WEST VIRGINIA CODE: §11-15A-13

§11-15A-13. Tax on gasoline and special fuel; section repealed January 1, 2004.

(a) Imposition of tax. --

(1) On deliveries in this state. -- Gasoline or special fuel furnished or delivered within this state to consumers or users is subject to tax at the rate imposed by section two of this article: Provided, That the amount of tax due under section two shall in no event be less than five percent of the average wholesale price of gasoline and special fuel and with the price to, in no case, be determined to be less than 97¢ per gallon for all gallons of gasoline and special fuel taxable under section two of this article.

(2) On purchases out-of-state. -- An excise tax is hereby imposed on the use or consumption in this state of gasoline or special fuel purchased outside this state at the rate of five percent of the average wholesale price of gasoline or special fuel, as determined under subsection (c), notwithstanding any provision of this article to the contrary: Provided, That gasoline or special fuel contained in the supply tank of a motor vehicle that is not a motor carrier is not taxable, except that gasoline or special fuel imported in the supply tank or auxiliary tank of construction equipment, mining equipment, track maintenance equipment or other similar equipment, is taxed in the same manner as that in the supply tank of a motor carrier.

(b) Definitions. -- Terms used in this section have the same meaning as when used in a comparable context in section eighteen, article fifteen of this chapter.

(c) Determination of average wholesale price. --

(1) To simplify determining the average wholesale price of all gasoline and special fuel, the Tax Commissioner shall, effective with the period beginning the first day of the month of the effective date of this section and each first day of January, annually, thereafter, determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of July 1, through the thirty-first day of October. Notification of the average wholesale price of gasoline and special fuel shall be given by the Tax Commissioner at least thirty days in advance of each first day of January, annual period, by filing notice of the average wholesale price in the state register, and by other means as the Tax Commissioner considers reasonable: Provided, That notice of the average wholesale price of gasoline and special fuel for the first period shall be timely given if filed in the state register on the effective date of this section.

(2) The "average wholesale price" means the single, statewide average per gallon wholesale price, rounded to the third decimal (thousandth of a cent), exclusive of state and federal excise taxes on each gallon of gasoline or diesel fuel, as determined by the Tax Commissioner from information furnished by distributors of gasoline or special fuel in this state, or any other information regarding wholesale selling prices as the Tax Commissioner

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may gather, or a combination of information: Provided, That in no event shall the average wholesale price be determined to be less than 97¢ per gallon of gasoline or special fuel.

(3) All actions of the Tax Commissioner in acquiring data necessary to establish and determine the average wholesale price of gasoline and special fuel, in providing notification of his or her determination prior to the effective date of any change in rate, and in establishing and determining the average wholesale price of fuel, may be made by the Tax Commissioner without compliance with the provisions of article three, chapter twenty-nine-a of this code.

(4) In any administrative or court proceeding brought to challenge the average whole price of gasoline and special fuel as determined by the Tax Commissioner, his or her determination is presumed to be correct and shall not be set aside unless it is clearly erroneous.

(d) Computation of tax due from motor carriers. -- Every person who operates or causes to be operated a motor carrier in this state shall pay the tax imposed by this section on the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this state, under the following rules:

(1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this state is that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this state, that the total number of miles traveled within this state bears to the total number of miles traveled within and without this state.

(2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c) of this section, of all gasoline and special fuel used in the operation of the motor carrier within this state during the preceding quarter, as if all gasoline and special fuel had been purchased outside this state.

(3) Next, the taxpayer shall determine the total tax paid under article fifteen of this chapter on all gasoline and special fuel purchased in this state for use in the operation of the motor carrier.

(4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit is allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by article fourteen-a of this chapter.

(e) Return and payment of tax. -- Tax due under this article on the uses or consumption in this state of gasoline or special fuel shall be paid by each taxpayer on or before the twenty-fifth day of January, April, July and October of each year, notwithstanding any provision of this article to the contrary, by check, bank draft, certified check or money order, payable to

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the Tax Commissioner, for the amount of tax due for the preceding quarter. Every taxpayer shall make and file with his or her remittance, a return showing the information the Tax Commissioner requires.

(f) Compliance. -- To facilitate ease of administration and compliance by taxpayers, the Tax Commissioner may require motor carriers liable for the taxes imposed by this article on the use of gasoline or special fuel in the operation of motor carriers within this state, and the tax imposed by article fourteen-a of this chapter on gallons of fuel, to file a combined return and make a combined payment of the tax due under this article and article fourteen-a of this chapter on the fuel. In order to encourage use of a combined return and the making of a single payment each quarter for both taxes, the due date of the return and tax due under article fourteen-a of this chapter is hereby changed from the last day of January, April, July and October of each calendar year, to the twenty-fifth day of each of those months, notwithstanding any provisions in article fourteen-a of this chapter to the contrary.

(g) Dedication of tax to highways. -- All tax collected under the provisions of this section after deducting the amount of any refunds lawfully paid shall be deposited in the "road fund" in the State Treasurer's office, and used only for the purpose of construction, reconstruction, maintenance and repair of highways, and payment of principal and interest on state bonds issued for highway purposes.

(h) Construction. -- The tax imposed by this article on the use of gasoline or special fuel in this state is not construed as taxing any gasoline or special fuel which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

(i) Effective date. --

This section shall have no force or effect after December 31, 2003: Provided, That tax liabilities arising for periods ending before January 1, 2004, shall be determined, paid, administered, assessed and collected as if this section had not been repealed, and the rights and duties of the taxpayer and the State of West Virginia are fully and completely preserved.

(j) Validation. -- Inasmuch as there is currently litigation challenging the lawfulness of this section in the situation where a motor carrier purchases gasoline or special fuel in another state paying to that other state a sales tax thereon and then consumes that gasoline or special fuel in its operation of a motor carrier in this state, without being statutorily allowed a credit for the sales tax against the tax imposed by this article with respect to the gallonage of tax paid fuel consumed in this state; and inasmuch as section ten-a of this article reestablishes the allowance of a credit and makes the allowance effectively retroactive and applicable to gasoline and special fuel consumed in this state after June 30, 1985, the purported Constitutional infirmity is cured. To avoid any question about whether this section was in effect subsequent to June 30, 1985, this section is reenacted and expressly made retroactive to July 1, 1985, and the Tax Commissioner shall not refund or credit any tax previously paid under this section due to a claim that the tax was not lawfully imposed

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subsequent to June 30, 1985.

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