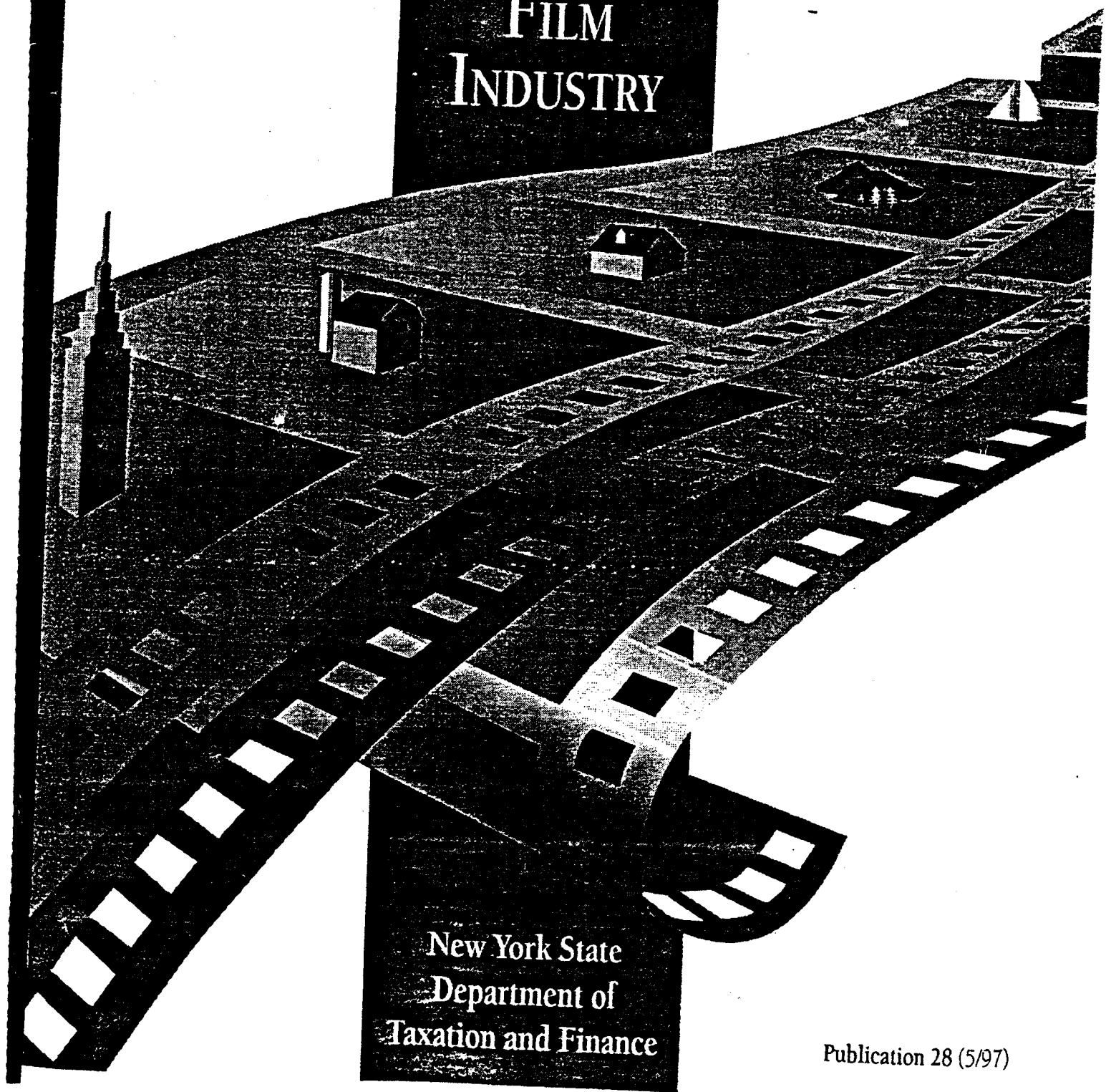


A GUIDE TO SALES TAX FOR THE FILM INDUSTRY

ORIGINAL: 1930

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New York State
Department of
Taxation and Finance

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Introduction

This publication discusses how New York State and local Sales and Use Taxes apply to film production. When used in this publication, the word film includes but is not limited to such items as feature films, television films, commercials, and similar film and video productions.

