includes those: (A) Compensated by the payment of wages in the ordinary course of employment; and (B) rendered to the person of an individual without, at the same time, selling tangible personal property, such as nursing, barbering, shoe shining, manicuring and similar services.

(13) "Prepaid wireless calling service" means a telecommunications service that provides the right to utilize mobile wireless service as well as other nontelecommunications services, including the download of digital products delivered electronically, content and ancillary services, which must be paid for in advance that is sold in predetermined units or dollars of which the number decline with use in a known amount.

(14) Production of natural resources.

(A) "Production of natural resources" means, except for oil and gas, the performance, by either the owner of the natural resources or another, of the act or process of exploring, developing, severing, extracting, reducing to possession and loading for shipment and shipment for sale, profit or commercial use of any natural resource products and any reclamation, waste disposal or environmental activities associated therewith and the construction, installation or fabrication of ventilation structures, mine shafts, slopes, boreholes, dewatering structures, including associated facilities and apparatus, by the producer or others, including contractors and subcontractors, at a coal mine or coal production facility.

(B) For the natural resources oil and gas, "production of natural resources" means the performance, by either the owner of the natural resources, a contractor or a subcontractor, of the act or process of exploring, developing, drilling, well-stimulation activities such as logging, perforating or fracturing, well-completion activities such as the installation of the casing, tubing and other machinery and equipment and any reclamation, waste disposal or environmental activities associated therewith, including the installation of the gathering system or other pipeline to transport the oil and gas produced or environmental activities associated therewith and any service work performed on the well or well site after production of the well has initially commenced.

(C) All work performed to install or maintain facilities up to the point of sale for severance tax purposes is included in the "production of natural resources" and subject to the direct use concept.

(D) "Production of natural resources" does not include the performance or furnishing of work, or materials or work, in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for the alteration, improvement or development of real property, by persons other than those otherwise directly engaged in the activities specifically set forth in this subdivision as "production of natural resources".

(15) "Providing a public service or the operating of a utility business" means the providing of a public service or the operating of a utility by businesses subject to the business and occupation tax imposed by sections two and two-d, article thirteen, chapter eleven of the West Virginia Code.

(16) "Purchaser" means a person who purchases tangible personal property, custom software or a service taxed by this article.

(17) "Sale", "sales" or "selling" includes any transfer of the 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. "Sale" also includes the furnishing of a service for consideration. "Sale" also includes the furnishing of prepaid wireless calling service for consideration.

(18) "Service" or "selected service" includes all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal property or custom software, but does not include contracting, personal services or the services rendered by an employee to his or her employer or any service rendered for resale: *Provided*, That the term "service" or "selected service" does not include payments received by a vendor of tangible personal property as an incentive to sell a greater volume of such tangible personal property under a manufacturer's, distributor's or other third party's marketing support program, sales incentive program, cooperative advertising agreement or similar type of program or agreement, and these payments are not considered to be payments for a "service" or "selected service" rendered, even though the vendor may engage in attendant or ancillary activities associated with the sales of tangible personal property as required under the programs or agreements.

(19) "Streamlined Sales and Use Tax Agreement" or "agreement", when used in this article, has the same meaning as when used in article fifteen-b, chapter 11 of the West Virginia Code, except when the context in which the word "agreement" is used clearly indicates that a different meaning is intended by the West Virginia State Legislature.

(20) "Tax" includes all taxes, additions to tax, interest and penalties levied under this article or article ten of this chapter.

(21) "Finance Director" means the city Finance Director or his or her delegate. The term "delegate" in the phrase "or his or her delegate", when used in reference to the Finance Director, means any officer or employee of the Finance Division duly authorized by the Finance Director directly, or indirectly by one or more redelegations of authority, to perform the functions

mentioned or described in this article or rules promulgated for this article. Notwithstanding the foregoing, such definition shall also include the State Tax Commissioner.

(22) "Taxpayer" means any person liable for the tax imposed by this article or additions to tax, penalties and interest imposed by article ten of this chapter.

(23) "Transmission" means the act or process of causing liquid, natural gas or electricity to pass or be conveyed from one place or geographical location to another place or geographical location through a pipeline or other medium for commercial purposes.

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

(25) "Ultimate consumer" or "consumer" means a person who uses or consumes services or personal property.

(26) "Vendor" means any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property or custom software. "Vendor" and "seller" are used interchangeably in this article.

(c) *Additional definitions.* -- Other terms used in this ordinance are defined in article fifteen-b, chapter 11 of the West Virginia Code which definitions are incorporated herein by reference. Additionally, other sections of this article may define terms primarily used in the section in which the term is defined.

776.04 Amount of tax; allocation of tax and transfers.

(a) *Vendor to collect.* -- For the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in 776.03 of this article, the vendor shall collect from the purchaser the tax as provided under this article and article fifteen-b, chapter eleven of the West Virginia Code, and shall pay the amount of tax to the State Tax Commissioner in accordance with the provisions of this article or article fifteen-b, chapter eleven of the West Virginia Code..

(b) *Amount of tax.* -- The general consumer sales, service and use tax imposed by this article shall be at the rate of one percent.

The tax computation under subsection (b) of this section shall 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.

(c) *No aggregation of separate sales transactions, exception for coin-operated devices.* -- Separate sales, such as daily or weekly deliveries, shall not be aggregated for the purpose of computation of the tax even though the sales are aggregated in the billing or payment therefor. Notwithstanding any other provision of this article, coin-operated amusement and vending machine sales shall be aggregated for the purpose of computation of this tax.

(d) *Rate of tax on certain mobile homes.* -- Notwithstanding any provision of this article to the contrary, the tax levied on sales of mobile homes to be used by the owner thereof as his or

her principal year-round residence and dwelling shall be an amount equal to one percent of fifty percent of the sales price.

(e) *Construction; custom software.* – whenever the words "tangible personal property" or "property" appear in this article, the same shall also include the words "custom software".

776.05 Purchaser to pay; accounting by vendor.

(a) The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the city for all tax paid by the purchaser.

(b) The vendor shall keep records necessary to account for:

(1) The vendor's gross proceeds from sales of personal property and services;

(2) The vendor's gross proceeds from taxable sales;

(3) The vendor's gross proceeds from exempt sales;

(4) The amount of taxes collected under this article, which taxes shall be held in trust for the City of Huntington until paid over to the State Tax Commissioner; and

(5) Any other information as required by this article, or article fifteen-b, chapter eleven of the West Virginia Code, or as required by the State Tax Commissioner and/or the City of Huntington Finance Director.

776.06 Failure to collect tax; liability of vendor.

If any vendor fails to collect the tax imposed by section 776.04 of this article, the vendor shall be personally liable for the amount the vendor failed to collect, except as otherwise provided in this article.

776.07 Liability of purchaser; assessment and collection.

(a) *General.* -- If any purchaser refuses or otherwise does not pay to the vendor the tax imposed by section 776.04 of this article, or a purchaser refuses to present to the vendor a proper certificate indicating the sale is not subject to this tax, or presents to the vendor a false certificate, or after presenting a proper certificate uses the items purchased in a manner that the sale would be subject to the tax, the purchaser shall be personally liable for the amount of tax applicable to the transaction or transactions.

(b) *Collection of tax from purchaser.* -- Nothing in this section relieves any purchaser who owes the tax and who has not paid the tax imposed by section three of this article from liability for payment of the tax. In those cases the Tax Commissioner has authority to make an assessment against the purchaser, based upon any information within his or her possession or that may come into his or her possession.

(c) *Liability of vendor.* -- This section may not be construed as relieving the vendor from liability for the tax, except as otherwise provided in this article or article fifteen-b, chapter eleven of the West Virginia Code.

