TITLE 110
LEGISLATIVE RULES
DEPARTMENT OF TAX AND REVENUE

SERIES 26
MUNICIPAL BUSINESS AND OCCUPATION TAX

§110-26-1. General.

1.1. Scope. -- These regulations explain and clarify the West Virginia Municipal Business and Occupation Tax, W. Va. Code §8-13-5. The regulations provide municipalities with guidance as to how the municipal business and occupation tax is to be administered.

1.2. Authority. -- W. Va. Code §§8-13-5 and W. Va. Code 11-10-5.

1.3. Filing date. -- April 15, 1992.

1.4. Effective date. -- April 15, 1992.

§110-26-1a. Definitions.

For purposes of these rules and regulations, the following terms are hereby defined.

1a.1. "Tax Year" or "taxable year" means the one year period adopted by the municipal ordinance providing for a municipal business and occupation tax authorized under W. Va. Code §8-13-5. Such tax year may be the calendar year, the municipality's fiscal year, the taxpayer's fiscal year, or any other year as determined under the ordinance imposing the municipal business and occupation tax. Where no tax year is specified, and no provision is made for determining the taxpayer's tax year under the ordinance, the "tax year" shall be the calendar year.

1a.2. "Municipality" is a word of art and shall mean and include any Class I, Class II and Class III city and any Class IV town or village, heretofore or hereafter incorporated as a municipal corporation under the laws of this State.

1a.3. "Town or village" is a term of art and shall, notwithstanding the provisions of W. Va. Code §2-2-10 mean, include and be limited to any Class IV town or village, as classified in W. Va. Code §8-1-3 heretofore or hereafter incorporated as a municipal corporation under the laws of this State, however created and whether operating under (1) a special legislative charter, (2) general law, or (3) a combination of the foregoing.

1a.5. "Governing body" shall mean the mayor and council together, the council, the board of directors, the commission, or other board or body of any municipality, by whatever name called, as the case may be, charged with the responsibility of enacting ordinances and determining the public policy of such municipality; and in certain articles dealing with intergovernmental

relations shall also mean the county court [county commission] of any county or governing board of other units of government referred to in said articles.

1a.6. "Councilmen" shall mean the members of a governing body, by whatever name such members may be called.

1a.7. "Mayor" shall mean the individual called mayor unless as to a particular municipality a commissioner (in a commission form of government) or the city manager (in a manager form of government) is designated or constituted by charter provision as the principal or chief executive officer or chief administrator thereof, in which event the term "mayor" shall mean as to such municipality such commissioner or city manager unless as to any particular power, authority, duty or function specified in this chapter to be exercised, discharged or fulfilled by the mayor it is provided by charter provision or ordinance that such particular power, authority, duty or function shall be exercised, discharged or fulfilled by the individual called mayor and not by a commissioner or city manager, in which event such particular power, authority, duty or function shall in fact be exercised, discharged or fulfilled in and for such municipality by the individual called mayor: Provided, That in the exercise and discharge of the ex officio justice of the peace [magistrate], conservator of the peace and mayor's court functions specified in this chapter, the term "mayor" shall always mean the individual called mayor.

1a.8. "Recorder" shall mean the recorder, clerk or other municipal officer, by whatever name called, charged with the responsibility of keeping the journal of the proceedings of the governing body of the municipality and other municipal records.

1a.9. "Treasurer" shall mean the treasurer or other municipal officer, by whatever name called, exercising the power and authority commonly exercised by a treasurer.

1a.10. "Administrative authority" shall mean the officer, commission or person responsible for the conduct and management of the affairs of the municipality in accordance with the charter, general law and the ordinances, resolutions and orders of the governing body thereof.

1a.11. "Charter" shall mean, except where specific reference is made to a particular type of charter, either a special legislative charter (whether or not amended under the provisions of former W. Va. Code §8A-1-1 et seq. or under W. Va. Code §8-4-1 et seq., and although so amended, such special legislative charter shall, for the purposes of these regulations, remain a special legislative charter), or a home rule charter framed and adopted or revised as a whole or amended by a city under the provisions of former W. Va. Code §8A-1-1 et seq. or under the provisions of W. Va. Code §8-3-1 et seq. or 8-4-1 et seq.

1a.12. "Ordinances" shall mean the ordinances and laws enacted by the governing body of a municipality in the exercise of its legislative power.

1a.13. "County court" ["county commission"] shall mean the governmental body created by Section 22, article VIII of the Constitution of this State, or any existing tribunal created in lieu of a county court [county commission].

1a.14. "Code" shall mean the Code of West Virginia, one thousand nine hundred thirty-one, as heretofore and hereafter amended.

1a.15. The term "Person" or the term "Company", herein used interchangeably, includes any individual, firm, partnership, co-partnership, joint adventure, association, corporation, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

1a.16. "Taxpayer" means any person liable for any tax hereunder.

1a.17. "Sale", "Sales" or "Selling" includes any transfer of ownership of, or title to, property, whether for money or in exchange for other property. When property is exchanged for other property rather than for money, the taxpayer must place a value on the property received and report the same for municipal business and occupation tax purposes as if money were received.

1a.18. The term "Sale Price" means the consideration whether money, credits, price, or other property expressed in the terms of money, paid or delivered by a buyer to a seller, all without any deduction, on account of the cost of tangible property sold, the cost of materials used, labor cost, interest, discount, delivery cost, taxes or any other expenses whatsoever paid or accrued, and without any deduction on account of losses.

1a.19. The term "Gross Proceeds of Sales" means the value proceeding or accruing from the sale of tangible property without any deduction on account of cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery cost, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

1a.20. "Gross Income" means all income from whatever source derived, unless excluded by law. Gross income shall include income realized in any form, whether in money, property, or services. Gross income means the gross receipts of the taxpayer, other than a banking or financial business, received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce, or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both. Gross income includes all receipts by the reason of the investment of the capital of the business engaged in and shall include rents, royalties, fees, reimbursed cost or expenses or other emoluments however designated. Gross income includes all interest, carrying charges, fees or other like income, however denominated, derived by the taxpayer from repetitive carrying of accounts, in the regular course and conduct of his business, and extension of credit in connection with the sale of any tangible property or service.

1a.20.1. If services or property are paid for other than in money, the fair market value of the property or service taken in payment must be included in gross income.

1a.20.2. No deduction shall be allowed against gross income for the cost of property sold, the cost of materials used, labor costs, taxes, royalties paid in cash or in kind or otherwise, interest or discount paid or any other expense whatsoever.

1a.20.3. For the definition of gross income of a banking or financial business, See Section 2k.2 of these rules and regulations.

1a.20.4. Examples of gross income are:

1a.20.4.1. A construction company, which desires to purchase a piece of heavy equipment, does not have available capital to make such purchase and, therefore, transfers title to a parcel of real estate to the heavy equipment dealer in return for the piece of heavy equipment. The fair market value of the real estate received by the heavy equipment dealer will be included in the dealer's gross income for purposes of the municipal business and occupation tax. An indicator as to the value of the real estate received by the dealer would be the price of the heavy equipment if it had been purchased for cash. This indicator does not conclusively establish the amount of gross receipts which inured to the dealer. If the article (real estate) received has a greater value than the article (heavy equipment) exchanged, then it is necessary that the dealer report the greater value for municipal business and occupation tax purposes.

1a.20.4.2. A person in the business of selling and servicing home appliances has income for the taxable year in the following manner: ninety-seven thousand dollars ($97,000) from the retail sale of appliances; thirteen thousand dollars ($13,000) received from servicing and repairing appliances; and ten thousand dollars ($10,000) received from the rental of the building. Even though the rental income is not directly related to the business of selling and servicing home appliances, it is an item of gross income as defined by the municipal business and occupation tax law. All three are items of gross income which the taxpayer must report on his municipal business and occupation tax return. Each item of gross income must be reported under its proper business classification.

1a.20.4.3. B agrees to construct an apartment building for R. The contract entered into by the parties stipulates that B's remuneration shall be his cost plus twenty percent (20%) thereof. B constructs said building and his cost aggregate one hundred fifty thousand dollars ($150,000) for which R makes reimbursement to B. B receives also thirty thousand dollars ($30,000) from R as his twenty percent (20%) of costs as stipulated by the contract. On his municipal business and occupation tax return, B will report, as gross income, one hundred eighty thousand dollars ($180,000). B will receive no deduction against gross income for monies received as reimbursement cost or expenses.

1a.20.4.4. M, who is in the business of drilling for and producing natural gas and oil, agrees with L, a landowner, to sink a well on L's land. The parties agree that if gas or oil is discovered, L will be entitled to a one-eighth (1/8) royalty therefrom, either in cash or in kind at L's option. The well is successful and L decides to accept, in payment (as his one-eighth (1/8) royalty) from M, two thousand (2,000) barrels of oil and thirty-five thousand dollars ($35,000) in cash. M, on his municipal business and occupation tax return, must report the entire gross income received from the production of oil and is not allowed a deduction therefrom for either the royalty paid in cash or in kind to L. M must also place a value on the two thousand (2,000) barrels of oil paid to L as a royalty and report said value for purposes of this tax.

1a.20.5. The term "Gross Income" and "Gross Proceeds of Sales" shall not include cash discounts allowed and taken on sales. When a contract of sale is made subject to cancellation at the option of one of the parties to revision in the even goods sold are defective or if the sale is made subject to discount upon cash payment, the gross proceeds actually derived from the contract and the selling price are determined by the transaction as finally completed. The selling price of a service or article of property does not include the amount of bona fide cash discount actually taken by the purchaser and the amount of such discount may be deducted from gross proceeds of sales providing such amount has been included in the gross amount column on the municipal business and occupation tax return.

1a.20.5.1. Cash discount deductions will be allowed under the production and manufacturing classifications only when the value of the products is determined from the gross proceeds of sales.

1a.20.5.2. The cost to the retailer of business stimulants and promotions is not considered cash discounts; nor is the value of such stimulants and promotions cash discounts. The expense incurred by the merchant in purchasing and distributing such items is a cost of doing business and is not deductible or excludible from gross income or gross proceeds of sales.

1a.20.5.3. X, a retail grocer, to stimulate business, purchases trading stamps and dispenses the same, based upon the amount of each individual order, to his customers. In preparing his municipal business and occupation tax return, X is not permitted to deduct the cost or value of the trading stamps from his gross proceeds of sales to arrive at his taxable income.

1a.20.6. The term "Gross Income" and "Gross Proceeds of Sales" shall not include the proceeds of sale of goods, ware or merchandise returned by the customers when the sale price is refunded either in cash or by credit.

1a.20.6.1. When sales are made either upon approval or upon a sale and return basis, and the purchaser returns the property purchased and the entire selling price is refunded or credited to the purchaser, the vendor may deduct an amount equal to the selling price from gross proceeds of sales in computing tax liability; if the gross income from said sale has been previously reported or entered in the gross amount column on the municipal business and occupation tax return.

1a.20.7. The term "Gross Income" and "Gross Proceeds of Sales" shall not include the amount allowed as trade-in value for any article accepted as part of payment for any article sold.

1a.20.7.1. This particular situation is prevalent in the automobile business. For example, X sells Y a new automobile for three thousand two hundred dollars ($3,200). In payment for the new automobile, X accepts Y's used automobile which has a trade-in value of seven hundred dollars ($700). X must report, on his municipal business and occupation tax return, the amount of two thousand five hundred dollars ($2,500) as gross income. When X sells the used automobile, the amount received from said sale will also be subject to municipal business and occupation tax.

1a.20.8. The terms "Gross Income" and "Gross Proceeds of Sales" shall not include excise tax imposed by the State of West Virginia.

1a.20.8.1. Excise taxes imposed by the State of West Virginia are not to be included in gross income to determine the amount of municipal business and occupation tax payable. For purposes of this deduction or exclusion from gross income, the following constitute West Virginia excise taxes: gasoline tax, diesel fuel tax, cigarette tax, beer barrel tax and soft drink tax.

1a.20.8.2. Exclusions or deductions from gross income for West Virginia excise taxes will be disallowed unless the taxpayer provides necessary information on his annual municipal business and occupation tax return to support the claimed deduction. On his tax return, the taxpayer claiming this exclusion or deduction must itemize the quantity of gasoline, diesel fuel, cigarettes and soft drinks sold. Adequate records must be maintained to properly establish the deductions claimed.

1a.20.9. The term "Gross Income" and "Gross Proceeds of Sales" shall not include certain excise taxes imposed by the United States of America.

1a.20.9.1. All excise taxes levied by the federal government are not deductible from gross income or from gross proceeds of sales. The test as to whether or not a particular federal excise tax is to be included in or excluded from gross income for municipal business and occupation tax purposes is whether the particular excise tax is a tax on the manufacturing process or a tax which attaches at the time of sale and not before. Therefore, to qualify as a deduction from gross income, the burden of said tax must rest upon the customer.

1a.20.9.2. Federal excise taxes which are taxes upon the process of manufacturing are not deductible or excludible from gross income or gross proceeds of sales for municipal business and occupation tax purposes. This includes, but is not limited to, federal excise taxes on alcohol and distilled spirits, tobaccos, cigars, cigarettes, matches, automobiles, tires, et cetera.

1a.20.9.3. Federal excise taxes which are taxes upon the consumer and which are held in trust by the vendor as agent for the federal government may be deducted from gross income or gross proceeds of sales in determining the amount of municipal business and occupation tax liability. This includes federal excise paid on gasoline, diesel fuel and lubricants.

1a.20.9.4. Persons claiming deductions for federal excise taxes must itemize on the annual municipal business and occupation tax form and provide necessary information to support said deduction. Deductions claimed for federal excise taxes will be disallowed in those cases where the taxpayer fails to provide an itemization.

1a.20.9.5. An example pertaining to state and federal excise taxes is presented below: Example -- John Doe owns and operates a service station. During the calendar year 1972, he sold, at retail, gasoline, oil, cigars, cigarettes, and soft drinks. His retail sales for the taxable year totaled one hundred fifty-seven thousand dollars ($157,000) and his service income from repairing and washing of automobiles totaled twenty-three thousand dollars ($23,000).

The taxpayer must report and pay tax under two (2) business classifications, retail and service. He is allowed a deduction from gross income, reported under the retail classification on the tax form, for State excise taxes on cigarettes, soft drinks and powders and gasoline. The taxpayer is also permitted a deduction for federal excise taxes on gasoline and oil. No deduction is permitted for the federal excise tax on cigars and cigarettes.

1a.20.10. The terms "Gross Income" or "Gross Proceeds of Sales" shall not include money or other property received or held by a professional person for the sole use and benefit of a client or another person or money received by the taxpayer on behalf of a bank or other financial institution for the repayment of a debt of another. The manner in which the attorney keeps his books and records must clearly and properly reflect this situation. Money or property received for the benefit of a client should be credited to a trustee or escrow account so that the State's tax examiners do not credit and include said funds in the trustee's gross income. For example, X, an attorney, institutes suit on behalf of a client and receives a favorable verdict. As a result therefore, the defendant, rather than making restitution directly to the plaintiff, pays the amount of the verdict to X. Therefore, X has received money for the benefit of a client and said amount shall not constitute gross income to X. X, the attorney, will include in gross income for municipal business and occupation tax purposes only his fee.

1a.21. The municipal business and occupation tax act imposes taxes upon persons engaged in business. The term "Business" shall include all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect. The term "Business" shall include the production of natural resources or manufactured products which are used or consumed by the producer or manufacturer. Business shall also include the activities of a banking business or a financial organization.

1a.21.1. In determining whether a business is engaged in for "Direct or Indirect Economic Gain or Benefit", the lack of profit suffered in said activity is not relevant; nor is it material that the business was engaged in without profit as the primary motivation. In order to further clarify this situation, two (2) examples are presented below.

1a.21.1.1. The D E Company provides, for employee use, a cafeteria in the basem__t of its office building. The cost of operating the cafeteria, for a year, is one hundred ten thousand dollars ($110,000) and the gross income derived therefrom is ninety-three thousand dollars ($93,000). Even though the cafeteria operation reflected a loss for the taxable year, the gross amount of income derived therefrom, ninety-three thousand dollars ($93,000), is subject, under the retail classification, to municipal business and occupation tax; because the cafeteria business was engaged in for indirect economic benefit or gain. By providing a direct benefit to its employees, the company has incurred an indirect benefit which places the operation within the definition of "Business" for the purpose of this tax.

1a.21.1.2. The D E Company decides to provide safety equipment to its industrial employees. It decides to provide said equipment at below cost prices to its employees; therefore, said activity is engaged in without profit motivation. The gross amount received from the sale of such equipment is subject to municipal business and occupation tax; for the company receives an indirect economic benefit by providing its employees with such equipment. It can be expected

that employees who take advantage of the safety equipment will be safer, have less loss of time accidents and will perform better than previously.

1a.21.2. "Business" shall not include a casual sale by a person who is not engaged in the business of selling the type of property involved in such casual sale. Sales are deemed to be casual or isolated when made by a person who is not engaged in the business of selling the type of property involved. Examples of casual sales are the following:

1a.21.2.1. Sale of any property which is of a type not regularly sold by the taxpayer; e.g., sale of an automobile or radio by a person engaged in the business of plumbing.