Although accurate, the information in this publication has been simplified. If there is any discrepancy between it and the Tax Law or regulations, the Tax Law and regulations will govern.

Unless otherwise noted, the term "tax" refers to the sales and use taxes under Articles 28 and 29 of the Tax Law.

With certain important exceptions, New York State imposes a sales tax on the purchase of all tangible property delivered within the state as well as certain services performed within the state. It also imposes a use tax on such property and services when purchased outside the state and delivered within the state. The local counties and cities are also permitted to impose a sales and use tax. In addition to New York City, many local jurisdictions impose such taxes. All exemptions and exclusions that are applicable to the state tax apply equally to all local taxes, including the local tax imposed by New York City, unless specifically provided otherwise. The state and local taxes are administered by the Department of Taxation and Finance.

The creation of a film is considered a manufacturing activity that results in the production of tangible personal property. Accordingly, a person engaged in the production of a film for sale is afforded all exemptions which are available to manufacturers. N/P

The production exemptions described in this publication only apply to the purchase of property or services that are used or consumed directly and predominantly in the production process. They do not apply to the purchase of property or services for use in either administrative or distribution activities.

Wages, salaries and other compensation paid by an employer to an employee are not subject to tax, even if the services provided would otherwise be taxable. For purposes of this guide, it is assumed that the services provided to a producer are not being provided by an employee. The determination of whether an individual is an employee is based upon the facts and circumstances of each situation.

The exemptions applicable to film production that are available to manufacturers are described on the following pages. A schedule of some of the property and services purchased by film producers is also included in this publication. Each item listed on the schedule is followed by a notation indicating its taxable status.

Should you require additional information or clarification about the information in this publication, please refer to the address or telephone numbers listed on the back cover.

General Information

Producers as Manufacturers

The production of a film is considered a manufacturing activity when the production results in the creation of a film for sale. When making a film for sale, the producer is entitled to all of the exemptions available to manufacturers. However, the producer must register as a New York State sales tax vendor to exercise its right to exemptions. Once registered, the producer may issue the appropriate exemption certificates to its suppliers.

Producers who are not registered as sales tax vendors should request *A Guide to Sales Tax in New York State*, Publication 750, which contains a registration application form. This publication may be obtained by calling or writing to the Department of Taxation and Finance.

Exclusions and Exemptions

Property Used or Consumed in Production

Machinery or equipment, as well as parts, tools and supplies, used or consumed directly and predominantly in the production of a film for sale may be purchased or leased exempt from all sales and use tax. Machinery or equipment is used predominantly in production if more than 50 percent of its use is directly in the production phase of a process.

For example, a pickup truck mounted with a camera is used 70% of the time to transport equipment to and from a shooting location and 30% of the time in the actual filming of a commercial or feature film. The purchase or rental of this truck does not qualify for exemption because the transporting of equipment is not considered part of the production process.

The exemptions provided above for property predominantly used or consumed in production do not apply to the purchase of property used for administrative purposes. Administration includes such activities as sales promotions, general office work, ordering and receiving materials, making travel arrangements, the preparation of shooting schedules, and the preparation of work and payroll records.

Property and Services Purchased for Resale

A manufacturer registered as a New York State sales tax vendor may make certain purchases for resale. Materials and services on these materials that will become a component of the product sold (e.g., original negative) may be purchased exempt from tax, if a properly completed *Resale Certificate*, Form ST-120, is issued to the supplier.

Installing, Repairing, Maintaining and Servicing

Charges to install, repair, maintain or service production equipment, parts, tools and supplies are exempt from the New York State and New York City taxes. They are, however, subject to local taxes outside New York City.

Examples of installation services subject to such local taxes are:

- (1) installing illumination lighting and sound equipment;
- (2) installing special effects riggings;
- (3) connecting wiring from electrical sources to production equipment.