776.08 Total amount collected is to be remitted.

No profit shall accrue to any person as a result of the collection of the tax levied by this article notwithstanding the total amount of the taxes collected may be in excess of the amount for which the person would be liable by the application of the rate of tax levied by section three of

this article to the vendor's gross proceeds from taxable sales and services. The total amount of all taxes collected by the vendor shall be returned and remitted to the State Tax Commissioner as provided in this article or article fifteen-b, chapter eleven of the West Virginia Code.

776.09 Vendor must show sale or service exempt; presumption.

(a) The burden of proving that a sale or service was exempt from the tax shall be upon the vendor, unless the vendor takes from the purchaser an exemption certificate signed by and bearing the address of the purchaser and setting forth the reason for the exemption and substantially in the form prescribed by the Tax Commissioner.

(b) To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established.

776.10 Tax on gross proceeds of sales or value of manufactured, etc., products.

(a) A person exercising the privilege of producing for sale, profit or commercial use, any natural resources, product or manufactured product, and either engaged in the business of selling such product not otherwise exempted herein, or engaged in a business or activity in which such natural resource, product or manufactured product is used or consumed by him and such use or consumption is not otherwise exempt under this article, shall make returns of the gross proceeds of such sales or, in the absence of sale, the gross value of the natural resource, product or manufactured product, so used or consumed by him, and pay the tax imposed by this article.

(b) The Tax Commissioner shall promulgate such uniform and equitable rules as he deems necessary for determining the gross value upon which the tax imposed by this article is levied in the absence of a sale, which value shall correspond as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by the same person or by another person.

(c) The provisions of this section, as amended by this act, shall apply to natural resources, products or manufactured products, used or consumed by the producer or manufacturer thereof.

776.11 Tax on the manufacture, sale and installation of modular dwellings.

(a) Notwithstanding the provisions of section seven, article fifteen, Chapter eleven of the West Virginia Code, persons engaged in the manufacture and sale or the manufacture, sale and installation of a modular dwelling shall pay the tax imposed by this article only on the value of the building supplies and materials used in the manufacture and installation of the modular dwelling and the preparation of the site for permanent installation, and not on the labor involved in such activities. For purposes of this section, the value of the building supplies and materials shall be the actual cost of the building supplies and materials. If the manufacturer asserts an exemption at the time of purchase of the building supplies and materials, the manufacturer shall remit the tax due on the value of the building supplies and materials used in the manufacture of the modular dwelling at the time of sale of the modular dwelling. If the manufacturer pays the tax at the time of purchase of the building supplies and materials, the manufacturer is responsible

for maintaining records evidencing payment of the tax. Failure to maintain such records will result in the tax being assessed to the manufacturer.

(b) Persons engaged in the sale and installation of a modular dwelling shall pay the tax imposed by this article on only the value of the materials used in the manufacture and installation of the modular dwelling and the preparation of the site for permanent installation, and not on the labor involved in such activities. For purposes of this section, the value of the materials used in the manufacture of the modular dwelling shall be the actual cost of the materials and building supplies to the manufacturer as delineated on the invoice to the purchaser. If the actual cost of the materials is not available, then the cost of the materials used in the manufacture of the modular dwelling shall be sixty percent of the total cost of the modular dwelling. A credit will be given to the purchaser for any sales or use tax that has been lawfully imposed by another state and paid by the manufacturer on the purchase of building supplies and materials used in the manufacture of the modular dwelling. If the manufacturer pays the tax at the time of purchase of the building supplies and materials, the manufacturer is responsible for maintaining records evidencing payment of the tax and delineating this amount on the invoice. Failure to maintain such records will result in the credit being denied.

(c) *Definition of modular dwelling.* -- For purposes of this article, a modular dwelling shall include, but not be limited to, single and multi-family houses, apartment units and commercial dwellings comprised of two or more sections without a permanent chassis, built to a state or model code other than the National Manufactured Housing Construction and Safety Standards Act of 1974, which are primarily constructed at a location other than the permanent site at which they are to be finally assembled and which are shipped to the site with most permanent components in place.

776.12 Furnishing of services included; exceptions.

The provisions of this article apply not only to selling tangible personal property and custom software, but also to the furnishing of all services, except professional and personal services, and except those services furnished by businesses subject to the control of the public service commission when the service or the manner in which it is delivered is subject to regulation by the public service commission.

776.13 Contractors.

(a) The provisions of this article shall not apply to contracting services. However, purchases by a contractor of tangible personal property or taxable services for use or consumption in the providing of a contracting service shall be taxable, except as otherwise provided in this article.

(b) Transition rules. -- The exemption from payment of tax on purchases of tangible personal property or taxable services directly used or consumed in the activity of contracting, as defined in section two of this article, which expires as of the first day of March, one thousand nine hundred eighty-nine, shall nevertheless remain in effect with respect to:

(1) Tangible personal property or taxable services purchased by a contractor on or after said first day of March in fulfillment of a written contract for contracting, as defined in section two of this article, that was executed and legally binding on the parties thereto on or before the fifteenth day of February, one thousand nine hundred eighty-nine; or in fulfillment of a written contract entered into after the said fifteenth day of February pursuant to a written bid for contracting that was made on or before the said fifteenth day of February that was binding on the

contractor, but only to the extent that the bid is subsequently incorporated into a written contract;
or

(2) Tangible personal property or taxable services purchased by a contractor on or after the said first day of March pursuant to a written contract executed on or before the fifteenth day of February, one thousand nine hundred eighty-nine, to purchase in specified quantities identified tangible personal property or specified taxable services; or

(3) Tangible personal property or taxable services purchased by a contractor for consumption or use in fulfillment of a written contract entered into before the first day of September, one thousand nine hundred eighty-nine, when such contract is for the construction of a new improvement to real property the construction or operation of which was approved by a federal or state regulatory body prior to the first day of February, one thousand nine hundred eighty-nine, or pursuant to a federal grant awarded prior to such first day of February.

(c) **Renewals and extensions.** -- A renewal of any contract shall constitute a new contract for purposes of this section, and the date of entry into a contract renewal by the parties, the date or dates of tender of consideration and the time of performance of any contractual obligations under a renewed contract shall be treated as the dates for determining application of this section to the renewed contract. Extensions of time granted or agreed upon by the parties to a contract for performance of the contract or for tender of consideration under the contract shall not be treated as contract renewals. Contracts to which such extensions apply shall be treated under these transition rules as if the original contractual provisions for performance and tender of consideration remain in effect.

(d) **Definitions.** -- For purposes of this section:

(1) The term "contract" or "contracts" means written agreements reciting or setting forth a fixed price consideration or a consideration based upon cost plus a stated percentage or a stated monetary increment. This term shall not mean or include ongoing sales contracts, contracts whereby any element of the consideration or the property or services sold or to be rendered in performance of the contract are undefined, or determined, as to either nature or quantity, subsequent to the making of the contract, or any open-ended contract.

(2) The term "contract renewal" or "renewal" means a covenant or agreement entered into or assumed by parties which have a current contractual relation or which have had a past contractual relation, whereby the parties agree to incur obligations beyond those which they were, or would have been, required, at the minimum, to carry out under their current or past contractual relation.

776.14 Nonresident contractor--registration, bond, etc.

(a) Every nonresident contractor shall register with the Tax Commissioner prior to engaging in the performance of a contract in the City of Huntington.

(b) (1) At the time of registration, the contractor shall deposit with the Tax Commissioner percent of the amount the contractor is to receive for the performance of the contract which shall be held within a Contractors Use Tax Fund pending the completion of the contract, the determination of the taxes due this state under this article and article fifteen-a of this chapter Eleven of the West Virginia Code, because of such contract and the payment of the tax.

(2) In lieu of the deposit, the contractor may provide a corporate surety bond to be approved by the Tax Commissioner as to form, sufficiency, value, amount, stability, and other features necessary to provide a guarantee of payment of the compensating tax due this state.

