

1 HB175
2 147177-2
3 By Representative McClendon
4 RFD: Health
5 First Read: 06-FEB-13

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ENROLLED, An Act,

To amend Section 40-23-1, Code of Alabama 1975, relating to certain exempt sale of ophthalmic materials; to provide that certain ophthalmic materials are subject to the state sales tax.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 40-23-1 of the Code of Alabama 1975, is amended to read as follows:

"§40-23-1.

"(a) For the purpose of this division, the following terms shall have the respective meanings ascribed by this section:

"(1) PERSON or COMPANY. Used interchangeably, includes any individual, firm, copartnership, association, corporation, receiver, trustee, 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.

"(2) DEPARTMENT. The Department of Revenue of the State of Alabama.

(3) COMMISSIONER. The Commissioner of Revenue of the State of Alabama.

"(4) TAX YEAR or TAXABLE YEAR. The calendar year.

1 "(5) SALE or SALES. Installment and credit sales and
2 the exchange of properties as well as the sale thereof for
3 money, every closed transaction constituting a sale. Provided,
4 however, a transaction shall not be closed or a sale completed
5 until the time and place when and where title is transferred
6 by the seller or seller's agent to the purchaser or
7 purchaser's agent, and for the purpose of determining transfer
8 of title, a common carrier or the U. S. Postal Service shall
9 be deemed to be the agent of the seller, regardless of any
10 F.O.B. point and regardless of who selects the method of
11 transportation, and regardless of by whom or the method by
12 which freight, postage, or other transportation charge is
13 paid. Provided further that, where billed as a separate item
14 to and paid by the purchaser, the freight, postage, or other
15 transportation charge paid to a common carrier or the U.S.
16 Postal Service is not a part of the selling price.

17 "(6) GROSS PROCEEDS OF SALES. The value proceeding
18 or accruing from the sale of tangible personal property, and
19 including the proceeds from the sale of any property handled
20 on consignment by the taxpayer, including merchandise of any
21 kind and character without any deduction on account of the
22 cost of the property sold, the cost of the materials used,
23 labor or service cost, interest paid, any consumer excise
24 taxes that may be included within the sales price of the
25 property sold, or any other expenses whatsoever, and without

1 any deductions on account of losses; provided, that cash
2 discounts allowed and taken on sales shall not be included,
3 and "gross proceeds of sales" shall not include the sale price
4 of property returned by customers when the full sales price
5 thereof is refunded either in cash or by credit. The term
6 "gross proceeds of sale" shall also mean and include the
7 reasonable and fair market value of any tangible personal
8 property previously purchased at wholesale which is withdrawn
9 or used from the business or stock and used or consumed in
10 connection with a business, and shall also mean and include
11 the reasonable and fair market value of any tangible personal
12 property previously purchased at wholesale which is withdrawn
13 from the business or stock and used or consumed by any person
14 so withdrawing the same, except property which has been
15 previously withdrawn from business or stock and so used or
16 consumed with respect to which property the tax has been paid
17 because of previous withdrawal, use, or consumption, except
18 property which enters into and becomes an ingredient or
19 component part of tangible personal property or products
20 manufactured or compounded for sale and not for the personal
21 and private use or consumption of any person so withdrawing,
22 using, or consuming the same, and except refinery, residue, or
23 fuel gas, whether in a liquid or gaseous state, that has been
24 generated by, or is otherwise a by-product of, a
25 petroleum-refining process, which gas is then utilized in the

1 process to generate heat or is otherwise utilized in the
2 distillation or refining of petroleum products.

3 "In the case of the retail sale of equipment,
4 accessories, fixtures, and other similar tangible personal
5 property used in connection with the sale of commercial mobile
6 services as defined herein, or in connection with satellite
7 television services, at a price below cost, "gross proceeds of
8 sale" shall only include the stated sales price thereof and
9 shall not include any sales commission or rebate received by
10 the seller as a result of the sale. As used herein, the term
11 "commercial mobile services" shall have the same meaning as
12 that term has in 47 U.S.C. Sections 153(n) and 332(d), as in
13 effect from time to time.

14 "(7) TAXPAYER. Any person liable for taxes
15 hereunder.