Utilities Used in Production

Utilities used or consumed **directly and exclusively** in the production of a film for sale are exempt from tax. However, this exemption does not apply to the New York City tax.¹

Examples of taxable and exempt electricity usage:

- (1) Electricity used or consumed by set lighting equipment is **exempt** (except in New York City).
- (2) Electricity used or consumed in a mobile trailer maintained for actors is **taxable**.
- (3) Electricity used or consumed to light and heat a temporary or permanent office is **taxable**.

Motor Fuels Used in Production

Motor fuel (e.g., gasoline) or diesel motor fuel used or consumed **directly and exclusively** in the production of a film for sale is exempt from tax. However, this exemption does not apply to the New York City tax.

Examples of taxable and exempt motor fuel or diesel motor fuel usage:

- (1) Motor Fuel or diesel motor fuel used or consumed in an automobile while used as a prop in a commercial is **exempt**.
- (2) Motor fuel or diesel motor fuel used or consumed in a motor vehicle that carries equipment from location to location is **taxable**.

New York State and local taxes must be paid on all motor fuel and diesel motor fuel when purchased. However, if the motor fuel or diesel motor fuel is used **directly and exclusively** in production, the purchaser may claim a refund by filing the appropriate refund application. *Application for Refund of Sales Tax on Automotive Fuels*, Form FT-500, should be used to claim a refund of sales tax paid on motor fuel (gasoline) and/or diesel motor fuel.

¹See information about New York City credit on page 4.

New York City Sales and Use Tax

All of the exemptions described above also apply to the New York City tax with the following exceptions. The purchase of utilities and fuel used in the production of a film for sale is not exempt from the New York City tax. However, a producer is entitled to claim a credit for the amount of New York City tax paid on electricity and electric service used in the production of a film for sale. The credit is allowed against the New York City General Corporation Tax or Unincorporated Business Tax. In addition, the exemption described above for motor fuel does not apply to the New York City sales and use tax.

Exemption Certificates

Film producers must furnish a properly completed *Exempt Use Certificate*, Form ST-121 to their suppliers to exempt their purchases of qualifying production machinery, equipment, parts, tools or supplies for use or consumption directly and predominantly in the production of a film for sale. This certificate must also be furnished to those who install, repair, maintain or service the exempt machinery, equipment, parts, tools or supplies.

Producers who purchase tangible personal property that becomes a physical component part of the film and is actually transferred to the customer must issue a properly completed *Resale Certificate*, Form ST-120, to their supplier.

A properly completed exemption certificate must be furnished, and accepted in good faith, no later than 90 days after delivery of the property or service or the sale will be considered a taxable sale. These exemption certificates may only be issued by a person registered as a New York vendor.

Producing a Film

The production of feature films, television programs, music videos and commercials results in the manufacture of tangible personal property. The production and sale of films, commercials, etc. can be divided into four basic categories:

- (1) preproduction (obtaining story rights, assembling and hiring of talent, director, etc.);
- (2) production (the actual shooting either on location or at a studio);
- (3) post production (mixing, editing and dubbing); and
- (4) the sale and distribution of the film.

Preproduction

Preproduction involves all activities engaged in before the shooting of a film. This includes activities such as obtaining story rights, writing the script, hiring talent and directors, arranging shooting schedules and creating a budget for the film. Sometimes the expenditures for these functions are called "above-the-line costs."

Production

The actual shooting takes place either on location or at a film studio. It involves the entire process of recording the actions taking place within the film. The production phase includes such preparation activities as the construction of sets, the obtaining of props, stage and location rentals, wardrobing, etc. The original negative is the medium (film, tape, etc.) first used in the camera when photographing live action, special effects, animation, computer generated images, etc. The developing of the film is a processing service. Processing services are purchased for resale since the production company is selling the film on which the service is being performed. Sometimes the expenditures for these activities are called "below-the-line costs."