1a.21.2.2. Sale of household goods or personal effects by a person who is not engaged in the business of selling; e.g., sale of used furniture and a used automobile by a retired individual.

1a.21.2.3. Sale of property by a person who is engaged in a business but who is not engaged in the business of selling; e.g., sale of a parcel of realty by a doctor, who is not engaged in the business of selling real property.

Persons who hold themselves out to the public as making sales at retail or wholesale are deemed to be engaged in the business of selling, and sales made by them of the type of property which they hold themselves out as selling, are not casual sales even though sales are made infrequently.

1a.22. The term "Banking Business" or "Financial Organization" shall mean any bank, banking association, trust company, industrial loan company, small loan company or licensee, building and loan association, savings and loan association, finance company, investment company, investment broker or dealer, and any other similar business organization at least ninety per centum of the assets of which consists of intangible personal property and at least ninety per centum of the gross receipts of which consists of dividends, interest and other charges derived from the use of money or credit.

1a.23. The term "Service Business" or "Calling" shall include all activities engaged in by a person for other persons for a consideration, which involve the rendering of a service as distinguished from sale of tangible property.

1a.23.1. "Service Business" or "calling" shall include, but not be limited to:

1a.23.1.1. Persons engaged in manufacturing, compounding or preparing for sale, profit or commercial use, articles, substances or commodities which are owned by another person. A Company manufactures plastic toys on orders received from B Company. B Company retains title to and supplies the raw materials. The payment received by A Company for manufacturing said articles shall be reported under the service classification on the municipal business and occupation tax return. In this particular situation, B Company is deemed to be the manufacturer.

1a.23.2. Persons acting as independent contractors in producing natural resource products owned by other persons, as personal property, immediately after the same are served, extracted, reduced to possession and produced. For example, C owns a large tract of standing timber and enters into a contract with D for the severance of the same. The income received by D for serving C's timber must be reported under the service classification on the municipal business and occupation tax return. In this particular situation, C is deemed to be the producer of the natural resource product.

1a.23.3. The repetitive carrying of accounts, in the regular course and conduct of business, and extension of credit in connection with the sale of any tangible personal property or service, except as to persons engaged in banking and other financial businesses. For example, the E F Furniture Company sells furniture with a retail price of three hundred dollars ($300.00) to an individual and agrees to allow the purchaser to make time payments on the account. For carrying the account, the seller stipulates a charge of one percent (1%) per month on the unpaid balance of said account. At the end of the six (6) months, the purchaser has paid his account in full and the seller has received three hundred ten dollars ($310.00) therefrom. Therefore, the additional ten dollars ($10.00) over and above the sale price of the furniture must be reported by the seller under the service classification on the municipal business and occupation tax return; for the ten dollars ($10.00) was received for providing a service rather than for the sale of merchandise.

1a.23.4. The term "Service Business or Calling" shall not include the services rendered by an employee to his employer. The municipal business and occupation tax law imposes upon persons engaged in business but not upon persons acting solely in the capacity of employees or servants.

1a.23.4.1. The question of whether a person is engaged in business or is acting in the capacity of an employee is dependent upon the facts in each case. The following rules may be accepted as a guide but do not necessarily control individual cases.

1a.23.4.2. An employee or servant is an individual whose entire compensation is fixed at a certain rate per day, week or month, or at a certain percentage of the business obtained by such employee or servant, payable in all events; one who has no direct interest in the income or profits of the business other than a wage or commission; one who has no liability for the expense of maintaining an office or place of business, one who has no liability for loss or indebtedness incurred in the conduct of the business; one whose conduct with respect to services rendered, or business transacted, is supervised or controlled by another. A corporation, joint venture, or any group of individuals acting as a unit, is not an employee or servant.

1a.23.4.3. Persons who furnish equipment on a rental basis and also furnish operators therefore, are presumed to be engaging in business and not to be employees or servants. Likewise, persons who furnish materials and the labor necessary in the placing or fabricating thereof are also presumed to be engaging in business and not to be employees or servants. The burden of proof will be upon such persons to show otherwise.

1a.23.4.4. The fact that a person is construed to be an employee under the provisions of the State Unemployment Compensation Law or the Federal Social Security Act, does not

conclusively establish such person as an employee within the provisions of the municipal business on occupation tax law.

1a.23.4.5. Persons regularly performing odd job carpentry, painting or paper hanging, plumbing, bricklaying, electrical work, etc., for the public generally are presumed to be engaging in business. The burden of proof is upon such persons to show otherwise. It is immaterial whether the workman is paid by the job, by the day or by the hour. It is likewise immaterial that the workman may supply labor only, any materials used being supplied by the property owner.

1a.23.4.6. A person engaging in business is generally one who holds himself out to the public as engaging in business either in respect to dealing in real or personal property or in respect to the rendition of services; one to whom gross income of the business inures; one upon whom liability for losses lies or who bears the expenses of conducting a business; one, generally acting in an independent capacity, whether or not subject to immediate control and supervision by a superior, or one who acts as an employer and his employees are subject to his control and supervision.

1a.24. "Selling at Wholesale" or "Wholesale Sales" shall mean and include:

1a.24.1. Sales of any tangible personal property for the purpose of resale in the form of tangible personal property.

1a.24.2. Sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity which is subject to the municipal business and occupation tax.

1a.24.3. Sales of any tangible personal property to the United States of America, its agencies and instrumentalities or to the State of West Virginia, its institutions or political subdivisions.

Price and quantity are not relevant in determining wholesale sale for municipal business and occupation tax purposes. The fact that an item is discounted or is sold in large quantities does not make a transaction wholesale. It is the status and intention of the customer of the vendor which determines whether the gross proceeds received by the vendor from the sale are taxable under the retail classification or the wholesale classification. For example:

1a.24.4. H, who owns and operates a furniture store, is going out of business and is therefore liquidating his entire inventory. V, who is a retail furniture dealer, purchases part of H's inventory for twenty thousand dollars ($20,000). H, must report, on his municipal business and occupation tax return, twenty thousand dollars ($20,000) payment under the wholesale classification rather than the retail classification; for V, a furniture dealer whose activities are subject to the municipal business and occupation tax law, purchased the stock for the purpose of resale. In order that H's method of accounting will reflect the sale at wholesale, it is necessary that he receive and have on record a consumers sales tax exemption certificate. The certificate, prepared and signed by V, must certify that V is a merchant who purchased tangible personal property for the purpose of resale. Of course, in this particular situation, the exemption certificate

is not primarily prepared and signed to assist H in determining taxable classification but to relieve H from the responsibility of paying West Virginia consumers sales tax on the purchase.

1a.24.5. V also purchased (for three hundred dollars ($300)) a color television set from H. V intends to make personal use of the set, therefore, the amount of this sale must be reported under the retail classification by H. Inasmuch as the sale of the television set was not a sale for the purpose of resale, V will not prepare a consumers sales tax exemption certificate.

1a.24.6. G, who owns and operates a grocery store, occasionally makes sales of groceries to a State hospital which is near his place of business. These sales are wholesale sales for municipal business and occupation tax purposes. All sales of tangible personal property made to the State, its institutions or political subdivisions are sales at wholesale. This would include sales to boards of education, municipalities, counties, penal institutions, et cetera.

1a.25. The term "Contracting" shall include the furnishing of work, or both materials and work, in the fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof. The term "Contracting" shall also include the alteration improvement or development of real property.

1a.25.1. A person performing any activity described in the preceding paragraph shall report his gross income therefrom under the contracting classification of the municipal business and occupation tax return and shall receive no deduction from gross income on account of any expenses incurred. All income derived from said activity shall be reported under the contracting classification, and the form of contract entered into by the parties shall not be determinative of taxable classification.

1a.25.2. The term "Prime Contractor" means a person engaged in the business of preforming for others, contracts for the construction, repairing, decorating or improving of new or existing buildings or other structures under, upon or above real property, either for the work or for a specific portion thereof.

1a.25.3. The word "Subcontractor" means a person engaged in the business of preforming a like or similar service for persons other than consumers, either for the entire work or for a specific portion thereof.

1a.25.4. The terms "Prime Contractor" and "Subcontractor" include persons preforming labor and services in respect to the moving of earth or clearing of land, razing or moving existing buildings or structures even though such services may not be done in connection with a contract involving the constructing, repairing, or altering of a new or existing building or structure.

1a.25.5. The term "Buildings or Structures" means and includes, but is not limited to, everything artificially built up or composed of parts joined together in some definite manner and attached to real property. It includes not only buildings in the general and ordinary sense, but also tanks, fences, conduits, culverts, railroad tracks, overhead and underground transmission systems, tunnels, monuments, retaining walls, bridges, trestles, parking lots and pavement for foot or vehicular traffic.

1a.25.6. The term "Contracting, Repairing, Decorating or Improving" of a new part of an existing building or structure or any part thereof, in addition to its ordinary meaning, includes the installing or attaching of any article of tangible personal property in or to real property, whether or not such personal property becomes a part of the realty by virtue of such installation.

1a.26. The term "Speculative Builder" means and includes one who constructs improvements upon real property owned by him for sale or rental. The gross income derived by the speculative builder from the sale of real property upon which the speculative builder has constructed improvements shall be reported under the retail classification on the municipal business and occupation tax form. The sales price is the measure of the tax.

§110-26-2. Imposition Of Privilege Tax.

2.1. The municipal business and occupation tax is a tax imposed upon persons for the act or privilege of engaging in business activities. The tax is measured by the application of rates against values of products, gross proceeds of sale or gross income of the business, as the case may be.

2.1.1. All persons engaging in business activities in a municipality which has ordinances providing for a municipal business and occupation tax pursuant to the authority granted by the Legislature in W. Va. Code §8-13-5 are subject to the municipal business and occupation tax unless specifically exempted by statute or by these rules and regulations.

2.1.2. Certain occupations and business activities are classified, and the classifications are significant inasmuch as the tax liability varies because of the different rates established for the types of business activities engaged in by the taxpayer. The business activity usually determines the taxable classification, and where different business activities are conducted, the taxpayer is liable for tax under each taxable classification involved.

2.1.3. The various business classifications and the maximum tax rates a municipality may apply thereto are presented in Table 110-26A at the end of this regulation. For a definitive treatment of each particular business classification, See Sections 2A through 2K of these rules and regulations.

2.2. Determination of values, general.

2.2.1. The following rules for determining the taxable value of natural resource products or articles manufactured within the State shall apply equally to producers and manufacturers engaged in such activities within the State. The values determined under these rules will be uniformly applied in computing the taxes imposed by statute.

2.2.2. The term "Value of Products", includes the value of by- products, and except as provided herein, shall be determined by gross proceeds of sales whether such sales are at wholesale or at retail, to which shall be added all subsidies and bonuses received with respect to

the production, manufacturing, or sale thereof. Under the production and manufacturing classifications of the municipal business and occupation tax, the value of products extracted or manufactured shall be determined by the gross proceeds of sales in every instance in which a bona fide sale of products is made, and whether sold at wholesale or at retail.

2.2.3. If any person who is liable for any tax under the production classification (See Section 2A of these rules and regulations) or the manufacturing classification (See Section 2B of these rules and regulations) ships or transports his products or any part thereof out of a municipality without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the municipality shall be the basis for the assessment of the tax, except in those instances in which another measure of the tax is expressly provided.

2.2.4. In determining the value of natural resources or manufactured products delivered to purchasers, there may be deducted from the gross proceeds of sales so much thereof as the taxpayer can show to be outgoing freight charges from the point at which the shipment originates in a municipality to the point of delivery. Freight charges, to be deductible, must actually be paid by the manufacturer or producer. However, no deduction will be allowed for expenses incurred by the taxpayer through the use of his own equipment in transporting items produced or manufactured.

2.3. Determination of values, manufacturing. - There are certain instances in which persons who manufacture, process or prepare products for sale are not readily able to determine the value of the products for purposes of the municipal business and occupation tax. In these instances, the following rules for determining taxable value shall apply.

2.3.1. Transportation outside the municipality without sale thereof. If any person manufactures, compounds or prepares for sale, within a municipality, products or articles which are shipped or transported outside the municipality without making sale of such products or articles, the value of the products in the condition in which they exist immediately before transportation outside the municipality shall be the basis for the assessment of tax imposed under the manufacturing classification (See W. Va. Code §11-13-2b (1987) and Section 2B of these rules and regulations) of the municipal business and occupation tax law. Whenever the situation, as described in the preceding sentence, arises, the taxpayer, to determine the value of said products for purposes of this tax, shall apply the following rules in the order stated:

2.3.1.1. The value of such products shall be determined by the actual gross proceeds of the subsequent sale of the products, whether such sale is at wholesale or at retail, as if such sale had been made at the time of shipment.

2.3.1.2. If no sale or shipment is made in the tax year in which the manufacture occurs, the gross value shall be reported for the tax year in which the subsequent sale of the products is made and shall be determined by the actual gross proceeds of the subsequent sale of the products, whether such sale is at wholesale or at retail.

2.3.2. Transported outside the municipality with sale thereof. If any person manufactures, compounds or prepares for sale, within a municipality, products or articles which are shipped or transported outside the municipality as a result of a bona fide sale of such products or articles, the value of such products or articles shall be determined in accordance with the following rules.

2.3.2.1. The actual gross proceeds of such sale, whether such sale was at retail or wholesale, to which shall be added all subsidies and bonuses received to manufacture or make sale of the product, shall be the value of such product for purposes of the municipal business and occupation tax. The full amount received from such sale shall be reported under the manufacturing classification of the municipal business and occupation tax return.

2.3.2.2. In determining value set forth and defined in subsection 2.3.2.1 above, the taxpayer shall be permitted to deduct from gross proceeds of sale the amount actually paid by him to transport the products outside the municipality, but no deduction will be allowed for expenses incurred by him through the use of his own equipment in transporting items manufactured.

2.3.3. Sales to affiliates. In determining value in regard to sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the vendor and vendee is such that gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the following rules shall be applied in the order stated.

2.3.3.1. Whenever sales are made to affiliates, the value shall correspond to the gross proceeds from the sale of similar products of like quality and character and in similar quantities between persons of no common interest.

2.3.3.2. If there are no sales between parties of no common interest by which the taxpayer may value his sales to affiliates, the value shall correspond to the gross proceeds from sales by the taxpayer to nonrelated purchasers of similar products of like quality and character and in similar quantities and shall include all subsidies and bonuses.

2.3.3.3. In the absence of sales of similar products as a guide to value, such value may be determined by a cost basis. In such cases there shall be included every item of cost attributable to the particular article manufactured, including direct and indirect overhead costs. There shall be added to this total manufacturing cost the average markup realized by the taxpayer on all products manufactured, compounded or prepared for sale.

2.3.4. Manufactured products consumed by the manufacturer.

2.3.4.1. Whenever a person manufactures, compounds or prepares final completed products, and such products are commercially consumed or used by such person, a value must then be reported under the manufacturing classification for purposes of the municipal business and occupation tax. This is to effect equality of municipal business and occupation tax liability between manufacturers who sell their entire output and those who use all or a portion of their output themselves. In other words, the tax liability is based upon the total value of the

manufactured products, and it is immaterial that a portion or the whole of the output may be used by the manufacturer and is not sold.

2.3.4.2. The article or product manufactured by the taxpayer and consumed in his business, to be taxable under the manufacturing classification of the municipal business and occupation tax act, must be a final completed product which is not subject to additional preparing, processing or compounding by the same manufacturer.

2.3.4.3. In other words, a manufactured product which is used to become a component of another product manufactured by the same manufacturer and which, of course, loses its identity therein, is not subject to the rule imposed by this subsection. To illustrate: Certain chemical compounds are manufactured or prepared and are consumed by the same manufacturer in the process of manufacturing a completely new or final completed chemical substance. In this instance the originally manufactured chemical compound which is consumed in and becomes a part of the substance is not required to have a value placed thereon for purposes of this tax because the tax is exacted therefrom when a value is placed on the new substance. Chemicals used in processing include chemical substances which are manufactured by the taxpayer to unite with other chemical substances or which produce a chemical reaction therewith, as contrasted with merely a physical change therein.

2.3.4.4. However, if a manufactured product which is to become a component part of another product and lose its identity therein is shipped outside the municipality for additional processing, a value must be placed on each product and reported under manufacturing classification. (For apportionment of sales price of such article, See Section 2b of these rules.)

2.3.4.5. A final completed product which is manufactured by the taxpayer and used or consumed in his business must have a value placed thereon and must be reported under the manufacturing classification for tax purposes. Such product would be one which does not become a component part of another product or one which does not lose its identity. To illustrate: Saws, jigs, cutting tools, etc. that are manufactured by a furniture manufacturer are final completed products subject to tax. Partially manufactured products sold within or without the municipality are final completed products subject to this tax. The taxpayer is relieved from placing a value on and reporting for tax purposes only those products manufactured within the municipality which become component parts of other products within the municipality and lose their identity in the other products.

2.3.4.6. In those cases where a person partially or wholly consumes or makes use of his final completed manufactured, compounded or prepared products, a value must be placed on such products, in accordance with the following rules in the order stated. In all instances where products or articles are consumed by the manufacturer and are consumed at a point distant from the place of manufacturing, no freight charges paid by the manufacturer will be allowed as a deduction in determining value under these rules, unless consideration has been given such charges in the method by which the values were determined.