(c) In addition, within thirty days after registration, under this section, the contractor shall file a statement with the Tax Commissioner itemizing the machinery, materials, supplies, and equipment that he has or will have on hand at the time he begins the fulfillment of the contract, including where such tangible personal property has been brought, shipped, or transported from outside this state upon which neither the tax imposed by this article nor article fifteen-a (**use tax**) of this chapter has been paid, and shall pay the tax due thereon at the time of filing and thereafter shall report and pay the taxes as required by this article and article fifteen-a, chapter eleven of the West Virginia Code.

776.15 Transition rules for elimination of exemption for materials and supplies incorporated in real property owned by governmental entities.

(a) **General rule.** -- The expired provisions in subsection (j), section nine of this article, which previously exempted sales of tangible personal property to persons engaging in the activity of contracting, pursuant to a written contract with the United States, this state, or with a political subdivision thereof, or with a public corporation created by the Legislature or by another governmental entity pursuant to an act of the Legislature, for a building or structure, or improvement thereto, or other improvement to real property that is or will be owned and used by the governmental entity for a governmental or proprietary purpose, shall continue in force for:

(1) Tangible personal property purchased by a contractor on or after the first day of October, one thousand nine hundred ninety, in fulfillment of a written contract for contracting, as defined in section two of this article, that was executed and legally binding on the parties thereto on or before the fifteenth day of September, one thousand nine hundred ninety; or in fulfillment of a written contract entered into after said fifteenth day of September pursuant to a written bid for contracting that was made on or before said fifteenth day of September that was binding on the contractor, but only to the extent that the bid is subsequently incorporated into a written contract; and

(2) Tangible personal property purchased by a contractor on or after the first day of October, one thousand nine hundred ninety, for consumption or use in fulfillment of a written contract for the construction of a new improvement to real property, the construction or operation of which was approved by a federal or state regulatory body prior to the fifteenth day of September, one thousand nine hundred ninety, or pursuant to a federal grant awarded prior to said fifteenth day of September.

(b) **Renewals and extensions.** -- A renewal of any contract shall constitute a new contract for purposes of this section, and the date of entry into a contract renewal by the parties, the date or dates of tender of consideration and the time of performance of any contractual obligations under a renewed contract shall be treated as the dates for determining application of this section to the renewed contract. Extensions of time granted or agreed upon by the parties to a contract for performance of the contract or for tender of consideration under the contract shall not be treated as contract renewals. Contracts to which such extensions apply shall be treated under these transition rules as if the original contractual provisions for performance and tender of consideration remain in effect. For purposes of this section, the terms "contract" or "contracts",

and "contract renewal" or "renewal" shall have the same meaning as defined in subsection (d), section eight-a of this article.

776.16 Limitations on right to assert exemptions.

(a) Persons who perform "contracting" as defined in section 776.03 of this article, or persons acting in an agency capacity, may not assert any exemption to which the purchaser of such contracting services or the principal is entitled. Any statutory exemption to which a taxpayer may be entitled shall be invalid unless the tangible personal property or taxable service is actually purchased by such taxpayer and is directly invoiced to and paid by such taxpayer. This section shall not apply to purchases by an employee for his or her employer; purchases by a partner for his or her partnership; or purchases by a duly authorized officer of a corporation, or unincorporated organization, for his or her corporation or unincorporated organization so long as the purchase is invoiced to and paid by the employer, partnership, corporation or unincorporated organization.

(b) *Transition rule.* -- This section shall not apply to purchases of tangible personal property or taxable services in fulfillment of a purchasing agent or procurement agent contract executed and legally binding on the parties thereto prior to September 15, 1999: *Provided,* That this transition rule shall not apply to any purchases of tangible personal property or taxable services made under such a contract after August 31, 1991; and this transition rule shall not apply if the primary purpose of the purchasing agent or procurement agent contract was to avoid payment of consumers sales and use taxes. However, effective July 1, 2007, this section shall not apply to purchases of services, machinery, supplies or materials, except gasoline and special fuel, to be directly used or consumed in the construction, alteration, repair or improvement of a new or existing building or structure by a person performing "contracting", as defined in section two of this article, if the purchaser of the "contracting" services would be entitled to claim the refundable exemption under subdivision (2), subsection (b), section nine of this article had it purchased the services, machinery, supplies or materials. Effective July 1, 2009, this section shall not apply to purchases of services, computers, servers, building materials and tangible personal property, except purchases of gasoline and special fuel, to be installed into a building or facility or directly used or consumed in the construction, alteration, repair or improvement of a new or existing building or structure by a person performing "contracting", as defined in section two of this article, if the purchaser of the "contracting" services would be entitled to claim the exemption under subdivision (7), subsection (a), section nine-h of this article.

776.17 Exemptions.

(a) *Exemptions for which exemption certificate may be issued.* -- A person having a right or claim to any exemption set forth in this subsection may, in lieu of paying the tax imposed by this article and filing a claim for refund, execute a certificate of exemption, in the form required by the Tax Commissioner, and deliver it to the vendor of the property or service in the manner required by the Tax Commissioner. However, the Tax Commissioner may, by rule, specify those exemptions authorized in this subsection for which exemption certificates are not required. The following sales of tangible personal property and services are exempt as provided in this subsection:

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

(2) Sales of textbooks required to be used in any of the schools of this state or in any institution in this state which qualifies as a nonprofit or educational institution subject to the West Virginia Department of Education and the Arts, the Board of Trustees of the University System of West Virginia or the board of directors for colleges located in this state;

(3) Sales of property or services to this state, its institutions or subdivisions, governmental units, institutions or subdivisions of other states: *Provided*, That the law of the other state provides the same exemption to governmental units or subdivisions of this state and to the United States, including agencies of federal, state or local governments for distribution in public welfare or relief work;

(4) Sales of vehicles which are titled by the Division of Motor Vehicles and which are subject to the tax imposed by section four, article three, chapter seventeen-a of the West Virginia code or like tax;

(5) Sales of property or services to churches which make no charge whatsoever for the services they render: *Provided*, That the exemption granted in this subdivision applies only to services, equipment, supplies, food for meals and materials directly used or consumed by these organizations and does not apply to purchases of gasoline or special fuel;

(6) Sales of tangible personal property or services to a corporation or organization which has a current registration certificate issued under article twelve of this chapter, which is exempt from federal income taxes under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended, and which is:

(A) A church or a convention or association of churches as defined in Section 170 of the Internal Revenue Code of 1986, as amended;

(B) An elementary or secondary school which maintains a regular faculty and curriculum and has a regularly enrolled body of pupils or students in attendance at the place in this state where its educational activities are regularly carried on;

(C) A corporation or organization which annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions or membership fees;

(D) An organization which has no paid employees and its gross income from fundraisers, less reasonable and necessary expenses incurred to raise the gross income (or the tangible personal property or services purchased with the net income), is donated to an organization which is exempt from income taxes under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended;

(E) A youth organization, such as the Girl Scouts of the United States of America, the Boy Scouts of America or the YMCA Indian Guide/Princess Program and the local affiliates thereof, which is organized and operated exclusively for charitable purposes and has as its primary purpose the nonsectarian character development and citizenship training of its members;

(F) For purposes of this subsection:

(i) The term "support" includes, but is not limited to:

(I) Gifts, grants, contributions or membership fees;

(II) Gross receipts from fundraisers which include receipts from admissions, sales of merchandise, performance of services or furnishing of facilities in any activity which is not an unrelated trade or business within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended;

(III) Net income from unrelated business activities, whether or not the activities are carried on regularly as a trade or business;

(IV) Gross investment income as defined in Section 509(e) of the Internal Revenue Code of 1986, as amended;

(V) Tax revenues levied for the benefit of a corporation or organization either paid to or expended on behalf of the organization; and

(VI) The value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge. This term does not include any gain from the sale or other disposition of property which would be considered as gain from the sale or exchange of a capital asset or the value of an exemption from any federal, state or local tax or any similar benefit;

(ii) The term "charitable contribution" means a contribution or gift to or for the use of a corporation or organization, described in Section 170(c)(2) of the Internal Revenue Code of 1986, as amended; and

(iii) The term "membership fee" does not include any amounts paid for tangible personal property or specific services rendered to members by the corporation or organization;

(G) The exemption allowed by this subdivision does not apply to sales of gasoline or special fuel or to sales of tangible personal property or services to be used or consumed in the generation of unrelated business income as defined in Section 513 of the Internal Revenue Code of 1986, as amended. The exemption granted in this subdivision applies only to services, equipment, supplies and materials used or consumed in the activities for which the organizations qualify as tax-exempt organizations under the Internal Revenue Code and does not apply to purchases of gasoline or special fuel;

(7) An isolated transaction in which any taxable service or any tangible personal property is sold, transferred, offered for sale or delivered by the owner of the property or by his or her representative for the owner's account, the sale, transfer, offer for sale or delivery not being made in the ordinary course of repeated and successive transactions of like character by the owner or on his or her account by the representative: *Provided*, That nothing contained in this subdivision may be construed to prevent an owner who sells, transfers or offers for sale tangible personal property in an isolated transaction through an auctioneer from availing himself or herself of the exemption provided in this subdivision, regardless of where the isolated sale takes place.

