

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1951

ENROLLED

Committee Substitute for

SENATE BILL NO. 127

*(Originating in the Committee
on Finance)*

(By Mr.)

PASSED *March 10,* 1951

In Effect *July 1,* 1951 Passage



121

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 127

(Originating in the Committee on Finance.)

[Passed March 10, 1951; in effect July 1, 1951.]

AN ACT to amend chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article to be designated article fifteen-a, relating to an excise tax on the privilege of using within this state any article of tangible personal property purchased for use in this state, providing for the payment and collection of such tax, and prescribing penalties for the violation thereof.

Be it enacted by the Legislature of West Virginia:

That chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by

adding thereto a new article designated as article fifteen-a to read as follows:

Article 15-a. Use Tax.

Section 1. *Definitions.*—The following words, terms, and phrases, when used in this article, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

1. “Person” includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, or any other group or combination acting as a unit and the plural as well as the singular number.

2. “Use” means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of that property in the regular course of business. Property used in “processing” within the meaning of this subsection shall mean and include (a) any tangible personal property including containers which it is intended shall, by means of fabrication, compounding, manufacturing, or germination, be-

19 come an integral part of other tangible personal property,
20 intended to be sold ultimately at retail, (b) fuel which is
21 consumed in creating power, heat or steam for processing
22 or for generating electric current, (c) industrial mate-
23 rials and equipment, which are not readily obtainable in
24 West Virginia, and which are directly used in the actual
25 fabricating, compounding, manufacturing or servicing of
26 tangible personal property intended to be sold ultimately
27 at retail.

28 3. "Purchase" means any transfer, exchange or barter,
29 conditional or otherwise, in any manner or by any means
30 whatsoever, for a consideration.

31 4. "Purchase price" means the total amount for which
32 tangible personal property is sold, valued in money,
33 whether paid in money or otherwise; provided that cash
34 discounts allowed and taken on sales shall not be in-
35 cluded.

36 5. "Tangible personal property" means tangible goods,
37 wares, and merchandise when furnished or delivered
38 within this state to consumers or users within this state.

39 6. "Retailer" means and includes every person en-

40 gaged in the business of selling tangible personal prop-
41 erty for use within the meaning of this article: *Provided,*
42 *however,* That when in the opinion of the tax commis-
43 sioner it is necessary for the efficient administration of
44 this article to regard any salesmen, representatives,
45 truckers, peddlers or canvassers as the agents of the
46 dealers, distributors, supervisors, employers or persons
47 under whom they operate or from whom they obtain the
48 tangible personal property sold by them, irrespective of
49 whether they are making sales on their own behalf or
50 on behalf of such dealers, distributors, supervisors, em-
51 ployers, or persons, the tax commissioner may so regard
52 them and may regard the dealers, distributors, super-
53 visors, employers, or persons as retailers for purposes of
54 this article.

55 7. "Retailer maintaining a place of business in this
56 state" or any like term shall mean and include any re-
57 tailer having or maintaining within this state, directly or
58 by a subsidiary, an office, distribution houses, sales house,
59 ware-house, or other place of business, or any agent oper-
60 ating within this state under the authority of the retailer

61 or its subsidiary, irrespective of whether such place of
62 business or agent is located here permanently or tem-
63 porarily, or whether such retailer or subsidiary is ad-
64 mitted to do business within this state pursuant to section
65 seventy-nine, article one, chapter thirty-one of the code
66 of West Virginia, one thousand nine hundred thirty-one.

67 8. The word "commissioner" means the state tax com-
68 missioner.

69 9. The word "taxpayer" includes any person within
70 the meaning of subsection one hereof, who is subject to a
71 tax imposed by this article, whether acting for himself or
72 as a fiduciary.

Sec. 2. *Imposition of Tax.*—An excise tax is hereby
2 imposed on the use in this state of tangible personal
3 property furnished or delivered within this state to con-
4 sumers or users within this state on or after the effec-
5 tive date of this article, at the rate of two per cent of the
6 purchase price of such property. Said tax is hereby im-
7 posed upon every person using such property within this
8 state until such tax has been paid directly to a retailer, or
9 to the state tax commissioner as hereinafter provided.

10 Purchases of tangible personal property made from the
11 Government of the United States or any of its agencies
12 by ultimate consumers shall be subject to the tax imposed
13 by this section. Industrial materials and equipment owned
14 by the federal government within the state of West Vir-
15 ginia of a character not ordinarily readily obtainable
16 within the state, shall not be subject to use tax when
17 sold, if such industrial materials and equipment would not
18 be subject to use tax if such were sold outside of the state
19 for use in West Virginia.