2.3.4.6.a. The value of the article consumed or used shall be determined according to the selling price at the place of use or consumption of similar products of like quality or character.

2.3.4.6.b. In absence of sales of similar products as a guide to value, such value may be determined by applying to the consumed product the average price at which sales are made during the taxable year to customers of the manufacturer.

2.3.4.6.c. In the absence of sales to customers as a guide to value, such value may be determined upon a cost basis, in which case there shall be included every item of cost attributable to that particular article, including all direct and indirect overhead costs and by adding thereto the average markup realized by the manufacturer on his products.

2.4. Determining of values, production of natural resources.

2.4.1. Under the production classification of the municipal business and occupation tax law (See W. Va. Code §13-11-2(a) (1987) and Section 2.2 of these rules and regulations) the value of natural resources products produced shall be determined by the gross proceeds of sales in every instance in which a bona fide sale of such products is made, and whether sold at wholesale or retail. In determining the value of natural resource products delivered to purchasers, there may be deducted from the gross proceeds of sales so much thereof as the taxpayer can prove to be actual outgoing freight charges (paid by him) from the point at which the shipment originates in the municipality to the point of delivery. However, no deduction is permitted for expenses incurred by him through the use of his own equipment in transporting items produced.

2.4.2. There are certain instances in which persons who produce natural resource products are not readily able to determine the value of said products for purposes of the municipal business and occupation tax. In these instances the rules which follow are to be applied. Whenever possible, and unless otherwise provided in these rules, the value of natural resource products produced within the municipality shall be determined by actual gross proceeds derived from said sale thereof (whether at retail or at wholesale) by the producer.

2.4.3. Transportation outside the municipality without sale thereof. If any person produces within a municipality natural resource products which are shipped or transported outside the municipality without making sale of such products, the value of the natural resource products in the condition in which they exist immediately before transportation outside the municipality shall be the basis for the assessment of tax under the production classification of the municipal business and occupation tax law (See Section 2A of these rules and regulations). Whenever the situation, as described in the preceding sentence, arises, the taxpayer, to determine the value of his natural resource products for the purposes of this tax, shall apply the following rules in the order stated.

2.4.3.1. The value of such natural resource products shall be determined by the actual gross proceeds of the subsequent sale of the products, whether such sale is at wholesale or retail, as if such sale had been made at the time of shipment.

2.4.3.2. If no sale or shipment is made in the tax year in which the manufacture occurs, the gross value shall be reported for the tax year in which the subsequent sale of the products is made and shall be determined by the actual gross proceeds of the subsequent sale of the products, whether such sale is at wholesale or at retail.

2.4.4. Transportation outside the municipality with sale thereof. If any person severs, extracts, reduces to possession or produces for sale, profit or commercial use, within a municipality, any natural resource products which are shipped or transported outside the municipality as a result of a sale of such products, the value of such natural resource products shall be determined in accordance with the following rules.

2.4.4.1. The actual gross proceeds of such sale, whether such sale was at retail or wholesale, to which shall be added all subsidies and bonuses received with respect to the production or sale of the product, shall be the value of such product for the purposes of the municipal business and occupation tax. The full amount received from such sale shall be reported under the production classification on the municipal business and occupation tax return.

2.4.4.2. In determining value as set forth and defined in subsection 2.4.4.1, the taxpayer shall be permitted to deduct from the gross proceeds of sale the amount actually paid by him to transport the products outside the municipality, but no deduction will be allowed for expenses incurred by him through the use of his own equipment in transporting natural resources produced.

2.4.5. Sales to affiliates. In determining the value in regard to sales from one to another affiliated companies or persons, or other circumstances where the relationship between the vendor and vendee is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the following rules shall be applied in the order stated.

2.4.5.1. Whenever sales are made to affiliates, the value shall correspond to the gross proceeds from the sale of similar products of like quality and character and in similar quantities between persons of no common interest.

2.4.5.2. If there are no sales between parties of no common interest by which the taxpayer may value his sales to affiliates, the sales shall correspond to the gross proceeds from sales by the taxpayer to nonrelated purchasers of similar products of like quality and character and in similar quantities and shall include all subsidies and bonuses.

2.4.5.3. In the absence of sales of similar natural resource products as a guide to value, such value may be determined by a cost basis. In such cases there shall be included every item of cost attributable to the particular natural resource product produced, including direct and indirect overhead costs. There shall be added to this total production cost the average markup realized by the taxpayer on all natural resource products produced.

2.4.6. Natural resource products consumed by the producer. Whenever a person produces natural resource products, and such products are commercially consumed or used by such person, a value must be placed upon the consumed natural resource products. This value must

then be reported under the production classification for purposes of the municipal business and occupation tax. In other words, the tax liability is based upon the total value of the produced natural resources, and is immaterial that a portion or the whole of the output may be used by the producer and is not sold. Whenever natural resource products produced within a municipality are used or consumed by the producer in his business, whether within or without the municipality, the value of such products shall be determined by the following rules in the order stated. In all instances where natural resources are consumed by the producer and are consumed at a point distant from the point of production no freight charges paid by the producer will be allowed as a deduction in determining value under these rules, unless due consideration has been given such charges in the method by which the values were determined.

2.4.6.1. The value of the natural resource product consumed or used shall be determined according to the selling price at the place of use or consumption of similar products of like quality and character by other taxpayers.

2.4.6.2. In the absence of sales of similar natural resource products as a guide to value, value shall be determined by applying to the used or consumed product the average price at which sales are made during the taxable year to customers of the producer.

2.4.6.3. In the absence of sales to customers as a guide to value, such value may be determined upon cost basis, in which case there shall be included every item of cost attributable to that particular natural resource product, including all direct or indirect overhead costs and by adding thereto the average markup realized by the producer on his natural resource products.

2.5. Manufacturing and selling articles within the state. -- Persons who manufacture, compound or prepare, within a municipality, products or articles for sale, profit or commercial use and make sale of the same within the municipality, must place a value on said products or articles and report the same under the manufacturing classification on the municipal business and occupation tax return. Said value shall be determined in accordance with the following rules.

2.5.1. Sales at wholesale.

2.5.1.1. If any person manufactures, compounds or prepares within a municipality, products or articles and makes sale thereof at wholesale within or without the municipality, the entire gross proceeds derived therefrom shall be reported under the manufacturing classification on the municipal business and occupation tax return.

2.5.1.2. Where the manufacturer makes sale thereof at wholesale within the municipality, the entire gross proceeds derived from such wholesale sales must also be required to be reported under the wholesale classification on the municipal business and occupation tax return.

2.5.2. Sales at retail.

2.5.2.1. If any person manufactures, compounds or prepares, within a municipality, products or articles and makes sale thereof at retail within or without the municipality, the sales

value of such products shall be reported under the manufacturing classification on the municipal business and occupation tax return.

2.5.2.2. The entire gross proceeds derived from such retail sale shall also be reported under the retail sales classification of the municipal business and occupation tax return where the manufacturer makes sale thereof at retail within the municipality.

2.6. Producing and selling natural resource products within the State. - Persons who produce, within a municipality, natural resource products and make sale of the same within or without the municipality, must place a value on the natural resource products and report the same under the production classification on the municipal business and occupation tax return. Said value shall be determined in accordance with the following rules.

2.6.1. Sales at wholesale.

2.6.1.1. If any person produces, within a municipality, natural resource products and makes sale thereof at wholesale within or without the municipality, the entire gross proceeds derived therefrom shall be reported under the production classification on the municipal business and occupation tax return.

2.6.1.2. The amount derived from such sale at wholesale shall be reported under the wholesale sales classification on the municipal business and occupation tax return if sale of the natural resource product is made within the municipality.

2.6.2. Sales at retail.

2.6.2.1. If any person produces, within a municipality, natural resource products and makes sale thereof at retail within or without the municipality, the sales value of such products shall be reported under the production classification on the municipal business and occupation tax return.

2.6.2.2. The entire gross proceeds derived from the sale at retail shall also be reported under the retail classification on the municipal business and occupation tax return if sale of the natural resource products is made within the municipality.

§110-26-2a. Production Of Natural Resource Products.

2a.1. Producers of natural resource products. - For purposes of these rules and regulations, the word "Producer" shall mean and include, but not be limited to, every person who engages in the business of severing, extracting, mining, quarrying, reducing to possession or producing for sale, profit or commercial use any natural resource products from his own land or from the land of another under the right or license granted by lease or contract, either directly or by contracting with others for the necessary labor or mechanical services. A person who produces natural resource products for the use or consumption in his own business whether located within or without the municipality is a producer for the purposes of the municipal business and occupation tax.

2a.1.1. Persons who are producers, as described in the preceding paragraph, shall report the gross proceeds derived therefrom under the applicable production classification on the municipal business and occupation tax return. If it is not possible for the producer to determine gross proceeds of sale, he must determine the value of his produced natural resource products by employing one of the rules set forth in Section 2 of these rules and regulations. The measure of the municipal business and occupation tax shall be the value (said value, whenever possible, shall be determined by gross proceeds of sale) of the entire production within the municipality, regardless of the place of sale or the fact that delivery may be made to points outside the municipality.

2a.1.2. A person who produces natural resource products and does not make sale of the same but uses or consumes the resources in his business shall report the value of such resources under applicable production classification on the municipal business and occupation tax return. In determining the value of the natural resource products, the taxpayer must adhere to Section 2 of these rules and regulations.

2a.1.3. Where the relationship between the producer of the natural resource products and the purchaser thereof is such that the gross proceeds derived from the sale are not indicative of the true value of the natural resources, the taxpayer shall determine value by application of one of the rules set forth in Section 2 of these rules and regulations.

2a.2. Producing natural resource products for others.

2a.2.1. A "Contract Miner" shall mean and include a person who has no title to or ownership in the natural resource products which he is producing for others. Persons performing under contract, either as prime contractors or subcontractors, labor or mechanical services for others who are engaged in the business of producing natural resources, are performing a service for the producer and are therefore taxable under the service classification rather than the production classification. All gross income received by the contract miner from the producer for such service is taxable under the municipal municipal business and occupation tax law in the municipality in which the service is rendered if the service is rendered within a municipality.

2a.2.2. The producer of the natural resource products that are extracted by the contract miner is taxable under the production classification on the municipal business and occupation tax form.

2a.3. Determination of producer and contract miner.

2a.3.1. Generally, a producer is one who has title to or an economic interest in mineral deposits or standing timber, and a contract miner is one who does not possess an economic interest but performs services for producers by contract. This contractual relationship will not affect the status of the parties in regard to municipal business and occupation tax liability. For example, a person who has ownership, title in or right by contract or lease in the mineral deposit or standing timber does not possess an economic interest merely because through a contractual relationship he possesses an economic advantage derived from production. In other words, an

agreement between the owner of an economic interest and another entitling the latter to purchase or process the product upon production or entitling the latter to compensation for producing, extracting or cutting does not convey an economic interest.

2a.3.2. If a dispute should arise as to which party is the producer and which is the contract miner, the Tax Department shall consider, in addition to the substance of agreement between the parties, other elements which shall include, but not be limited to the following:

2a.3.2.1. Which person is entitled to claim a depletion allowance for federal income tax purposes.

2a.3.2.2. Is the person mining, cutting or extracting the natural resource product obligated to pay royalty to another.

2a.3.2.3. By lease or contract, does one person have the exclusive right to sever, mine, cut or extract the natural resource product.

2a.3.2.4. Does the contract between the parties contain an exclusive and mandatory sales/purchase agreement.

2a.4. Preparing natural resource products for others. - Any person who makes charges to the producer or to another for preparing natural resource products for sale or use is determined to be engaged in a service activity and shall report all gross income from such activity under the service classification on the municipal business and occupation tax return. Such person preparing the products in this instance is not deemed a manufacturer for he has no title to or ownership in the products but is only performing a service on products owned by another. As to the applicability of the municipal business and occupation tax statute to persons who prepare their own natural resource products, See Section 2b of these rules and regulations.

2a.5. Royalties derived from natural resources.

2a.5.1. Persons who receive payments, as royalties, from producers of natural resource products are not deemed to be producers thereof but shall report all payments under the rental and royalty classification on the municipal business and occupation tax return. The fact that the payment is called by a name other than royalty shall not alter the taxation of such payment if the recipient thereof has furnished real property which has a situs in the municipality and which includes minerals in place, or any interest therein, for hire, loan, lease or otherwise.

2a.5.2. Lessees, sublessees or other denominated lessees are producers of all the natural resources produced, regardless of any payment, in kind or otherwise, to lessors, sublessors or other denominated lessors of a part of such natural resources as rents or royalties.

2a.6. Treatment of freight charges incurred by producers.

2a.6.1. In certain instances, producers of natural resource products are permitted to deduct outgoing freight charges from the gross proceeds of sales to arrive at taxable value under the applicable production classification.

2a.6.2. In order to determine the value within the municipality and at the place where production ends, there may be deducted from gross proceeds of sales certain outgoing freight charges actually paid by the producer, but no deduction will be allowed for expenses incurred by him through the use of his own equipment in transporting item produced.

2a.6.3. In all instances where products are used or consumed by the producer at a point distant from the place of production, outgoing freight charges paid by the producer will not be allowed as a deduction, unless due consideration has been given to them also in the method by which the values were determined.

2a.6.4. Generally, freight charges to be deductible from gross proceeds of sales must be paid by the producer to a common carrier to deliver natural resources to a bona fide purchaser. To illustrate: Coal, at the place where production ends, has a value of ten dollars ($10.00) per ton. If a purchaser buys the coal production at the mine for said price, the producer will report under the coal production classification the gross proceeds of sale, ten dollars ($10.00). However, if the purchaser buys the same coal delivered at eleven dollars ($11.00) per ton, and the producer pays a common carrier to make such delivery, the producer may deduct such freight charges one dollar ($1.00) from the gross proceeds of sale eleven dollars ($11.00) reported under the coal production classification to arrive at the taxable value of ten dollars (10.00).

2a.6.5. If the producer of natural resource products sells his products to a purchaser and agrees to deliver such products in his own equipment for a fee, the fee may be deducted from the gross proceeds of sale in arriving at taxable value under the production classification. The fee charged for transportation by the producer is not taxable under the service classification because this activity had been taxed under the carrier income tax up until July 1, 1987.

2a.6.6. Producers may not deduct expenses incurred in the transportation of coal or other natural resource products from the mining operation to the tipple for preparation.

2a.6.7. If hauling or transportation charges are incurred by the producer and have been absorbed by the producer, such charges are outgoing freight charges and are deductible from gross proceeds of sale to arrive at taxable value.

2a.6.8. A contract miner may not deduct any transportation charges incurred by him for hauling or transporting natural resource products whether in his equipment or in the equipment of another.

2a.6.9. The severance and production of natural gas shall be valued for purposes of the municipal business and occupation tax at the well-mouth immediately preceding transportation and transmission. In order to arrive at the well-mouth value of such severance and production, transportation or transmission expenses incurred by producers of natural gas shall be allowed a deduction from the gross proceeds of the sale of gas. For these purposes, one of the following

alternative methods shall be used for obtaining the well-mouth value of the severance and production of natural gas.

2a.6.9.1. From the gross proceeds of the sale of the production of natural gas, there shall be allowed a deduction in the amount of the costs of transportation or transmission of such gas through the system of the producer from the well-mouth point of severance and production to the point of sale, limited to actual costs of transportation or transmission incurred without reference to items unrelated to such transportation or transmission such as general administrative, overhead, or return investment. Such deduction must be supported by schedules and statements of cost by the producer.

2a.6.9.2. As a alternative to the method presented at Subsection 2a.6.9.1, supra, the well-mouth value of such severance and production may be determined by the average purchase price of natural gas from the same pool or field, or, in the event no gas is purchased from the same pool or field, by the average purchase price of natural gas from the most proximate pool or field and of the same quality and characteristics as that severed and produced, Provided, That in either case the purchase price shall accurately represent the well-mouth value of the gas severed or produced. This determination shall be supported by a statement of the pool or field from which the gas severed or produced is obtained.

2a.6.9.3. As an alternative to the methods presented at Subsections 2a.6.9.1 and 2a.6.9.2, the well-mouth value of such severance and production may be determined by a deduction of transportation and transmission costs in the amount of 15 percent (15%) of the gross proceeds of the natural gas severed and produced, and a computation of the deduction therefrom.

2a.6.10. Producers, other than utilities, must report under the service classification the difference between the gross proceeds of sale from the gas and the tangible well-mouth value reported under the natural gas production classification.

2a.7. Reserved for Future Use.

2a.8. Business of producing timber.

