

## LEGISLATIVE BILL 714

Approved by the Governor April 17, 1989

Introduced by Lamb, 43; Bernard-Stevens, 42; Smith, 33;  
Hefner, 19; Robak, 22; Conway, 17

AN ACT relating to revenue and taxation; to amend sections 77-2701 and 77-2702, Revised Statutes Supplement, 1988; to redefine terms; to authorize contractors and repairpersons to elect a method of taxation; to prohibit the inclusion of certain amounts in deficiency determinations; to harmonize provisions; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 77-2701, Revised Statutes Supplement, 1988, be amended to read as follows:

77-2701. Sections 77-2701 to 77-27,135 and section 3 of this act shall be known and may be cited as the Nebraska Revenue Act of 1967. After January 1, 1984, any reference to sections 77-2701 to 77-27,135 or the Nebraska Revenue Act of 1967 shall be construed to include sections 77-2734.01 to 77-2734.15.

Sec. 2. That section 77-2702, Revised Statutes Supplement, 1988, be amended to read as follows:

77-2702. For ~~the purpose~~ purposes of sections 77-2702 to 77-2713 and section 3 of this act, unless the context otherwise requires:

(1) Business shall mean any activity engaged in by any person or caused to be engaged in by him or her with the object of gain, benefit, or advantage, either direct or indirect;

(2) Tax Commissioner shall mean the Tax Commissioner of the State of Nebraska;

(3) Contractor or repairperson shall mean any person who performs any repair services or any improvement upon real estate, including leased property, and who, as a necessary and incidental part of performing such services, incorporates tangible personal property belonging to him or her into the property being so repaired or improved. Contractor or repairperson shall not include any person who incorporates live plants into real estate, except when such incorporation

is incidental to the transfer of an improvement upon real estate or the real estate. The contractor or repairperson not electing to be taxed as a retailer shall be considered to be the consumer of such tangible personal property furnished by him or her and incorporated into the property being so repaired or improved for all the purposes of the Nebraska Revenue Act of 1967. The contractor or repairperson:

(a) Shall be permitted to make an election that he or she will be taxed as a retailer in which case he or she shall not be considered the final consumer of tangible personal property incorporated into real estate except when such incorporation is incidental to the transfer of an improvement upon real estate or the real estate;

(b) Shall be permitted to make an election that he or she will be taxed as the consumer of tangible personal property incorporated into real estate, will pay the sales tax or remit the use tax at the time of purchase, and will maintain a tax-paid inventory; or

(c) Shall be permitted to make an election that he or she will be taxed as the consumer of tangible personal property incorporated into real estate and may issue a resale certificate when purchasing tangible personal property that will be incorporated into real estate. Such person shall then remit the appropriate use tax on any materials when withdrawn from inventory for incorporation into real estate at the rate in effect at the time and place of the withdrawal from inventory.

The provisions of this subdivision (3) shall not excuse any person from the obligation to collect sales tax on retail sales of tangible personal property not incorporated into real estate or from the obligation to pay the sales tax or remit the use tax on tools and other materials consumed that are not incorporated into real estate.

The Department of Revenue shall not prescribe any requirements of Nebraska sales revenue, percentage or otherwise, restricting any person's election. Any change in an election shall require prior approval by the Tax Commissioner.

Any change in the election provided for in this subdivision shall, if filed on or prior to the fifteenth of the month, become effective at the beginning of the following month or, if filed after the fifteenth of the month, become effective on the first day of the next succeeding month. Any person who changes his or her election and becomes a contractor or repairperson shall pay the tax on all tangible personal

property in inventory which may be incorporated into real estate at the time of making the change in election except when such contractor or repairperson elects to purchase inventory with a resale certificate. Any person who changes his or her election and becomes a retailer shall not be entitled to a refund but shall receive a credit for the tax paid on tangible personal property in inventory at the time the tangible personal property is sold. The credit shall be applied against the tax collected on sales of such tangible personal property.

