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SENATE BILL NO. 432

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Finance and Appropriations
on February 10, 2022)

(Patron Prior to Substitute—Senator Dunnavant)

A BILL to amend and reenact § 58.1-602 of the Code of Virginia, relating to sales tax; taxable accommodations.

Be it enacted by the General Assembly of Virginia:

1. That § 58.1-602 of the Code of Virginia is amended and reenacted as follows:

§ 58.1-602. (Effective September 1, 2021) Definitions.

As used in this chapter, unless the context clearly shows otherwise:

"Accommodations" means any room or rooms, lodgings, or accommodations in any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for a consideration. "Accommodations" does not include rooms or space offered by a person in the business of providing conference rooms, meeting space, or event space if the person does not also offer rooms available for overnight sleeping.

"Accommodations fee" means the room charge less the discount room charge, if any, provided that the accommodations fee shall not be less than \$0.

"Accommodations intermediary" means any person other than an accommodations provider that facilitates the sale of an accommodation, charges a room charge to the customer, and charges an accommodations fee to the customer, which fee it retains as compensation for facilitating the sale. For purposes of this definition, "facilitates the sale" includes brokering, coordinating, or in any other way arranging for the purchase of the right to use accommodations via a transaction directly, including via one or more payment processors, between a customer and an accommodations provider.

"Accommodations intermediary" does not include a person:

1. If the accommodations are provided by an accommodations provider operating under a trademark, trade name, or service mark belonging to such person; or

2. Who facilitates the sale of an accommodation if (i) the price paid by the customer to such person is equal to the price paid by such person to the accommodations provider for the use of the accommodations and (ii) the only compensation received by such person for facilitating the sale of the accommodation is a commission paid from the accommodations provider to such person.

"Accommodations provider" means any person that furnishes accommodations to the general public for compensation. The term "furnishes" includes the sale of use or possession or the sale of the right to use or possess.

"Advertising" means the planning, creating, or placing of advertising in newspapers, magazines, billboards, broadcasting and other media, including, without limitation, the providing of concept, writing, graphic design, mechanical art, photography and production supervision. Any person providing advertising as defined in this section shall be deemed to be the user or consumer of all tangible personal property purchased for use in such advertising.

"Affiliate" means the same as such term is defined in § 58.1-439.18.

"Amplification, transmission and distribution equipment" means, but is not limited to, production, distribution, and other equipment used to provide Internet-access services, such as computer and communications equipment and software used for storing, processing and retrieving end-user subscribers' requests.

"Business" includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either directly or indirectly.

"Cost price" means the actual cost of an item or article of tangible personal property computed in the same manner as the sales price as defined in this section without any deductions therefrom on account of the cost of materials used, labor, or service costs, transportation charges, or any expenses whatsoever.

"Custom program" means a computer program that is specifically designed and developed only for one customer. The combining of two or more prewritten programs does not constitute a custom computer program. A prewritten program that is modified to any degree remains a prewritten program and does not become custom.

"Discount room charge" means the full amount charged by the accommodations provider to the accommodations intermediary, or an affiliate thereof, for furnishing the accommodations.

"Distribution" means the transfer or delivery of tangible personal property for use, consumption, or storage by the distributee, and the use, consumption, or storage of tangible personal property by a person that has processed, manufactured, refined, or converted such property, but does not include the transfer or delivery of tangible personal property for resale or any use, consumption, or storage

60 otherwise exempt under this chapter.

61 "Gross proceeds" means the charges made or voluntary contributions received for the lease or rental
62 of tangible personal property or for furnishing services, computed with the same deductions, where
63 applicable, as for sales price as defined in this section over the term of the lease, rental, service, or use,
64 but not less frequently than monthly. "Gross proceeds" does not include finance charges, carrying
65 charges, service charges, or interest from credit extended on the lease or rental of tangible personal
66 property under conditional lease or rental contracts or other conditional contracts providing for the
67 deferred payments of the lease or rental price.

68 "Gross sales" means the sum total of all retail sales of tangible personal property or services as
69 defined in this chapter, without any deduction, except as provided in this chapter. "Gross sales" does not
70 include the federal retailers' excise tax or the federal diesel fuel excise tax imposed in § 4091 of the
71 Internal Revenue Code if the excise tax is billed to the purchaser separately from the selling price of the
72 article, or the Virginia retail sales or use tax, or any sales or use tax imposed by any county or city
73 under § 58.1-605 or 58.1-606.

