
WEST VIRGINIA CODE CHAPTER 33
ARTICLE 43

WV Legislature

§33-43-1. Short title.

This article shall be known and may be referred to as the "Insurance Tax Procedures Act."

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§33-43-2. Application.

(a) The provisions of this article applies to all taxes, surcharges, assessments, penalties and fees, however denominated, which are remitted to the commissioner.

(b) This article supersedes any provisions in this code which concern the matters addressed in this article, but only to the extent that those other provisions are inconsistent with this article.

§33-43-3. Definitions.

For the purposes of this article and where not otherwise defined in this chapter:

- (a) "Assessment" means a written notice by the commissioner of an amount due by a taxpayer for payment of any tax, fee, penalty or related charge administered under this article.
- (b) "Days" means calendar days.
- (c) "Filing date" for a return means the date prescribed by the Legislature for the filing of a return, or if no date is prescribed, the payment date for the tax which is the subject of the return.
- (d) "Final decision" means a decision for which the availability of an appeal has been exhausted, either because the time for filing a petition has elapsed or because the petition has been denied.
- (e) "Payment date" for a tax means the date prescribed by the Legislature for the payment of the tax, or if no date is prescribed, on March 1 next following the end of the taxable year for the tax.
- (f) "Related charges" includes fees, and additions and interest called for by this article.
- (g) "Surcharge" means a tax payable by a policyholder but collected and remitted to the commissioner by the insurer.
- (h) "Tax" means any tax to which this article applies.
- (i) "Taxable premium" means the amount of the gross direct premiums, annuity considerations or dividends on participating policies applied in reduction of premiums less premiums returned to policyholders due to cancellation of policies.
- (j) "Taxpayer" includes any legal entity which is liable for the remittance of a tax to the commissioner in a particular taxable year, and any legal entity that is required to file a return under this article.

§33-43-4. Powers of the commissioner.

(a) All powers granted to the commissioner by this article are in addition to those powers granted to the commissioner elsewhere in this code, and no provision of this article may be construed to eliminate or diminish the other powers.

(b) The commissioner may prescribe any forms as he or she considers necessary for the fair, uniform and efficient administration of taxes. All forms now used by the commissioner shall be prescribed until the commissioner requires otherwise.

(c) The commissioner may propose rules for legislation approval in accordance with the provisions of article three, chapter twenty-nine-a of this code which he or she considers necessary for the fair, uniform and efficient administration of taxes. All currently existing rules remain in effect until amended or repealed.

(d) For the purpose of ascertaining the application of this article to a taxpayer, the commissioner may:

(1) Examine any books, papers, records, memoranda or property of the taxpayer, legal entity, or any other person which may be relevant in determining its tax liability, compliance or taxpayer status;

(2) Require the attendance for the purpose of giving testimony of the taxpayer or legal entity, or of an employee, officer or agent of the taxpayer or legal entity who reasonably is believed to possess knowledge which may be relevant in determining its tax liability, compliance or taxpayer status;

(3) Exercise any of the powers conferred by sections four through eight of article two of this chapter.

(e) If the commissioner determines, after notice and hearing, that a person has failed or refused to comply with the provisions of this article, or of any legislative rule proposed by the commissioner and approved by the Legislature pursuant to this article, the commissioner may order that the person comply with the provisions and that the person take any other steps as are reasonably necessary to allow the provisions to be enforced. If the person holds a license issued by the commissioner, the commissioner may revoke that license upon the person's failure or refusal to obey an order issued under this subsection or in the commissioner's discretion may in the alternative assess a penalty against the person in an amount up to \$5,000 per occurrence.

(f) The commissioner has exclusive authority to bring or join suit in a court of competent jurisdiction, or to pursue any other action allowed by law, to enforce the provisions of this article, or of legislative rules proposed pursuant to this article and approved by the Legislature, or to enforce any order, subpoena or other directive issued by the commissioner pursuant to this article to best promote the fair, uniform and efficient administration of

taxes.