Any contractor or repairperson who has not completed and filed an election as required in this subdivision prior to January 1, 1990, or within three months after beginning to operate as a contractor or repairperson, whichever is later, shall be considered a retailer for all periods until an election has been made;

(4)(a) Gross receipts shall mean the total amount of the sale or lease or rental price, as the case may be, of the retail sales of the retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(i) The cost of tangible personal property sold. In accordance with ~~such~~ rules and regulations ~~adopted and promulgated by~~ as the Tax Commissioner, ~~may prescribe~~, a deduction may be taken if the retailer has purchased tangible personal property for some purpose other than resale, has reimbursed his or her vendor for tax which the vendor is required to pay to the state or has paid the use tax with respect to the tangible personal property, and has resold the property prior to making any use of the tangible personal property other than retention, demonstration, or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his or her vendor with respect to the sale of the tangible personal property;

(ii) The cost of the materials used, labor or service costs, interest paid, losses, or any other expense;

(iii) The cost of transportation of the tangible personal property prior to its sale to the purchaser;

(iv) The amount of any excise or property tax levied against the tangible personal property, except as otherwise provided in the Nebraska Revenue Act of 1967; or

(v) The amount charged for warranties,

guarantees, or maintenance agreements;

(b) Gross receipts of every person engaged as a public utility specified in subdivision (4)(b) of this section or as a community antenna television service operator or any person involved in the connecting and installing of services defined in subdivision (4)(b) (i), (ii), or (iv) of this section shall mean:

(i) In the furnishing of telephone communication service, the gross income received from furnishing local exchange telephone service and intrastate message toll telephone service;

(ii) In the furnishing of telegraph service, the gross income received from the furnishing of intrastate telegraph services;

(iii) In the furnishing of gas, electricity, sewer, and water service except water used for irrigation of agricultural lands, manufacturing purposes, and the care of animal life, the products of which ordinarily constitute food for human consumption, the gross income received from the furnishing of such services upon billings or statements rendered to consumers for such utility services; and

(iv) In the furnishing of community antenna television service, the gross income received from the furnishing of such community antenna television service as regulated under sections 18-2201 to 18-2205.

Gross receipts shall also mean gross income received from the provision, installation, construction, servicing, or removal of tangible personal property used in conjunction with the furnishing, installing, or connecting of any public utility services specified in subdivision (4)(b)(i) or (ii) of this section or community antenna television service specified in subdivision (4)(b)(iv) of this section. Gross receipts shall not mean gross income received from telephone directory advertising;

(c) Gross receipts of every person engaged in selling, leasing, or otherwise providing intellectual or entertainment property shall mean:

(i) In the furnishing of computer software, the gross income received, including the charges for coding, punching, or otherwise producing computer software and the charges for the tapes, disks, punched cards, or other properties furnished by the seller. Gross receipts shall not include the amount charged for training customers in the use of computer software; if such amount is separately stated and such separate statement is not used as a means of avoiding imposition of the tax upon the actual sales price of the computer

software; and

(ii) In the furnishing of videotapes and movie film, the gross income received from the license, franchise, or other method establishing the charge, except the gross income received from videotape and film rentals when the admission tax is charged under the Nebraska Revenue Act of 1967; and

(d) Gross receipts ~~does~~ shall not include any of the following:

(i) Cash discounts allowed and taken on sales;

(ii) Sales price of tangible personal property returned by customers when the full sales price is refunded either in cash or credit;

(iii) Except as provided in subdivision (4)(b) of this section, the amount charged for labor or services rendered in installing or applying the tangible personal property sold if such amount is separately stated and such separate statement is not used as a means of avoiding imposition of the tax upon the actual sales price of the tangible personal property;

(iv) The amount charged for finance charges, carrying charges, service charges, or interest from credit extended on sales of tangible personal property under contracts providing for deferred payments of the purchase price if such charges are not used as a means of avoiding imposition of the tax upon the actual sales price of the tangible personal property;

(v) The value of tangible personal property taken by a seller in trade as all or a part of the consideration for a sale of tangible personal property of any kind or nature;

(vi) The value of a motor vehicle taken by any person in trade as all or a part of the consideration for a sale of another motor vehicle;

(vii) For purposes of the sales or use tax, if the retailer establishes to the satisfaction of the Tax Commissioner, and has been given prior approval by the Tax Commissioner, that the sales or use tax has been added to the total amount of the sale price and has not been absorbed by him or her, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed; or

(viii) Receipts from conditional sale contracts, installment sale contracts, rentals, and leases executed in writing prior to June 1, 1967, and with delivery of the tangible personal property prior to June 1, 1967, are not subject to the tax imposed by the Nebraska Revenue Act of 1967 if such conditional sale contracts, installment sale contracts, rentals, or

leases are for a fixed price and are not subject to negotiation or alteration;

(5) In this state or within the state shall mean within the exterior limits of the State of Nebraska and includes all the territory within these limits owned by or ceded to the United States of America;

(6) Occasional sale shall mean:

(a) A sale of tangible personal property which is the subject of any intercompany sale involving any parent, subsidiary, or brother-sister company relationship under subsection (5) of section 77-2704 and which was either originally acquired prior to June 1, 1967, or, if acquired thereafter, the seller directly or indirectly has previously paid a sales or use tax thereon, including:

(i) From one corporation to another corporation pursuant to a reorganization. As used in For purposes of this subdivision, reorganization shall mean a statutory merger or consolidation or the acquisition by a corporation of substantially all of the properties of another corporation when the consideration is solely all or a part of the voting stock of the acquiring corporation or of its parent or subsidiary corporation;

(ii) In connection with the winding up, dissolution, or liquidation of a corporation only when there is a distribution of the property of such corporation to the shareholders in kind if the portion of the property so distributed to the shareholder is substantially in proportion to the share of stock or securities held by the shareholder;

(iii) To a corporation for the purpose of organization of such corporation when the former owners of the property transferred are immediately after the transfer in control of the corporation and the stock or securities received by each is substantially in proportion to his or her interest in the property prior to the transfer;

(iv) To a partnership in the organization of such partnership if the former owners of the property transferred are immediately after the transfer members of such partnership and the interest in the partnership, received by each, is substantially in proportion to his or her interest in the property prior to the transfer; or

(v) From a partnership to the members thereof when made in kind in the dissolution of such partnership if the portion of the property so distributed to the members of the partnership is substantially in

proportion to the interest in the partnership held by the members;

(b) A sale of tangible personal property consisting of household goods and personal effects if each of the following conditions is met and if any one condition is not met then the entire gross receipts shall be subject to the tax imposed by section 77-2703:

(i) Such sales are by an individual at his or her residence or if more than one individual's property is involved such sales are by one of the individuals involved at the residence of one of the individuals;

(ii) Such sales do not occur at any residence for more than three days during a calendar year;

(iii) Such individual or individuals or any member of any of their households do not conduct or engage in a trade or business in which similar items are sold;

(iv) Such property sold was originally acquired for and used for personal use; and

(v) Such property is not otherwise excepted from the definition of occasional sale;

(c) Any sale of business or farm machinery and equipment if each of the following conditions is met and if any one condition is not met the entire gross receipts shall be subject to the tax imposed by section 77-2703:

(i) Such machinery and equipment was transferred without the aid or supervision of any third party. For the purposes of this section, third party shall include anyone other than the owner and the buyer. The release of a lien held by a third party shall not constitute aid;

(ii) Such machinery or equipment was used by the seller as a depreciable capital asset in connection with the farm or business for a period of at least one year;

(iii) Such property was originally acquired prior to June 1, 1967, or if acquired thereafter, the seller directly or indirectly has previously paid a sales or use tax thereon; and

(iv) Such property is not otherwise excepted from the definition of occasional sale;

(d) A sale of tangible personal property by an organization created exclusively for religious purposes or an agent of the organization for such sale if each of the following conditions is met and if any one condition is not met then the entire gross receipts shall be subject to the tax imposed by section 77-2703:

(i) All sales occur during an activity

conducted by such organization or, if more than one organization is involved, by one of the organizations owning property being sold;

(ii) The organization only sells property it owns during one such activity in a calendar year; and

(iii) The activity does not last longer than three consecutive days;

(e) Occasional sale shall not include any sale of tangible personal property directly by or any sale which is supervised or aided by an auctioneer or an agent or employee of an auctioneer; and

(f) Except for a sale listed in subdivision (6)(a) of this section, an occasional sale shall not include any sale of motor vehicles, trailers, and semitrailers as defined in section 60-301;

(7) Person shall mean and include any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, cooperative, assignee, or any other group or combination acting as a unit, but shall also include the United States or any agency thereof, this state or any agency hereof, or any city, county, district, or other political subdivision of this state, or agency thereof;

(8) Purchase shall mean any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration, including, but not limited to, a transfer of the possession of tangible personal property in which the seller retains the title as security for the payment of the price and a transfer, for a consideration, of tangible personal property which has been produced, fabricated, or printed to the special order of the customer;

(9) Rental price or lease price shall mean the total amount for which tangible personal property is rented or leased, with rent or lease payments set at a fair market value, valued in money, whether paid in money or otherwise, without any deduction on account of (a) the cost of the tangible personal property rented or leased, (b) the cost of material used, labor or service cost, interest charged, losses, or any other expenses, or (c) the cost of transportation of tangible personal property at any time. The total amount for which tangible personal property is rented or leased includes any services which are a part of the lease or rental and any amount for which credit is given to the lessee by



the lessor or renter;