74 "Import" and "imported" are words applicable to tangible personal property imported into the
75 Commonwealth from other states as well as from foreign countries, and "export" and "exported" are
76 words applicable to tangible personal property exported from the Commonwealth to other states as well
77 as to foreign countries.

78 "In this Commonwealth" or "in the Commonwealth" means within the limits of the Commonwealth
79 of Virginia and includes all territory within these limits owned by or ceded to the United States of
80 America.

81 "Integrated process," when used in relation to semiconductor manufacturing, means a process that
82 begins with the research or development of semiconductor products, equipment, or processes, includes
83 the handling and storage of raw materials at a plant site, and continues to the point that the product is
84 packaged for final sale and either shipped or conveyed to a warehouse. Without limiting the foregoing,
85 any semiconductor equipment, fuel, power, energy, supplies, or other tangible personal property shall be
86 deemed used as part of the integrated process if its use contributes, before, during, or after production,
87 to higher product quality, production yields, or process efficiencies. Except as otherwise provided by
88 law, "integrated process" does not mean general maintenance or administration.

89 "Internet" means collectively, the myriad of computer and telecommunications facilities, which
90 comprise the interconnected worldwide network of computer networks.

91 "Internet service" means a service that enables users to access proprietary and other content,
92 information electronic mail, and the Internet as part of a package of services sold to end-user
93 subscribers.

94 "Lease or rental" means the leasing or renting of tangible personal property and the possession or use
95 thereof by the lessee or renter for a consideration, without transfer of the title to such property.

96 "Manufacturing, processing, refining, or conversion" includes the production line of the plant starting
97 with the handling and storage of raw materials at the plant site and continuing through the last step of
98 production where the product is finished or completed for sale and conveyed to a warehouse at the
99 production site, and also includes equipment and supplies used for production line testing and quality
100 control. "Manufacturing" also includes the necessary ancillary activities of newspaper and magazine
101 printing when such activities are performed by the publisher of any newspaper or magazine for sale
102 daily or regularly at average intervals not exceeding three months.

103 The determination of whether any manufacturing, mining, processing, refining or conversion activity
104 is industrial in nature shall be made without regard to plant size, existence or size of finished product
105 inventory, degree of mechanization, amount of capital investment, number of employees or other factors
106 relating principally to the size of the business. Further, "industrial in nature" includes, but is not limited
107 to, those businesses classified in codes 10 through 14 and 20 through 39 published in the Standard
108 Industrial Classification Manual for 1972 and any supplements issued thereafter.

109 "Modular building" means, but is not limited to, single and multifamily houses, apartment units,
110 commercial buildings, and permanent additions thereof, comprised of one or more sections that are
111 intended to become real property, primarily constructed at a location other than the permanent site, built
112 to comply with the Virginia Industrialized Building Safety Law (§ 36-70 et seq.) as regulated by the
113 Virginia Department of Housing and Community Development, and shipped with most permanent
114 components in place to the site of final assembly. For purposes of this chapter, "modular building" does
115 not include a mobile office as defined in § 58.1-2401 or any manufactured building subject to and
116 certified under the provisions of the National Manufactured Housing Construction and Safety Standards
117 Act of 1974 (42 U.S.C. § 5401 et seq.).

118 "Modular building manufacturer" means a person that owns or operates a manufacturing facility and
119 is engaged in the fabrication, construction and assembling of building supplies and materials into
120 modular buildings, as defined in this section, at a location other than at the site where the modular
121 building will be assembled on the permanent foundation and may or may not be engaged in the process

of affixing the modules to the foundation at the permanent site.

"Modular building retailer" means any person that purchases or acquires a modular building from a modular building manufacturer, or from another person, for subsequent sale to a customer residing within or outside of the Commonwealth, with or without installation of the modular building to the foundation at the permanent site.

"Motor vehicle" means a "motor vehicle" as defined in § 58.1-2401, taxable under the provisions of the Virginia Motor Vehicles Sales and Use Tax Act (§ 58.1-2400 et seq.) and upon the sale of which all applicable motor vehicle sales and use taxes have been paid.

"Occasional sale" means a sale of tangible personal property not held or used by a seller in the course of an activity for which it is required to hold a certificate of registration, including the sale or exchange of all or substantially all the assets of any business and the reorganization or liquidation of any business, provided that such sale or exchange is not one of a series of sales and exchanges sufficient in number, scope and character to constitute an activity requiring the holding of a certificate of registration.

