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SENATE BILL NO. 174

Senate Amendments in [] — February 8, 2010

A *BILL to amend and reenact §§ 58.1-602, 58.1-609.1, and 58.1-610 of the Code of Virginia, relating to exemptions from the retail sales and use tax for certain energy efficient systems; solar photovoltaic systems, solar thermal systems, and wind-powered electrical generators purchased for installation in or on residential real property.*

Patron Prior to Engrossment—Senator Deeds

Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-602, 58.1-609.1, and 58.1-610 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.

"Integrated process," when used in relation to semiconductor manufacturing, means a process that begins with the research or development of semiconductor products, equipment, or processes, includes the handling and storage of raw materials at a plant site, and continues to the point that the product is

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60 packaged for final sale and either shipped or conveyed to a warehouse. Without limiting the foregoing,
61 any semiconductor equipment, fuel, power, energy, supplies, or other tangible personal property shall be
62 deemed used as part of the integrated process if its use contributes, before, during, or after production,
63 to higher product quality, production yields, or process efficiencies. Except as otherwise provided by
64 law, such term shall not mean general maintenance or administration.

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

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

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

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

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

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

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

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

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

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

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

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

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

"Railroad rolling stock" means locomotives, of whatever motive power, autocars, railroad cars of every kind and description, and all other equipment determined by the Tax Commissioner to constitute railroad rolling stock.

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

The terms "retail sale" and a "sale at retail" shall specifically include the following: (i) the sale or charges for any room or rooms, lodgings, or accommodations furnished to transients for less than 90 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; (iii) separately stated local property taxes collected; (iv) that portion of the amount paid by the purchaser as a discretionary gratuity added to the price of a meal; or (v) that portion of the amount paid by the purchaser as a mandatory gratuity or service charge added by a restaurant to the price of a meal, but only to the extent that such mandatory gratuity or service charge does not exceed 20% of the price of the meal. 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.

"Semiconductor cleanrooms" means the integrated systems, fixtures, piping, partitions, flooring,

183 lighting, equipment, and all other property used to reduce contamination or to control airflow,
184 temperature, humidity, vibration, or other environmental conditions required for the integrated process of
185 semiconductor manufacturing.

186 "Semiconductor equipment" means (i) machinery or tools or repair parts or replacements thereof; (ii)
187 the related accessories, components, pedestals, bases, or foundations used in connection with the
188 operation of the equipment, without regard to the proximity to the equipment, the method of attachment,
189 or whether the equipment or accessories are affixed to the realty; (iii) semiconductor wafers and other
190 property or supplies used to install, test, calibrate or recalibrate, characterize, condition, measure, or
191 maintain the equipment and settings thereof; and (iv) equipment and supplies used for quality control
192 testing of product, materials, equipment, or processes; or the measurement of equipment performance or
193 production parameters regardless of where or when the quality control, testing, or measuring activity
194 takes place, how the activity affects the operation of equipment, or whether the equipment and supplies
195 come into contact with the product.

196 "Solar photovoltaic system" means an energy system or solar panel that collects or absorbs sunlight
197 for conversion into electricity and that has been certified as meeting all applicable safety standards of
198 Underwriters Laboratories. Systems that are interconnected with the utility grid shall comply with
199 performance and safety standards established by the Virginia State Corporation Commission in
200 accordance with § 56-594.

201 "Solar thermal system" means a solar energy system that collects or absorbs solar energy to
202 generate hot water or air for space heating or water heating. Solar water heating systems shall meet the
203 operational guidelines for an OG-300 certified solar water heating system as established by the Solar
204 Rating and Certification Corporation. Solar space heating panels that heat air shall meet the
205 operational guidelines for an OG-100 certified solar panel.

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

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

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

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

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

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

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

234 "Wind-powered electrical generator" means an electrical generating unit that (i) has a capacity of
235 not more than 10 kilowatts, (ii) uses wind as its total source of fuel, (iii) is intended primarily to offset
236 all or part of the owner's electricity requirements, (iv) meets all applicable performance and quality
237 standards specified by the Virginia Department of Mines, Minerals and Energy, and (v) for units that
238 are interconnected with the utility grid, complies with performance and safety standards established by
239 the Virginia State Corporation Commission in accordance with § 56-594.