Post Production

Post production involves the editing, dubbing and mixing of a film. It consists of the entire process by which the individual actions recorded during production are transformed into a cohesive body. Only selected portions of the images recorded on the original negative will appear in the final production. The selection process together with all subsequent editing may utilize either film, tape or any other visual/audio medium. Work prints, rushes, dailies, interpositives, CRI's (color reversal internegatives), rough cuts, answer prints, visual/audio masters, both analog and digital, and computer disks, are examples of items used in the selection process. Sound, corrected color, special effects shots, opticals, computer generated images and credits are incorporated. It results in the creation of the elements to be used for making dupes. These elements are exempt as either machinery, equipment, parts, tools or supplies used in production.

Internegatives, fine grain positives, edited visual/audio masters both analog and digital, and other intermediate elements are used ultimately to produce the materials used for exhibition in theaters or for distribution by cable or broadcasting. The purchase of these items is exempt as production equipment.

Duplication and Distribution

Sales and use taxes are imposed on the **total selling price** of a film. The vendor selling the film is responsible for collecting sales tax based on the rate of tax in effect in the taxing jurisdiction where the film or tape is delivered. There is no New York sales and use tax imposed on the outright sale of a film when the film is delivered out-of-state. A film is deemed to be delivered where the original negative is delivered.

The materials used for exhibition in theatres or for distribution by cable or broadcast, e.g., release prints, dupes or other release copies, may be in the form of film or tape as well as CD ROM, DVD (Digital Versatile Disk) and any other medium, both analog or digital. The sale of these materials is considered separate and apart from the sale of the film.

Occasionally, the producer of a film does not sell the film outright but will grant a distributor a "license to exhibit" or a "license to use." In this situation, the producer must collect sales tax unless the distributor has acquired the "license to exhibit" or "license to use" for resale. In this case, the distributor must furnish a properly completed *Resale Certificate*, Form ST-120, to the producer.

Right to Reproduce

In some instances, a "right to reproduce" a film will be granted. The granting of a "right to reproduce" is not a sale or license to exhibit, and the transaction is not taxable. Temporary possession or custody for the purpose of making the reproduction is not a transfer of possession that would convert the reproduction right into a license to use.

Generally, when a producer makes a film for the purpose of granting a "right to reproduce," the producer is not making a film or tape for sale. Thus, sales tax must be paid on all purchases of machinery, equipment, parts, tools and supplies.

Need Tax Help?

For forms or publications, call toll free (from New York State only) 1 800 462-8100. From areas outside New York State, call (518) 438-1073. Forms and publications are also available, toll free on Fax-on-Demand 1 800 748-3676, or on the Internet at <http://www.tax.state.ny.us>

For information, call toll free (from New York State only) 1 800 CALL TAX (1 800 225-5829). From areas outside New York State, call (518) 438-8581. Telephone assistance is available from 8:30 a.m. to 4:25 p.m., Monday through Friday.

Persons with Disabilities - In compliance with the Americans with Disabilities Act, we will ensure that our lobbies, offices, meeting rooms and other facilities are accessible to persons with disabilities. If you have any questions about special accommodations for persons with disabilities, please call the information and assistance numbers listed above.

If you need to write, address your letter to:

**NYS Tax Department
Taxpayer Assistance Bureau
W.A. Harriman Campus
Albany, NY 12227**

Need Help With Your Production?

**New York State Governor's Office for Motion Picture and Television Development,
call (212) 803-2330.**

or write:

**NYS Governor's Office for Motion Picture and Television Development
633 Third Avenue
New York, NY 10017**

Manufacturing, Processing, Assembling, or Refining.--

Authority:

Sec. 11-15-9(b)(2), Code;
Sec. 11-15-9(a)(38), Code;
Sec. 11-15-2(l), Code;
Sec. 11-15-2(d)(1), Code;
Sec. 11-15-2(d)(2), Code;
Sec. 11-15-2(d)(3), Code;
Secs. 11-15-7, 11-15A-2a(a), Code
Sec. 11-15A-2a(b), Code;
Reg. Sec. 110-15-9.4.1
Reg. Sec. 110-15-123.1;
Reg. Sec. 110-15-2.46
Reg. Sec. 110-15-123.4.2
Reg. Sec. 110-15-2.27
Reg. Sec. 110-15-123.3
Reg. Sec. 110-15-3.4.6
Reg. Sec. 110-15-3.4.7
Reg. Sec. 110-15-7.1;
Reg. Sec. 110-15-4.7.2

TSD-358, WV Dept. of Tax and Revenue
TSD-370, WV Dept. of Tax and Revenue.