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§33-43-4a. Agreements and compromises.

(a) Prior to commencing any civil action, the commissioner may compromise any claim relating to the liability of a person with respect to any tax, including any surcharge, interest, additional tax, fee, fine or penalty, administered by the commissioner under this chapter for any taxable period. The following conditions apply to any agreement entered into under this subsection:

The agreement must be in writing;

(2) In the absence of a showing of fraud, malfeasance or misrepresentation of a material fact, then:

(A) The agreement shall be final and conclusive;

(B) The agreement and the matters so agreed upon shall not be reopened or the agreement modified by any officer, employee or agent of this state; and

(C) In any civil action or administrative proceeding, the compromise agreement or any determination, assessment, collection, payment, abatement, refund or credit made in accordance therewith may not be annulled, modified, set aside or disregarded.

(b) The commissioner may compromise all or part of any civil case arising under the provisions of this article. The following conditions apply to any agreement entered into under this subsection:

(1) Any liability for tax, including any surcharge, interest, additional tax, fee, fine or penalty, may be compromised upon consideration of the terms and conditions of the compromise agreement in light of any or all of the following:

(A) Doubt as to liability;

(B) Doubt as to the ability to collect;

(C) Strength of the taxpayer's defenses to the assessment of the tax, surcharge, interest, additional tax, fee, fine or penalty;

(D) Age of the dispute;

(E) The anticipated time and resources which will be required to develop the civil action for adjudication; and

(F) Any other factors relevant to the determination of whether citizens of the State of West Virginia are best served by entering into a compromise agreement.

(2) In all matters involving issues in respect of a tax liability in controversy of \$15,000 or

more for one or all of the years involved in claim or case, the commissioner shall seek the written recommendation of the Attorney General before entering into the compromise agreement. The written recommendation of the Attorney General shall be placed in the commissioner's file.

(c) Whenever a compromise agreement is made by the commissioner under subsection (a) or (b) of this section, there shall be placed on file in the commissioner's office an opinion from the commissioner's legal counsel. The opinion must include the following:

- (1) The amount of tax, surcharge, additional tax, fee and interest assessed;
- (2) The anticipated fine or penalty imposed by law on the person against whom the tax, surcharge, additional tax, fee and interest was assessed; and
- (3) The amount actually paid in accordance with the terms of the compromise agreement;
- (4) The reasons underlying the decision to enter into a compromise agreement: Provided, That the requirements of this subsection do not apply with respect to any agreement in which the amount of the tax assessed, including any surcharge, interest, additional tax, fee, fine or penalty, is less than \$1,000.

(d) Report to Legislature. -- The commissioner shall submit to the Speaker of the House of Delegates, the President of the Senate and the Legislative Auditor a quarterly report summarizing the issues and amounts of liabilities contained in the agreements and compromises into which he or she has entered pursuant to this section. The report shall be in a form which preserves the confidentiality of the identity of the taxpayers involved in the agreements and compromises. Notwithstanding any other provision of law to the contrary, the agreements and compromises entered into pursuant to this section shall be subject to audit, in their entirety, by the Legislative Auditor.

§33-43-5. Limitation on actions.

The commissioner has exclusive authority to bring or join suit in a court of competent jurisdiction, or pursue any other action allowed by law, to obtain the payment of taxes and related charges: Provided, That the commissioner must so act within ten years following the date upon which the assessment or order establishing the taxpayer's liability becomes final.

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§33-43-6. Returns.

(a) Any person who is subject to a tax in a given taxable year shall file a return for that tax and that taxable year, even if the person has no tax liability for that taxable year.

(1) Each return shall be filed by the applicable filing date. The commissioner, at his or her discretion, may accept a return after the filing date.

(2) Should a taxpayer file more than one return for the same tax, only the return last filed shall be effective. The commissioner, at his or her discretion, may approve the withdrawal of a return by the taxpayer.