(8) Sales of tangible personal property or of any taxable services rendered for use or consumption in connection with the commercial production of an agricultural product the ultimate sale of which is subject to the tax imposed by this article or which would have been subject to tax under this article: *Provided*, That sales of tangible personal property and services to be used or consumed in the construction of or permanent improvement to real property and sales of gasoline and special fuel are not exempt: *Provided, however*, That nails and fencing may not be considered as improvements to real property;

(9) Sales of tangible personal property to a person for the purpose of resale in the form of tangible personal property: *Provided*, That sales of gasoline and special fuel by distributors and importers is taxable except when the sale is to another distributor for resale: *Provided, however*, That sales of building materials or building supplies or other property to any person engaging in the activity of contracting, as defined in this article, which is to be installed in, affixed to or incorporated by that person or his or her agent into any real property, building or structure is not exempt under this subdivision;

(10) Sales of newspapers when delivered to consumers by route carriers;

(11) Sales of drugs, durable medical goods, mobility-enhancing equipment and prosthetic devices dispensed upon prescription and sales of insulin to consumers for medical purposes;

(12) Sales of radio and television broadcasting time, preprinted advertising circulars and newspaper and outdoor advertising space for the advertisement of goods or services;

(13) Sales and services performed by day care centers;

(14) Casual and occasional sales of property or services not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character by a corporation or organization which is exempt from tax under subdivision (6) of this subsection on its purchases of tangible personal property or services. For purposes of this subdivision, the term "casual and occasional sales not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of like character" means sales of tangible personal property or services at fundraisers sponsored by a corporation or organization which is exempt, under subdivision (6) of this subsection, from payment of the tax imposed by this article on its purchases when the fundraisers are of limited duration and are held no more than six times during any twelve-month period and "limited duration" means no more than eighty-four consecutive hours: *Provided*, That sales for volunteer fire departments and volunteer school support groups, with duration of events being no more than eighty-four consecutive hours at a time, which are held no more than eighteen times in a twelve-month period for the purposes of this subdivision are considered "casual and occasional sales not conducted in a repeated manner or in the ordinary course of repetitive and successive transactions of a like character";

(15) Sales of property or services to a school which has approval from the Board of Trustees of the University System of West Virginia or the Board of Directors of the State College System to award degrees, which has its principal campus in this state and which is exempt from federal and state income taxes under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended: *Provided*, That sales of gasoline and special fuel are taxable;

(16) Sales of lottery tickets and materials by licensed lottery sales agents and lottery retailers authorized by the state Lottery Commission, under the provisions of article twenty-two, chapter twenty-nine of this code;

(17) Leases of motor vehicles titled pursuant to the provisions of article three, chapter seventeen-a of the West Virginia code to lessees for a period of thirty or more consecutive days;

(18) Notwithstanding the provisions of section eighteen or eighteen-b of this article or any other provision of this article to the contrary, sales of propane to consumers for poultry house heating purposes, with any seller to the consumer who may have prior paid the tax in his or her price, to not pass on the same to the consumer, but to make application and receive refund of the tax from the Tax Commissioner pursuant to rules which are promulgated after being

proposed for legislative approval in accordance with chapter twenty-nine-a of the West Virginia code by the Tax Commissioner;

(19) Any sales of tangible personal property or services purchased and lawfully paid for with food stamps pursuant to the federal food stamp program codified in 7 U. S. C. §§2011, *et seq.*, as amended, or with drafts issued through the West Virginia special supplement food program for women, infants and children codified in 42 U. S. C. §§1786;

(20) Sales of tickets for activities sponsored by elementary and secondary schools located within this state;

(21) Sales of electronic data processing services and related software: *Provided*, That, for the purposes of this subdivision, "electronic data processing services" means:

(A) The processing of another's data, including all processes incident to processing of data such as keypunching, keystroke verification, rearranging or sorting of previously documented data for the purpose of data entry or automatic processing and changing the medium on which data is sorted, whether these processes are done by the same person or several persons; and

(B) Providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to the computer equipment;

(22) Tuition charged for attending educational summer camps;

(23) Dispensing of services performed by one corporation, partnership or limited liability company for another corporation, partnership or limited liability company when the entities are members of the same controlled group or are related taxpayers as defined in Section 267 of the Internal Revenue Code. "Control" means ownership, directly or indirectly, of stock, equity interests or membership interests possessing fifty percent or more of the total combined voting power of all classes of the stock of a corporation, equity interests of a partnership or membership interests of a limited liability company entitled to vote or ownership, directly or indirectly, of stock, equity interests or membership interests possessing fifty percent or more of the value of the corporation, partnership or limited liability company;

(24) Food for the following are exempt:

(A) Food purchased or sold by a public or private school, school-sponsored student organizations or school-sponsored parent-teacher associations to students enrolled in the school or to employees of the school during normal school hours; but not those sales of food made to the general public;

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

(C) Food purchased or sold by a charitable or private nonprofit organization, a nonprofit organization or a governmental agency under a program to provide food to low-income persons at or below cost;

(D) Food sold by a charitable or private nonprofit organization, a nonprofit organization or a governmental agency under a program operating in West Virginia for a minimum of five years to provide food at or below cost to individuals who perform a minimum of two hours of community service for each unit of food purchased from the organization;

(E) Food sold in an occasional sale by a charitable or nonprofit organization, including volunteer fire departments and rescue squads, if the purpose of the sale is to obtain revenue for the functions and activities of the organization and the revenue obtained is actually expended for that purpose;

(F) Food sold by any religious organization at a social or other gathering conducted by it or under its auspices, if the purpose in selling the food is to obtain revenue for the functions and activities of the organization and the revenue obtained from selling the food is actually used in carrying out those functions and activities: *Provided*, That purchases made by the organizations are not exempt as a purchase for resale; or

(G) Food sold by volunteer fire departments and rescue squads that are exempt from federal income taxes under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended, when the purpose of the sale is to obtain revenue for the functions and activities of the organization and the revenue obtained is exempt from federal income tax and actually expended for that purpose;

(25) Sales of food by little leagues, midget football leagues, youth football or soccer leagues, band boosters or other school or athletic booster organizations supporting activities for grades kindergarten through twelve and similar types of organizations, including scouting groups and church youth groups, if the purpose in selling the food is to obtain revenue for the functions and activities of the organization and the revenues obtained from selling the food is actually used in supporting or carrying on functions and activities of the groups: *Provided*, That the purchases made by the organizations are not exempt as a purchase for resale;

(26) Charges for room and meals by fraternities and sororities to their members: *Provided*, That the purchases made by a fraternity or sorority are not exempt as a purchase for resale;

(27) Sales of or charges for the transportation of passengers in interstate commerce;

(28) Sales of tangible personal property or services to any person which this state is prohibited from taxing under the laws of the United States or under the constitution of this state;