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Sales of services, machinery, supplies, and materials (except gasoline and special fuel) directly used or consumed in the activity of manufacturing are exempt from sales tax (Sec. 11-15-9(b)(2), Code; Reg. Sec. 110-15-9.4.1; TSD-358, WV Dept. of Tax and Revenue). The exemption also applies to the following activities in addition to manufacturing: transportation (see ¶60-710), transmission (see ¶60-750), communication (see ¶60-720), production of natural resources (see ¶60-530), gas storage (see ¶60-560), generation or production or selling of electric power, provision of a public utility service or the operation of a utility service or the operation of a utility business, in the aforementioned businesses or organizations.

Whether a purchase of an item is taxable depends on its use rather than the type of property or service purchased (Reg. Sec. 110-15-123.1;). The exemption is a refundable exemption, meaning that the purchaser either pays the tax and applies for a refund with the Tax Commissioner or gives the vendor a direct pay permit number (Sec. 11-15-9(b)(2), Code;).

“Manufacturing” means a systematic operation or integrated series of systematic operations engaged in as a business that transforms or converts tangible personal property by physical, chemical, or other means into a different form, composition, or character (Sec. 11-15-2(l), Code;). Manufacturing begins when the raw materials arrive and ends when no further changes are to be made to the resultant property in the production process (Reg. Sec. 110-15-2.46). Charges for moving a product between different locations of the same manufacturer where further steps in the manufacturing process occur are exempt (Reg. Sec. 110-15-9.4.1). Manufacturing does not include the storage or transportation of completed products (Reg. Sec. 110-15-123.4.2). A person does not need legal title to or an economic interest in transformed property in order to be engaged in a manufacturing activity.

● *Directly used or consumed*

Only purchases of services, supplies, machinery, and materials directly used in activities or operations that are an integral and essential part of the manufacturing activity are exempt from sales and use tax (Sec. 11-15-2(d)(1), Code; Reg. Sec. 110-15-2.27). Purchases used in activities incidental, convenient, or remote to manufacturing are taxable. Tangible personal property and services are directly used in manufacturing only if they (Sec. 11-15-2(d)(2), Code; Reg. Sec. 110-15-123.3; TSD-358, WV Dept. of Tax and Revenue):

- (1) are physically incorporated into a finished product resulting from manufacturing production;
- (2) cause a direct physical, chemical, or other change upon property undergoing manufacturing production (for example, equipment used to assemble parts during the manufacturing process);
- (3) transport or store property undergoing manufacturing production (for example, fork lifts to move partially manufactured goods from one area to another, but not if used to move completed goods on the loading dock);
- (4) measure or verify a change in property directly used in manufacturing production (for example, testing equipment used in quality control);
- (5) physically control or direct the movement or operation of property directly used in manufacturing production (for example, conveyor belts on an assembly line);

- (6) directly and physically record the flow of property undergoing manufacturing production;
- (7) produce energy for property directly used in manufacturing production (for example, an electrical generator or boiler used to produce energy for use in operating equipment directly used in manufacturing);
- (8) facilitate the transmission of gas, water, steam, or electricity from the point of their diversion to property directly used in manufacturing production (for example, pipes to carry water to equipment directly used in manufacturing);
- (9) control or regulate atmospheric conditions required for manufacturing production (for example, air conditioning necessary during a manufacturing process, but not if used for the personal comfort of employees);
- (10) serve as an operating supply for property undergoing manufacturing production or for property directly used in manufacturing production (for example, warehouses used to store property directly used in the manufacturing process);
- (11) maintain or repair property directly used in manufacturing production;
- (12) store, remove, or transport economic waste resulting from a manufacturing activity (for example, trash bins used to store waste resulting from manufacturing);
- (13) are used in a pollution control (defined in Reg. Sec. 110-15-2.27.1.13.a) or environmental quality or protection activity (defined in Reg. Sec. 110-15-2.27.1.13.b) directly related to the activity of manufacturing (for example, a scrubber used to clean air emissions from a manufacturing facility);
- (14) are used in a personnel, plant, product, or community safety or security activity directly relating to manufacturing activity (for example, safety shoes used by personnel for protection in a hazardous manufacturing facility); and
- (15) are otherwise used as an integral and essential part of manufacturing production.