(b) Each return shall be executed by the taxpayer in a manner prescribed by the commissioner. Each return so executed shall constitute a sworn statement by the signatory that, to the best of his or her knowledge and belief, the information provided in the return or in any supporting materials which accompany the return is true and accurate.

(c) All returns shall be prepared on forms prescribed by the commissioner. If no form has been prescribed for a particular tax, the return may be in a form chosen by the taxpayer but shall clearly set forth the following information: The taxpayer's name, address and telephone number; the identification number used by the taxpayer in filing federal income tax returns; the tax and taxable year to which the return applies; and all information used to calculate the tax liability of the taxpayer.

(d) For purposes of this article, a return is not regarded as filed if:

(1) It is not filed by the applicable filing date, unless the commissioner accepts the return; or

(2) It has not been received by the commissioner; or

(3) It has not been properly executed by the taxpayer; or

(4) It is not in the proper form; or

(5) It is incomplete or inaccurate in any material respect; or

(6) It is not accompanied by supporting material required by the commissioner; or

(7) It is withdrawn by the taxpayer with the approval of the commissioner; or

(8) It is not accompanied by the payment for any tax due.

(e) If a tax is to be paid in installments, the taxpayer shall file an appropriate return for each period for which an installment payment is calculated, even if the taxpayer is not required to make an installment payment for that period. The returns shall satisfy all requirements established for annual returns by this section except that the filing date for an installment

return is the date prescribed for the installment payment for the period described by the return. Failure of a taxpayer to make quarterly payments, if required, of at least one fourth of either the total tax paid during the preceding calendar year or eighty percent of the actual tax liability for the current calendar year is considered the same as a failure or refusal to pay the estimated taxes and subjects the taxpayer to the penalties provided in this article.

(f) If a taxpayer has failed to file a return by the applicable filing date or has filed a false or fraudulent return, the commissioner may use any information which is available to him or her to determine the taxpayer's tax liability: Provided, That a determination of tax liability by the commissioner pursuant to this subsection does not relieve the taxpayer of the duty to file a true, accurate and complete return and does not reduce or preclude any penalty based upon the taxpayer's failure to file.

(g) A taxpayer to whom a credit has been issued may apply the credit as payment for any like tax due to be remitted by the taxpayer upon written notice to the commissioner stating the amount of the credit to be so applied.

§33-43-7. Penalties.

(a) If any taxpayer fails to file a return by the applicable filing date, then for each day throughout which the taxpayer fails to file, the taxpayer is liable for a civil penalty of \$25: Provided, That the Commissioner may waive or reduce this penalty if the Commissioner determines that the failure to timely file was caused by excusable neglect.

(b) If a taxpayer fails to pay a tax liability in full by the applicable payment date, then for each day throughout which a portion of the liability remains unpaid, the taxpayer is liable for a civil penalty in an amount equal to one percent of the unpaid portion: Provided, That the sum of the penalties imposed under this subsection may not exceed one hundred percent of the tax liability: Provided, however, That this penalty may be waived or reduced if the taxpayer establishes, to the satisfaction of the Commissioner, that the failure upon which the penalty is based was not, in whole or in part, willful or due to the neglect of the taxpayer.

(c) The assessment of a penalty under this section is automatic unless a waiver or reduction of the penalty is agreed to by the Commissioner in writing.

§33-43-8. Assessments.

(a) The commissioner may issue assessments for tax liabilities and related charges, or any portions thereof, which are due and payable but unpaid. At any time before an assessment becomes final, the commissioner may amend the assessment, in whole or in part. Except as otherwise provided in this article, an assessment which is amended by the commissioner shall be regarded as a new assessment.

(b) The commissioner shall give the taxpayer notice of every assessment or amendment thereto. The date upon which the notice is sent to the taxpayer shall be regarded as the date upon which the assessment is issued.

(c) The notice of assessment shall specify the amount of each tax liability or related charge which is the subject of the assessment: Provided, That the notice may list interest and penalties which accrue or are imposed from the time that the assessment is issued to the time that the assessment is paid.