16 "(8) GROSS RECEIPTS. The value proceeding or
17 accruing from the sale of tangible personal property,
18 including merchandise and commodities of any kind and
19 character, all receipts actual and accrued, by reason of any
20 business engaged in, not including, however, interest,
21 discounts, rentals of real estate or royalties, and without
22 any deduction on account of the cost of the property sold, the
23 cost of the materials used, labor or service cost, interest
24 paid, any consumer excise taxes that may be included in the
25 sales price of the property sold, or any other expenses

1 whatsoever and without any deductions on account of losses.
2 The term "gross receipts" shall also mean and include the
3 reasonable and fair market value of any tangible personal
4 property previously purchased at wholesale which is withdrawn
5 or used from the business or stock and used or consumed in
6 connection with a business, and shall also mean and include
7 the reasonable and fair market value of any tangible personal
8 property previously purchased at wholesale which is withdrawn
9 from the business or stock and used or consumed by any person
10 so withdrawing the same, except property which has been
11 previously withdrawn from business or stock and so used or
12 consumed and with respect to which property the tax has been
13 paid because of previous withdrawal, use, or consumption,
14 except property which enters into and becomes an ingredient or
15 component part of tangible personal property or products
16 manufactured or compounded for sale as provided in subdivision
17 (9) and not for the personal and private use or consumption of
18 any person so withdrawing, using, or consuming the same, and
19 except refinery, residue, or fuel gas, whether in a liquid or
20 gaseous state, that has been generated by, or is otherwise a
21 by-product of, a petroleum-refining process, which gas is then
22 utilized in the process to generate heat or is otherwise
23 utilized in the distillation or refining of petroleum
24 products.

1 "(9) WHOLESALE SALE or SALE AT WHOLESALE. Any one of
2 the following:

3 "a. A sale of tangible personal property by
4 wholesalers to licensed retail merchants, jobbers, dealers, or
5 other wholesalers for resale and does not include a sale by
6 wholesalers to users or consumers, not for resale.

7 "b. A sale of tangible personal property or
8 products, including iron ore, and including the furnished
9 container and label of such property or products, to a
10 manufacturer or compounder which enter into and become an
11 ingredient or component part of the tangible personal property
12 or products which the manufacturer or compounder manufactures
13 or compounds for sale, whether or not such tangible personal
14 property or product used in manufacturing or compounding a
15 finished product is used with the intent that it becomes a
16 component of the finished product; provided, however, that it
17 is the intent of this section that no sale of capital
18 equipment, machinery, tools, or product shall be included in
19 the term "wholesale sale." The term "capital equipment,
20 machinery, tools, or product" shall mean property that is
21 subject to depreciation allowances for Alabama income tax
22 purposes.

23 "c. A sale of containers intended for one-time use
24 only, and the labels thereof, when containers are sold without

1 contents to persons who sell or furnish containers along with
 2 the contents placed therein for sale by persons.

3 "d. A sale of pallets intended for one-time use only
 4 when pallets are sold without contents to persons who sell or
 5 furnish pallets along with the contents placed thereon for
 6 sale by persons.

7 "e. A sale to a manufacturer or compounder, of
 8 crowns, caps, and tops intended for one-time use employed and
 9 used upon the containers in which a manufacturer or compounder
 10 markets his products.

11 "f. A sale of containers to persons engaged in
 12 selling or otherwise supplying or furnishing baby chicks to
 13 growers thereof where containers are used for the delivery of
 14 chicks or a sale of containers for use in the delivery of eggs
 15 by the producer thereof to the distributor or packer of eggs
 16 even though containers used for delivery of baby chicks or
 17 eggs may be recovered for reuse.

18 "g. A sale of bagging and ties used in preparing
 19 cotton for market.

20 "h. A sale to meat packers, manufacturers,
 21 compounders, or processors of meat products of all casings
 22 used in molding or forming wieners and Vienna sausages even
 23 though casings may be recovered for reuse.

24 "i. A sale of commercial fish feed including
 25 concentrates, supplements, and other feed ingredients when

1 substances are used as ingredients in mixing and preparing
2 feed for fish raised to be sold on a commercial basis.

3 "j. A sale of tangible personal property to any
4 person engaging in the business of leasing or renting tangible
5 personal property to others, if tangible personal property is
6 purchased for the purpose of leasing or renting it to others
7 under a transaction subject to the privilege or license tax
8 levied in Article 4 of Chapter 12 of this title against any
9 person engaging in the business of leasing or renting tangible
10 personal property to others.