(29) Sales of tangible personal property or services to any person who claims exemption from the tax imposed by this article or article fifteen-a of this chapter pursuant to the provision of any other chapter of this code;

(30) Charges for the services of opening and closing a burial lot;

(31) Sales of livestock, poultry or other farm products in their original state by the producer of the livestock, poultry or other farm products or a member of the producer's immediate family who is not otherwise engaged in making retail sales of tangible personal property; and sales of livestock sold at public sales sponsored by breeders or registry associations or livestock auction markets: *Provided*, That the exemptions allowed by this subdivision may be claimed without presenting or obtaining exemption certificates provided the farmer maintains adequate records;

(32) Sales of motion picture films to motion picture exhibitors for exhibition if the sale of tickets or the charge for admission to the exhibition of the film is subject to the tax imposed by this article and sales of coin-operated video arcade machines or video arcade games to a person engaged in the business of providing the machines to the public for a charge upon which the tax imposed by this article is remitted to the Tax Commissioner: *Provided*, That the exemption provided in this subdivision may be claimed by presenting to the seller a properly executed exemption certificate;

(33) Sales of aircraft repair, remodeling and maintenance services when the services are to an aircraft operated by a certified or licensed carrier of persons or property, or by a governmental entity, or to an engine or other component part of an aircraft operated by a certificated or licensed carrier of persons or property, or by a governmental entity and sales of tangible personal property that is permanently affixed or permanently attached as a component part of an aircraft owned or operated by a certificated or licensed carrier of persons or property, or by a governmental entity, as part of the repair, remodeling or maintenance service and sales of machinery, tools or equipment directly used or consumed exclusively in the repair, remodeling or maintenance of aircraft, aircraft engines or aircraft component parts for a certificated or licensed carrier of persons or property or for a governmental entity;

(34) Charges for memberships or services provided by health and fitness organizations relating to personalized fitness programs;

(35) Sales of services by individuals who babysit for a profit: *Provided*, That the gross receipts of the individual from the performance of baby-sitting services do not exceed five thousand dollars in a taxable year;

(36) Sales of services by public libraries or by libraries at academic institutions or by libraries at institutions of higher learning;

(37) Commissions received by a manufacturer's representative;

(38) Sales of primary opinion research services when:

(A) The services are provided to an out-of-state client;

(B) The results of the service activities, including, but not limited to, reports, lists of focus group recruits and compilation of data are transferred to the client across state lines by mail, wire or other means of interstate commerce, for use by the client outside the State of West Virginia; and

(C) The transfer of the results of the service activities is an indispensable part of the overall service.

For the purpose of this subdivision, the term "primary opinion research" means original research in the form of telephone surveys, mall intercept surveys, focus group research, direct mail surveys, personal interviews and other data collection methods commonly used for quantitative and qualitative opinion research studies;

(39) Sales of property or services to persons within the state when those sales are for the purposes of the production of value-added products: *Provided*, That the exemption granted in this subdivision applies only to services, equipment, supplies and materials directly used or consumed by those persons engaged solely in the production of value-added products: *Provided, however*, That this exemption may not be claimed by any one purchaser for more than five consecutive years, except as otherwise permitted in this section.

For the purpose of this subdivision, the term "value-added product" means the following products derived from processing a raw agricultural product, whether for human consumption or for other use. For purposes of this subdivision, the following enterprises qualify as processing raw agricultural products into value-added products: Those engaged in the conversion of:

- (A) Lumber into furniture, toys, collectibles and home furnishings;
- (B) Fruits into wine;
- (C) Honey into wine;
- (D) Wool into fabric;
- (E) Raw hides into semifinished or finished leather products;
- (F) Milk into cheese;
- (G) Fruits or vegetables into a dried, canned or frozen product;
- (H) Feeder cattle into commonly accepted slaughter weights;
- (I) Aquatic animals into a dried, canned, cooked or frozen product; and
- (J) Poultry into a dried, canned, cooked or frozen product;

(40) Sales of music instructional services by a music teacher and artistic services or artistic performances of an entertainer or performing artist pursuant to a contract with the owner or operator of a retail establishment, restaurant, inn, bar, tavern, sports or other entertainment facility or any other business location in this state in which the public or a limited portion of the public may assemble to hear or see musical works or other artistic works be performed for the enjoyment of the members of the public there assembled when the amount paid by the owner or operator for the artistic service or artistic performance does not exceed three thousand dollars: *Provided*, That nothing contained herein may be construed to deprive private social gatherings, weddings or other private parties from asserting the exemption set forth in this subdivision. For the purposes of this exemption, artistic performance or artistic service means and is limited to the conscious use of creative power, imagination and skill in the creation of aesthetic experience for an audience present and in attendance and includes, and is limited to, stage plays, musical performances, poetry recitations and other readings, dance presentation, circuses and similar presentations and does not include the showing of any film or moving picture, gallery presentations of sculptural or pictorial art, nude or strip show presentations, video games, video arcades, carnival rides, radio or television shows or any video or audio taped presentations or the sale or leasing of video or audio tapes, air shows or any other public meeting, display or show other than those specified herein: *Provided, however*, That nothing contained herein may be construed to exempt the sales of tickets from the tax imposed in this article. *Provided further*, That nude dancers or strippers may not be considered as entertainers for the purposes of this exemption;

(41) Charges to a member by a membership association or organization which is exempt from paying federal income taxes under Section 501(c)(3) or (c)(6) of the Internal Revenue Code of 1986, as amended, for membership in the association or organization, including charges to members for newsletters prepared by the association or organization for distribution primarily to its members, charges to members for continuing education seminars, workshops, conventions, lectures or courses put on or sponsored by the association or organization, including charges for related course materials prepared by the association or organization or by the speaker or speakers

for use during the continuing education seminar, workshop, convention, lecture or course, but not including any separate charge or separately stated charge for meals, lodging, entertainment or transportation taxable under this article: *Provided*, That the association or organization pays the tax imposed by this article on its purchases of meals, lodging, entertainment or transportation taxable under this article for which a separate or separately stated charge is not made. A membership association or organization which is exempt from paying federal income taxes under Section 501(c)(3) or (c)(6) of the Internal Revenue Code of 1986, as amended, may elect to pay the tax imposed under this article on the purchases for which a separate charge or separately stated charge could apply and not charge its members the tax imposed by this article or the association or organization may avail itself of the exemption set forth in **subdivision (9) of this subsection** relating to purchases of tangible personal property for resale and then collect the tax imposed by this article on those items from its member;

(42) Sales of governmental services or governmental materials by county assessors, county sheriffs, county clerks or circuit clerks in the normal course of local government operations;

(43) Direct or subscription sales by the Division of Natural Resources of the magazine currently entitled *Wonderful West Virginia* and by the Division of Culture and History of the magazine currently entitled *Goldenseal* and the journal currently entitled *West Virginia History*;

(44) Sales of soap to be used at car wash facilities;

(45) Commissions received by a travel agency from an out-of-state vendor;

(46) The service of providing technical evaluations for compliance with federal and state environmental standards provided by environmental and industrial consultants who have formal certification through the West Virginia Department of Environmental Protection or the West Virginia Bureau for Public Health or both. For purposes of this exemption, the service of providing technical evaluations for compliance with federal and state environmental standards includes those costs of tangible personal property directly used in providing such services that are separately billed to the purchaser of such services and on which the tax imposed by this article has previously been paid by the service provider;

(47) Sales of tangible personal property and services by volunteer fire departments and rescue squads that are exempt from federal income taxes under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended, if the sole purpose of the sale is to obtain revenue for the functions and activities of the organization and the revenue obtained is exempt from federal income tax and actually expended for that purpose;

(48) Lodging franchise fees, including royalties, marketing fees, reservation system fees or other fees that have been or may be imposed by a lodging franchiser as a condition of the franchise agreement; and

(49) Sales of the regulation size United States flag and the regulation size West Virginia flag for display.