(d) Notwithstanding any other provisions of this article, assessments may be issued only within the following time periods:

- (1) For tax liabilities, if the taxpayer has filed a return for the tax and taxable year at issue, within three years of the filing date for the return or the date upon which the return actually was filed, whichever comes later;
- (2) For fees, within three years of the date prescribed for payment of the fee;
- (3) For penalties based upon a failure to pay a tax, at any time.

(e) The commissioner shall, within ninety days of a written request by a taxpayer, issue an assessment: Provided, That the commissioner may refuse to issue an assessment until the taxpayer has provided the commissioner with all information necessary to determine or verify the taxpayer's outstanding liabilities for taxes and related charges.

(f) If the taxpayer does not timely request a hearing on an assessment pursuant to section nine of this article, the assessment shall become final. A final assessment is conclusive of the liability of the taxpayer and is not subject to either administrative or judicial review.

§33-43-9. Hearing and appeal; judicial review.

(a) Within sixty days of the issuance of an assessment or imposition of a penalty, a taxpayer may request a hearing before the commissioner on the amount or validity of the assessment or penalty. Except as otherwise provided in this article or in legislative rules proposed and approved by the Legislature thereto, the hearings are subject to the requirements established in sections thirteen and fourteen, article two of this chapter.

(b) A request for a hearing shall be in writing and shall set forth with reasonable particularity the taxpayer's objections to the assessment or penalty and the factual basis therefore. At any time prior to the hearing, the commissioner may allow a taxpayer to amend the request.

(c) The taxpayer's request shall be executed by the taxpayer in a manner prescribed by the commissioner, and a request so executed shall constitute a sworn statement by the signatory that to the best of his or her knowledge and belief, the information provided in the request is true and accurate.

(d) Assessments issued by the commissioner shall be presumed correct, and the taxpayer shall bear the burden of proving, by a preponderance of the evidence, that the assessment is incorrect or contrary to law.

(e) If the taxpayer does not timely appeal the commissioner's order, that order shall become final as of the expiration of the period during which the taxpayer may have brought an appeal. Upon becoming final, an order shall be conclusive of the liability of the taxpayer and is not subject to either administrative or judicial review.

(f) An agreed order signed by the taxpayer and the commissioner is final and shall constitute a waiver of the taxpayer's right to a hearing or appeal under this chapter.

§33-43-10. Refunds and credits.

(a) This section is the sole method of receiving a refund or credit for any tax or related charge administered under this article.

(b) Any taxpayer claiming to be due a refund or credit for overpayment of any tax or related charge administered under this article may, within five years from the date of the filing of the return under which the tax was imposed or within four years from the date the tax was paid, whichever term expires later, file with the commissioner a petition in writing requesting a refund of the tax or any part thereof:

(1) If the petition and the proofs filed in support thereof persuades the commissioner that the payment of the tax or related charges or any part thereof was improperly required, he or she shall refund or issue a credit to the taxpayer for the improper amounts;

(2) If the commissioner is in doubt as to whether or not the taxes or related charges were proper, or if the commissioner is of the opinion that the payment of the tax collected, or any part thereof was proper, then the commissioner shall within thirty days hold a hearing to determine the issue;

(3) If a taxpayer is considered to be due a credit or refund, the commissioner shall, if the amount exceeds \$1,000, at his or her discretion, pay the amount in equal, annual installments over not more than three years. The commissioner may issue a credit against future taxes in lieu of a refund payment, whether lump sum or installment;

(4) The payment of refunds or issuance of credits to a taxpayer pursuant to this section shall constitute a complete and final settlement of all of the taxpayer's claims for which the refunds or credits are paid. No cause of action or liability, whether for damages, attorney's fees, costs or of any other nature, shall arise against the commissioner or against his or her agents for administering or litigating the Constitutionality of a tax subsequently determined to be unconstitutional.

§33-43-11. Interest.

