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HOUSE BILL NO. 896

Offered January 11, 2006

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A BILL to amend and reenact §§ 58.1-602, 58.1-3833, and 58.1-3840 of the Code of Virginia, relating to state and local sales and use taxes and local taxes on meals.

 Patrons—Gear and Miller

 Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-602, 58.1-3833, and 58.1-3840 of the Code of Virginia are amended and reenacted as follows:

§ 58.1-602. Definitions.

As used in this chapter, unless the context clearly shows otherwise, the term or phrase:

"Advertising" means the planning, creating, or placing of advertising in newspapers, magazines, billboards, broadcasting and other media, including, without limitation, the providing of concept, writing, graphic design, mechanical art, photography and production supervision. Any person providing advertising as defined herein shall be deemed to be the user or consumer of all tangible personal property purchased for use in such advertising.

"Amplification, transmission and distribution equipment" means, but is not limited to, production, distribution, and other equipment used to provide Internet-access services, such as computer and communications equipment and software used for storing, processing and retrieving end-user subscribers' requests.

"Business" includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either directly or indirectly.

"Cost price" means the actual cost of an item or article of tangible personal property computed in the same manner as the sales price as defined in this section without any deductions therefrom on account of the cost of materials used, labor, or service costs, transportation charges, or any expenses whatsoever.

"Custom program" means a computer program which is specifically designed and developed only for one customer. The combining of two or more prewritten programs does not constitute a custom computer program. A prewritten program that is modified to any degree remains a prewritten program and does not become custom.

"Distribution" means the transfer or delivery of tangible personal property for use, consumption, or storage by the distributee, and the use, consumption, or storage of tangible personal property by a person who has processed, manufactured, refined, or converted such property, but does not include the transfer or delivery of tangible personal property for resale or any use, consumption, or storage otherwise exempt under this chapter.

"Gross proceeds" means the charges made or voluntary contributions received for the lease or rental of tangible personal property or for furnishing services, computed with the same deductions, where applicable, as for sales price as defined in this section over the term of the lease, rental, service, or use, but not less frequently than monthly.

"Gross sales" means the sum total of all retail sales of tangible personal property or services as defined in this chapter, without any deduction, except as provided in this chapter. "Gross sales" shall not include the federal retailers' excise tax or the federal diesel fuel excise tax imposed in § 4091 of the Internal Revenue Code if the excise tax is billed to the purchaser separately from the selling price of the article, or the Virginia retail sales or use tax, or any sales or use tax imposed by any county or city under § 58.1-605 or 58.1-606.

"Import" and "imported" are words applicable to tangible personal property imported into the Commonwealth from other states as well as from foreign countries, and "export" and "exported" are words applicable to tangible personal property exported from the Commonwealth to other states as well as to foreign countries.

"In this Commonwealth" or "in the Commonwealth" means within the limits of the Commonwealth of Virginia and includes all territory within these limits owned by or ceded to the United States of America.

"Internet" means collectively, the myriad of computer and telecommunications facilities, which comprise the interconnected world-wide network of computer networks.

"Internet service" means a service that enables users to access proprietary and other content, information electronic mail, and the Internet as part of a package of services sold to end-user

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59 subscribers.

60 "Lease or rental" means the leasing or renting of tangible personal property and the possession or use
61 thereof by the lessee or renter for a consideration, without transfer of the title to such property.

62 "Manufacturing, processing, refining, or conversion" includes the production line of the plant starting
63 with the handling and storage of raw materials at the plant site and continuing through the last step of
64 production where the product is finished or completed for sale and conveyed to a warehouse at the
65 production site, and also includes equipment and supplies used for production line testing and quality
66 control. The term "manufacturing" shall also include the necessary ancillary activities of newspaper and
67 magazine printing when such activities are performed by the publisher of any newspaper or magazine
68 for sale daily or regularly at average intervals not exceeding three months.

69 The determination whether any manufacturing, mining, processing, refining or conversion activity is
70 industrial in nature shall be made without regard to plant size, existence or size of finished product
71 inventory, degree of mechanization, amount of capital investment, number of employees or other factors
72 relating principally to the size of the business. Further, "industrial in nature" shall include, but not be
73 limited to, those businesses classified in codes 10 through 14 and 20 through 39 published in the
74 Standard Industrial Classification Manual for 1972 and any supplements issued thereafter.