240 § 58.1-609.1. Governmental and commodities exemptions.

241 The tax imposed by this chapter or pursuant to the authority granted in §§ 58.1-605 and 58.1-606
242 shall not apply to the following:

243 1. Fuels which are subject to the tax imposed by Chapter 22 (§ 58.1-2200 et seq.) of this title.
244 Persons who are refunded any such fuel tax shall, however, be subject to the tax imposed by this

chapter, unless such taxes would be specifically exempted pursuant to any provision of this section.

2. Motor vehicles, trailers, semitrailers, mobile homes and travel trailers.

3. Gas, electricity, or water when delivered to consumers through mains, lines, or pipes.

4. Tangible personal property for use or consumption by the Commonwealth, any political subdivision of the Commonwealth, or the United States. This exclusion shall not apply to sales and leases to privately owned financial and other privately owned corporations chartered by the United States. Further, this exemption shall not apply to tangible personal property which is acquired by the Commonwealth or any of its political subdivisions and then transferred to private businesses for their use in a facility or real property improvement to be used by a private entity or for nongovernmental purposes other than tangible personal property acquired by the Herbert H. Bateman Advanced Shipbuilding and Carrier Integration Center and transferred to a Qualified Shipbuilder as defined in the third enactment of Chapter 790 of the 1998 Acts of the General Assembly.

5. Aircraft subject to tax under Chapter 15 (§ 58.1-1500 et seq.) of this title.

6. Motor fuels and alternative fuels for use in a commercial watercraft upon which a fuel tax is refunded pursuant to § 58.1-2259.

7. Sales by a government agency of the official flags of the United States, the Commonwealth of Virginia, or of any county, city or town.

8. Materials furnished by the State Board of Elections pursuant to §§ 24.2-404 through 24.2-407.

9. Watercraft as defined in § 58.1-1401.

10. Tangible personal property used in and about a marine terminal under the supervision of the Virginia Port Authority for handling cargo, merchandise, freight and equipment. This exemption shall apply to agents, lessees, sublessees or users of tangible personal property owned by or leased to the Virginia Port Authority and to property acquired or used by the Authority or by a nonstock, nonprofit corporation that operates a marine terminal or terminals on behalf of the Authority.

11. Sales by prisoners confined in state correctional facilities of artistic products personally made by the prisoners as authorized by § 53.1-46.

12. Tangible personal property for use or consumption by the Virginia Department for the Blind and Vision Impaired or any nominee, as defined in § 51.5-60, of such Department.

13. [Expired.]

14. Tangible personal property sold to residents and patients of the Virginia Veterans Care Center at a canteen operated by the Department of Veterans Services.

15. Tangible personal property for use or consumption by any nonprofit organization whose members include the Commonwealth and other states and which is organized for the purpose of fostering interstate cooperation and excellence in government.

16. Tangible personal property purchased for use or consumption by any soil and conservation district which is organized in accordance with the provisions of Article 3 (§ 10.1-506 et seq.) of Chapter 5 of Title 10.1.

17. Beginning September 1, 2004, (i) tangible personal property sold or leased to Alexandria Transit Company, Greater Lynchburg Transit Company, GRTC Transit System, or Greater Roanoke Transit Company that is owned, operated, or controlled by any county, city, or town, or any combination thereof, that provides public transportation services, and/or (ii) tangible personal property sold or leased to any county, city, or town, or any combination thereof, that is transferred to any of the companies set forth in clause (i) owned, operated, or controlled by any county, city, or town, or any combination thereof, that provides public transportation services.

18. (Effective until July 1, 2012) Qualified products designated as Energy Star or WaterSense with a sales price of \$2,500 or less per product purchased for noncommercial home or personal use. The exemption provided by this subdivision shall apply only to sales occurring during the four-day period that begins each year on the Friday before the second Monday in October and ends at midnight on the second Monday in October.