(10) Retail sale or sale at retail shall mean:

(a) A sale for any purpose other than for resale in the regular course of business of tangible personal property;

(b) A sale of tangible personal property to an advertising agency which purchases the tangible personal property as an agent for a disclosed or undisclosed principal. The advertising agency is and remains liable for the sales and use tax on the purchase the same as if the principal had made the purchase directly;

(c) The delivery in this state of tangible personal property by an owner or former owner thereof or by a factor or agent of such owner, former owner, or factor, if the delivery is to a customer or person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in this state. The person making the delivery in such cases shall include the delivery person's selling price of the tangible personal property in his or her gross receipts;

(d) The sale of admissions which shall mean the right or privilege to have access to or use a place or location. When an admission to an activity is combined with the solicitation of a contribution, the portion or the amount charged representing the fair market price of the admission shall be considered a retail sale subject to the tax imposed by section 77-2703. The organization conducting the activity shall determine the amount properly attributable to the purchase of the privilege, benefit, or other consideration in advance and such amount shall be clearly indicated on any ticket, receipt, or other evidence issued in connection with the payment. Admissions shall not include fees charged by (i) elementary or secondary schools, public or private, or (ii) school districts, student organizations, or parent-teacher associations pursuant to an agreement with the proper school authorities, in an elementary or secondary school, public or private, during the regular school day or at an approved function of any such school; and

(e) A sale of live plants incorporated into real estate, except when such incorporation is incidental to the transfer of an improvement upon real estate or the real estate; and

(f) A sale of any tangible personal property incorporated into real estate by a person electing to be taxed as a retailer pursuant to subdivision (3)(a) of this section except when such incorporation is

incidental to the transfer of an improvement upon real estate or the real estate;

(11) Retail sale or sale at retail shall not include the sale of:

(a) Tangible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail;

(b)(i) Any form of animal life of a kind the products of which ordinarily constitute food for human consumption. Animal life shall be defined in part, but not limited to, live poultry or livestock on the hoof when sales are made by the grower, producer, feeder, or by any person engaged in the business of bartering, buying, or selling live poultry or livestock on the hoof;

(ii) Feed for any form of animal life or water which is supplied for consumption by animal life or which is otherwise used in caring for animal life of a kind the products of which ordinarily constitute food for human consumption or of a kind the pelts of which ordinarily are used for human apparel. Feed shall mean and include, but is not limited to, all grains, minerals, salts, proteins, fats, fibers, vitamins, grit, and antibiotics commonly used as feed or feed supplements;

(iii) Seeds and annual plants, the products of which ordinarily constitute food for human consumption and which seeds and annual plants are sold to commercial producers of such products, and seed legumes, seed grasses, and seed grains when sold to be used exclusively for agricultural purposes; or

(iv) Agricultural chemicals for use in agriculture and applied to land or crops. Agricultural chemicals shall not include chemicals applied to harvested grains stored in commercial elevators;

(c) Nonreturnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container; containers when sold with the contents if the sales price of the contents is not required to be included in the measure of the taxes imposed by the Nebraska Revenue Act of 1967; and returnable containers when sold with the contents in connection with a retail sale of the contents or when resold for refilling. The term returnable containers means containers of a kind customarily returned by the buyer of the contents for reuse. All other containers are nonreturnable containers;

(d) Tangible personal property the transfer of which to the consumer constitutes an occasional sale or the transfer of which to the consumer is made by way of an occasional sale;

(e) Tangible personal property the sale, purchase, or use of which has been taxed to that taxpayer in another state, territory, or possession of the United States of America when such other state, territory, or possession grants a reciprocal exclusion or an exemption to similar transactions in this state;

(f) The purchase in this state or the purchase without this state, with title passing in this state, of materials and replacement parts, when used as or when used directly in the repair and maintenance or manufacture of railroad rolling stock, whether owned by a railroad or by any person, whether a common or contract carrier or otherwise, motor vehicles, watercraft, or aircraft engaged as common or contract carriers of persons or property or the purchase in such manner of motor vehicles, watercraft, or aircraft to be used as common or contract carriers of persons or property. All purchasers seeking to take advantage of the exemption shall apply to the Tax Commissioner for a common or contract carrier exemption. All common or contract carrier exemption certificates shall expire on October 31, 1986, and on October 31 every three years thereafter. All persons seeking to continue to take advantage of the common or contract carrier exemption shall apply for a new certificate at the expiration of the prior certificate. The Tax Commissioner shall notify such exemption certificate holders at least sixty days prior to the expiration date of such certificate that their certificate will expire and be null and void as of such date; or