(b) *Refundable exemptions.* -- Any person having a right or claim to any exemption set forth in this subsection shall first pay to the vendor the tax imposed by this article and then apply to the Tax Commissioner for a refund or credit, or as provided in section nine-d of this article, give to the vendor his or her West Virginia direct pay permit number. The following sales of tangible personal property and services are exempt from tax as provided in this subsection:

(1) Sales of property or services to bona fide charitable organizations who make no charge whatsoever for the services they render: *Provided*, That the exemption granted in this subdivision applies only to services, equipment, supplies, food, meals and materials directly used or consumed by these organizations and does not apply to purchases of gasoline or special fuel;

(2) Sales of services, machinery, supplies and materials directly used or consumed in the activities of manufacturing, transportation, transmission, communication, production of natural resources, gas storage, generation or production or selling electric power, provision of a public utility service or the operation of a utility service or the operation of a utility business, in the businesses or organizations named in this subdivision and does not apply to purchases of gasoline or special fuel;

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

(4) Sales and services, fire-fighting or station house equipment, including construction and automotive, made to any volunteer fire department organized and incorporated under the laws of the State of West Virginia: *Provided*, That sales of gasoline and special fuel are taxable;

(5) Sales of building materials or building supplies or other property to an organization qualified under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended, which are to be installed in, affixed to or incorporated by the organization or its agent into real property or into a building or structure which is or will be used as permanent low-income housing, transitional housing, an emergency homeless shelter, a domestic violence shelter or an emergency children and youth shelter if the shelter is owned, managed, developed or operated by an organization qualified under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended; and

(6) Sales of construction and maintenance materials acquired by a second party for use in the construction or maintenance of a highway project.

776.18 Exemptions; exceptions for sales of liquors and wines to private clubs.

The exemptions provided in this article for sales of tangible personal property and services rendered for use or consumption in connection with the conduct of the business of selling tangible personal property to consumers or dispensing a service subject to the tax under this article and, for sales of tangible personal property for the purpose of resale in the form of tangible personal property, shall not apply to persons or organizations licensed under authority of article seven, chapter sixty of the West Virginia code, for the purchase of liquor or wines for resale either from the alcohol beverage control commissioner or from retail liquor licensees licensed under authority of article three-a, chapter sixty of the West Virginia code.

776.19 Exemption for purchases of tangible personal property and services for direct use in research and development.

(a) Sales of tangible personal property and services directly used or consumed in the activity of research and development are exempt from tax imposed by this article. Any person having a right or claim to the exemption set forth in this section shall first pay to the vendor the tax imposed by this article and then apply to the Tax Commissioner for a refund or credit or give to

the vendor the person's West Virginia direct pay permit number in accordance with the provisions of **section nine-d of this article**.

(b) For purposes of this article:

(1) "Directly used or consumed in the activity of research and development" means used or consumed in those activities or operations which constitute an integral and essential part of research and development, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to research and development.

(A) Uses of property or consumption of services which constitute direct use or consumption in the activity of research and development include only:

(i) In the case of tangible personal property, physical incorporation of property into tangible personal property that is the subject of, or directly used in, research and development;

(ii) Causing a direct physical, chemical or other change upon property that is the subject of, or directly used in, research and development;

(iii) Transporting or storing property that is the subject of, or directly used in, research and development;

(iv) Measuring or verifying a change in property that is the subject of, or directly used in, research and development;

(v) Physically controlling or directing the physical movement or operation of property that is the subject of, or directly used in, research and development;

(vi) Directly and physically recording the flow of property that is the subject of, or directly used in, research and development;

(vii) Producing energy for property that is the subject of, or directly used in, research and development;

(viii) Controlling or otherwise regulating atmospheric or other environmental conditions required for research and development;

(ix) Serving as an operating supply for property that is the subject of, or directly used in, research and development;

(x) Maintenance or repair of property, including maintenance equipment, that is directly used in research and development;

(xi) Storage, removal or transportation of economic or other waste resulting from the activity of research and development;

(xii) Pollution control or environmental quality or environmental protection activity directly relating to the activity of research and development, and personnel, plant, property or community safety or security activity directly relating to the activity of research and development; or

(xiii) Otherwise being used as an integral and essential part of research and development.

(B) Uses of property or services which do not constitute direct use or consumption in the activity of research and development include, but are not limited to:

(i) Heating and illumination of office buildings;

(ii) Janitorial or general cleaning activities;

- (iii) Personal comfort of personnel;
- (iv) Planning or scheduling of work or inventory control;
- (v) Marketing, general management, supervision, finance, training, accounting and administration; or
- (vi) An activity or function incidental or convenient to research and development, rather than an integral and essential part of these activities.

(2) "Research and development" means systematic scientific, engineering or technological study and investigation in a field of knowledge in the physical, computer or software sciences, often involving the formulation of hypotheses and experimentation, for the purpose of revealing new facts, theories or principles, or increasing scientific knowledge, which may reveal the basis for new or enhanced products, equipment or manufacturing processes. Research and development includes, but is not limited to, design, refinement and testing of prototypes of new or improved products, or design, refinement and testing of manufacturing processes before commercial sales relating thereto have begun. For purposes of this section commercial sales include, but are not limited to, sales of prototypes or sales for market testing.

(A) Research and development does not include:

- (i) Market research;
- (ii) Sales research;
- (iii) Efficiency surveys;
- (iv) Consumer surveys;
- (v) Product market testing;
- (vi) Product testing by product consumers or through consumer surveys for evaluation of consumer product performance or consumer product usability;
- (vii) The ordinary testing or inspection of materials or products for quality control (quality control testing);
- (viii) Management studies;
- (ix) Advertising;
- (x) Promotions;
- (xi) The acquisition of another's patent, model, production or process or investigation or evaluation of the value or investment potential related thereto;
- (xii) Research in connection with literary, historical or similar projects;
- (xiii) Research in the social sciences, economics, humanities or psychology and other nontechnical activities; and
- (xiv) The providing of sales services or any other service, whether technical service or nontechnical service.

(C) No provision of this section may be interpreted to alter, abrogate or impede application of the exemption for sales of primary opinion research services set forth in section nine of this article.

776.19 Exemption for services and materials regarding technical evaluation for compliance to federal and state environmental standards provided by environmental and industrial consultants.

The service of providing technical evaluations for compliance with federal and state environmental standards provided by environmental and industrial consultants who have formal certification through the West Virginia department of environmental protection or the West Virginia bureau for public health or both is exempt from the tax imposed by this article. For purposes of this exemption, the service of providing technical evaluations for compliance with federal and state environmental standards includes those costs of tangible personal property directly used in providing the services that are separately billed to the purchaser of the services, and on which the tax imposed by this article has previously been paid by the service provider.

776.20 Apportionment of purchase price; existing contracts protected.

Whenever a purchaser will use acquired tangible personal property, a service, or the results of a service for both exempt and nonexempt purposes, the gross proceeds of such sale paid to the vendor for such property or service shall be apportioned between the exempt and nonexempt uses, in a manner established as reasonable by the Tax Commissioner, by regulations the Tax Commissioner may prescribe, for the purpose of determining the tax liability in respect of such purchase.

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

776.21 Exemption for sales and services subject to special district excise tax.

Notwithstanding any provision of this article to the contrary, any sale or service upon which a special district excise tax is paid, pursuant to the provisions of section twelve, article twenty-two, chapter seven of the West Virginia code, section eleven, article thirteen-b, chapter eight of the West Virginia code, or section twelve, article thirty-eight, chapter eight of the West Virginia code is exempt from the tax imposed by this article: *Provided*, That the special district excise tax does not apply to sales of gasoline and special fuel.

776.22 Exemptions for sales of computer hardware and software directly incorporated into manufactured products; certain leases; sales of electronic data processing service; sales of computer hardware and software directly used in communication; sales of educational software; sales of internet advertising; sales of high-technology business services directly used in fulfillment of a government contract; sales of tangible personal property for direct use in a high-technology business or internet advertising business; definitions.