2a.8.1. General. -- A person engaged in a municipality in the business of severing, reducing to possession and producing timber for sale, profit or commercial use is subject to municipal business and occupation tax under the production of timber classification. A timber producer will also be taxable under other classifications of the municipal business and occupation tax when the activity engaged in is not taxable under this classification. The privilege of producing timber ends once the tree is severed from its root structure and its limbs and top are removed. R.S. Burruss, d.b.a. R.S. Burruss Lumber Co., et. al. v. Tax Commissioner, W. Va., 297 S.E.2d 836, 839 (1982). All cuts thereafter are taxable under the manufacturing classification. The value taxed under this classification which is attributable to the production of timber privilege will not again be taxable to the producer of the timber products under the manufacturing classification. W. Va. Code §11-13-2b (1987). Beginning April 13, 1985, however, manufacturers of timber products are required to report gross proceeds derived from wholesale sales made in the

municipality under the wholesale classification if the municipal business and occupation tax ordinance so provides.

2a.8.2. Taxable value. -- The measure of tax under this classification is the gross value of the timber at the point where the production privilege ends. This is an amount equal to the fair market value of the timber production at that point. When a sale occurs at the point, taxable value is gross proceeds of sale. In the absence of such a sale, taxable value is that amount which corresponds as nearly as possible to the gross proceeds from the sale of similar products of like quality or character determined under the following uniform and equitable rules.

2a.8.2.1. Rule 1.

2a.8.2.1.a. In the absence of sales at the point where the timber production privilege ends, gross value must be determined in light of the most reliable and accurate information available. Such factors as the following are to be given due consideration.

2a.8.2.1.a.1. Character and quality of the timber as determined by species, age, size, condition, etc.;

2a.8.2.1.a.2. The quantity of timber per acre, the total quantity under consideration, and the location of the timber in question with reference to other timber.

2a.8.2.1.a.3. Accessibility of the timber (location with reference to distance from a common carrier, the topography and other features of the ground upon which the timber stands and over which it must be transported in process of exploitation, the probable cost of exploitation and the climate and the state of industrial development of the locality); and

4. The freight rates charged by common carriers to important markets.

The timber in each particular case will be valued on its own merits. The Tax Commissioner will give weight and consideration to any and all facts and evidence having a bearing on the market value such as cost, actual sales and transfers of similar timber products, the margin between cost of production and the price realized for timber products, and royalties and rentals paid to the owner of the standing timber. The taxpayer bears the burden of keeping such records as may be necessary to prove the fair market value of his timber at the point where production ends. In the absence of such substantiation, fair market value shall be determined under Rule 2 of this subsection.

2a.8.2.2. Rule 2.

2a.8.2.2.a. At the election of the taxpayer, or in the absence of books and records to substantiate fair market value determined under Rule 1, above, the following rule shall be used to determine the gross value of timber at the point where production ends.

2a.8.2.2.a.1. A person who produces timber and sells his logs, and by-products of timber production and bucking operations, on the ground, either where the trees were felled in

the forest or at a central collection point, shall report seventy-five (75%) of the gross proceeds of sale under the timber production classification and the remaining twenty-five percent (25%) shall be reported under the manufacturing classification. Additionally, one hundred percent (100%) of gross proceeds of sales shall be reported under the appropriate sales classification after April 13, 1985.

2a.8.2.2.a.2. A person who produces timber, sells and delivers his timber products, in the same condition that they leave the forest, to a saw mill, other manufacturer or consumer, shall report fifty percent (50%) under the manufacturing classification, regardless of whether the sale is made within or without the municipality. Additionally, if the sale is made in the municipality, one hundred percent (100%) of the gross proceeds of sales shall be reported under its appropriate sales classification after April 13, 1985.

2a.8.2.2.a.3. A person who produces timber and further saws, mills or otherwise manufactures the same into lumber, cross ties, timbers, veneer and other products for sale, profit or commercial use shall report twenty-five percent (25%) of his gross proceeds of sale under the timber production classification and seventy-five percent (75%) under the manufacturing classification. Where no sale is made, the fair market value of lumber, cross ties, timbers, veneer or other products must nevertheless be determined as provided in Section 2.4 and twenty-five percent (25%) of that amount shall be reported under the production classification. Additionally, if a sale is made in the municipality, one hundred percent (100%) of gross proceeds of sales shall be reported under the appropriate sales classification after April 13, 1985.

2a.8.3. Who is the producer. -- Whenever standing timber is cut, someone is the producer of that timber for purposes of the municipal business and occupation tax. Not every person who cuts timber from the stump, however, is the producer of that timber. Under the municipal business and occupation tax law, the person who owns the timber immediately after its severance is the producer.

2a.8.3.1. A person who hires another to cut timber for him is generally the producer of that timber.

2a.8.3.2. A person who cuts timber for another, to which he does not take title, reports the gross income from his cutting activity under the service classification. See Section 2h of these regulations.

2a.8.4. Taxability of person who severs and uses or consumes timber in his business. -- A person exercising the privilege of producing timber who uses or consumes the same in his business is deemed to be engaged in the business of producing timber for sale, profit or commercial use and is required to make municipal business and occupation tax returns on account of the production of the business showing the gross value of the timber production determined in accordance with Subsection 2a.8.2. Source: W. Va. Code §11-13-2(1985). See Owens-Illinois Glass Company v. Battle, 151 W. Va. 655, 154 S.E.2d 854 (1967): Gilbert Imported Hardwoods, Inc. v. Dailey, W. Va., 280 S.E.2d 260 (1981).

2a.8.5. Contract right to cut. -- The holder of a contract right to cut timber, who has both the right to cut the timber and to use the products from the cutting for his own account, is the producer of that timber for purposes of the municipal business and occupation tax. Comment. -- A quick test for differentiating between a holder of a contract right to cut and a logging contractor is that the former qualifies for depletion under Section 631(a) of the Internal Revenue Code of 1954, as amended, whereas a logging contractor does not qualify.

2a.8.6. Logging contractor.

2a.8.6.1. A logging contractor may have the right under a contract to cut certain timber, but is required to deliver the logs, that he never owned, to the mill or log yard designated by the owner of the timber. The contract in this instance is merely a service agreement. The logging contractor reports his gross income under the service classification of the municipal business and occupation tax. See Section 2h of these regulations. The owner of the timber reports the gross value of the timber, at the point where production ends, under the production classification, and the balance under the manufacturing classification. Additionally, one hundred percent (100%) of the gross proceeds of sale are reportable under the wholesale classification, if sale is made in the municipality after April 13, 1985.

2a.8.6.2. Although the base contract may not require the logger to deliver the logs to the owner, another contract entered into simultaneously may require it. If the two contracts are, in substance, part of one transaction, the logger has not acquired a contract right to cut and sell the timber in his own behalf.

2a.8.7. Wholesale sales. -- Prior to April 13, 1985, A producer who sells his timber products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial or industrial consumers for use or consumption in the purchaser's business is not required to pay tax again under the wholesale sales classification. W. Va. Code §11-13-2 (1978). Sales of timber products to the United States of America, its agencies and instrumentalities or to the State of West Virginia, its institutions or political subdivisions are also classified as wholesale sales and similarly treated. Beginning April 13, 1985, however, persons who manufacture timber or timber products are also required to report the gross proceeds of sale of wholesale sales made in the municipality under the wholesale classification. W. Va. Code §11-13-2(1985).

2a.8.8. Retail sales. -- A timber producer who sells his timber products at retail in this State is required to report his gross value of his timber products under the production classification and his gross proceeds of sale under the retail sales classification. W. Va. Code §11-13-2(1978).

2a.8.9. Definitions. -- As used in this regulation, the term:

2a.8.9.1. "Bucking" means the process of cutting the tree into log lengths which is generally, but not always, done prior to skidding.

2a.8.9.2. "Bumping" means the process of removing limbs from the trees after they have been severed. Depending upon the particular job, this is sometimes done at the place of

severance, but is also often done after the tree has been removed to the collection and loading point.

2a.8.9.3. "By-product" means any additional product, other than the principal or intended product, which results from production or manufacturing activities and which has a market value, regardless of whether or not the additional product was an expected or intended result of the production or manufacturing activities.

2a.8.9.4. "Christmas trees" means evergreen trees commonly known as Christmas trees, including fir, hemlock, spruce and pine trees, which are sold for use as Christmas trees.

2a.8.9.5. "Commercial use" means the use or consumption of a produced or manufactured product, including any by-product, in a business activity of the producer or manufacturer. "Commercial use" also means the use or consumption of a product in a business activity of the purchaser.

2a.8.9.6. "Consumer" means any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of his business.

2a.8.9.7. "Contract right to cut".-A contract right to cut timber is the right to cut timber under a binding contract and to sell the timber cut for the holder's own account or to use such cut timber in his trade or business. Not all cutting contracts give a contract right to cut. If the holder does not own the timber immediately after severance, then the cutting contract is a service contract under which the holder is performing services for compensation.

2a.8.9.8. "Fair market value of timber production" is the amount which would induce a willing seller to sell and a willing buyer to purchase timber products at the point where the timber production privilege ends.

2a.8.9.9. "Logs" refers to the section or sections of a tree which have been cut or sawed from the trunk after the same has been severed from the stump.

2a.8.9.10. "Orchard" means a systematic planting of fruit trees as opposed to individual plantings for ornamental purposes.

2a.8.9.11. "Owner of timber" means any person who owns an interest in timber, including a sublessor and an owner of a contract right to cut timber. Such owner of timber must have a right to cut timber for sale on his own account or for use in his trade or business in order to own an interest in timber within the meaning of W. Va. Code §11-13-2a.

2a.8.9.12. "Producing timber" includes the severing and bumping or delimbing of the tree. All cuts thereafter which ultimately result in a timber product are taxed under the manufacturing classification.

2a.8.9.13. "Pulpwood" means wood cut or prepared primarily to manufacture into wood pulp, for subsequent manufacture into paper, fiber board or other products, depending largely on the species, cut and the pulping process.

2a.8.9.14. "Sapling" means young trees with trunks not over four inches in diameter.

2a.8.9.15. "Skidding" means to pull logs from the stump to the skidway, landing or sawmill.

2a.8.9.16. "Timber" means and includes trees of any marketable species, whether planted or of natural growth, standing or down, located on public or privately owned land, which are suitable for commercial or industrial use. The term "timber" does not include:

2a.8.9.16.a. Trees marketed as Christmas trees,

2a.8.9.16.b. Saplings, brush and undergrowth,

2a.8.9.16.c. Fruit trees planted in an orchard,

2a.8.9.16.d. Other trees which are usable only for firewood or for decoration, except when the wood of such is sold for a commercial or industrial use other than for use as fuel or decoration, or

2a.8.9.16.e. Trees lifted from the soil and sold with roots intact for transplanting.

2a.8.9.17. "Timber producer" means every person who from his own land or from the land of another under a right or license granted by lease or contract, either directly or by contracting with others for the necessary labor or mechanical services, fells, cuts and takes timber for sale, profit or commercial or industrial use. This does not include a person who is under contract to provide the necessary labor or mechanical services to a timber producer.

2a.8.9.18. "Timber products" includes tree tops, tree limbs, logs, wood chips and stumps, etc., produced from "timber".

2a.8.9.19. "Trees of marketable species" means those species of trees growing in West Virginia which have a commercial use.

2a.8.9.20. "Undergrowth" and "underbrush" include shrubs, bushes, small trees, etc., growing beneath standing timber having no commercial value.

§110-13-2b. Manufacturing, Compounding Or Preparing Products; Processing Of Food Excepted.

2b.1. Manufacturers of products.

2b.1.1. For purposes of these rules and regulations, the word "Manufacturer" shall mean and include, but not limited to, every person engaging within this State in the business of manufacturing, compounding or preparing for sale, profit or commercial use any article, substance or commodity. The term "To Manufacture" embraces all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a

result thereof a new, different or useful substance or article of tangible personal property is produced for sale, profit or commercial or industrial use, and shall include the production or fabrication of special made or custom made articles. To manufacture also means producing articles from raw materials or prepared materials by giving these matters new forms, quantities, properties, or combinations. It includes such activities as making, fabricating, processing, refining, mixing, compounding, etc. The term to manufacture does not include activities which are merely incidental to nonmanufacturing activities. Therefore, the following do not constitute manufacturing, compounding, or preparing for sale: cooking and serving of food by a restaurant, repairing and reconditioning of tangible personal property owned by others, etc.

2b.1.2. The phrase "Manufacturing, Compounding or Preparing for Sale" means a process whereby a person from his own materials or ingredients manufactures for sale, or for commercial or industrial use any article, substance or commodity either directly, or by contracting with others for the necessary labor and mechanical services.

2b.1.3. Persons engaged in manufacturing compounding or preparing products shall report the gross proceeds derived therefrom under the manufacturing classification on the municipal business and occupation tax returns. If it is not possible for the manufacturer to determine gross proceeds of sale, he must determine the value of his products by employing the applicable rule set forth in Section 2.3 of these rules and regulations. The measure of the municipal business and occupation tax shall be the value (said value, whenever possible, shall be determined by gross proceeds of sale) of the entire production within the municipality, regardless of the place of sale or the fact that delivery may be made to points outside the municipality.

2b.1.4. A person who manufactures final completed products and does not make sale of the same but uses or consumes said products in his business shall report the value of such products under the manufacturing classification on the municipal business and occupation tax return. In determining the value of such final completed products, the taxpayer must adhere to Section 2.3 of these rules.

2b.1.5. Where the relationship between the manufacturer of products and the purchaser thereof is such that the gross proceeds of sale are not indicative of the true value of the manufactured articles, the taxpayer shall determine value by application of the proper rule set forth in Section 2.3 of these rules and regulations.

2b.1.6. Persons engaged in the business of manufacturing, compounding or preparing for sale, profit or commercial use, any article, substance or commodity and the same is sold at retail within the municipality shall report the gross proceeds derived from such sale under the retail classification, and the value of the same shall be also reported under the manufacturing classification.

2b.1.7. Where a person manufactures, compounds or prepares for sale, profit or commercial use, products, substances or commodities and makes sale of the same at wholesale within the municipality, such person shall report the gross income derived from the sale at wholesale under the manufacturing classification, and the value of the same shall be also reported under the

wholesale sales classification if the sale is made in the municipality and the municipal business and occupation tax ordinance so requires.

2b.2. Manufacturing products for others.

2b.2.1. The term "Manufacturing Products for Others" means the performance of labor and mechanical services upon materials belonging to others so that as a result thereof a new, different or useful article of tangible personal property is produced.

2b.2.2. Persons engaged in the business of manufacturing, compounding or preparing for sale, profit or commercial use, any article, substance or commodity, title to which is vested in another, and the article, substance or commodity is returned, not sold, by the person performing the manufacturing service to the owner, the person performing the service shall report the gross income derived therefrom under the service classification on the business and occupation tax form. In this case, the person performing the manufacturing service is not vested with title to the goods; therefore, he reports his gross income under the service classification. The owner of these goods, for whom the manufacturing service was performed, must report the income from such goods under the manufacturing classification of the municipal business and occupation tax return because he is manufacturing through the activities of others.

2b.2.3. Persons performing manufacturing services for others often add materials to make a desired product for the owner. In those cases where the person rendering a manufacturing service furnishes or sells tangible personal property to complete the article for the owner, the gross income derived from the rendition of the service is taxable under the service classification and the gross income derived from furnishing or selling tangible personal property is taxable under retail or wholesale classification, as the case may be.

2b.3. Manufacturing electric power. -- If any person produces electric power within this State and is not deemed taxable under the public service or public utility section of the municipal business and occupation tax law on such electric power, such person is a manufacturer of electric power and shall report gross income derived therefrom under the manufacturing classification. In other words, the manufacture of electric power which is not taxable under public utilities classification is taxable under the manufacturing classification.

2b.4. Dressing and processing of food.

2b.4.1. Persons who dress and process food shall not be considered as manufacturing or compounding for the purposes of the municipal business and occupation tax law. The sale of these food products on a wholesale or retail basis shall be subject only to the tax imposed under these respective classifications.

2b.4.2. Dressing and Processing of Food for purposes of this Section shall mean those instances where the taxpayer begins with what is usually considered a food substance and ends with a food product. See Ballard's Farm Sausage Inc. v. Dailey, 246 S.E.2d 265 (W. Va. 1978).

2b.5. Partially manufactured within and without the municipality.

2b.5.1. In those instances in which the same person partially manufactures products within the municipality and partially manufactures such products outside the municipality, only a portion of the gross proceeds of sale of such products is taxable under the municipal business and occupation tax.

2b.5.2. To determine that portion of the sale price that is applicable to municipal business and occupation tax, under the manufacturing classification, the taxpayer, at his option, shall elect and apply one of the following methods of apportionment:

2b.5.2.1. That portion of the sale price of the manufactured product that the payroll cost of manufacturing such product within the municipality bears to the entire payroll cost of manufacturing such product; or

2b.5.2.2. That portion of the sale price of the manufactured product that the cost of operation to manufacture such products within the municipality bears to the entire cost to manufacture such products.

2b.5.3. A taxpayer is not permitted to report one partially manufactured product under the payroll cost option and another partially manufactured product under the manufacturing cost option within the same taxable year. Once an option or method is chosen, the option shall apply to all of the taxpayer's manufactured articles or products for the particular taxable year.

2b.5.4. If option 2b.5.2.1 is elected by the taxpayer, only direct payroll costs are to be considered in the formula to compute the percentage of sales price attributable to the municipality. Direct payroll costs do not include the value of or expenses of employee benefits, such as, pension plans, insurance programs, employer contribution of FICA taxes, etc.