(g) Railroad rolling stock whether purchased by a railroad or by any other person;

(12) Retailer shall mean:

(a)(i) Every seller engaged in the business of making sales of tangible personal property for storage, use, or other consumption or in the business of making sales at auction of tangible personal property owned by the person or others for storage, use, or other consumption. Retailer shall include, in the case of sales at auction of tangible personal property when the person collecting the proceeds of the auction is not the auctioneer or an agent or employee of the auctioneer, the person collecting the proceeds of the auction, other than the owner of the tangible personal property, together with his or her principal, if any, and retailer

shall not include the auctioneer in such case;

(ii) Every person who leases or rents to another tangible personal property for storage, use, or other consumption; except film rentals when an admission tax is charged under the Nebraska Revenue Act of 1967 and railroad rolling stock interchanged pursuant to the provisions of the Interstate Commerce Act;

(iii) Every person engaged in the business of renting or furnishing for periods of less than thirty days any room or rooms, lodgings, or accommodations in any hotel, motel, inn, tourist camp, tourist cabin, or any other place, except a facility licensed under the provisions of Chapter 71, article 20, in which rooms, lodgings, or accommodations are regularly furnished for a consideration or a facility operated by an educational institution established under Chapter 79 or 85 in which rooms are regularly used to house students for a consideration for periods in excess of thirty days, shall be and constitute a retail merchant in respect thereto and the gross income received therefrom shall constitute gross income of a retail merchant received from transactions constituting selling at retail;

(iv) Every person engaged as a public utility in furnishing telephone, telegraph, gas, electricity, sewer, and water service, and every person engaged in furnishing community antenna television service as defined in subdivision (4)(b) of this section; and

(v) Every person renting or otherwise furnishing tangible personal property under an agreement requiring the periodic cleaning or laundering of such tangible personal property; and

(vi) Every person who has elected to be considered a retailer pursuant to subdivision (3)(a) of this section; and

(b) When the Tax Commissioner determines that it is necessary for the efficient administration of the Nebraska Revenue Act of 1967 to regard any salespersons, representatives, peddlers, canvassers, or auctioneers and persons conducting auction sales as the agents of the dealers, distributors, supervisors, or employers under whom they operate or from whom they obtain the tangible personal property sold by them irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, auctioneers, or employers, the Tax Commissioner may, at his or her discretion, treat such agent as the vendor jointly responsible with his or her principal, distributor, supervisor, or employer for the purposes of the Nebraska Revenue Act of 1967;

(13) Sale shall mean and include any transfer of title or possession or segregation in contemplation of transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. Sale shall include:

(a) The producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish, either directly or indirectly, the materials used in the producing, fabricating, processing, printing, or imprinting;

(b) The furnishing and distributing of tangible personal property for a consideration by social clubs and fraternal organizations to their members or others;

(c) The furnishing, preparing, or serving for a consideration of food, meals, or drinks;

(d) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price;

(e) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer; and

(f) The renting or furnishing for periods of less than thirty days of any room or rooms, lodgings, or accommodations in any hotel, motel, inn, tourist camp, tourist cabin, or any other place, except a facility licensed under the provisions of Chapter 71, article 20, in which rooms, lodgings, or accommodations are regularly furnished for a consideration or a facility operated by an educational institution established under Chapter 79 or 85 in which rooms are regularly used to house students for a consideration for periods in excess of thirty days;

(14) Sale for resale shall mean a sale of tangible personal property to any purchaser who is purchasing such tangible personal property for the purpose of reselling it in the normal course of his or her business, either in the form or condition in which it is purchased or as an attachment to or integral part of other tangible personal property. A sale for resale shall include a sale of tangible personal property to a contractor or repairperson electing to be taxed as a retailer under subdivision (3)(a) of this section, to a contractor or repairperson being taxed as the consumer of tangible personal property and electing a tax-free inventory under subdivision (3)(c) of this section, or

to a purchaser for the sole purpose of that purchaser's renting or leasing such tangible personal property to another person, with rent or lease payments set at a fair market value, or film rentals for use in a place where an admission is charged that is subject to taxation under the Nebraska Revenue Act of 1967; but not if incidental to the renting or leasing of real estate;