(a) In order to modernize the exemptions from tax contained in this article as a result of

technological advances in computers and the expanded role of computers, the internet and global instant communications in business and to encourage computer software developers, computer hardware designers, systems engineering firms, electronic data processing companies and other high-technology companies to locate and expand their businesses in West Virginia, the following sales of tangible personal property and software are exempt:

(1) Sales of computer hardware or software (including custom designed software) to be directly incorporated by a manufacturer into a manufactured product. For purposes of this subsection, the payment of licensing fees for the right to incorporate hardware or software developed by persons other than the manufacturer into a manufactured product is exempt from the tax imposed by this article;

(2) Sales of computer hardware or software (including custom designed software) directly used in communication as defined in this article;

(3) Sales of electronic data processing services;

(4) Sales of educational software required to be used in any of the public schools of this state or in any institution in this state which qualifies as a nonprofit or educational institution subject to administration, regulation, certification or approval of the Department of Education, the Department of Education and the Arts or the Higher Education Policy Commission;

(5) Sales of internet advertising of goods and services;

(6) Sales of high-technology business services to high-technology businesses which enter into contracts with this state, its institutions and subdivisions, governmental units, institutions or subdivisions of other states, or with the United States, including agencies of federal, state or local governments for direct use in fulfilling the government contract; and

(7) Sales of prewritten computer software, computers, computer hardware, servers and building materials and tangible personal property to be installed into a building or facility for direct use in a high-technology business or an internet advertising business.

(b) *Definitions.* --

As used in this article, the following terms have the following meanings:

(1) "Computer hardware" means a computer, as defined in article fifteen-b, chapter eleven of the West Virginia code, and the directly and immediately connected physical equipment involved in the performance of data processing or communications functions, including data input, data output, data processing, data storage, and data communication apparatus that is directly and immediately connected to the computer. The term "computer hardware" does not include computer software.

(2) "High-technology business" means and is limited to businesses primarily engaged in the following activities: Computer hardware design and development; computer software design, development, customization and upgrade; computer systems design and development; website design and development; network design and development; design and development of new manufactured products which incorporate computer hardware and software; electronic data processing; network management, maintenance, engineering, administration and security services; website management, maintenance, engineering, administration and security services and computer systems management, maintenance, engineering, administration and security services. High-technology business as defined herein is intended to include businesses which engage in the activities enumerated in this definition as their primary business activity, and not as

a secondary or incidental activity and not as an activity in support of or incidental to business activity not specifically enumerated in this definition.

(3) "High-technology business services" means and is limited to computer hardware design and development; computer software design, development, customization and upgrade; computer systems design and development; website design and development; network design and development; electronic data processing; computer systems management; computer systems maintenance; computer systems engineering; computer systems administration and computer systems security services.

(4) "Internet advertising business" means a for-profit business that is engaged, for monetary remuneration, in the primary business activity of announcing, or calling public attention to, goods or services in order to induce the public to purchase those goods or services, and which uses the internet as its sole advertising communications medium. For purposes of this definition, internet advertising must be the primary business activity of the business and not a secondary or incidental activity and not an activity in support of or incidental to other business activity.

(5) "Network" means a group of two or more computer systems linked together.

(6) "Server" means a computer or device on a network that manages network resources.

(c) The amendments to this section made in the first extraordinary session of the Legislature in 2009 shall apply to purchases made on and after July 1, 2009.

776.23 Exempt drugs, durable medical goods, mobility enhancing equipment and prosthetic devices.

(a) Notwithstanding any provision of this article, article fifteen-a or article fifteen-b, chapter eleven of the West Virginia code, the purchase by a health care provider of drugs, durable medical goods, mobility enhancing equipment and prosthetic devices, all as defined in section two, article fifteen-b of this chapter, to be dispensed upon prescription and intended for use in the diagnosis, cure, mitigation, treatment or prevention of injury or disease are exempt from the tax imposed by this article.

(b) For purposes of this exemption, "health care provider" means any person licensed to prescribe drugs, durable medical goods, mobility enhancing equipment and prosthetic devices intended for use in the diagnosis, cure, mitigation, treatment or prevention of injury or disease. For purposes of this section, the term "health care provider" includes any hospital, medical clinic, nursing home or provider of inpatient hospital services and any provider of outpatient hospital services, physician services, nursing services, ambulance services, surgical services or veterinary services.

776.24 Exemption for Sales of clothing and clothing accessories by tax-exempt organizations.

Sales of clothing and clothing accessories by organizations that are exempt from federal income taxes under Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code of 1986, as amended, and that have annual revenue obtained from the sales of less than \$40,000, are exempt from the tax imposed under this article and article fifteen-a of this chapter: *Provided*, That the purpose of the sale is to obtain revenue for the activities and functions of the organization, and the revenue obtained is exempt from federal income tax and actually expended

for that purpose: *Provided, however,* That the clothing and clothing accessories sold are acquired or obtained by donation only, without compensation, remuneration or consideration to the donor. The Tax Commissioner may, by rule, specify the exemption authorized in this section to be a "per se" exemption for which exemption certificates are not required.

776.25 Discretionary designation of per se exemptions.

Notwithstanding any other provision of this article, the Tax Commissioner may, by rule, specify those exemptions authorized in this article or in other provisions of this code or applicable federal law for which exemption certificates or direct pay permits are not required.

776.26 Tax paid by ultimate consumer.

It is the intent of this article that the tax levied hereunder shall be passed on to and be paid by the ultimate consumer. The amount of the tax shall be added to the sales price, and shall constitute a part of that price and be collectible as such.

776.27 Exemption for certain organizations.

(a) Sales of taxable services by a corporation or organization that are exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, and that meet the requirements set forth in subsection (b) of this section, are exempt from the tax imposed by this article, except that this exemption shall not apply to sales of taxable services to the extent that income received from the sales of such services is taxable under Section 511 of the Internal Revenue Code.

(b) The exemption set forth in this section applies only to those corporations or organizations meeting the following criteria:

(1) The corporation or organization is organized and operated primarily for charitable or educational purposes and its activities and programs contribute importantly to promoting the general welfare of youth, families and the aged, improving health and fitness and providing recreational opportunities to the public;

(2) The corporation or organization offers membership or participation in its programs and activities to the general public and charges fees or dues which make its programs and activities accessible by a reasonable cross-section of the community; and

(3) The corporation or organization offers financial assistance on a regular and on-going basis to individuals unable to afford the organization's membership dues or fees.

(c) For purposes of this section, the term "corporation" and the term "organization" are used interchangeably and mean a corporation or other organization that is exempt from income tax under Section 501(c)(3) of the Internal Revenue Code, as amended.

(d) Nothing in this section shall affect the application of this article to nonprofit tax-exempt hospitals.

776.28 Agreements by competing taxpayers.

To provide uniform methods of adding the average equivalent of the tax to the selling price in each sale or transaction subject to the tax, appropriate rules and regulations, except as otherwise herein provided, may be agreed upon or adopted by competing taxpayers or associations of taxpayers, except that all collections shall be made on the basis of the total transaction at the time of sale, without regard to the value of the separate items making up the

total amount of the sale. Such rules and regulations, if they do not involve price fixing, shall not be deemed illegal as in restraint of trade or commerce. The Tax Commissioner shall cooperate in formulating such rules and regulations, and, in the event appropriate rules and regulations are not submitted to him within thirty days after this article takes effect, or within a reasonable extended period fixed by the Tax Commissioner, he shall himself formulate and promulgate appropriate rules and regulations to effectuate the purpose of this section.

776.29 Collection of tax when sale on credit.

A vendor doing business wholly or partially on a credit basis shall remit to the Tax Commissioner the tax due on the credit sale for the month in which the credit transaction occurred.