For the purposes of this exemption, an Energy Star qualified product is any dishwasher, clothes washer, air conditioner, ceiling fan, compact fluorescent light bulb, dehumidifier, programmable thermostat, or refrigerator, the energy efficiency of which has been designated by the United States Environmental Protection Agency and the United States Department of Energy as meeting or exceeding each such agency's requirements under the Energy Star program. For the purposes of this exemption, WaterSense qualified products are those that have been recognized as being water efficient by the WaterSense program sponsored by the U.S. Environmental Protection Agency as indicated by a WaterSense label.

19. ~~[Solar]~~ Beginning July 1, 2012, solar photovoltaic systems, solar thermal systems, and wind-powered electrical generators purchased for installation in or on residential real property.

§ 58.1-610. Contractors.

A. Any person who contracts orally, in writing, or by purchase order, to perform construction,

306 reconstruction, installation, repair, or any other service with respect to real estate or fixtures thereon, and
307 in connection therewith to furnish tangible personal property, shall be deemed to have purchased such
308 tangible personal property for use or consumption. Any sale, distribution, or lease to or storage for such
309 person shall be deemed a sale, distribution, or lease to or storage for the ultimate consumer and not for
310 resale, and the dealer making the sale, distribution, or lease to or storage for such person shall be
311 obligated to collect the tax to the extent required by this chapter.

312 B. Any person who contracts to perform services in this Commonwealth and is furnished tangible
313 personal property for use under the contract by the person, or his agent or representative, for whom the
314 contract is performed, and a sales or use tax has not been paid to this Commonwealth by the person
315 supplying the tangible personal property, shall be deemed to be the consumer of the tangible personal
316 property so used, and shall pay a use tax based on the fair market value of the tangible personal
317 property so used, irrespective of whether or not any right, title or interest in the tangible personal
318 property becomes vested in the contractor. This subsection, however, shall not apply to the industrial
319 materials exclusion or the other industrial exclusions set out in § 58.1-609.3, including those set out in
320 subdivisions 2, 3 and 4 thereof; the media-related exemptions set out in subdivision 2 of § 58.1-609.6;
321 the governmental exclusions set out in subdivision 4 of § 58.1-609.1; *the exemptions for energy efficient*
322 *systems set out in subdivision 19 of § 58.1-609.1*; the agricultural exclusions set forth in subdivision 1 of
323 § 58.1-609.2; or the exclusion for baptistries set forth in former subdivision 2 of § 58.1-609.8.

324 C. Any person who contracts orally, in writing, or by purchase order to perform any service in the
325 nature of equipment rental, and the principal part of that service is the furnishing of equipment or
326 machinery which will not be under the exclusive control of the contractor, shall be liable for the sales or
327 use tax on the gross proceeds from such contract to the same extent as the lessor of tangible personal
328 property.

329 D. Tangible personal property incorporated in real property construction which loses its identity as
330 tangible personal property shall be deemed to be tangible personal property used or consumed within the
331 meaning of this section. Any person selling fences, venetian blinds, window shades, awnings, storm
332 windows and doors, locks and locking devices, floor coverings (as distinguished from the floors
333 themselves), cabinets, kitchen equipment, window air conditioning units or other like or comparable
334 items, shall be deemed to be a retailer of such items and not a using or consuming contractor with
335 respect to them, whether he sells to and installs such items for contractors or other customers and
336 whether or not such retailer fabricates such items.

337 E. Nothing in this section shall be construed to (i) affect or limit the resale exclusion provided for in
338 this chapter, or the industrial materials and other industrial exclusions set out in § 58.1-609.3, the
339 exclusion for baptistries set out in former subdivision 2 of § 58.1-609.8, or the partial exclusion for the
340 sale of modular buildings as set out in § 58.1-610.1, or (ii) impose any sales or use tax with respect to
341 the use in the performance of contracts with the United States, this Commonwealth, or any political
342 subdivision thereof, of tangible personal property owned by a governmental body which actually is not
343 used or consumed in the performance thereof.

344 F. Notwithstanding the other provisions of this section, any person engaged in the business of
345 furnishing and installing locks and locking devices shall be deemed a retailer of such items and not a
346 using or consuming contractor with respect to them.