2b.5.5. If option 2b.5.2.2 is elected by the taxpayer, only manufacturing costs are to computed. Selling expenses, administrative expenses, advertising expenses, etc., whether incurred within or without the municipality, are not considered a cost of operation to manufacture, nor are research expenses, home office overhead, marketing expenses, etc.

2b.6. Treatment of freight charges incurred by manufacturers.

2b.6.1. In certain instances, persons who manufacture, compound or prepare products within the municipality are permitted to deduct outgoing freight charges from the gross proceeds of sales to arrive at taxable value under the manufacturing classification on the municipal business and occupation tax form.

2b.6.2. To determine the value of manufactured articles within the municipality, there may be deducted from gross proceeds of sale certain outgoing freight charges actually paid by the manufacturer, but no deduction will be allowed for expenses incurred by him through the use of his own equipment in transporting items manufactured.

2b.6.3. In all instances where manufactured products are used or consumed by the manufacturer at a point distant from place of manufacture, outgoing freight charges paid by the manufacturer will not be allowed as deductions unless due consideration was given to them also in the method by which value was determined.

2b.6.4. Generally, freight charges to be deductible from gross proceeds of sale must be paid by the manufacturer to a common carrier to deliver manufactured products to a bona fide purchaser. To illustrate: Glassware, at the place where manufacturing end, has a value of twenty-five dollars ($25.00) per gross. If a purchaser buys the glassware at the glass plant for said price, the manufacturer will report under the manufacturing classification the gross proceeds of sale, twenty-five dollars ($25.00). However, if the purchaser buys the same glassware delivered at twenty-seven dollars ($27.00) per gross, and the manufacturer pays a common carrier to make such delivery, the manufacturer may deduct such freight charges, two dollars ($2.00) from the gross proceeds of sale, twenty-seven dollars ($27.00) reported under the manufacturing classification to arrive at the taxable value of twenty-five dollars ($25.00).

2b.6.5. If the manufacturer sells his articles to a purchaser and agrees to deliver such articles in his own equipment for a fee, the fee may be deducted from gross proceeds of sale in arriving at taxable value under the manufacturing classification. However, the amount of deduction must be reported under the service classification.

2b.6.6. If hauling or transportation charges are incurred by the manufacturer and have been absorbed by the manufacturer, such charges are outgoing freight charges and are deductible from gross proceeds of sale to arrive at a taxable value.

2b.7. Problems and solutions relating to the manufacturing, compounding or preparing of products, articles, substances or commodities. -- Presented below are several examples, problems and solutions thereto regarding the proper taxation of manufacturing activities.

2b.7.1. Example. -- A B manufactures clothing within the municipality and sells the same, at wholesale, for three hundred thousand dollars ($300,000). A B will report this sale at wholesale under the manufacturing classification as well as under the wholesale classification, unless the sale is made outside the municipality or unless the municipal business and occupation tax ordinance excepts such sales, in which case it would be reported only under the manufacturing classification.

A B also sells some of his manufactured product at a retail factory outlet and derives fifteen thousand dollars ($15,000) from such sales. A B will report this amount fifteen thousand dollars ($15,000) under the retail classification and will also report such amount under the manufacturing classification. A B receives no deduction from the gross proceeds of sales at retail to arrive at manufactured value, for the retail sales were made at the factory where production ended.

2b.7.2. Example. -- C D, the owner of materials and fabrics, contracts with A B to have A B manufacture sweaters from the goods. The contract stipulates that A B will manufacture twenty-five thousand (25,000) sweaters from C D's goods for a fee of one hundred thirty-five

thousand dollars ($135,000), and that A B will furnish any thread or buttons necessary to complete the garments. A B is to invoice C D separately for any tangible personal property furnished by A B.

A B completes the manufacturing service and delivers the sweaters to C D and invoices C D for four thousand dollars ($4,000) for materials furnished.

A B will report one hundred thirty-five thousand dollars ($135,000) under the service classification and four thousand dollars ($4,000) under the wholesale classification. The one hundred thirty-five thousand dollars ($135,000) is not reported under the manufacturing classification by A B since he was performing services upon materials belonging to another. The sale of the furnished tangible personal property is reported at wholesale rather than at retail for the sale was made to a manufacturer C D).

C D sells a portion of these sweaters at wholesale for four hundred thousand dollars ($400,000). This amount must be reported by C D under the manufacturing classification, regardless of the place of sale, and he may deduct therefrom any outgoing freight charges paid to a common carrier to deliver these goods to the purchaser.

The remainder of the sweaters are sold at retail by C D for one hundred thousand dollars ($100,000). Of such retail sales, eighty thousand dollars ($80,000) worth occurred outside the municipality and twenty thousand dollars worth occurred within the municipality. Therefore, C D must report only twenty thousand dollars ($20,000) under the retail classification for those retail sales within the municipality and must place a sales value on this portion of the goods and report the same under the manufacturing classification. C D will determine such value in accordance with the applicable rules set forth in Section 2.3 of these rules.

The eighty thousand dollars ($80,000) of retail sales which occurred outside the municipality are not reportable under the retail classification, but a sales value must be placed on this portion of the goods and must be reported under the manufacturing classification in accordance with Section 2.3 of these rules. These are sales of manufactured products for delivery outside the municipality and are reportable under manufacturing only. It is assumed that the taxpayer had no outgoing freight charges, in this example, and that the value of his articles was reflected by the gross proceeds of sales; therefore, he will report the one hundred thousand dollars ($100,000) (of retail sales) under the manufacturing classification.

C D's municipal business and occupation tax return will reflect five hundred thousand dollars ($500,000) reported under the manufacturing classification and twenty thousand dollars ($20,000) under the retail classification.

2b.7.3. Example. -- XY, a coal broker, purchases coal from Kentucky and has it transported to his tipple and preparation plant within the municipality. XY purchased one hundred thousand (100,000) tons at five dollars ($5.00) per ton. The coal is tippled, prepared, screened, graded, washed, etc. by XY and sold by him for delivery outside the municipality for eight dollars ($8.00) per ton, or a total of eight hundred thousand dollars ($800,000). In the purchase contract, it is stipulated that XY will pay all outgoing freight charges to deliver such coal. The freight

charges in the amount of ten thousand dollars ($10,000) were paid by XY to a railroad, which is, of course, a common carrier.

XY will report the gross proceeds of sale eight hundred thousand dollars ($800,000) of the coal described in the preceding paragraph less the preparers outgoing freight charges ten thousand dollars ($10,000) as taxable income, seven hundred ninety thousand dollars ($790,000) under the manufacturing classification; for the activities of screening, grading, washing, etc., are deemed to be preparing articles for sale, which activities come under the manufacturing classification. Inasmuch as this was a sale made of manufactured products for delivery outside the municipality, the taxpayer has no responsibility to report gross proceeds therefrom under either the retail or wholesale classes.

During the taxable period, XY tippled, prepared, screened, graded, etc., coal, title to which was vested in others, for a fee of two dollars ($2.00) per ton. Gross income from this activity, performing manufacturing services on goods owned by others amounted to three hundred fifty thousand dollars ($350,000). Inasmuch as title to this coal was vested in others, XY is deemed to be performing activities taxable under the service classification and will report accordingly.

The taxpayer purchased West Virginia coal and other natural resource products which he sold for six hundred thousand dollars ($600,000). XY performed no activities on these products and sold the same in the condition in which they were purchased. The sale of such products occurred outside of the municipality. The transaction was negotiated and consummated without the municipality, and it was provided that title passed to the purchaser only upon delivery.

On the transaction described in the preceding paragraph, XY is not subject to municipal business and occupation tax. He did not produce, manufacture or prepare the goods for sale. The goods were purchased by him within West Virginia and sold by him outside the municipality in the form in which he purchased them. Therefore, XY performed no activities within the municipality subject to the municipal business and occupation tax. In this situation the burden of proof is on the taxpayer to show that the sale was consummated without the municipality and therefore not subject to tax. A detailed list of all such transactions must be maintained by the taxpayer and must show the shipping point, the purchaser's name, the delivery point, the mode of delivery and the date of shipment.

Exemption for sales consummated outside the municipality does not apply to persons subject to tax under the production classification (Section 2a of these rules) or under the manufacturing, compounding or preparing for sale classification (Section 2b of these rules). Persons subject to tax under the production classification or the manufacturing, compounding or preparing for sale classification are producing, manufacturing, compounding or preparing for sale products within the municipality for sale without the municipality and are taxable on the privileges engaged in within the municipality. The measure of the tax is the value of the entire production or entire product manufactured within the municipality, regardless of the place of sale or the fact that the delivery may be made to points outside the municipality.

2b.7.4. Example. -- At a site within the municipality, EF manufactures component parts for radios and television sets and ships the parts to its assembly factory outside the municipality

where additional manufacturing is performed to make radios and televisions ready for sale. Therefore, the same person (EF) is partially manufacturing a product within the municipality and partially manufacturing such product outside the municipality.

Whereas the municipal business and occupation tax law can reach only those activities or privileges which occurred within the municipality, the taxpayer must elect a method of apportionment to determine his municipal gross income from manufacturing. (See Section 2b.5 of these rules.) The taxpayer elects to use, in this example, the payroll method of apportionment.

The payroll cost of manufacturing the parts within the municipality totaled one hundred thousand dollars ($100,000). The entire payroll cost of manufacturing the radio and television sets was five hundred thousand dollars ($500,000), including the municipal payroll. Therefore, the municipal payroll cost is twenty percent (20%). In computing payroll cost, only direct payroll cost in manufacturing the item in question is included. No other expenses are included.

Assuming that EF sells the radios and television sets for one million, six hundred thousand dollars ($1,600,000), its municipal gross income reported under the manufacturing classification is three hundred twenty thousand dollars ($320,000); (twenty percent (20%) X one million, six hundred thousand dollars ($1,600,000) = three hundred twenty thousand dollars ($320,000)).

Persons who perform a manufacturing service on goods owned by another must report their entire gross income derived from activity under the service classification and are not permitted to employ an apportionment method. The rule stated in the preceding sentence shall apply even if the owner (manufacturer) of the goods ships the same outside the municipality for additional manufacturing or preparing. Only the owner-manufacturer is entitled to prorate his income under one of the apportionment methods.

If the owner-manufacturer pays another to perform services on his goods within the municipality and ships those goods outside the municipality for additional processing, the owner-manufacturer must elect the cost of operations method of apportionment. He is not eligible to use the payroll method since he has no municipal payroll in these particular goods (the goods were partially manufactured by another).

2b.7.5. Example. -- ST manufactures chemicals and related items within the municipality. In order to manufacture house paint, ST must manufacture certain chemical compounds which become component parts of the paint and which lose their identity therein. These manufactured chemical compounds consumed by the manufacturer within the municipality are not subject to the municipal business and occupation tax in that such compounds become component parts of the product, lose their identity therein and increase the taxable value of the product (house paint) manufactured within the municipality which is reported under this tax act.

ST ships a portion of the chemical compound to its operation outside of the municipality. ST must place a manufactured value on this portion of the compound and report the same under the manufacturing classification on the municipal business and occupation tax return; because this product becomes a final complete product for purposes of this tax once it is shipped outside the municipality, with or without sale thereof. Any manufactured product which is shipped

outside the municipality, whether for consumption or use or for sale, becomes a final completed product subject to this tax.

ST consumes a portion of its manufactured paint to paint its factory. A value, in accordance with Section 2.3 of these rules, must be placed on the consumed product and reported under the manufacturing classification of the municipal business and occupation tax return. In this situation, the taxpayer is consuming final completed products. Final completed products manufactured within the municipality are taxable under the manufacturing classification, regardless of where consumed or used by the manufacturer.

2b.7.6. Example -- A business rebuilds engines owned by others and also purchases engines which it rebuilds and later sells.

Where the business rebuilds engines owned by others it would report its gross receipts under the service classification. Where the owner of the rebuilt engine is in the business of rebuilding engines it would report the value of the rebuilt engine under the manufacturing classification. Where the owner of the rebuilt engine is an individual not engaged in a related business activity no business and occupation tax is due from the owner of the rebuilt engine because he is not engaging in business.

Where the business purchased the engines which it rebuilds and later sells, gross receipts from rebuilding the engines shall be taxable under the manufacturing classification in the municipality in which the engine rebuilding activity is conducted, and also under the appropriate sales classification if the sale occurs in the municipality or is otherwise attributable to the municipality.

2b.8. Business of manufacturing timber products.

2b.8.1. General. -- A person engaged in a municipality in the business of manufacturing, compounding or preparing delimbed trees, logs or timber products for sale, profit or commercial use, either direct or by contracting services from others is subject to municipal business and occupation tax under the manufacturing classification and shall determine his municipal business and occupation tax liability in accordance with these regulations. He is also taxable under other classifications of the municipal business and occupation tax when the activity engaged in is not taxable under the manufacturing classification.

2b.8.2. Measure of tax. -- The measure of tax under this classification is the adjusted gross value of all timber products, including by- products, manufactured, compounded or prepared in the municipality for sale, profit or commercial use, regardless of places of sale or the fact that delivery may be made to points outside the municipality.

2b.8.3. Gross value. -- The term "gross value" means gross proceeds of sales in every instance where a bona-fide, arms-length sale of product(s) is made, regardless of whether the sale is at wholesale or retail. This amount shall include all subsidies and bonuses received with respect to the manufacture or sale of the timber products. In the absence of a bona-fide, arms-length sale, gross value is that amount which corresponds as nearly as possible to gross proceeds from the sale of similar products of like quality or character in an arms-length transaction under

similar circumstances and conditions. This gross value shall be determined under the rules set forth in Section 2.3 of these regulations.

2b.8.4. Adjusted gross value. -- The term "adjusted gross value" is determined under Subsection 2b.8.3 above, minus the following:

2b.8.4.1. The cost of timber or timber products which are used as ingredients, components or elements in the manufacture of timber products that are taxed under the manufacturing classification.

2b.8.4.1.a. Effective beginning April 1, 1982, taxable value of timber products manufactured in the municipality, which are sold or commercially used, does not include the cost of any timber or timber products purchased and used as an ingredient, component or element of a timber product manufactured in the municipality. Only the cost of timber or timber products that become a recognizable, integral part of the timber product is deductible. The following are examples of tangible personal property which are not deductible.

2b.8.4.1.a.1. A manufacturer of timber products purchases pallets. The pallets do not become an ingredient, component or element of the manufactured timber products. The cost of the pallets is not deductible.

2b.8.4.1.a.2. A manufacturer of timber products purchases paper cups, straws, napkins, plates, towels and toilet tissue. Their cost is not deductible.

2b.8.4.1.a.3. A manufacturer of timber products purchases wooden crates, cardboard boxes, excelsion and wrapping materials for shipping his manufactured timber products. Their cost is not deductible.

2b.8.4.1.b. An integrated producer/manufacturer of timber products may deduct the gross value of the timber at the point where the production privilege ends. When the timber is produced in this State, the amount that may be deducted is the value of the timber reported under the production classification. See, Section 2a.8 of these regulations.

2b.8.4.1.b.1. Example. -- XYZ Lumber Company produces timber which it then manufactures into lumber in the municipality. The gross value of the timber at the point where the production privilege ended was two thousand five hundred dollars ($2,500). The manufactured lumber was sold for ten thousand dollars ($10,000). The adjusted gross value of the manufactured timber products subject to the manufacturing tax is seven thousand five hundred dollars ($7,500).

2b.8.4.1.b.2. Example. -- XYZ Lumber Company also purchases logs from other producers of timber for five thousand dollars ($5,000). The timber products manufactured from the purchased logs is sold for fifteen thousand dollars ($15,000). The adjusted gross value of the timber products subject to the manufacturing tax is ten thousand dollars ($10,000).

2b.8.4.1.b.3. Example. -- L & M Lumber Company produces timber in Kentucky and manufactures it into lumber at its saw mill in the municipality. The lumber is sold

for fifty thousand dollars ($50,000). To determine the adjusted gross value of the lumber subject to the manufacturing tax, the taxpayer must first determine the gross value of its timber at the point when production ended. Following regulations Section 2a.8.3, this amount is determined to be thirty thousand dollars ($30,000), and is allowable as a deduction from the fifty thousand dollars ($50,000) selling price of the manufactured lumber to determine the adjusted gross value of twenty thousand dollars ($20,000). Adjusted gross value must then be apportioned since manufacturing began in Kentucky and ended in the municipality.

2b.8.4.2. Transportation charges actually paid by the manufacturer. In determining the adjusted gross value of timber products manufactured in the municipality, the manufacturer may deduct from "gross value" the amount of outgoing freight charges paid by him, from the point at which the shipment originates in the municipality to the point of delivery to the customer, to the extent included in gross value. For freight charges to be deductible, they must actually be paid by the manufacturer. No deduction shall be allowed for expenses incurred by the manufacturer in transporting or delivering items manufactured to the purchaser, through the use of his own equipment, regardless of whether the equipment is owned, borrowed or leased by him.

2b.8.4.3. Bad debts. -- No deduction is allowed for bad debts because the measure of the tax is the value of the entire product manufactured, compounded or prepared for sale in the municipality.