11 "k. A purchase or withdrawal of parts or materials
12 from stock by any person licensed under this division where
13 parts or materials are used in repairing or reconditioning the
14 tangible personal property of a licensed person, which
15 tangible personal property is a part of the stock of goods of
16 a licensed person, offered for sale by him, and not for use or
17 consumption of a licensed person.

18 "(10) SALE AT RETAIL or RETAIL SALE. All sales of
19 tangible personal property except those above defined as
20 wholesale sales. The quantities of goods sold or prices at
21 which sold are immaterial in determining whether or not a sale
22 is at retail. Sales of building materials to contractors,
23 builders, or landowners for resale or use in the form of real
24 estate are retail sales in whatever quantity sold. Sales of
25 building materials, fixtures, or other equipment to a

1 manufacturer or builder of modular buildings for use in
2 manufacturing, building, or equipping a modular building
3 ultimately becoming a part of real estate situated in the
4 State of Alabama are retail sales, and the use, sale, or
5 resale of building shall not be subject to the tax. Sales of
6 tangible personal property to undertakers and morticians are
7 retail sales and subject to the tax at the time of purchase,
8 but are not subject to the tax on resale to the consumer.
9 Sales of tangible personal property or products to
10 manufacturers, quarry operators, mine operators, or
11 compounders, which are used or consumed by them in
12 manufacturing, mining, quarrying, or compounding and do not
13 become an ingredient or component part of the tangible
14 personal property manufactured or compounded as provided in
15 subdivision (9) are retail sales. The term "sale at retail" or
16 "retail sale" shall also mean and include the withdrawal, use,
17 or consumption of any tangible personal property by any one
18 who purchases same at wholesale, except property which has
19 been previously withdrawn from the business or stock and so
20 used or consumed and with respect to which property tax has
21 been paid because of previous withdrawal, use, or consumption,
22 except property which enters into and becomes an ingredient or
23 component part of tangible personal property or products
24 manufactured or compounded for sale as provided in subdivision
25 (9) and not for the personal and private use or consumption of

1 any person so withdrawing, using, or consuming the same; and
2 wholesale purchaser shall report and pay the taxes thereon. In
3 the case of the sale of equipment, accessories, fixtures, and
4 other similar tangible personal property used in connection
5 with the sale of commercial mobile services as defined in
6 subdivision (6) above, or in connection with satellite
7 television services, at a price below cost, the term "sale at
8 retail" and "retail sale" shall include those sales, and those
9 sales shall not also be taxable as a withdrawal, use, or
10 consumption of such tangible personal property.

11 "(11) BUSINESS. All activities engaged in, or caused
12 to be engaged in, with the object of gain, profit, benefit, or
13 advantage, either direct or indirect, and not excepting
14 subactivities producing marketable commodities used or
15 consumed in the main business activity, each of which
16 subactivities shall be considered business engaged in, taxable
17 in the class in which it falls.

18 "(12) AUTOMOTIVE VEHICLE. A power shovel, dragline,
19 crawler, crawler crane, ditcher, or any similar machine which
20 is self-propelled, in addition to self-propelled machines
21 which are used primarily as instruments of conveyance.

22 "(13) PREPAID TELEPHONE CALLING CARD. A sale of a
23 prepaid telephone calling card or a prepaid authorization
24 number, or both, shall be deemed the sale of tangible personal

1 property subject to the tax imposed on the sale of tangible
2 personal property pursuant to this chapter.

3 "(b) The use within this state of tangible personal
4 property by the manufacturer thereof, as building materials in
5 the performance of a construction contract, shall, for the
6 purposes of this division, be considered as a retail sale
7 thereof by manufacturer, who shall also be construed as the
8 ultimate consumer of materials or property, and who shall be
9 required to report transaction and pay the sales tax thereon,
10 based upon the reasonable and fair market price thereof at the
11 time and place where same are used or consumed by him or it.
12 Where the contractor is the manufacturer or compounder of
13 ready-mix concrete or asphalt plant mix used in the
14 performance of a contract, whether the ready-mix concrete or
15 asphalt plant mix is manufactured or compounded at the job
16 site or at a fixed or permanent plant location, the tax
17 applies only to the cost of the ingredients that become a
18 component part of the ready-mix concrete or the asphalt plant
19 mix. The provisions of this subsection shall not apply to any
20 tangible personal property which is specifically exempted from
21 the tax levied in this division.