"Open video system" means an open video system authorized pursuant to 47 U.S.C. § 573 and, for purposes of this chapter only, also includes Internet service regardless of whether the provider of such service is also a telephone common carrier.

"Person" includes any individual, firm, copartnership, cooperative, nonprofit membership corporation, joint venture, association, corporation, estate, trust, business trust, trustee in bankruptcy, receiver, auctioneer, syndicate, assignee, club, society, or other group or combination acting as a unit, body politic or political subdivision, whether public or private, or quasi-public, and the plural of "person" means the same as the singular.

"Prewritten program" means a computer program that is prepared, held or existing for general or repeated sale or lease, including a computer program developed for in-house use and subsequently sold or leased to unrelated third parties.

"Qualifying locality" means Charlotte County, Gloucester County, Halifax County, Henry County, Mecklenburg County, Northampton County, Patrick County, Pittsylvania County, or the City of Danville.

"Railroad rolling stock" means locomotives, of whatever motive power, autocars, railroad cars of every kind and description, and all other equipment determined by the Tax Commissioner to constitute railroad rolling stock.

"Remote seller" means any dealer deemed to have sufficient activity within the Commonwealth to require registration under § 58.1-613 under the criteria specified in subdivision C 10 or 11 of § 58.1-612 or any software provider acting on behalf of such dealer.

"Retail sale" or a "sale at retail" means a sale to any person for any purpose other than for resale in the form of tangible personal property or services taxable under this chapter, and shall include any such transaction as the Tax Commissioner upon investigation finds to be in lieu of a sale. All sales for resale must be made in strict compliance with regulations applicable to this chapter. Any dealer making a sale for resale which is not in strict compliance with such regulations shall be personally liable for payment of the tax.

The terms "retail sale" and a "sale at retail" specifically include the following: (i) the sale or charges for any accommodations furnished to transients for less than 90 continuous days; (ii) sales of tangible personal property to persons for resale when because of the operation of the business, or its very nature, or the lack of a place of business in which to display a certificate of registration, or the lack of a place of business in which to keep records, or the lack of adequate records, or because such persons are minors or transients, or because such persons are engaged in essentially service businesses, or for any other reason there is likelihood that the Commonwealth will lose tax funds due to the difficulty of policing such business operations; (iii) the separately stated charge made for automotive refinish repair materials that are permanently applied to or affixed to a motor vehicle during its repair; and (iv) the separately stated charge for equipment available for lease or purchase by a provider of satellite television programming to the customer of such programming. Equipment sold to a provider of satellite television programming for subsequent lease or purchase by the customer of such programming shall be deemed a sale for resale. The Tax Commissioner is authorized to promulgate regulations requiring vendors of or sellers to such persons to collect the tax imposed by this chapter on the cost price of such tangible personal property to such persons and may refuse to issue certificates of registration to such persons. The terms "retail sale" and a "sale at retail" also specifically include the separately stated charge made for supplies used during automotive repairs whether or not there is transfer of title or possession of the supplies and whether or not the supplies are attached to the automobile. The purchase of such supplies by an automotive repairer for sale to the customer of such repair services shall be deemed a sale for resale.

The term "transient" does not include a purchaser of camping memberships, time-shares, condominiums, or other similar contracts or interests that permit the use of, or constitute an interest in,

183 real estate, however created or sold and whether registered with the Commonwealth or not. Further, a
184 purchaser of a right or license which entitles the purchaser to use the amenities and facilities of a
185 specific real estate project on an ongoing basis throughout its term shall not be deemed a transient,
186 provided, however, that the term or time period involved is for seven years or more.

187 The terms "retail sale" and "sale at retail" do not include a transfer of title to tangible personal
188 property after its use as tools, tooling, machinery or equipment, including dies, molds, and patterns, if (i)
189 at the time of purchase, the purchaser is obligated, under the terms of a written contract, to make the
190 transfer and (ii) the transfer is made for the same or a greater consideration to the person for whom the
191 purchaser manufactures goods.

192 "Retailer" means every person engaged in the business of making sales at retail, or for distribution,
193 use, consumption, or storage to be used or consumed in the Commonwealth.

194 "Room charge" means the full retail price charged to the customer by the accommodations
195 intermediary for the use of the accommodations, including any accommodations fee, before taxes. The
196 room charge shall be determined in accordance with 23VAC10-210-730 and the related rulings of the
197 Department on the same.