2b.8.4.4. Cash discounts. -- Cash discounts allowed and taken may be deducted.

2b.8.4.5. Returned goods. -- The proceeds of sales which have been refunded, either in cash or by credits, upon return of the manufactured product may be deducted, if previously included in gross income.

2b.8.4.6. Trade-ins. -- The amount allowed as "trade-in value" for any article accepted as part payments for any manufactured product sold is not allowed as a deduction unless the article will be remanufactured in the municipality by the taxpayer for sale, profit or commercial use.

2b.8.4.7. Excise taxes.

2b.8.4.7.a. Excise taxes other than consumers sales and service tax imposed by this State and paid by the taxpayer may be deducted.

2b.8.4.7.b. Excise taxes imposed by the Federal government which the manufacturer is required to collect from the customer and hold in trust may be deducted. (See Section 1a.20.9).

2b.8.5. Manufactured products sold at retail. -- A manufacturer who sells products manufactured in the municipality "at wholesale" reports his adjusted gross proceeds of sale under the manufacturing classification. Gross proceeds of sale would also be reported under the wholesale classification, for sales made in the municipality if the municipal business and occupation tax ordinance so provides. A manufacturer who sells products "at retail" reports his adjusted gross proceeds of sale under the manufacturing classification, W. Va. Code §11-13-2b

(1987), and gross proceeds of sale under the retail sales classification, W. Va. Code §11-13-2c (1987). The term "selling at wholesale" is defined in W. Va. Code §11-13-1 (1987) to mean and include:

2b.8.5.1. Sales of any tangible personal property for the purpose of resale in the form of tangible personal property.

2b.8.5.2. Sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity subject to municipal business and occupation tax.

2b.8.5.3. Sales of tangible personal property to the United States of America including its agencies and instrumentalities, or to the State of West Virginia, including its agencies, institutions and political subdivisions.

All other sales are "sales at retail."

2b.8.6. Definitions. -- As used in this regulation, the term:

2b.8.6.1. "By-product" means any additional product, other than the principal or intended product, which results from production or manufacturing activities and which has a market value, regardless of whether or not the additional product was an expected or intended result of the production or manufacturing activities.

2b.8.6.2. "Chipboard" is a timber product manufactured from small particles of waste wood.

2b.8.6.3. "Commercial use" means the use or consumption of a produced or manufactured product, including any by-product, in a business activity of the producer or manufacturer. "Commercial use" also means the use or consumption of a product in a business activity of the purchaser.

2b.8.6.4. "Fiberboard" is a timber product manufactured from forest thinings and saw mill waste.

2b.8.6.5. "Manufacturer" means a person engaged in the business of manufacturing, compounding or preparing timber or timber products for sale, profit or commercial use.

2b.8.6.6. "Manufacturer of timber products" means a person who:

2b.8.6.6.a. bucks delimbed trees into log lengths

2b.8.6.6.b. operates a sawmill for the sawing of logs into rough lumber in its various sizes and forms; or

2b.8.6.6.c. operates a cooperage mill, veneer mill, excelsior mill, paper mill, chipmill, plant or other industrial facility for the manufacture of timber or timber products into other timber or products.

2b.8.6.7. "Paper, paper products, printing and publishing industry" is defined as the manufacture of pulp from wood, rags and other fibers; the conversion of such pulp into paper, paperboard and building board; the manufacture of paper, paperboard and building board; the manufacture of paper, paperboard, and pulp into bags, boxes, containers, tags, cards, envelopes, pressed and molded pulp goods, and all other converted paper products; the printing performed on the foregoing and on allied products; the printing or publishing of newspapers, books, periodicals, maps and music; and all manufacturing and service operations performed by typesetters, advertising typographers, electrotypers, stereotypers, photoengravers, steel and copper plate engravers, commercial printers, lithographers, gravure printers, private printing plants of concerns engaged in other businesses, binderies, and news syndicates.

2b.8.6.8. "Pulpwood" is generally manufactured from timber. It can also be manufactured from other products such as cotton, flax, or paper. Only the cost of timber and timber products used to manufacture wood pulp is deductible.

2b.8.6.9. "Seasoning" means to bring the wood into condition for use by exposure in open air or in kilns.

2b.8.6.10. "Timber products" include bark, billets, bolts, chemical wood, cooperate products, crating, cross ties, excelsior, fuelwood, logs, lumber, mine ties and props, piles, poles, ports, pulpwood, shingles, switch ties, timber, wood and related materials, wood chips, wood flour, wooden furniture and fixtures, and all other products usually considered a timber product, but does not include any paper or paper product, newspaper, books, magazines or periodicals.

2b.8.6.11. "Timber products industry" is defined as those industries which manufacture products from lumber, wood and related materials; and logging and wood preserving. It does not include any product or activity in the metal, machinery, transportation equipment and allied products industry; the jewelry and miscellaneous products manufacturing industry; the construction industry; or the paper, paper products, printing or publishing industry.

2b.8.6.12. "Veneer mill" means a mill which manufactures logs into very thin sheets of wood called veneer, veneer is either used for making plywood or, if the wood has good grain and color, it is used for decorative purposes.

2b.8.6.13. "Wall panelling" may be composed of any material or combinations of materials including, but not limited to, solid wood, plywood, wood products, plastics, metals, etc., and may be textured, prefinished, partially finished, or unfinished. For example, a hardboard panel may have an imitation marble finish or a fiberboard panel may have an imitation burlap finish.

2b.8.7. Trees not wanted for their wood, "waste branches," bark and saw dust can be used to extract oils, resins, tanning dyes and different chemicals which are important to other industries. The cost to the manufacturer of the trees, "waste branches", bark and saw dust is not

deductible when determining the taxable value of oils, resins, tanning dyes and different chemicals which are extracted or manufactured from them. Similarly, the cost of oils, resins, tanning dyes and different chemicals extracted or manufactured from timber is not deductible when they are used or become an ingredient or component or element of a timber or forest product.

2b.8.8. Contractors. -- A contractor who builds houses, buildings and other structures using timber products may not deduct the cost of the timber products when determining his municipal business and occupation tax liability.

§110-26-2c. Selling Tangible Property; Exempt Sales.

2c.1. Every person who engages or continues within a municipality in the business of selling any tangible property whatsoever, real or personal, is subject to the municipal business and occupation tax and shall report the gross income therefrom under either the retail or wholesale classification, depending upon the type of sale. Any vendor who receives income from extending credit to vendees or from the repetitive carrying of accounts in connection with the sale of any tangible personal property shall report such income under the service classification on the municipal business and occupation tax form. See Section 1a.1 of these rules and regulations.

2c.2. It is important that the taxpayer maintain books and records to accurately reflect the distinction between sales at retail and sales at wholesale. The rates of tax for these two classifications are different. If the books and records do not make a readily identifiable distinction, the municipality, upon audit, will consider that all sales were made at retail and the burden of proof will be on the taxpayer to show otherwise.

2c.3. Sales at wholesale.

2c.3.1. "Selling at Wholesale" and "Wholesale Sales" shall mean and include:

2c.3.1.1. Sales of any tangible personal property for the purpose of resale (by the vendee) in the form of tangible personal property;

2c.3.1.2. Sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in conduct of any business or activity which is subject to the municipal business and occupation tax;

2c.3.1.3. Sales of any tangible personal property to the United States, its agencies and instrumentalities or to this State and its institutions or political subdivisions.

2c.3.2. Sales of tangible personal property made to purchasers who are going to resell property in the form of tangible personal property are sales at wholesale by the vendor, regardless of where the purchaser sells such property. To illustrate: A distributor in the municipality sells kitchen products (pots, pans, knives, etc.) to a vendee who intends to resell such products without the municipality. The distributor shall report the gross income from such sale under the wholesale classification; for it is immaterial that the vendee intends to make sale of the property outside the municipality. To qualify as a wholesale sale for the taxable status of

the vendor, it is only necessary that the vendor be appraised by the vendee that he (the vendee) is purchasing tangible personal property to be resold in the form of tangible personal property.

2c.3.3. Sales of tangible personal property which property is not resold in the same form by the vendee are also sales at wholesale if the vendee directly uses or consumes such property in a business or activity which is subject to municipal business and occupation tax. To illustrate: A vendor sells pens, paper, etc., to a manufacturer who will consume such products in the conduct of his manufacturing operation. Said sale is deemed to be at wholesale for purposes of the vendor's municipal business and occupation tax liability for the purchaser intends to use the purchased goods in a business activity subject to municipal business and occupation tax. If the vendor had made such sale to an Ohio manufacturer who has no business activity within this State subject to this State's municipal business and occupation tax, such sale, for the vendor's tax status, is nevertheless at wholesale.

2c.4. Sales at retail.

2c.4.1. All sales made to ultimate consumers and sales that are not wholesale sales are sale made at retail, and the gross income therefrom must be reported under the retail classification of the municipal business and occupation tax form.

2c.4.2. An ultimate consumer is one who purchases goods for his own personal use and who does not engage in the business of selling such goods in the form of tangible personal property and who does not consume such goods in the conduct of a business which would be subject to this States municipal business and occupation tax if it were carried on in a municipality imposing such a tax.

2c.4.3. All sales of real estate (such as by a speculative builder) are sales at retail and must be reported accordingly. On sales of realty, the status of the purchaser or the intention or use made of the property by the purchaser is of no consequence to the vendor's tax status. To illustrate: A speculative builder constructs apartment buildings which he later sells to a West Virginia municipality, such sale must be reported at retail on the tax return of the speculative builder.

2c.4.4. Casual sales of real estate are not taxable to the vendor.

2c.4.5. Sales of tangible personal property made by vendors to persons engaging in exempt business activities (agriculture, horticulture, grazing) are not exempt sales and the gross income derived from such sales must be reported by the vendor under the retail classification. This rule results from the fact that the purchaser (farmer, etc.) is not engaged in a business subject to the municipal business and occupation tax.

2c.4.6. All sales made through vending machines are sales at retail. The term "Vending Machines" means and includes only those machines which, through the insertion of a coin of a specified amount, will return to the vendee a predetermined specific article of merchandise. It includes, but is not limited to, machines which vend cigarettes, toilet articles, sandwiches, beverages, candies, confections, et cetera.

2c.5. Exempt sales.

2c.5.1. Sales by any person engaging in the business of horticulture, agriculture or grazing are not taxable under either the wholesale or retail classification. These sales, to be exempt from municipal business and occupation tax, must be made by the taxpayer of products he has grown and produced in the business of horticulture, agriculture or grazing and not of products which he purchases from others. To illustrate: A florist who purchases flowers and shrubbery from a horticulturist and resells the same to the public is deemed to be making sales at retail and such sales do not fall within this exemption. The sales made by the horticulturist (one who grows his own) to the florist are not taxable sales and, of course, come within this exemption. If the florist grows any of his own stock and makes sale of the same, he is not taxable on such sales.

2c.5.2. The exemption contained herein does not extend to all business activities of the person making exempt sales but is limited to sales of his own products. The gross income from any other business activities of such person must be reported under the applicable classification on the municipal business and occupation tax return. To illustrate: A farmer who leases or rents his equipment to other farmers must report his gross rental income under the rental classification. Also, persons who manufacture, compound or prepare their own products (before sale thereof) into new, useful or different products become liable under the manufacturing classification on the tax return. For example, A raises dairy cows and produces milk therefrom which he sells to supermarkets. The sale of such milk is an exempt sale since the milk was produced by A from his own herd. (Pasteurization and homogenization are not manufacturing processes under this tax.) If A, rather than selling a portion of his milk, makes butter, cheese or ice cream from such milk, he is engaged in the business of manufacturing and must report the gross income from such products under the manufacturing classification.

2c.5.3. Sales of stocks, bonds or other evidences of indebtedness are not sales at either wholesale or retail and are therefore exempt from such classifications. However, income, fees or commissions derived from buying and selling the same for others must be reported under the appropriate classification.

§110-26-2d. Public Service Or Utility Business.

2d.1. Certain persons engaged within this State in any public service or utility business are taxable on such business and shall report the gross income from such business activities under the appropriate classification on the municipal business and occupation tax form. Only gross income derived from the supplying of public services shall be reported under the public service classifications. All income received by a public service or public utility taxpayer from activities other than the supplying of public services shall be reported under the appropriate classification on the municipal business and occupation tax return. For example, a light and power company engaged in operating a generating plant and system for distribution of electrical energy for sale, may also be engaged in selling various electrical appliances at retail. Such company would be taxable under the electric light and power company classification with respect to the sale of electric energy and also taxable under the retail classification with respect to the sale of electric appliances.

2d.2. There are certain persons who are not subject to the tax imposed under the public utility section even though such persons may be subject to the control of this State's Public Service Commission. These statutorily exempt persons are railroads, railroad car companies, express companies, pipeline companies, motor carriers, telephone and telegraph companies and water carriers by steamboat or steamship. Municipally-owned water companies and municipally-owned electric distributions systems are not subject to the tax imposed under this Section.

§110-26-2e. Contracting.

2e.1. The business of contracting is taxable under the municipal business and occupation tax law and the gross income derived therefrom must be reported under the contracting classification. See Section 1a of these rules as to definition of "Contracting," "Prime Contractor," "Subcontractor," "Buildings or Structures," "Contracting, Repairing, Decorating or Improving" and "Speculative Builder".

2e.2. Prime and subcontractors, taxable on gross income with no deductions therefrom. -- A prime contractor, one who furnishes work or both materials and work under a written or oral contract, for the construction, alteration, repair, decoration or improvement of a new or existing building or structure or any part thereof, or for the alteration, improvement or development of realty, must report his gross income under the contracting classification without any deduction on account of any expenses incurred. If the prime contract executes a contract with another for a portion of the job or project, the prime contractor receives no deduction from gross income on account of any payments made to the subcontractor. The subcontractor will also be taxable on his gross income under the contracting classification.

2e.3. Contract entered into with governments. -- Gross income received by a person for contracting activities performed for the State of West Virginia, the federal government or any of their instrumentalities, agencies, boards, commissions or political subdivisions, etc., or performed for nonprofit organizations is taxable and shall be reported under the contracting classification. The fact that the owner is a governmental unit or a nonprofit organization does not relieve the contractor, subcontractor, suppliers or any other person from liability for municipal business and occupation tax on the full amount of gross income.

2e.4. Form of contract.

2e.4.1. Persons engaged in the contracting business shall report the entire gross income under the contracting classification, regardless of whether the contract is a turnkey contract, lump sum contract, per unit contract, cost plus fixed fee contract, or other contract having a similar basis. Gross income received from a contracting activity must be reported under the contracting classification and the manner of performance, basis of determining cost, fee or income or form of contract shall not alter the definition of contractor or of contracting and shall not change the taxability of such income from the contracting classification to another classification. A contracting activity remains a contracting activity regardless of what the parties may name it and regardless of the manner in which the parties may make payment and perform the work.

2e.4.2. The measure of the tax under the contracting classification is gross income and includes all items of cost where the contractor has incurred liability. The cost of materials and labor can only be exempted from the measure of the tax in those cases where the contractor is not liable to vendors or workmen for payment. In those cases where the contractor contends that he has not incurred a municipal business and occupation tax liability because he acted solely as agent for the owner, the burden of proving alleged principal-agency relationship shall be upon the contractor.

2e.5. Separate contracts for labor and materials.

2e.5.1. In cases where the contractor enters into a separate contract for the furnishing of materials by the contractor and a separate contract for erection of such materials by the contractor, the gross income from both contracts is taxable under the contracting classification, unless it can be proved by the contractor that passage of title of the materials was not dependent upon the erection of the materials by the contractor and that the sale of such materials is, in fact, a separate and distinct transaction, taxable under the municipal business and occupation tax law, as a retail or wholesale sale, as the case may be. The contract to furnish materials shall not be considered a separate and distinct transaction from the contract to erect the same, unless it is established by the contractor to be a complete arm's length transaction with no dependency existing between the contract for materials and the contract for erection. The burden of proving any alleged arm's length transaction shall be upon the contractor.

2e.5.2. A separate purchase order for the furnishing of work or labor and a separate purchase order for the furnishing of materials which constitute the contract(s) between the parties shall be treated in the same manner as set forth in the paragraph above.

§110-26-2f. Reserved For Future Use.

§110-26-2g. Business Of Operating Amusements.

2g.1. Any person who derives income from engaging in the business of operating amusements shall report such income under the amusement classification on the municipal business and occupation tax form. Amusements shall include, but shall not be limited to, dance halls, theaters, skating rinks, moving picture shows, radio broadcasting stations, bowling alleys, golf courses, golf driving ranges, racetracks, carnivals, billiard parlors, etc. Any other place at which amusements are offered to the public shall constitute amusements for the purpose of this classification.

2g.2. Persons engaged in the business of radio broadcasting and who provide amusements or entertainment at the broadcasting station or at a public place for which an admission is charged shall report such income under the amusement classification. As to gross income derived by radio broadcasting stations from advertising activities, See Section 2h of these rules and regulations.

