



STATE OF WEST VIRGINIA
Department of Revenue
State Tax Department

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WEST VIRGINIA STATE TAX DEPARTMENT
Administrative Notice 2008-27

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

SUBJECT: Application and Severability of Bundled Transactions.

This Administrative Notice sets forth the West Virginia Tax Department policy for applying bundled transaction provisions for purposes of the West Virginia consumers sales and service tax and use tax in accordance with Articles 11-15-1 *et seq.*, 11-15A-1 *et seq.*, and 11-15B-1 *et seq.* of the West Virginia Code.

A. Application and Severability of bundled transactions. All parts of the definition of a "bundled transaction" set forth in §11-15B-2(4) shall be used to determine whether a transaction is a bundled transaction and none of the definition's parts shall be severable when making such a determination. Except as provided in this notice, a transaction that does not comply with any single part of the definition shall not be a bundled transaction.

B. Types of Products Included in a Bundled Transaction. For purposes of the "bundled transaction" definition found in §11-15B-2(4), "products" shall include all types of products except real property and services to real property. Types of products include; tangible personal property, services, intangibles, digital goods, and products that are subject to sales tax on the retail sale but the imposition of tax on the retail sale of such products is not itself considered tangible personal property, services, or digital goods.

Distinct and Identifiable Products. A "bundled transaction" is a retail sale of two or more products that are "distinct and identifiable." Packaging that accompanies the retail sale of a product, products provided free of charge and items included in the definition of "sales price" and "purchase price" are not distinct and identifiable products.

- a. Packaging is not a separate and distinct product when such packaging is the wrapping or packing that accompanies the retail sale of a product(s) and such packaging is incidental or immaterial to the retail sale of the product(s).
- b. A product provided free of charge is not a separate and distinct product. A product shall be considered to be provided free of charge in a retail sale if, in order to obtain the product, the purchaser is required to make a purchase of one or more other products and the price of the purchased products does not change based on the seller providing a product free of charge. Such products provided free of charge with the necessary purchase of another product (e.g.

a free car wash with the purchase of gas or free dinnerware with the purchase of groceries) shall be considered "promotional products".

- c. A retail sale is not considered to be for "two or more distinct and identifiable products" if the items are included in the definition of "sales price" and "purchase price."

One Non-itemized Price. The sales price or purchase price of a bundled transaction is for one non-itemized price. If a retail sale of two or more products is not made for "one non-itemized price," then the retail sale is not a "bundled transaction." A transaction shall not be considered to be a bundled transaction if, by negotiation or otherwise, the sales price varies with the purchaser's selection of the distinct and identifiable products being sold. A retail sale shall not be considered made for "one non-itemized price" if the purchaser has the option of declining to purchase any of the products being sold and, as a result of the purchaser's selection of products, the sales price varies or a different price is negotiated.

- a. A retail sale shall not be considered a bundled transaction if the price is separately identified by product on binding sales documents or other supporting sales-related documentation made available to the purchaser because the sale is not being made for "one non-itemized price." The sales-related documents made available to a purchaser in paper or electronic form shall provide enough information for the purchaser to determine the price(s) of taxable and exempt products.
- b. A transaction shall not be considered a bundled transaction if a seller bills or invoices one price for the sale of distinct and separate products but the price invoiced is equal to the total of the individually priced or itemized products contained in supporting sales-related documentation, such as a catalog, price list, or service agreement.
- c. If the seller bills or invoices one price for a transaction that includes a bundle of products and also includes one or more additional products that are individually priced or itemized in a catalog or price list, the additional products individually priced or itemized shall not be considered to be a part of the bundled products sold for one non-itemized price.
- d. If a transaction does not qualify as a bundled transaction because of the provisions in this subsection (B.2.a-c), the transaction shall not be considered a bundled transaction as a result of the seller offering a subsequent discount of the total sales price without itemizing the amount of the discount for each product. In such a situation, if there is no sales-related documentation showing the allocation of the discount, the discount shall be considered to be allocated pro rata among the otherwise separately itemized products.

Records Required to be Maintained by the Seller. In order to show whether a retail sale was for one or more distinct and identifiable products and whether the products were sold for one non-itemized price, a seller shall maintain copies of invoices, service agreements, contracts, catalogs, price lists, rate cards and other sales-related documents given to, or made available to, the purchaser.

True Object - §11-15B-2(4)(C)(i)(ii) "True object," as the term is used in the definition of a bundled transaction, shall mean the main product or item in the transaction. If as a result of applying §11-15B-2(4)(C)(i)(ii), a transaction is not a bundled transaction, then the transaction shall be considered a retail sale of the service that is the object of the transaction.

- a. Section 11-15B-2(4)(C)(i)(ii), is subjective in nature and shall be applied on a case-by-case basis to the particular facts involved in each situation. Examples, not intended to be all inclusive, of factors that might be considered are as follows:

The business in which the seller is engaged.

The purchaser's object in engaging in the transaction.

De minimis Test - §11-15B-2(4)(C)(iii). A seller may use the sales price or the purchase price of each product in the transaction to measure or quantify whether the taxable products are de minimis. A seller shall not use the sales price for some products in the transaction and the purchase price for other products in the transaction to measure or quantify whether the taxable product(s) in the transaction are de minimis.

- a. If services have been sold under a service contract, the full contract price for the services shall be used to determine whether products in the transaction are de minimis regardless of the time period covered by the service contract. For the purpose of determining whether services in the transaction are de minimis, the price of the services shall not be prorated based on the term of the service contract.
- b. When the taxable products in a transaction are determined to be de minimis, the transaction is not a "bundled transaction."

When the taxable part of a bundle is not de minimis, the transaction is subject to sales tax imposed by §11-15-3.

When the non-taxable part of a bundle is the de minimis portion, the transaction is subject to sales tax imposed by §11-15-3.

Primary Test - §11-15B-2(4)(C)(v). A seller may use the sales price or the purchase price of each product in the transaction to measure or quantify whether the taxable

products in the transaction are the primary products (more than 50% of the total sales price or purchase price). A seller shall not use the sales price for some of the products in the transaction and the purchase price for other products in the transaction to measure or quantify whether the taxable product(s) in the transaction are the primary products.

- a. Section 11-15B-2(4)(C)(v) may be applied only to transactions that contain multiple products that are only tangible personal property and at least one product is: food and food ingredients including soft drinks, candy, and dietary supplements; drugs including over-the-counter and grooming and hygiene products; durable medical equipment; mobility enhancing equipment; prosthetic devices, and medical supplies.
- b. When the taxable products in the transaction are not the primary products (more than 50%), then the transaction is not a "bundled transaction."

If food and food ingredients is the primary product, taxable at a lower rate as imposed by §11-15-3, the transaction is subject to the lower rate of tax.

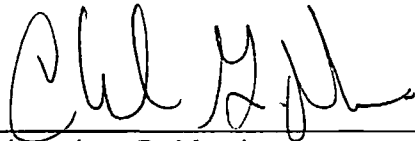
If the taxable product subject to the general sales tax rate is the primary object, the transaction is subject to the general sales tax rate as imposed by §11-15-3.

In the case of a bundled transaction that includes any of the following: telecommunication service, ancillary service, internet access, or audio or video programming service:

- a. If the price is attributable to products that are taxable and products that are nontaxable, the portion of the price attributable to the nontaxable products shall be subject to tax unless the provider can identify by reasonable and verifiable standards such portion from its books and records that are kept in the regular course of business for other purposes, including, but not limited to, non-tax purposes.

Notice of this determination will be filed in the West Virginia Register.

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