20 This act shall not apply to purchases made by counties
21 or municipal corporations.

Sec. 3. *Exemptions.*—The use in this state of the fol-
2 lowing tangible personal property is hereby specifically
3 exempted from the tax imposed by this article.

4 1. All articles of tangible personal property brought
5 into the state of West Virginia by a non-resident indi-
6 vidual thereof for his or her use or enjoyment while
7 within the state.

8 2. Tangible personal property, the gross receipts from
9 the sale of which are exempted from the retail sales tax

10 by the terms of section nine, article fifteen, chapter eleven
11 of the code of West Virginia, one thousand nine hundred
12 thirty-one.

13 3. Tangible personal property, the gross receipts from
14 the sale of which are derived from the sale of machinery,
15 supplies and materials to contractors, or to persons en-
16 gaged in the business of manufacturing, transportation,
17 transmission, communication or in the production of nat-
18 ural resources in this state.

19 4. Tangible personal property, the gross receipts or
20 the gross proceeds from the sale of which are required
21 to be included in the measure of the tax imposed by arti-
22 cle fifteen, chapter eleven of the code of West Virginia,
23 one thousand nine hundred thirty-one, and any amend-
24 ment made or which may hereafter be made thereto.

25 5. Tangible personal property the sale of which in this
26 state is not subject to the West Virginia Consumers' Sales
27 Tax.

Sec. 4. *Evidence of Use.*—For the purpose of the
2 proper administration of this article to prevent evasion
3 of the tax, evidence that tangible personal property was

4 sold by any person for delivery in this state shall be
5 prima facie evidence that such tangible personal property
6 was sold for use in this state.

Sec. 5. *How Collected.*—The tax herein imposed shall
2 be collected in the following manner:

3 1. The tax upon the use of all tangible personal prop-
4 erty, which is sold by a retailer maintaining a place of
5 business in this state, or by such other retailer as the tax
6 commissioner shall authorize pursuant to section seven
7 of this article shall be collected by such retailer and re-
8 mitted to the state tax commissioner, pursuant to the
9 provisions of sections six to ten, inclusive of this article.

10 2. The tax upon the use of all tangible personal prop-
11 erty not paid pursuant to subsection one of this section
12 shall be paid to the tax commissioner directly by any
13 person using such property within this state, pursuant
14 to the provisions of section eleven of this article.

Sec. 6. *Collection by Retailer.*—Every retailer main-
2 taining a place of business in this state and making sales
3 of tangible personal property for use in this state, not
4 exempted under the provisions of section three of this

5 article, shall at the time of making such sales, whether
6 within or without the state, collect the tax imposed by this
7 article from the purchaser, and give to the purchaser a
8 receipt therefor in the manner and form prescribed by
9 the tax commissioner, if the tax commissioner shall, by
10 regulation, require such receipt. Each such retailer shall
11 list with the tax commissioner the name and address of
12 all his agents operating in this state, and the location of
13 any and all his distribution or sales houses or offices or
14 other places of business in this state.

Sec. 7. *Foreign Retailers.*—The tax commissioner may,
2 in his discretion, upon application authorize the collec-
3 tion of the tax herein imposed by any retailer not main-
4 taining a place of business within this state, who, to the
5 satisfaction of the tax commissioner furnishes adequate
6 security to insure collection and payment of the tax. Such
7 retailer shall be issued, without charge, a permit to col-
8 lect such tax in such manner, and subject to such regula-
9 tions and agreements as the tax commissioner shall pre-
10 scribe. When so authorized, it shall be the duty of such
11 retailer to collect the tax upon all tangible personal prop-

12 erty sold to his knowledge for use within this state, in
13 the same manner and subject to the same requirements as
14 a retailer maintaining a place of business within this
15 state. Such authority and permit may be cancelled when,
16 at any time, the tax commissioner considers the security
17 inadequate, or that such tax can more effectively be col-
18 lected from the person using such property in this state.

Sec. 8. *Absorbing Tax.*—It shall be unlawful for any
2 retailer to advertise or hold out or state to the public or
3 to any purchaser, consumer or user, directly or indirectly,
4 that the tax or any part thereof imposed by this article
5 will be assumed or absorbed by the retailer or that it will
6 not be added to the selling price of the property sold, or if
7 added that it or any part thereof will be refunded. The
8 tax commissioner shall have the power to adopt and
9 promulgate rules and regulations for adding such tax, or
10 the equivalent thereof, by providing different methods
11 applying uniformly to retailers within the same general
12 classification for the purpose of enabling such retailers
13 to add and collect, as far as practicable, the amount of
14 such tax. Any person violating any of the provisions of

15 this section within this state shall be guilty of a misde-
16 meanor and subject to the penalties provided in section
17 twenty of this article.