2g.3. In the case of operators of places of amusement doing business on a percentage basis, the operator is subject to the municipal business and occupation tax on the total amount of admissions, regardless of whether, under the terms of agreement, he is required to pay a percentage of the admissions as part of the cost of operating. Moving picture show operators who rent film on a percentage basis are required to report the total admissions without any deduction on account of the proportion of admissions paid out for the use of the film.

2g.4. Persons who operate places of amusement and who also sell tangible property in connection therewith; such as, sale of popcorn by theatre owner, shall report the gross income from such sales under the applicable sales classification on the municipal business and occupation tax return.

2g.5. Also, persons engaged in the amusement business may be subject to tax under the rental classification on a certain portion of their gross income. This situation occurs when amusement operators rent personal property such as lockers or bowling shoes to their patrons.

§110-26-2h. Service Business Or Calling.

2h.1. Persons engaged in any service business or calling not otherwise specifically taxed under the municipal business and occupation tax law shall report the gross income derived therefrom under the service classification on the municipal business and occupation tax form.

2h.1.1. "Service Business or Calling" shall include all activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible property, but shall not include the services rendered by an employee to his employer. This term shall include persons engaged in manufacturing, compounding or preparing for sale, profit or commercial use, articles, substances or commodities which are owned by another or others, as well as persons engaged as independent contractors in producing natural resource products for persons required to pay the tax imposed under the production classification.

2h.1.2. Persons engaged in the business of television broadcasting and/or radio broadcasting are exempt from tax on gross income derived from advertising services.

2h.2. Services to personal property.

2h.2.1. Where a person renders a service to personal property belonging to others, e.g., mechanics repairing another's automobile, the gross income derived from the work or labor performed in rendering the service shall be reported under the service classification.

2h.2.2. There are many cases where a person in rendering a service, sells tangible personal property, e.g., parts used in automotive repairs. In such instances, the gross income derived from the rendition of the service, usually labor charges, is taxable under the service classification and the gross income derived from the sale of tangible personal property is taxable under the retail or wholesale classification, as the case may be. However, in those cases where the taxpayer renders a service to personal property owned by another and sells personal property to such person to

complete the repair of the article, the taxpayer may apportion the gross income between the classifications only if his books and records accurately reflect a separation and if the invoice presented to the customer shows the separation between the services and sales. If the taxpayer fails to maintain adequate records, the entire gross income will be taxed under the service classification and the burden will be upon the taxpayer to prove the proper segregation of receipts.

2h.3. Personal and professional services. -- Personal services and professional services are not exempt from the municipal business and occupation tax, and the gross income from these services must be reported under the service classification.

2h.4. Problems, solutions and examples relating to service businesses or callings. -- Presented below are several examples, problems and solutions thereto regarding the proper taxation of service activities. Any person engaged in any service business or calling within this State not otherwise taxed under the municipal business and occupation tax law is taxable under the service classification. In general service business or calling includes, but is not limited to, advertising agents, appraisers, architects, attorneys, barbers, beauticians, collection agents, court reporters, dentists, doctors, detectives, engineers, employment agents, funeral directors, janitors, kennel operators, laundries, teachers, school operators, laboratory operators, veterinarians, window cleaners, and others. It also includes persons engaged in the business of cleaning, repairing, improving, etc., the personal property of others. The term does not include persons who render services to others in the capacity of employees as distinguished from independent contractors. (See Section 1a of these rules.)

2h.4.1. Example.

AB, a dentist, operating within West Virginia, has gross income derived from repairing teeth and furnishing dentures, bridge work, etc. All of AB's gross income is to be reported under the service classification; because persons such as dentists primarily render professional services and do not make sales. The furnishing of dentures, bridge work, etc., is indispensable to and in furtherance of the professional services rendered by the taxpayer.

If AB should sell dentures to an individual without the dentures being indispensable to or in furtherance of professional dental services rendered to the individual, then the sale would qualify as a sale at retail or wholesale for purposes of this tax. This would certainly be an unusual situation and the burden of proof would be upon the taxpayer to show that such transaction was in no way connected to his primary business of rendering professional services.

2h.4.2. Example.

CD is a funeral director within the municipality and commonly quotes a lump sum price for a standard funeral service, which includes the furnishing of a casket, services, care of the body, funeral coach, preparation of the grave site, flowers, etc. where CD quotes a lump sum price such as twelve hundred dollars ($1,200), which includes both the sale of tangible personal property and the charge for rendition of services, he must separate his gross income and report each portion thereof under the applicable classification. His books and records and invoices to

customers must reflect the segregation of receipts or he will be required to report all income under the service classification.

In the instant case, of the twelve hundred dollars ($1,200) lump sum fee, he invoices five hundred dollars ($500) as sales of property and seven hundred dollars ($700) as his fee for services rendered. Therefore, he may report five hundred dollars ($500) under the retail classification and seven hundred dollars ($700) under the service classification.

2h.4.3. Example.

RE, a licensed real estate broker within the municipality, accepts a listing to sell an office building for the owner. Upon sale of the building, RE will receive seven percent (7%) of the selling price as his commission. RE employs XY, a license real estate salesman (not a broker). XY is to receive twenty percent (20%) of RE's commission for any realty he sells which is listed by the broker. XY finds a purchaser for the office building listed by the broker and the agreed upon sales price is eight hundred thousand dollars ($800,000). The broker's commission from the owner is fifty-six thousand dollars ($56,000) (seven percent (7%) X eight hundred thousand dollars ($800,000) = fifty-six thousand dollars ($56,000)). The broker pays XY a commission of eleven thousand, two hundred dollars ($11,200) (twenty percent (20%) X fifty-six thousand dollars ($56,000) = eleven thousand two hundred dollars ($11,200).

The broker will report his entire commission fifty-six thousand dollars ($56,000) with no deductions whatsoever under the service classification. The real estate salesman (XY) is liable for municipal business and occupation tax on his income only if he is an independent real estate salesman and is not an employee of the broker. Real estate salesman licensed under W. Va. Code §47-12-1 et seq. are subject to specific regulatory controls. Consequently, regardless of how they may be classified for other purposes, licensed real estate salesmen are considered employees of brokers for purposes of the municipal business and occupation tax and are not taxable on their activities on behalf of brokers.

§110-26-2i. Furnishing Property For Hire; Rental And Royalty.

2i.1. Any person engaged in the business of furnishing any real or tangible personal property, which has a tax situs in a municipality, or any interest therein for hire, loan, lease or otherwise, whether the return be in the form of rentals, royalties, fees or otherwise, shall report the gross income derived therefrom under the rental and royalty classification. The term tangible personal property as used herein shall not include money or public securities. The terms "Rental and Royalty Classification", "Rental Classification" and "Royalty Classification," when used within these regulations, are synonymous.

2i.2. The owner or operator of a store or an establishment in which leased departments are conducted must include on his return the rental income received by him from the lessee. The lessor must file a municipal business and occupation tax return and pay tax under this applicable classification.

§110-26-2j. Small Loan And Industrial Loan Business.

2j.1. Persons engaged in the business of making loans of money, credit goods, or things in action, who because of such activity are required under the provisions of W. Va. Code §47-7A-1 et seq. as amended, to obtain a license from the West Virginia Commissioner of Banking, and persons engaged in business as an industrial loan company, shall report all gross income received before April 1, 1971, under the small loan and industrial loan classification. The measure of the tax for persons engaged in this type of business shall not include the return of capital or return of principal in making loans of money, credit goods or things in action.

2j.2. All gross income received by such persons, as described in the preceding paragraph, received on or after April 1, 1971, shall be reported under the banking classification on the municipal business and occupation tax return. (See Section 2k of these rules and regulations.)

§110-26-2k. Banking And Other Financial Business.

2k.1. Any person who engages, within this State, in a banking or financial business shall report gross income derived therefrom under the banking classification on the municipal business and occupation tax return. The preceding rule is applicable only to income received on or after April 1, 1971. For a definition of "Banking Business" or "Financial Organization", See Section 1a, of these rules and regulations.

2k.2. The term "Gross Income" of a banking or financial business shall mean interest, premiums, discounts, dividends, service fees or charges, commissions, fines, rents from real or tangible personal property, royalties, charges for bookkeeping or data processing, receipts from check sales, charges or fees, and receipts from the sale of tangible personal property.

2k.3. "Gross Income" of a banking or financial business shall not include:

2k.3.1. interest received on the obligations of the United States, its agencies and instrumentalities;

2k.3.2. interest received on obligations of this or any other State, territory or possession of the United States, or any political subdivision of any of the foregoing or of the District of Columbia; or

2k.3.3. interest received on investments or loans primarily secured by first mortgages or deeds of trust on residential property occupied by nontransients.

2k.4. All interest derived on activities exempt under Section 2K.3 shall be reported separately, as to amounts, on the municipal business and occupation tax return of a person taxable under the banking classification. In other words, a full disclosure must be made by such person as to the amount of exempt income he received on investments or loans primarily secured by first mortgages or deeds of trust on residential property occupied by nontransients. This exempt income must be explained in detail and separately shown on the exemptions schedule of the municipal business and occupation tax return.

2k.5. Banks and other financial businesses shall report gross income and pay tax under the banking classification only. For example, a financial organization which makes retail sales of tangible personal property shall not report the gross proceeds from sales under the retail classification but shall report the proceeds under the banking classification. Banking and financial businesses, unlike all other businesses, do not have to segregate their income or receipts into the various taxable classifications.

2k.6. Where a banking business or financial organization has several business locations, a municipality shall impose its business and occupation tax only upon gross income received at banks and branch offices located within the municipality. The presence of an automated teller machine "ATM" in a municipality shall not be treated as a business location giving rise to business and occupation tax liability in the municipality.

§110-26-3. Exemptions.

3.1. Business exempt from tax. -- The municipal business and occupation tax law exempts from the tax the following businesses:

3.1.1. Insurance companies which pay the State of West Virginia a tax upon premiums: Provided, however, That this exemption shall not extend to that part of the gross income of insurance companies which is received for the use of real property, other than property in which the insurance company maintains its office or offices, in this State, whether the income be in the form of rentals or royalties.

3.1.2. Nonprofit cemetery companies organized and operated for the exclusive benefit of their members.

3.1.3. Fraternal societies, organizations and associations, which are organized and operated for the exclusive benefit of their members and not for profit. However, this exemption shall not extend to that part of the gross income arising from sale of alcoholic liquor, food and related services, of such societies, organizations and associations which are licensed as private clubs under the provisions of W. Va. Code §60-7-1 et seq.

3.1.4. Corporations, associations and societies organized and operated exclusively for religious or charitable purposes.

3.1.5. Production credit associations, organized under the provisions of the federal "Farm Credit Act of 1933".

3.1.6. Any credit union organized under the provisions of W. Va. Code §31-1-1 et seq. or any other chapter of the West Virginia Code. However, the exemptions of this Section shall not apply to corporations or cooperative associations organized under the provisions of W. Va. Code §19-4-1 et seq.

3.1.7. Gross income derived from providing advertising services rendered in the business of radio and television broadcasting.

3.1.8. The gross income or gross proceeds of sale of a gasification or liquification of coal project in the demonstration, pilot or research stages. To qualify for this exemption the Tax Commissioner must first certify the project as eligible. Such exemption shall expire seven years from the date the project first receives gross income or gross proceeds from sales.

3.2. Business exempt by specific statutes.

3.2.1. Public service district for water and sewage services. -- Public service districts providing water and sewage services organized in compliance with the provisions of W. Va. Code §16-13A-1 et seq., are exempt from the payment of the municipal business and occupation tax. This is an exemption provided by specific statute and is only available to those public service districts that have complied with all the requirements as set forth in the above cited provisions of the Code.

3.2.2. Municipal waterworks. -- Waterworks in the State of West Virginia which are organized and/or operated by a municipal corporation in compliance with the provision of W. Va. Code §8-12-1 et seq., entitled, "Waterworks", are exempt from the payment of the municipal business and occupation tax. This is an exemption provided by specific statute and is only available to those municipal waterworks that have complied with all requirements as set forth in the aforecited provisions of the Code.

3.2.3. Municipal combined waterworks and sewage systems. -- Waterworks and sewage systems in the State of West Virginia which are organized and/or operated by a municipal corporation in compliance with the provisions of W. Va. Code §8-13-1 et seq., as amended, entitled, "Combine Waterworks and Sewage Systems", are exempt from the payment of the municipal business and occupation tax. This is an exemption provided by specific statute and is only available to those municipal waterworks and sewage systems that have complied with all the requirements as set forth in the above cited provisions of the Code.

3.2.4. Municipal and sanitary district sewage works. -- Sewage works in the State of West Virginia are organized and/or operated by any municipal corporation and/or sanitary district in compliance with the provisions of W. Va. Code §16-13-1 et seq., are exempt from the payment of the municipal business and occupation tax. This is an exemption provided by specific statute and is only available to those sewage works of municipal corporations and sanitary districts that have complied with all the requirements as set forth in the aforecited provisions of the Code.

3.2.5. Horse racing and dog racing. -- Persons engaged in the business of horse racing or dog racing and organized in compliance with the provisions of W. Va. Code §19-23-1 et seq., are exempt from the payment of the municipal business and occupation tax. This is an exemption provided by specific statute and is only available to those persons that have complied with all the requirements as set forth in the provisions of the Code. However, those public conveniences, such as golf courses and other recreational activities and motel or hotel operations from which persons engaged in horse racing or dog racing derive income, are subject to the municipal business and occupation tax under the appropriate classifications.

3.2.6. West Virginia business development corporations. -- Business development corporations organized in compliance with the provisions of W. Va. Code §31-14-1 et seq., are exempt from payment of the municipal business and occupation tax.

§110-26-4. Compilation Of Tax; Payment.

4.1. Every person liable for municipal business and occupation taxes shall pay the same in quarterly estimated installments. Such estimated payments are due on or before the last day of the month following the taxable quarter. In other words, if a taxpayer keeps records and pays tax on a calendar year basis he will file quarterly estimated payments for his municipal business and occupation taxes. The installments and annual return shall be due on or before the dates provided by municipal ordinance.

4.2. If the municipal ordinance so provides and a taxpayer can reasonably expect his tax liability to be less than one hundred dollars ($100.00) for the taxable year, he does not have to file quarterly estimated installments and may file only an annual return.

4.3. The municipality, if it deems it necessary to ensure payment of the tax, may require estimated payments for periods of shorter duration than quarter year periods.

§110-26-5. Return And Remittance By Taxpayer.

5.1. Annual return.

5.1.1. Every taxpayer shall, on or before the expiration of one month after the end of the tax year, file a municipal business and occupation tax return for the entire taxable year. The return must show the gross proceeds of sales or gross income of business, trade or calling, and the taxpayer must compute the amount of tax chargeable against him. Such return must be signed by the taxpayer.

5.1.2. For a taxpayer maintaining records and paying taxes on a calendar year basis unless otherwise provided by municipal ordinance, the annual return is due on or before January 31 of the following year. The annual return is filed at the close of the taxable year and replaces the fourth quarterly estimate. The annual return is a recompilation of the three quarterly estimates and the fourth quarter's business. It provides a medium for making such adjustments on the quarterly estimates as may be necessary.

5.2. Extension of time.

5.2.2. No extensions of time may be granted for filing of quarterly returns or making estimated payments.

§110-26-6 through §110-26-9. Reserved For Future Use.

§110-26-10. Taxability Of Specific Businesses.

10.1. Presented below are certain specific types of business activities and brief explanations as to the applicable classification under which each should report gross income. If any taxpayer is in doubt as to the proper class or classes under which he is required to file, he should forward an inquiry to the municipality.

10.1.1. Accountants. -- Persons who are certified public accountants, public accountants, bookkeepers or who provide accounting services to others for a consideration are taxable on the gross income derived from such activities under the service classification on the municipal business and occupation tax form.

10.1.2. Automobiles and other motor vehicles. -- Persons engaged in the business of selling automobiles and other motor vehicles shall report the gross receipts therefrom under the retail or wholesale classification, depending upon the type of sale. No deduction is allowed such persons for sales made to nonresidents of this State or the municipality unless it can be conclusively established by the dealer that such sale was consummated outside the boundaries of the municipality. Gross income received for repairing automobiles of others shall be reported under the service classification.

10.1.3. Advertising agencies.

10.1.3.1. Advertising agencies are primarily engaged in the business of rendering services, but may also make sales of tangible personal property to their clients or others or make purchases of such articles as agents in behalf of their clients. Articles acquired or produced by advertising agencies may be for their own use in connection with the rendition of an advertising service or may be for resale as tangible personal property to their clients.

10.1.3.2. The gross income received for advertising services, including commissions or discounts received upon articles purchased as agents in behalf of clients, is taxable under the service classification. Included in this classification are amounts attributable to sales of tangible personal property, unless charges for such articles are separately stated in billings rendered to clients.

10.1.4. Barbers and beauticians. -- Gross income received from barbering and beautician services shall be reported under the service classification. Any gross income received from sales of tangible personal property such as hair tonic, hair spray, etc. shall be reported under the retail classification.

10.1.5. Doors, windows and awnings. -- Persons engaged in the business of manufacturing doors, windows and awnings shall report the gross income from such activities under the manufacturing classification. Persons who manufacture and make sale of such products at retail must also report the gross proceeds of sale under the retail classification. Persons who install these products must report the gross income derived therefrom under the contracting classification.