A taxpayer shall be liable for interest on any unpaid final assessment or penalty or portion thereof: Provided, That interest may not be charged on interest. Interest shall be calculated using the annual rates which are established by the Tax Commissioner pursuant to section seventeen-a of article ten, chapter eleven of this code and shall accrue daily.

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§33-43-12. Allocation of payments.

(a) Payments made by a taxpayer, other than installment payments of a tax liability which is required to be paid in installments, shall be allocated to the taxpayer's outstanding liabilities as follows:

- (1) First, to any assessment which has become final;
- (2) Next, to any fee which has not yet been assessed;
- (3) Next, to any tax or related charge which has not yet been assessed;
- (4) Finally, to any assessment which has not yet become final.

§33-43-13. Overpayments and underpayments.

(a) Upon discovering that a taxpayer has made payments in excess of the taxpayer's outstanding liabilities, the commissioner shall give notice of the overpayment to the taxpayer.

(b) Payments by a taxpayer in excess of the amounts required to satisfy the taxpayer's liabilities for taxes and related charges shall give rise to a credit against the taxpayer's future liabilities unless the taxpayer, within thirty days of receiving the notice, either requests a refund under this article and is granted the refund, or establishes to the satisfaction of the commissioner that no future liabilities will be incurred by the taxpayer.

(c) Upon discovering that a taxpayer has made payments less than the taxpayer's outstanding liabilities, or that the taxpayer has made no payments, the commissioner shall give notice of the underpayment to the taxpayer, which notice will be considered an assessment of the amount due.

§33-43-14. Retroactive monetary relief for unconstitutional taxes.

(a) The remedies provided by this article are exclusive and shall be in lieu of any and all remedies provided by common law or by other provisions of this code.

(b) Retroactive monetary relief for an unconstitutional tax shall be granted only at the express order of a court of competent jurisdiction which appears in a final decision of that court. Notwithstanding any other provision of this code, a final decision ordering retroactive monetary relief may not be considered to override any statute of limitations contained within this article, or to require relief for any claim which is *res judicata*.

(c) Retroactive monetary relief shall comprise only a refund of the unconstitutional tax, or of the portion thereof that the court has ordered refunded, which actually has been paid by the taxpayer, together with any penalties or interest which are based upon the taxpayer's failure to pay the unconstitutional tax and which actually have been paid by the taxpayer.

(1) Except as otherwise provided in this section, retroactive monetary relief shall be paid to the taxpayer in a lump sum within one hundred eighty days of the final decision which orders the relief.

(2) If the amount of retroactive monetary relief due to any individual taxpayer exceeds \$1,000 or the aggregate amount of the relief due to all taxpayers exceeds \$100,000, the commissioner at his or her discretion may pay all refunds issued pursuant to the final decision in equal, annual installments over not more than three years. For purposes of this subsection, a year shall be a period of twelve calendar months measured from the date upon which the final decision which orders the relief is entered.

(3) With the approval of the taxpayer, the commissioner may issue a credit against future taxes in lieu of a refund payment due pursuant to this section, whether lump sum or installment.

(d) The payment of refunds or issuance of credits to a taxpayer pursuant to this section shall constitute a complete and final settlement of all of the taxpayer's claims which are based upon the unconstitutional tax for which the refunds are paid or the credits issued. No cause of action or liability, whether for damages, attorney's fees, costs or of any other nature, shall arise against the commissioner or against his or her agents for administering or litigating the Constitutionality of a tax subsequently determined to be unconstitutional.

§33-43-15. Taxes collected on behalf of the commissioner.

When a person is required to collect a tax or surcharge from another and remit the amount thus collected to the commissioner, the moneys collected are considered to be held by that person in trust for the State of West Virginia. With respect to the filing of returns, assessments and interest, taxes that are collected by a person to be remitted to the commissioner are treated as would a tax paid directly by that person to the commissioner. The person collecting the tax shall return to the policyholder or person paying the tax or surcharge any refund made for overpayment of the amount collected.