75 "Modular building" means, but shall not be limited to, single and multifamily houses, apartment
76 units, commercial buildings, and permanent additions thereof, comprised of one or more sections that are
77 intended to become real property, primarily constructed at a location other than the permanent site, built
78 to comply with the Virginia Industrialized Building Safety Law (§ 36-70 et seq.) as regulated by the
79 Virginia Department of Housing and Community Development, and shipped with most permanent
80 components in place to the site of final assembly. For purposes of this chapter, a modular building shall
81 not include a mobile office as defined in § 58.1-2401 or any manufactured building subject to and
82 certified under the provisions of the National Manufactured Housing Construction and Safety Standards
83 Act of 1974 (42 U.S.C. § 5401 et seq.).

84 "Modular building manufacturer" means a person or corporation who owns or operates a
85 manufacturing facility and is engaged in the fabrication, construction and assembling of building
86 supplies and materials into modular buildings, as defined in this section, at a location other than at the
87 site where the modular building will be assembled on the permanent foundation and may or may not be
88 engaged in the process of affixing the modules to the foundation at the permanent site.

89 "Modular building retailer" means any person who purchases or acquires a modular building from a
90 modular building manufacturer, or from another person, for subsequent sale to a customer residing
91 within or outside of the Commonwealth, with or without installation of the modular building to the
92 foundation at the permanent site.

93 "Motor vehicle" means a "motor vehicle" as defined in § 58.1-2401, taxable under the provisions of
94 the Virginia Motor Vehicles Sales and Use Tax Act (§ 58.1-2400 et seq.) and upon the sale of which all
95 applicable motor vehicle sales and use taxes have been paid.

96 "Occasional sale" means a sale of tangible personal property not held or used by a seller in the
97 course of an activity for which he is required to hold a certificate of registration, including the sale or
98 exchange of all or substantially all the assets of any business and the reorganization or liquidation of
99 any business, provided such sale or exchange is not one of a series of sales and exchanges sufficient in
100 number, scope and character to constitute an activity requiring the holding of a certificate of registration.

101 "Open video system" means an open video system authorized pursuant to 47 U.S.C. § 573 and, for
102 purposes of this chapter only, shall also include Internet service regardless of whether the provider of
103 such service is also a telephone common carrier.

104 "Person" includes any individual, firm, copartnership, cooperative, nonprofit membership corporation,
105 joint venture, association, corporation, estate, trust, business trust, trustee in bankruptcy, receiver,
106 auctioneer, syndicate, assignee, club, society, or other group or combination acting as a unit, body
107 politic or political subdivision, whether public or private, or quasi-public, and the plural of such term
108 shall mean the same as the singular.

109 "Prewritten program" means a computer program that is prepared, held or existing for general or
110 repeated sale or lease, including a computer program developed for in-house use and subsequently sold
111 or leased to unrelated third parties.

112 "Retail sale" or a "sale at retail" means a sale to any person for any purpose other than for resale in
113 the form of tangible personal property or services taxable under this chapter, and shall include any such
114 transaction as the Tax Commissioner upon investigation finds to be in lieu of a sale. All sales for resale
115 must be made in strict compliance with regulations applicable to this chapter. Any dealer making a sale
116 for resale which is not in strict compliance with such regulations shall be personally liable for payment
117 of the tax.

118 The terms "retail sale" and a "sale at retail" shall specifically include the following: (i) the sale or
119 charges for any room or rooms, lodgings, or accommodations furnished to transients for less than 90
120 continuous days by any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any

other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for a consideration; (ii) sales of tangible personal property to persons for resale when because of the operation of the business, or its very nature, or the lack of a place of business in which to display a certificate of registration, or the lack of a place of business in which to keep records, or the lack of adequate records, or because such persons are minors or transients, or because such persons are engaged in essentially service businesses, or for any other reason there is likelihood that the Commonwealth will lose tax funds due to the difficulty of policing such business operations; and (iii) the separately stated charge made for automotive refinish repair materials that are permanently applied to or affixed to a motor vehicle during its repair. The Tax Commissioner is authorized to promulgate regulations requiring vendors of or sellers to such persons to collect the tax imposed by this chapter on the cost price of such tangible personal property to such persons and may refuse to issue certificates of registration to such persons.

The term "transient" shall not include a purchaser of camping memberships, time-shares, condominiums, or other similar contracts or interests that permit the use of, or constitute an interest in, real estate, however created or sold and whether registered with the Commonwealth or not. Further, a purchaser of a right or license which entitles the purchaser to use the amenities and facilities of a specific real estate project on an ongoing basis throughout its term shall not be deemed a transient; provided, however, that the term or time period involved is for seven years or more.