10.1.6. Laundries and dry cleaners. -- Persons who derive gross income from a laundry or dry cleaning business shall report said income under the service classification. However, sales of tangible personal property to the general public are taxable under the retail sales classification.

10.1.7. Hospitals. -- Generally, the gross income derived by hospitals for services rendered to patients shall be reported under the service classification. Some of the gross income derived from such business may be subject to tax under the retail or wholesale classification, as the case may be, if the rendition of the service involves the sale of tangible personal property.

10.1.8. Hotels and motels. -- Gross income received by hotels and motels for the renting of rooms or sleeping quarters shall be reported under the service classification. A hotel, motel, boarding house, rooming house, apartment hotel, resort lodge, or tourist camp includes all establishments which are held out to the public as a hotel, public lodging house, or places where sleeping accommodations may be obtained, whether with or without meals or facilities for preparing the same. The foregoing does not include establishments in the business of renting real estate, such as apartments, nor does it include hospitals, sanitariums, nursing homes, rest homes and similar institutions. Gross income from meals sold to the public by hotels or motels, etc. shall be reported under the retail classification.

10.1.9. Photography, photo printing, etc. -- Persons engaged in the business of photoprinting, photostating, photography, photoengraving, blueprinting, etc., are required to report the gross income from such activities as follows:

10.1.9.1. Gross income from the developing of films owned by others, is to be reported under the service classification.

10.1.9.2. Gross income from making prints, photostats, blueprints, etc., shall be reported under the manufacturing classification.

10.1.9.3. Persons who develop film owned by others and make prints therefrom shall, when a charge is made for the development process, report under the service classification the gross income derived from developing the film and under the manufacturing classification the wholesale value of the prints manufactured.

10.1.9.4. Persons engaged in the photography business who take pictures, make prints and sell the finished product at retail shall report the value of the product under manufacturing and in addition to this, shall report the gross proceeds derived from the sale under the retail classification.

10.1.10. Trading stamps. -- Persons engaged in the business of trading stamps and who have redemption centers or stores within this State shall report the gross income derived therefrom under the retail classification. Gross income received from the sale of trading stamps to merchants who dispense stamps to their customers shall be reported under the wholesale classification.

10.1.11. Coin operated machines.

10.1.11.1. Gross income received by an individual who is the owner of coin operated vending machines shall be reported under the retail classification. If the owner splits the gross income with the individual within whose establishment the vending machine is located, the operator of the establishment shall report his portion of the gross income under the service classification. The owner of the vending machines receives no deduction or exclusion from gross income for the portion paid to the establishment operator.

10.1.11.2. Gross income received by an individual who is the owner of coin operated amusement devices shall be reported under the amusement classification. If the owner splits the gross income with the individual within whose establishment the amusement device is located, the operator of the establishment shall report his portion of the gross income under the service classification. The owner of the amusement devices receives no deduction or exclusion from gross income for the portion paid to the establishment operator.

10.1.12. Wall covering and floor covering. -- Persons engaged in the business of selling and installing wall covering and floor covering shall report the gross income therefrom in the following manner:

10.1.12.1. If the sale of the product is separate and distinct from the agreement to install the product and separate charges are made for each, the vendor may report the sale under the retail or wholesale classification, as the case may be, and the installation under the contracting classification. The method by which the installation charge is computed will not alter the fact that such installation is contracting. See Section 2e of these rules.

§110-26-11. Doing Business Within And Without The Municipality.

11.1. Persons domiciled outside a municipality who (a) lease tangible personal property to lessees in the municipality, or (b) perform construction or installation contracts in the municipality, or (c) render services to others therein, are doing business in the municipality, irrespective of the domicile of such persons and irrespective of whether or not such persons maintain a permanent place of business in the municipality.

11.2. Persons domiciled outside a municipality who sell tangible personal property to persons in the municipality, may be doing business in the municipality, irrespective of the domicile of such persons and irrespective of whether or not such persons maintain a permanent place of business in the municipality.

11.3. Persons domiciled in and having a place of business in a municipality, who (a) sell or lease personal property to buyers or lessees outside the municipality, or (b) perform construction or installation contracts outside the municipality, or (c) render services to others outside the municipality, are doing business both within and without the municipality. Whether or not such persons are subject to municipal business and occupation tax under the law depends upon the kind of business and the manner in which it is transacted. The following general principles govern in determining tax liability under the municipal business and occupation tax.

11.3.1. When the business involves a construction or installation contract in the municipality, no deduction from the measure of the tax is permitted, even though the contractor is domiciled outside the municipality and maintains a place of business outside the municipality which may contribute to the contract performed in the municipality.

11.3.2. When the business involves a construction or installation contract outside the municipality, the tax does not apply to any part of the income derived therefrom (except such part of the income as may be applicable to the manufacturer in the municipality by the contractor of articles used or incorporated in such construction or installation), even though the contractor is domiciled in the municipality and maintains a place of business therein which may contribute to the contract performed outside the municipality.

11.3.3. When the business involves a transaction taxable under the service classification, the tax does not apply upon any part of the gross income received for services incidentally rendered to persons in the municipality by a person who does not maintain a place of business in the municipality and who is not domiciled therein. However, the tax applies upon the income received for services incidentally rendered to persons outside the municipality by a person domiciled therein who does not maintain a place of business within the jurisdiction of the place of domicile of the person to whom the service is rendered.

11.3.4. For example, persons domiciled in a municipality, but having no place of business outside the municipality, are taxable upon the following types of income:

11.3.4.1. An insurance agency upon commissions received for insurance placed outside the municipality;

11.3.4.2. An attorney upon fees received from persons outside the municipality, even though a portion of his services were necessarily performed without the municipality;

11.3.4.3. A collection agency upon income received from clients without the municipality or with respect to collections made from persons without the municipality;

11.3.4.4. An accountant upon income received from persons for services performed without the municipality;

11.3.4.5. An investment company upon income received from loans placed without the municipality;

11.3.4.6. A commodity broker upon commissions received from persons without the municipality;

11.3.4.7. An advertising agency upon income received from advertising solicited and secured from firms without the municipality;

11.3.4.8. An employment agency upon income received for securing employees for firms without the municipality;

11.3.4.9. A physician upon income received from the treatment of patients without the municipality;

11.3.4.10. A purchasing agency upon commissions received from clients without the municipality or with respect to purchases made without the municipality.

11.3.5. Conversely, persons engaged in business without the municipality, but having no place of business within the municipality, are not taxable with respect to the reverse of the above situations. It is assumed, of course, that such services, to avoid taxation, are rendered only incidentally to persons within the municipality.

11.3.6. Persons engaged in a business taxable under the service classification and who maintain places of business both within and without the municipality which contribute to the performance of a service, shall apportion to the municipality that portion of gross income derived from services rendered by them in that municipality. Where it is not practical to determine such apportionment by separate accounting methods, the taxpayer shall apportion to each the proportion of total income which the cost of doing business within each bears to the total cost of doing business within and without each municipality.

§110-26-12. Jurisdiction To Impose A Municipal Business And Occupation Tax.

12.1. Authority to impose tax. -- The governing body of a municipality shall have plenary power and authority to enact an ordinance imposing a municipal business and occupation tax upon any business activity or occupation for which the State imposed its business and occupation tax prior to July 1, 1987, which is engaged in or carried on within the corporate limits of the municipality pursuant to the provisions of W. Va. Code §8-13-5.

12.2. Nexus. -- Generally, for a municipality to impose its municipal business and occupation tax upon a particular taxpayer, that taxpayer must have sufficient contacts within the corporate limits of the municipality to sustain the municipality's taxing jurisdiction over the taxpayer.

For example, in instances where services are performed entirely within a municipality or where contracting activities are engaged in within a municipality sufficient nexus exists for a municipality to impose its municipal business and occupation tax.

12.3. Activity must take place inside municipality. -- In addition to the nexus requirement, the taxpayer must engage in the business activity within the municipal limits for the municipality to impose its municipal business and occupation tax.

12.3.1. Production of natural resources is deemed to occur in the municipality if the natural resource is severed within the municipal limits. Severance is deemed to occur as follows:

12.3.1.1. Coal being surface mined is severed at its physical location prior to removal.

12.3.1.2. Coal from an underground mine is severed at the portal where it is reduced to possession at the surface.

12.3.1.3. Limestone or sandstone which is quarried is severed at the physical location prior to removal.

12.3.1.4. Limestone or sandstone which is mined from underground is severed at the portal where it is reduced to possession at the surface.

12.3.1.5. Oil and gas are severed at the wellhead.

12.3.1.6. Timber, sand and gravel, and other natural resource products are severed at their physical location prior to removal, except in the case of underground mining in which circumstance severance occurs at the portal where it is reduced to possession at the surface.

12.3.2. Manufacturing occurs where activities of a commercial or industrial nature are undertaken which involve labor or skill being applied, by hand or machinery, to materials so that as a result thereof, a new, different or useful substance or article of tangible personal property is produced for sale, profit or commercial or industrial use. Where the manufacturing process occurs both within and without a municipality, the municipality may subject that portion of the value derived therefrom as provided in Sections 2.3 and 2b of these regulations.

12.3.3. Sales of tangible personal property are deemed to occur in the municipality where the sale is made. Whenever a customer physically enters a store within a municipality and makes a purchase or signs a contract for the purchase of tangible personal property such sales are subject to that municipality's business and occupation tax regardless of where that tangible personal property is delivered. Additionally, a municipality may impose its municipal business and occupation tax pursuant to W. Va. Code §8-13-5(e), if the sale of tangible personal property was directed from a business location within the municipality or if the business of making the sale of such tangible personal property has its principal office in the municipality and the sale was not directed from another business location. In no case shall the taxing authority extended under W. Va. Code §8-13-5(e) apply to sales of tangible personal property which is subject to municipal business and occupation tax in another municipality.

12.3.3.1. Where orders are placed by mail or by some form of telecommunication without the customer physically coming to a location within the municipality, or where orders are accepted by a representative traveling outside the municipality, the following rules shall apply:

12.3.3.1.a. If the sale is made conditioned upon delivery outside of West Virginia no municipal business and occupation tax may be imposed upon the sale.

12.3.3.1.b. If the order is placed based upon solicitation by a representative (regardless of whether there is an employment or agency relationship or whether acting as an independent contractor) who solicits orders within a municipality imposing a municipal business

and occupation tax of its own, and the tangible personal property is to be delivered in that municipality, then that municipality and no other may tax the value of the sale.

12.3.3.1.c. Where the tangible personal property is delivered in West Virginia to a location which is not subject to a municipal business and occupation tax, the municipality may impose its municipal business and occupation tax upon such sale pursuant to W. Va. Code §8-13-5(e).

12.3.3.2. In those instances where orders for tangible personal property are filled from a truck or warehouse located within a municipality and those orders are placed with the truck driver or at the warehouse such sales are taxable entirely by that municipality and no other.

12.3.3.3. Where the tangible personal property is picked up by the customer at a store or warehouse in another municipality, the municipality in which the store or warehouse where the tangible personal property is picked up is entitled to tax the value of such sale.

12.3.4. Municipalities may tax public service or utility businesses upon sales of services to locations within the municipality.

12.3.5. Municipalities may tax contracting activities if the building or structure upon which contracting activities are being performed are located within the municipality. The place of business or office location from which a contractor operates is not entitled to any municipal business and occupation tax upon contracting receipts from projects located outside of that municipality. Where only a portion of the contract is performed within the municipality the taxpayer must apportion the receipts from that contract to reflect that portion of the work performed within the municipality. This may be done upon a reasonable basis such as a proportion based on square footage or actual cost at the option of the taxpayer provided accurate supporting documentation is maintained to demonstrate the reasonableness of the apportionment.

12.3.6. In those instances where a service business or calling is primarily engaged in within a municipality that municipality may impose its municipal business and occupation tax pursuant to W. Va. Code §8-13-5(e), if the provision of the service has its principal office in the municipality and the provision of the service was not directed from another business location. In no instance shall the taxing authority extended under W. Va. Code §8-13-5(e) apply to sales of services performed in another municipality which imposes a municipal business and occupation tax or performed outside of West Virginia unless such services are incidental to the basic provision of a service as indicated under Sections 11.3.3 and 11.3.4 of these regulations.

12.3.7. Amusements are subject to the municipal business and occupation tax in the municipality in which the amusement is located.

12.3.8. Rentals, royalties, fees or other gross receipts shall be subject to municipal business and occupation tax in the municipality in which the real or tangible personal property giving rise to a rental, royalty, fee or other gross receipts is located, or in the municipality in which the production of natural resources occur giving rise to the rental, royalty, fee or other gross receipts.

12.3.9. Banking and other financial business is subject to municipal business and occupation tax in the municipality in which the banking or other financial business has a business location. For purposes of these regulations a business location shall not include an automated teller machine.

§110-26-13. Business Activity Subject To Municipal Business And Occupation Tax In More Than One Municipality.

13.1. In those instances where manufacturing occurs at a facility which is located in two or more municipalities, the gross proceeds of sale subject to the municipal business and occupation tax shall be divided between the municipalities in which the facility is located by applying a ratio corresponding to the square footage of the facility and its attendant real property, including but not limited to, parking, warehouses, offices, etc., located in the respective municipalities. This rule shall apply only in those instances where a single facility is situated astride municipal boundaries.

In these instances where the manufacturing process is conducted at multiple facilities the taxpayer is to apply the apportionment formula in Section 2b.5.2.1 or Section 2b.5.2.2 of these regulations for determining the amount of gross proceeds of sale subject to a municipality's business and occupation tax where a product is only partially manufactured in a municipality.

13.2. In those instances where sales of tangible personal property or the provision of services occur at a business location which is located astride a municipal boundary, each municipality is entitled to tax the gross proceeds of sale in a ratio corresponding to the square footage of the business location's real property located in the respective municipalities. The square footage of all real property of the business location shall include but not be limited to, parking, showrooms, warehouses, offices, etc., at a particular business location.

13.3. In those instances where a project subject to the privilege on contracting is located astride a municipal boundary each municipality may impose its business and occupation tax only upon that portion of the gross proceeds of sale, as is represented by the ratio of the square footage of the project located within each municipality.

§110-26-14. Procedure And Administration.

A municipality shall assess the amount of tax, penalties and interest within three years of the date the return was filed. In the case of a false or fraudulent return filed with intent to evade tax, or in case no return is filed, the municipality may assess at any time.

Claim for refund must be filed within three years after the due date of the return in respect of which the return was filed, or within two years of the date the tax was paid, whichever period expires later. Should no return have been filed by the taxpayer, the claim for refund must be filed within two years from the time the tax was paid.

The ordinance of a municipality imposing a business and occupation or privilege tax shall provide procedures for the assessment and collection of such tax, similar to those procedures in

W. Va. Code §11-10-1 et seq. and shall conform with such provisions as they relate to waiver of penalties and additions to tax.

§110-26-15. Maximum Rates.

Municipalities are not permitted to create their own classifications of business activities but instead must rely on those in existence on July 1, 1987 prior to the expiration of the State of West Virginia's business and occupation tax. The municipality is authorized to impose its municipal business and occupation tax at any rate the governing body chooses within such classifications up to the following maximums within each classification:
(See Table 1 at the end of this regulation.)

§110-26-16. Reciprocal Exchange Agreements.

Pursuant to the authority granted in W. Va. Code §11-10-5d(i), the Department of Tax and Revenue may enter into a reciprocal exchange agreement with a municipality providing for the disclosure to the municipality of State sales tax information, primarily consisting of liquor sales tax and sales tax information from single location businesses. This information is similar to the information necessary for the municipality to determine municipal business and occupation tax on sales by such businesses. The reciprocal exchange agreement shall provide for disclosure only for the purpose of, and only to the extent necessary in, the administration of the tax laws, and shall be disclosed only to those individuals listed in the agreement. State officers and employees include municipal officers and employees, who shall be subject to those penalties provided for unlawful disclosures by officers and employees of the State as set forth in W. Va. Code 11-10-5d(c). Such disclosures shall in no case include federal tax returns.

TABLE 1:

	RATE $100
Production (§11-13-2a)	
Coal	$ 1.00
Sand & gravel (not mined or quarried)	3.00
Oil, blast furnace slag	3.00
Natural gas in excess of $5,000	6.00
Limestone or sandstone quarried or mined	1.50
Timber	1.50
Other natural resource products	2.00
Manufacturing (§11-13-2b)	.30
Business of selling tangible property (§11-13-2c)	
Retailers	.50
Wholesalers	.15
Public service or utility business (§11-13-2d)	
Electric light and power companies (sales and demand charges, domestic purposes and commercial lighting)	4.00
Water companies	4.00
Electric light and power companies (all other sales and demand charges)	3.00
Natural gas companies, Toll bridges	3.00
All other public service or utility business	2.00
Contracting (§11-13-2e)	2.00
Amusements (§11-13-2g)	.50
Service business or calling (§11-13-2h)	1.00
Rentals, royalties, fees or otherwise (§11-13-2i)	1.00
Small loan and industrial loan businesses (§11-13-2j)	1.00
Banking and other financial business (§11-13-2k)	1.00