There is no direct use exemption for tangible personal property or services used in heating or lighting office buildings, janitorial or general cleaning activities, production planning, scheduling of work, inventory control, marketing, general management, supervision, finance, training, accounting, administration, activities incidental or convenient to manufacturing production rather than in an integral or essential part of the activities, samples distributed in the advertising or marketing of products, or for the personal comfort of personnel (Sec. 11-15-2(d)(3), Code; Reg. Sec. 110-15-2.27; Reg. Sec. 110-15-123.3; TSD-358, WV Dept. of Tax and Revenue; TSD-370, WV Dept. of Tax and Revenue).

● *Examples of taxable and nontaxable items*

The following items are examples of property indirectly used in manufacturing activities and, therefore, are subject to tax (Reg. Sec. 110-15-123.4.2; TSD-358, WV Dept. of Tax and Revenue): office furniture and supplies; recordkeeping equipment; computer and computer software (unless used to control flow of goods in production) uniforms; manuals and trade publications; machinery, tools, parts, and materials used to repair equipment and site facilities not directly used in manufacturing; tangible personal property and services used to convey or handle finished products; and tangible personal property or services used in advertising or marketing.

The following items are examples of property directly used in manufacturing activities (Reg. Sec. 110-15-123.4.2; TSD-358, WV Dept. of Tax and Revenue): raw materials used in manufacturing and incorporated into the completed product; tangible personal property or services used in conveying or unloading raw materials and partially finished manufactured goods from storage to the production line; tangible personal property used in storage of raw materials or partially completed manufactured goods; machinery or equipment directly used in manufacturing; computer hardware and software if used to direct production line operations, to control the flow of goods in production, or in quality control; pollution control equipment; packaging materials used in packaging manufactured products for sale; and safety equipment or clothing necessary to the manufacturing process.

● *Self-produced, self-consumed goods*

A manufacturer that uses or consumes its own manufactured products must pay use tax on their gross value, unless the use or consumption is otherwise exempt (Secs. 11-15-7, 11-15A-2a(a), Code; Reg. Sec. 110-15-3.4.6; Reg. Sec. 110-15-7.1);).

Tax base of product used or consumed: The gross value or tax base of a product used or consumed by its own manufacturer is equal to the selling price at the place of use or consumption of comparable products offered for sale by persons not related to the taxpayer (Sec. 11-15A-2a(b), Code; Reg. Sec. 110-15-3.4.7; Reg. Sec. 110-15-7.1);), or if there are no such sales, the average price of comparable products sold by the manufacturer to its customers. In the absence of sales to customers, the tax base is the cost of the product plus the average markup realized by the manufacturer. If the product is consumed or used away from the place of manufacturing, freight charges are not deductible unless they were

considered in the method by which the values were determined.

Use tax accrues when the manufacturer first uses or consumes the product in West Virginia in a non-exempt manner (Reg. Sec. 110-15-4.7.2).

● *Commissions paid to manufacturers' representatives*

Commissions received by manufacturers' representatives after June 30, 1987 will be exempt from sales tax (Sec. 11-15-9(a)(38), Code).