The terms "retail sale" and "sale at retail" shall not include a transfer of title to tangible personal property after its use as tools, tooling, machinery or equipment, including dies, molds, and patterns, if (i) at the time of purchase, the purchaser is obligated, under the terms of a written contract, to make the transfer and (ii) the transfer is made for the same or a greater consideration to the person for whom the purchaser manufactures goods.

"Retailer" means every person engaged in the business of making sales at retail, or for distribution, use, consumption, or storage to be used or consumed in the Commonwealth.

"Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property and any rendition of a taxable service for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication, and the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale.

"Sales price" means the total amount for which tangible personal property or services are sold, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser, consumer, or lessee by the dealer, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, losses or any other expenses whatsoever. "Sales price" shall not include (i) any cash discount allowed and taken; (ii) finance charges, carrying charges, service charges or interest from credit extended on sales of tangible personal property under conditional sale contracts or other conditional contracts providing for deferred payments of the purchase price; ~~or~~; (iii) separately stated local property taxes collected; *or (iv) any gratuity or service charge added to the price of a meal, whether added at the discretion of the purchaser or not.* Where used articles are taken in trade, or in a series of trades as a credit or part payment on the sale of new or used articles, the tax levied by this chapter shall be paid on the net difference between the sales price of the new or used articles and the credit for the used articles.

"Storage" means any keeping or retention of tangible personal property for use, consumption or distribution in the Commonwealth, or for any purpose other than sale at retail in the regular course of business.

"Tangible personal property" means personal property which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, insurance or other obligations or securities. The term "tangible personal property" shall include (i) telephone calling cards upon their initial sale, which shall be exempt from all other state and local utility taxes, and (ii) manufactured signs.

"Use" means the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it does not include the sale at retail of that property in the regular course of business. The term does not include the exercise of any right or power, including use, distribution, or storage, over any tangible personal property sold to a nonresident donor for delivery outside of the Commonwealth to a nonresident recipient pursuant to an order placed by the donor from outside the Commonwealth via mail or telephone. The term does not include any sale determined to be a gift transaction, subject to tax under § 58.1-604.6.

182 "Use tax" refers to the tax imposed upon the use, consumption, distribution, and storage as herein
183 defined.

184 "Used directly," when used in relation to manufacturing, processing, refining, or conversion, refers to
185 those activities which are an integral part of the production of a product, including all steps of an
186 integrated manufacturing or mining process, but not including ancillary activities such as general
187 maintenance or administration. When used in relation to mining, it shall refer to the activities specified
188 above, and in addition, any reclamation activity of the land previously mined by the mining company
189 required by state or federal law.

190 "Video programmer" means a person or entity that provides video programming to end-user
191 subscribers.

192 "Video programming" means video and/or information programming provided by or generally
193 considered comparable to programming provided by a cable operator including, but not limited to,
194 Internet service.

195 § 58.1-3833. County food and beverage tax.

196 A. Any county is hereby authorized to levy a tax on food and beverages sold, for human
197 consumption, by a restaurant, as such term is defined in subdivision 9 of § 35.1-1, not to exceed four
198 percent of the amount charged for such food and beverages. Such tax shall not be levied on food and
199 beverages sold through vending machines or by any person described in subdivisions 1, 2, 3, and 5 of
200 § 35.1-25, as well as nonprofit cafeterias in public schools, nursing homes, and hospitals. Grocery stores
201 and convenience stores selling prepared foods ready for human consumption at a delicatessen counter
202 shall be subject to the tax, for that portion of the grocery store or convenience store selling such items.

203 This tax shall be levied only if the tax is approved in a referendum within the county which shall be
204 held in accordance with § 24.2-684 and initiated either by a resolution of the board of supervisors or on
205 the filing of a petition signed by a number of registered voters of the county equal in number to 10
206 percent of the number of voters registered in the county, as appropriate on January 1 of the year in
207 which the petition is filed with the court of such county. The clerk of the circuit court shall publish
208 notice of the election in a newspaper of general circulation in the county once a week for three
209 consecutive weeks prior to the election. If the voters affirm the levy of a local meals tax, the tax shall
210 be effective in an amount and on such terms as the governing body may by ordinance prescribe. If such
211 resolution of the board of supervisors or such petition states for what projects and/or purposes the
212 revenues collected from the tax are to be used, then the question on the ballot for the referendum shall
213 include language stating for what projects and/or purposes the revenues collected from the tax are to be
214 used.