776.30 When separate records of sales required.

(a) Any vendor engaged in a business subject to this tax, who is at the same time engaged in some other kind of business, occupation or profession, not taxable under this article, shall keep records to show separately the transactions used in determining the tax base taxed under this article.

(b) In the event the person fails to keep separate records there shall be levied upon the person a tax based upon the entire gross proceeds of both or all of the person's businesses.

776.31 Sales to affiliated companies or persons.

In determining gross proceeds of sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from a sale are not indicative of the true value of the subject matter of the sale, the Tax Commissioner shall prescribe uniform and equitable rules for determining the amount upon which the tax shall be levied, corresponding as nearly as possible to gross proceeds from the sale of similar products of like quality or character, where no common interest exists between the parties.

776.32 Tax return and payment.

(a) *Payment of tax.* -- The taxes levied by this article are due and payable in monthly installments, on or before the twentieth day of the month next succeeding the month in which the tax accrued, except as otherwise provided in this article.

(b) *Tax return.* -- The taxpayer shall, on or before the twentieth day of each month, make out and mail to the Tax Commissioner a return for the preceding month, in the form prescribed by the Tax Commissioner, showing:

- (1) The total gross proceeds of the vendor's business for the preceding month;
- (2) The gross proceeds of the vendor's business upon which the tax is based;
- (3) The amount of the tax for which the vendor is liable; and

(4) Any further information necessary in the computation and collection of the tax which the Tax Commissioner may require, except as otherwise provided in this article or article fifteen-b of this chapter.

(c) *Remittance to accompany return.* -- Except as otherwise provided in this article or article fifteen-b of this chapter, a remittance for the amount of the tax shall accompany the return.

(d) *Deposit of collected tax.* -- Tax collected by the Tax Commissioner shall be deposited as provided in section thirty of this article, except that:

(1) Tax collected on sales of gasoline and special fuel shall be deposited in the state road fund; and

(2) Any sales tax collected by the Alcohol Beverage Control Commissioner from persons or organizations licensed under authority of article seven, chapter sixty of this code shall be paid into a revolving fund account in the State Treasury, designated the Drunk Driving Prevention Fund, to be administered by the Commission on Drunk Driving Prevention, subject to appropriations by the Legislature.

(e) *Return to be signed.* -- A return shall be signed by the taxpayer or the taxpayer's duly authorized agent, when a paper return is prepared and filed. When the return is filed electronically, the return shall include the digital mark or digital signature, as defined in article three, chapter thirty-nine-a of the West Virginia code, or the personal identification number of the taxpayer, or the taxpayer's duly authorized agent, made in accordance with any procedural rule that may be promulgated by the Tax Commissioner.

(f) *Accelerated payment.* --

(1) Taxpayers whose average monthly payment of the taxes levied by this article and article fifteen-a of this chapter during the previous calendar year exceeds one hundred thousand dollars, shall remit the tax attributable to the first fifteen days of June each year on or before the twentieth day of June: *Provided,* That on and after the first day of June, two thousand seven, the provisions of this subsection that require the accelerated payment on or before the twentieth day of June of the tax imposed by this article and article fifteen-a, chapter eleven, of the West Virginia Code are no longer effective and any such tax due and owing shall be payable in accordance with subsection (a) of this section.

(2) For purposes of complying with subdivision (1) of this subsection, the taxpayer shall remit an amount equal to the amount of tax imposed by this article and article fifteen-a, chapter eleven, of the West Virginia code, on actual taxable sales of tangible personal property and custom software and sales of taxable services during the first fifteen days of June or, at the taxpayer's election, the taxpayer may remit an amount equal to fifty percent of the taxpayer's liability for tax under this article on taxable sales of tangible personal property and custom software and sales of taxable services made during the preceding month of May.

(3) For a business which has not been in existence for a full calendar year, the total tax due from the business during the prior calendar year shall be divided by the number of months, including fractions of a month, that it was in business during the prior calendar year; and if that amount exceeds one hundred thousand dollars, the tax attributable to the first fifteen days of June each year shall be remitted on or before the twentieth day of June as provided in subdivision (2) of this subsection.

(4) When a taxpayer required to make an advanced payment of tax under subdivision (1) of this subsection makes out its return for the month of June, which is due on the twentieth day of July, the taxpayer may claim as a credit against liability under this article for tax on taxable

transactions during the month of June the amount of the advanced payment of tax made under subdivision (1) of this subsection.

776.33 Liability of officers of corporation, etc.

If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed by article ten of this chapter may be enforced against them as against the association or corporation which they represent.

776.34 Receivership; bankruptcy; priority of tax.

In the distribution, voluntary or compulsory, in receivership, bankruptcy or otherwise, of the property or estate of any person, all taxes due and unpaid under this article shall be paid from the first money available for distribution in priority to all claims and liens except taxes and debts due the United States which under federal law are given priority over the debts and liens created by this article. Any person charged with the administration or distribution of any such property or estate who shall violate the provisions of this section shall be personally liable for any taxes accrued and unpaid under this article which are chargeable against the person whose property or estate is in administration or distribution.

776.35 Other times for filing returns.

The Tax Commissioner may, upon written request, authorize a taxpayer whose books and records are not kept on a monthly basis to file returns at times other than those specified in section sixteen, but in no event shall a taxpayer make less than one return a calendar month, except as provided by section twenty or as may be authorized in writing by the Tax Commissioner.

776.36 Quarterly and annual returns.

(a) When the total consumers sales and use tax remittance for which a person is liable does not exceed an average monthly amount over the taxable year of two hundred fifty dollars, he or she may pay the tax and make a quarterly return on or before the twentieth day of the first month in the next succeeding quarter in lieu of monthly returns.

(b) When the total consumers sales and use tax remittance for which a person is liable does not in the aggregate exceed six hundred dollars for the taxable year, he or she may pay the tax and make an annual return on or before thirty days after the end of his or her taxable year for federal and state income tax purposes.

776.37 Annual return; extension of time.

(a) **Date due.** -- On or before thirty days after the end of the tax year, each person liable for the payment of any tax due under this article shall make and file an annual return in such form as may be required by the Tax Commissioner, showing:

- (1) Total gross proceeds of his business for preceding tax year,
- (2) Gross proceeds upon which the tax for that year was computed, and
- (3) Any other information necessary in the computation or collection of the tax that the Tax Commissioner may require.

(b) **Supporting schedule for consolidated return.** -- Whenever a person operates two or more places of business and files a consolidated monthly return, a schedule shall be attached to the consolidated annual return showing, for each place of business, total sales and charges for rendering services, total transactions subject to tax and total tax collections.

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

(d) **Extension of time.** -- The Tax Commissioner for good cause shown, may, on written application of a taxpayer, extend the time for making any return required by the provisions of this article.

776.38 Consolidated returns.

A person operating two or more places of business of like character from which are made or dispensed sales or services which are taxable hereunder shall file consolidated returns covering all such sales or services.

776.39 Keeping and preserving of records.

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

776.40 Records of nonresidents doing business in state.

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

776.41 Records of Finance Director; preservation of returns.

The Finance Director shall keep full and accurate records of all moneys received by him. He shall preserve all returns filed with him hereunder for five years.

776.42 Proceeds of tax.

The proceeds of the tax imposed by this article shall be deposited in the General Revenue Fund of the City of Huntington.

776.43 Severability.

Severability. -- If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this article is for any reason held to be invalid, unlawful or unconstitutional, that decision may not affect the validity of the remaining portions of this article or any part thereof.

776.44 General procedure and administration.

Each and every provision of the "West Virginia Tax Procedure and Administration Act" set forth in article ten of this chapter shall apply to the tax imposed by this article fifteen with like effect as if said act were applicable only to the tax imposed by this article.

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BE IT FURTHER ORDAINED that all other articles, sections and sub-sections of the Codified Ordinances of the City of Huntington, as revised, shall remain in full force and effect until further Ordinance of this Council.