22 "(c) The sale of lumber by a lumber manufacturer to
23 a trucker for resale is a sale at wholesale as sales are
24 defined herein where the trucker is either a licensed dealer
25 in lumber or, if a resident of Alabama, has registered with

1 the Department of Revenue, and has received therefrom a
2 certificate of registration or, if a nonresident of this state
3 purchasing lumber for resale outside the State of Alabama, has
4 furnished to the lumber manufacturer his name, address and the
5 vehicle license number of the truck in which the lumber is to
6 be transported, which name, address, and vehicle license
7 number shall be shown on the sales invoice rendered by the
8 lumber manufacturer. The certificate provided for herein shall
9 be valid for the calendar year of its issuance and may be
10 renewed from year to year on application to the Department of
11 Revenue on or before January 31 of each succeeding year;
12 provided, that if not renewed the certificate shall become
13 invalid for the purpose of this division on February 1.

14 "(d) The dispensing or transferring of ophthalmic
15 materials, including lenses, frames, eyeglasses, contact
16 lenses, and other therapeutic optic devices, to a patient by a
17 licensed ophthalmologist, as a part of his or her professional
18 service, shall ~~not~~, for purposes of this division, ~~be deemed~~
19 ~~or considered to~~ constitute a sale, subject to the state sales
20 tax. The licensed ophthalmologist or licensed optometrist
21 ~~shall be considered the ultimate consumer of the ophthalmic~~
22 ~~materials and shall have no responsibility or duty pursuant to~~
23 ~~this division for the collection of~~ collect the state sales
24 tax. ~~The sale of the ophthalmic materials to a licensed~~
25 ~~ophthalmologist by a supplier thereof shall be considered a~~

1 ~~retail sale subject to the state sales tax, and the supplier~~
2 ~~shall be responsible for collecting sales tax from the~~
3 ~~licensed ophthalmologist.~~ In no event shall the providing of
4 professional services in connection with the dispensing or
5 transferring of ophthalmic materials, including dispensing
6 fees or fitting fees, by a licensed ophthalmologist or
7 licensed optometrist be considered a sale subject to the state
8 sales tax. When the ophthalmic materials are purchased by a
9 consumer covered by a third party benefit plan, including
10 Medicare, the sales tax shall be applicable to the amount that
11 the ophthalmologist, optometrist, or optician is reimbursed by
12 the third party benefit plan plus the amount that the consumer
13 pays to the ophthalmologist, optometrist, or optician at the
14 time of the sale. All transfers of ophthalmic materials by
15 opticians or optometrists shall be considered retail sales
16 subject to the state sales tax. The term supplier shall
17 include but not be limited to optical laboratories, ophthalmic
18 material wholesalers, or anyone selling ophthalmic materials
19 to ophthalmologists.

20 "(e) Notwithstanding the above, the withdrawal, use,
21 or consumption of a manufactured product by the manufacturer
22 thereof in quality control testing performed by employees or
23 independent contractors of the taxpayer, for purposes of this
24 division, shall not be deemed or considered to constitute a
25 transaction subject to sales tax, nor shall a gift by the

1 manufacturer of a manufactured product, withdrawn from the
2 manufacturer's inventory, to an entity listed in 26 U.S.C.
3 Sections 170(b) or (c), be considered a transaction subject to
4 sales tax.

5 "(f) Notwithstanding the foregoing, a gift by a
6 retailer of a product or products where the aggregate retail
7 value of any single gift is equal to or less than ten thousand
8 dollars (\$10,000), withdrawn from the retailer's inventory, to
9 an entity listed in 26 U.S.C. Sections 170(b) or (c) shall not
10 be deemed or considered to constitute a transaction subject to
11 sales and use tax."

12 Section 2. This act shall become effective
13 immediately following its passage and approval by the
14 Governor, or its otherwise becoming law.

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Speaker of the House of Representatives

President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in
and was passed by the House 18-APR-13.

Jeff Woodard
Clerk

Senate

20-MAY-13

Passed