215 The term "beverage" as set forth herein shall mean alcoholic beverages as defined in § 4.1-100 and
216 nonalcoholic beverages served as part of a meal. The tax shall be in addition to the sales tax currently
217 imposed by the county pursuant to the authority of Chapter 6 (§ 58.1-600 et seq.) of this title. Collection
218 of such tax shall be in a manner prescribed by the governing body.

219 B. Notwithstanding the provisions of subsection A of this section, Roanoke County, Rockbridge
220 County, Frederick County, Arlington County, and Montgomery County, are hereby authorized to levy a
221 tax on food and beverages sold for human consumption by a restaurant, as such term is defined in
222 § 35.1-1 and as modified in subsection A above and subject to the same exemptions, not to exceed four
223 percent of the amount charged for such food and beverages, provided that the governing body of the
224 respective county holds a public hearing before adopting a local food and beverage tax, and the
225 governing body by unanimous vote adopts such tax by local ordinance. The tax shall be effective in an
226 amount and on such terms as the governing body may by ordinance prescribe.

227 C. Nothing herein contained shall affect any authority heretofore granted to any county, city or town
228 to levy a meals tax. The county tax limitations imposed pursuant to § 58.1-3711 shall apply to any tax
229 levied under this section, mutatis mutandis. All food and beverage tax collections and all meals tax
230 collections shall be deemed to be held in trust for the county, city or town imposing the applicable tax.
231 The wrongful and fraudulent use of such collections other than remittance of the same as provided by
232 law shall constitute embezzlement pursuant to § 18.2-111.

233 D. No county which has heretofore adopted an ordinance pursuant to subsection A of this section
234 shall be required to submit an amendment to its meals tax ordinance to the voters in a referendum.

235 E. Notwithstanding any other provision of this section, no locality shall levy any tax under this
236 section upon (i) that portion of the sales price constituting a gratuity or service charge, whether added
237 at the discretion of the purchaser or not, or (ii) alcoholic beverages sold in factory sealed containers
238 and purchased for off-premises consumption or food purchased for human consumption as "food" is
239 defined in the Food Stamp Act of 1977, 7 U.S.C. § 2012, as amended, and federal regulations adopted
240 pursuant to that act, except for the following items: sandwiches, salad bar items sold from a salad bar,
241 prepackaged single-serving salads consisting primarily of an assortment of vegetables, and nonfactory
242 sealed beverages.

243 § 58.1-3840. Certain excise taxes permitted.

244 A. The provisions of Chapter 6 (§ 58.1-600 et seq.) of this title to the contrary notwithstanding, any
245 city or town having general taxing powers established by charter pursuant to or consistent with the
246 provisions of § 15.2-1104 may impose excise taxes on cigarettes, admissions, transient room rentals,
247 meals, and travel campgrounds ~~provided that no~~. *No such taxes on meals may be imposed on (i) that*
248 *portion of a meal's sale price that is a gratuity or a service charge, whether added at the discretion of*
249 *the purchaser or not, or (ii) food and beverages sold through vending machines or on any tangible*
250 *personal property purchased with food coupons issued by the United States Department of Agriculture*
251 *under the Food Stamp Program or drafts issued through the Virginia Special Supplemental Food*
252 *Program for Women, Infants, and Children. In addition, as set forth in § 51.5-98, no blind person*
253 *operating a vending stand or other business enterprise under the jurisdiction of the Department for the*
254 *Blind and Vision Impaired and located on property acquired and used by the United States for any*
255 *military or naval purpose shall be required to collect and remit meals taxes.*

256 B. Notwithstanding any other provision of this section, no city or town shall levy any tax under this
257 section upon alcoholic beverages sold in factory sealed containers and purchased for off-premises
258 consumption or food purchased for human consumption as "food" is defined in the Food Stamp Act of
259 1977, 7 U.S.C. § 2012, as amended, and federal regulations adopted pursuant to that act, except for the
260 following items: sandwiches, salad bar items sold from a salad bar, prepackaged single-serving salads
261 consisting primarily of an assortment of vegetables, and nonfactory sealed beverages.

262 C. Any city or town that is authorized to levy a tax on admissions may levy the tax on admissions
263 paid for any event held at facilities that are not owned by the city or town at a lower rate than the rate
264 levied on admissions paid for any event held at its city- or town-owned civic centers, stadiums and
265 amphitheatres.

266 D. (Expires January 1, 2008) Any city or town that is authorized to levy a tax on admissions may
267 also levy a surcharge on admissions charged for attendance at any event at a major league baseball
268 stadium, as defined in § 15.2-5800, located in the city or town if the stadium has a seating capacity of
269 at least 40,000 seats. The surcharge shall not exceed two percent of the charge for admissions.