Sec. 9. *Tax as Debt.*—The tax herein required to be
2 collected by any retailer pursuant to sections six or seven,
3 and any tax collected by any retailer pursuant to said
4 sections, shall constitute a debt owed by the retailer to
5 this state.

Sec. 10. *Payment to Tax Commissioner.*—Each re-
2 tailer required or authorized, pursuant to sections six or
3 seven, to collect the tax herein imposed, shall be required
4 to pay to the tax commissioner the amount of such tax on
5 or before the fifteenth day of the month next succeeding
6 each quarterly period, the first such quarterly period
7 being the period commencing on the first day of July, one
8 thousand nine hundred fifty-one, and ending on the thir-
9 tieth day of September, one thousand nine hundred fifty-
10 one. At such time, each retailer shall file with the tax com-
11 missioner a return for the preceding quarterly period in
12 such form as may be prescribed by the tax commissioner
13 showing the sales price of any or all tangible personal prop-

14 erty sold by the retailer during such preceding quarterly
15 period, the use of which is subject to the tax imposed by
16 this article, and such other information as the tax com-
17 missioner may deem necessary for the proper adminis-
18 tration of this article. The return shall be accompanied
19 by a remittance of the amount of such tax, for the period
20 covered by the return, provided that where such tangible
21 personal property is sold under a conditional sales con-
22 tract, or under any other form of sale wherein the pay-
23 ment of the principal sum, or a part thereof, is extended
24 over a period longer than sixty days from the date of the
25 sale thereof, the retailer may collect and remit each quar-
26 terly period that portion of the tax—equal to two per cent
27 of that portion of the purchase price actually received
28 during such quarterly period. The tax commissioner, if
29 he deems it necessary in order to insure payment to the
30 state of the amount of such tax, may in any or all cases
31 require returns and payments of such amount to be made
32 for other than quarterly periods. The tax commissioner
33 may, upon request and a proper showing of the necessity
34 therefor, grant an extension of time not to exceed thirty

35 days for making any return and payment. Returns shall
36 be signed by the retailer or his duly authorized agent,
37 and must be certified by him to be correct.

Sec. 11. *Liability of User.*—Any person who uses any
2 tangible personal property upon which the tax herein im-
3 posed has not been paid either to a retailer or direct to the
4 tax commissioner as herein provided, shall be liable
5 therefor, and shall on or before the fifteenth day of the
6 month next succeeding each quarterly period pay the tax
7 herein imposed upon all such property used by him during
8 the preceding quarterly period in such manner and ac-
9 companied by such returns as the tax commissioner shall
10 prescribe. All of the provisions of section ten with refer-
11 ence to such returns and payment shall be applicable to
12 the returns and payments herein required.

Sec. 12. *Bond to Secure Payment.*—The tax commis-
2 sioner may, when in his judgment it is necessary and ad-
3 visable to do so in order to secure the collection of the
4 tax levied under this article, authorize any person subject
5 to such tax, and any retailer required or authorized to
6 collect such tax pursuant to the provisions of sections

7 six and seven, to file with him a bond issued by a surety
8 company authorized to transact business in this state and
9 approved by the insurance commissioner as to solvency
10 and responsibility, in such amount as the tax commis-
11 sioner may fix, to secure the payment of any tax, amount,
12 and/or penalties due or which may become due from such
13 person. In lieu of such bond, securities approved by the
14 tax commissioner, in such amount as he may prescribe,
15 may be deposited with him, which securities shall be kept
16 in the custody of the state treasurer and may be sold by
17 him at public or private sale, after notice to the de-
18 positor thereof, if it becomes necessary to do so in order
19 to recover any tax and/or penalties due. Upon any such
20 sale, the surplus, if any, above the amounts due under
21 this article shall be returned to the person who deposited
22 the securities.

Sec. 13. *Determination by Tax Commissioner.*—If any
2 return required by this article is not filed, or if a return
3 when filed is incorrect or insufficient and the maker fails
4 to file a corrected or sufficient return within twenty days
5 after the same is required by notice from the tax commis-

6 sioner, such tax commissioner shall determine the amount
7 of the tax due, from such evidence as he may be able
8 to obtain. The tax commissioner shall give notice of such
9 determination to the person liable for the tax. Such
10 determination shall finally and irrevocably fix the tax
11 unless the person against whom it is assessed shall,
12 within thirty days after the giving of notice of such
13 determination apply to the tax commissioner for a hearing
14 or unless the tax commissioner of his own motion shall
15 reduce the same. At such hearing evidence may be offered
16 to support such determination or to prove that it is in-
17 correct. After such hearing the tax commissioner shall
18 within a reasonable time give notice of his decision to
19 the person liable for the tax.