Manufacturing, Processing, Assembling, or Refining--

Authority:

Sec. 54:32B-8.13(a), R.S.;
Sec. 54:32B-8.13(d), R.S.;
Sec. 54:32B-11(4), R.S.;
Sec. 54:32B-8.20, R.S.;
Sec. 54:32B-6, R.S.;
Sec. 54:32B-3(b), R.S.;
Sec. 54:32B-8.36, R.S.;
Regs. 18:24-4.1, 18:24-4.4
Reg. 18:24-4.3;
Reg. 18:24-4.4;
Reg. 18:24-4.2;
Reg. 18:24-4.5;
Reg. 18:24-4.6;
Reg. 18:24-4.7.

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Sales of machinery, apparatus, or equipment for use or consumption directly and primarily in the production of tangible personal property by manufacturing, processing, assembling, or refining are exempt from tax (Sec. 54:32B-8.13(a), R.S.; Regs. 18:24-4.1, 18:24-4.4). The exemption does not apply if the use of the property is merely incidental to the above activities, nor does the exemption apply to motor vehicles, parts with a useful life of one year or less, and tools and supplies used in conjunction with the machinery, apparatus, or equipment (Sec. 54:32B-8.13(d), R.S.; Reg. 18:24-4.3).

Machinery, apparatus, or equipment is directly used in production only when used to initiate, sustain, or terminate the transformation of raw materials into finished products (Reg. 18:24-4.4). To determine whether there is direct use, the following factors are considered: (1) the physical proximity of the property to the production process; (2) the proximity of time the property is used to the time other property is used before and after it in the production process; and (3) the active causal relationship between the use of the property and the production of the finished product.

When a single unit of machinery, apparatus, or equipment is put to use in two different activities, only one of which is a "direct use", the property is not exempt from tax unless used more than 50% of the time directly in manufacturing, processing, assembling, or refining operations, except in those cases where the machinery, apparatus, or equipment is rented, leased, or used by persons other than the purchaser (Reg. 18:24-4.4).

The use of property by the purchaser for conversion into articles produced for sale, or distribution as samples, is exempt from tax (Sec. 54:32B-11(4), R.S.).

Definitions: "Assembling" means the collecting or gathering together of the parts of a product, and placing them in their proper relation to each other (Reg. 18:24-4.2).

"Manufacturing or processing" means the performance of operations to place items of tangible personal property in a form, composition, or character different from that in which it was acquired. The change must be substantial and must result in a transformation into a different or substantially more usable product.

"Machinery, apparatus or equipment" means any complex, mechanical, electrical, or electronic device that is adapted to the accomplishment of a production process, and that is designed to be used and is used in manufacturing, converting, processing, fabricating, assembling, or refining tangible personal property for sale.

"Refining" means the making fine or pure or partially free from extraneous or undesirable matter.

● *Chemicals and catalysts used in processing*

Sales of materials, such as chemicals and catalysts, that are used to induce or cause a refining or chemical process, are exempt from tax when the materials are an integral or essential part of the processing operation, but do not become part of the finished product (Sec. 54:32B-8.20, R.S.; Reg. 18:24-4.5).

● *Use of property manufactured, processed, or assembled by user*

Manufacturers, assemblers, or processors who use their own products are subject to use tax if they sell items of the same kind in the regular course of business (Sec. 54:32B-6, R.S.). Storage, keeping, retention, or withdrawal from storage by these persons are not taxable uses.

● *Services*

The sales tax applies to the services of producing, fabricating, processing, printing, or imprinting tangible personal

property for a person who furnishes the tangible personal property (not purchased for resale) upon which the fabricating is performed (Sec. 54:32B-3(b), R.S.; Reg. 18:24-4.6;). However, these services are not subject to sales tax when the property is delivered to the purchaser outside the state for use outside the state (Sec. 54:32B-3(b), R.S.; Reg. 18:24-4.7;).

● *Recycling equipment*

Receipts from sales of recycling equipment are exempt from sales and use taxes (Sec. 54:32B-8.36, R.S.;). For purposes of this exemption, "recycling equipment" means any equipment that is used exclusively in the recycling of solid waste. The term "recycling equipment" does not include conventional motor vehicles or any equipment used in a process after the first marketable product is produced or, in the case of recycling iron or steel, any equipment used to reduce the waste to molten state and in any process thereafter.