198 "Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional
199 or otherwise, in any manner or by any means whatsoever, of tangible personal property and any
200 rendition of a taxable service for a consideration, and includes the fabrication of tangible personal
201 property for consumers who furnish, either directly or indirectly, the materials used in fabrication, and
202 the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on
203 the premises of the person furnishing, preparing, or serving such tangible personal property. A
204 transaction whereby the possession of property is transferred but the seller retains title as security for the
205 payment of the price shall be deemed a sale.

206 "Sales price" means the total amount for which tangible personal property or services are sold,
207 including any services that are a part of the sale, valued in money, whether paid in money or otherwise,
208 and includes any amount for which credit is given to the purchaser, consumer, or lessee by the dealer,
209 without any deduction therefrom on account of the cost of the property sold, the cost of materials used,
210 labor or service costs, losses or any other expenses whatsoever. "Sales price" does not include (i) any
211 cash discount allowed and taken; (ii) finance charges, carrying charges, service charges or interest from
212 credit extended on sales of tangible personal property under conditional sale contracts or other
213 conditional contracts providing for deferred payments of the purchase price; (iii) separately stated local
214 property taxes collected; (iv) that portion of the amount paid by the purchaser as a discretionary gratuity
215 added to the price of a meal; or (v) that portion of the amount paid by the purchaser as a mandatory
216 gratuity or service charge added by a restaurant to the price of a meal, but only to the extent that such
217 mandatory gratuity or service charge does not exceed 20 percent of the price of the meal. Where used
218 articles are taken in trade, or in a series of trades as a credit or part payment on the sale of new or used
219 articles, the tax levied by this chapter shall be paid on the net difference between the sales price of the
220 new or used articles and the credit for the used articles.

221 "Semiconductor cleanrooms" means the integrated systems, fixtures, piping, partitions, flooring,
222 lighting, equipment, and all other property used to reduce contamination or to control airflow,
223 temperature, humidity, vibration, or other environmental conditions required for the integrated process of
224 semiconductor manufacturing.

225 "Semiconductor equipment" means (i) machinery or tools or repair parts or replacements thereof; (ii)
226 the related accessories, components, pedestals, bases, or foundations used in connection with the
227 operation of the equipment, without regard to the proximity to the equipment, the method of attachment,
228 or whether the equipment or accessories are affixed to the realty; (iii) semiconductor wafers and other
229 property or supplies used to install, test, calibrate or recalibrate, characterize, condition, measure, or
230 maintain the equipment and settings thereof; and (iv) equipment and supplies used for quality control
231 testing of product, materials, equipment, or processes; or the measurement of equipment performance or
232 production parameters regardless of where or when the quality control, testing, or measuring activity
233 takes place, how the activity affects the operation of equipment, or whether the equipment and supplies
234 come into contact with the product.

235 "Storage" means any keeping or retention of tangible personal property for use, consumption or
236 distribution in the Commonwealth, or for any purpose other than sale at retail in the regular course of
237 business.

238 "Tangible personal property" means personal property that may be seen, weighed, measured, felt, or
239 touched, or is in any other manner perceptible to the senses. "Tangible personal property" does not
240 include stocks, bonds, notes, insurance or other obligations or securities. "Tangible personal property"
241 includes (i) telephone calling cards upon their initial sale, which shall be exempt from all other state and
242 local utility taxes, and (ii) manufactured signs.

243 "Use" means the exercise of any right or power over tangible personal property incident to the
244 ownership thereof, except that it does not include the sale at retail of that property in the regular course

of business. "Use" does not include the exercise of any right or power, including use, distribution, or storage, over any tangible personal property sold to a nonresident donor for delivery outside of the Commonwealth to a nonresident recipient pursuant to an order placed by the donor from outside the Commonwealth via mail or telephone. "Use" does not include any sale determined to be a gift transaction, subject to tax under § 58.1-604.6.

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

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

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

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

2. That nothing in the definitions of "retail sale" and "sale at retail" in § 58.1-602 of the Code of Virginia shall be construed to require or have required, in any year prior to the effective date of this act, the collection of any tax under Chapter 6 (§ 58.1-600 et seq.) of Title 58.1 of the Code of Virginia for the offering of rooms or space by a person in the business of providing conference rooms, meeting space, or event space if the person does not also offer rooms available for overnight sleeping.

3. That the provisions of the first enactment of this act shall be given retroactive effect to September 1, 2021.

4. That the provisions of this act shall not entitle any taxpayer to a refund of taxes remitted prior to July 1, 2022.