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HOUSE BILL NO. 1094

Offered January 24, 2000

A BILL to amend and reenact §§ 58.1-602 and 58.1-610 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 58.1-610.1, relating to sales and use tax.

Patrons—Dudley, Ruff and Weatherholtz; Senator: Reynolds

Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-602 and 58.1-610 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 58.1-610.1 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 this Commonwealth from other states as well as from foreign countries, and "export" and "exported" are words applicable to tangible personal property exported from this 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 subscribers.

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HB1094

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 multi-family houses, apartment*
76 *units, commercial buildings, and permanent additions thereof, comprised of one or more sections that*
77 *are intended to become real property, primarily constructed at a location other than the permanent site,*
78 *built 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 ninety
120 continuous days by any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any
121 other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for

a consideration; and (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. 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 this 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 this 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. 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 this 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.

"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.

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

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

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

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

188 § 58.1-610. Contractors.

189 A. Any person who contracts orally, in writing, or by purchase order, to perform construction,
190 reconstruction, installation, repair, or any other service with respect to real estate or fixtures thereon, and
191 in connection therewith to furnish tangible personal property, shall be deemed to have purchased such
192 tangible personal property for use or consumption. Any sale, distribution, or lease to or storage for such
193 person shall be deemed a sale, distribution, or lease to or storage for the ultimate consumer and not for
194 resale, and the dealer making the sale, distribution, or lease to or storage for such person shall be
195 obligated to collect the tax to the extent required by this chapter.

196 B. Any person who contracts to perform services in this Commonwealth and is furnished tangible
197 personal property for use under the contract by the person, or his agent or representative, for whom the
198 contract is performed, and a sales or use tax has not been paid to this Commonwealth by the person
199 supplying the tangible personal property, shall be deemed to be the consumer of the tangible personal
200 property so used, and shall pay a use tax based on the fair market value of the tangible personal
201 property so used, irrespective of whether or not any right, title or interest in the tangible personal
202 property becomes vested in the contractor. This subsection, however, shall not apply to the industrial
203 materials exclusion or the other industrial exclusions set out in § 58.1-609.3, including those set out in
204 subdivisions 2, 3 and 4 thereof; the media-related exemptions set out in subdivision 2 of § 58.1-609.6;
205 the governmental exclusions set out in subdivision 4 of § 58.1-609.1; the agricultural exclusions set forth
206 in subdivision 1 of § 58.1-609.2; or the exclusion for baptistries set forth in subdivision 2 of
207 § 58.1-609.8.

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

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

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

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

231 §58.1-610.1. Modular building manufacturers and retailers.

232 *The retail sale of a modular building, as defined by § 58.1-602, by a modular building manufacturer*
233 *or modular building retailer, as defined by § 58.1-602, shall be subject to the tax authorized by this*
234 *chapter upon sixty percent of the retail sales price. If the modular building manufacturer has paid such*
235 *tax on the cost price of materials incorporated in a modular building that has been constructed for sale*
236 *without installation, it may credit against the tax shown to be due on the return the amount of sales or*
237 *use tax paid on the cost of materials used in fabricating such a modular building.*