(15)(a) Sales price shall mean the total amount for which tangible personal property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of:

(i) The cost of the tangible personal property sold;

(ii) The cost of material used, labor or service cost, interest paid, losses, or any other expenses;

(iii) The cost of transportation of the tangible personal property. The total amount for which tangible personal property is sold includes any services which are a part of the sale and any amount for which credit is given to the purchaser by the seller;

(iv) The cost of computer software contained on the tangible personal property; or

(v) The cost of any license, franchise, or lease for the use of computer software or entertainment properties such as videotapes or movie films; and

(b) Sales price ~~does~~ shall not include any of the following:

(i) Cash discounts allowed and taken on sales;

(ii) The amount refunded for tangible personal property returned by customers when all or part of the amount charged therefor is refunded either in cash or credit;

(iii) The amount charged for labor or services rendered in installing and applying the property sold if such amount is separately stated and such separate statement is not used as a means of avoiding imposition of the tax upon the actual sales price of the tangible personal property;

(iv) The amount charged for finance charges, carrying charges, service charges, or interest from credit extended on sales of tangible personal property under contracts providing for deferred payments of the purchase price if such charges are not used as a means of avoiding imposition of the tax upon the actual sales price of the tangible personal property;

(v) The value of tangible personal property taken by a seller in trade as all or a part of the consideration for a sale of tangible personal property

of any kind or nature; ~~or~~

(vi) The value of a motor vehicle taken by any person in trade as all or part of the consideration for a sale of another motor vehicle; or

(vii) The amount charged for labor or services rendered in incorporating tangible personal property into real estate;

(16) Seller shall include every person engaged in the business of selling, leasing, or renting tangible personal property of a kind the gross receipts from the retail sale, lease, or rental of which are required to be included in the measure of the sales tax;

(17) Storage shall include any retention in this state for any purposes except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer, other than tangible personal property which will enter into or become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail. Except for a transaction that is subject to sales tax under the Nebraska Revenue Act of 1967, neither storage nor use as defined in this subdivision shall include the keeping, retaining, or exercising of any right or power over tangible personal property for the purpose of subsequently transporting it outside the state or for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property to be transported outside the state and thereafter used solely outside the state;

(18) Tangible personal property shall mean personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses and includes tangible personal property which is used to convey computer software;

(19) Taxpayer shall mean any person subject to a tax imposed by sections 77-2702 to 77-2713;

(20) Use shall mean the exercise of any right or power over tangible personal property incident to the ownership or possession of that tangible personal property, except that it does not include the sale of that tangible personal property in the regular course of business or the exercise of any right or power over tangible personal property which will enter into or become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail. Use specifically includes the incorporation of tangible personal property or the

withdrawal of tangible personal property from inventory for incorporation into real estate or into improvements upon real estate without regard to the fact that such real estate and improvements may subsequently be sold as such; and

(21) Engaged in business in this state shall mean and include any of the following:

(a) Maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse, storage place, or other place of business in this state;

(b) Having any representative, agent, salesperson, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or taking orders for any tangible personal property;

(c) Deriving rentals from a lease of tangible personal property in this state by any retailer;

(d) Soliciting retail sales of tangible personal property from residents of this state on a continuous, regular, or systematic basis by means of advertising which is broadcast from or relayed from a transmitter within this state or distributed from a location within this state;

(e) Soliciting orders from residents of this state for tangible personal property by mail, if the solicitations are continuous, regular, seasonal, or systematic and if the retailer benefits from any banking, financing, debt collection, or marketing activities occurring in this state or benefits from the location in this state of authorized installation, servicing, or repair facilities;

(f) Being owned or controlled by the same interests which own or control any retailer engaged in business in the same or similar line of business in this state; or

(g) Maintaining or having a franchisee or licensee operating under the retailer's trade name in this state if the franchisee or licensee is required to collect the tax under the Nebraska Revenue Act of 1967.

Sec. 3. The Tax Commissioner shall not include in any notice of deficiency determination issued for a period prior to January 1, 1990, any amount for tax on tangible personal property incorporated into real estate on which a sales tax has been collected by a contractor or repairperson and which has not been refunded. Such sales tax shall be considered as



properly paid tax and shall not be refunded except as specifically allowed in some other provision of the Nebraska Revenue Act of 1967.

Sec. 4. That original sections 77-2701 and 77-2702, Revised Statutes Supplement, 1988, are repealed.

Sec. 5. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.