Sec. 14. *Appeal.*—An appeal may be taken by the tax-
2 payer to the circuit court of the county in which he re-
3 sides, or in which his principal place of business is lo-
4 cated, within thirty days after he shall have received
5 notice from the tax commissioner of his determination as
6 provided for in section thirteen of this article.

7 The appeal shall be taken by a written notice to the tax

8 commissioner and served as an original notice. When said
9 notice is so served it shall with the return thereon, be
10 filed in the office of the clerk of said circuit court, and
11 docketed as other cases, with the taxpayer as plaintiff
12 and the tax commissioner as defendant. The plaintiff
13 shall file with such clerk a bond for the use of the de-
14 fendant, with sureties approved by such clerk, in penalty
15 at least double the amount of tax appealed from, and in
16 no case shall the bond be less than fifty dollars, condi-
17 tioned that the plaintiff shall perform the orders of the
18 court.

19 The court shall hear the appeal in equity and determine
20 anew all questions submitted to it on appeal from the
21 determination of the tax commissioner. In such appeal
22 the burden of proof shall be upon the taxpayer. The court
23 shall render its decree thereon and a certified copy of said
24 decree shall be filed by the clerk of said court with the
25 tax commissioner who shall then correct the assessment
26 in accordance with said decree. An appeal may be taken
27 by the taxpayer or the tax commissioner to the Supreme
28 Court of Appeals of this state in the same manner that
29 appeals are taken in suits in equity.

Sec. 15. *Service of Notice.*—Any notice, except notice
2 of appeal, authorized or required under the provisions of
3 this article may be given by mailing the same to the per-
4 son for whom it is intended by registered mail, addressed
5 to such person at the address given in last return filed by
6 him pursuant to the provisions of this article, or if no
7 return has been filed, then to such address as may be ob-
8 tainable. The mailing of such notice shall be presumptive
9 evidence of the receipt of the same by the person to whom
10 addressed. Any period of time which is determined ac-
11 cording to the provision of this article by the giving of
12 notice shall commence to run from the date of registra-
13 tion and posting of such notice.

Sec. 16. *Failure to Pay; Penalties.*—Any person failing
2 to file a return or corrected return or to pay any tax
3 and/or amount required to be paid by this article within
4 the time required by this article, shall be subject to a
5 penalty of five per cent of the amount due plus one per
6 cent of such amount for each month of delay or fraction
7 thereof, after such return was required to be filed or such
8 tax or amount became due; but the tax commissioner, if

9 satisfied that the delay was excusable, may remit all or
10 any part of such penalty. Such penalty shall be paid to the
11 tax commissioner. Unpaid penalties may be enforced in
12 the same manner as the tax imposed by this article. The
13 certificate of the tax commissioner to the effect that a tax
14 and/or amount required to be paid by this article has not
15 been paid, that a return has not been filed, or that infor-
16 mation has not been supplied pursuant to the provisions
17 of this article, shall be prima facie evidence thereof.

Sec. 17. *Assessment; Levy to Collect Tax.*—The tax
2 commissioner shall have power to make an assessment
3 against any person subject to the tax imposed by this
4 article which is due and unpaid. Such assessment may
5 include penalties. The tax commissioner may collect
6 such assessment by levy, action at law, distraint or any
7 other method of enforcing or collecting taxes which may
8 be provided by law and shall have the right to file liens
9 therefor in any county.

Sec. 18. *Seller Must Show Sale Not at Retail; Presump-*
2 *tion.*—The burden of proving that a sale was not at retail
3 shall be upon the seller, unless he takes from the pur-

4 chaser a certificate signed by and bearing the address of
5 the purchaser to the effect that the property was pur-
6 chased for resale. To prevent evasion it shall be pre-
7 sumed that all proceeds are subject to the tax until the
8 contrary is clearly established.

Sec. 19. *Fraud.*—Any person required to make, render,
2 sign, or certify any return or supplementary return,
3 who makes any false or fraudulent return with intent
4 to defeat or evade the tax, and/or amount required to
5 be paid by this article, shall be guilty of a misdemeanor
6 and shall, for each such offense, be fined not less than
7 fifty dollars and not more than five hundred dollars, or
8 be confined in jail not more than sixty days, or be sub-
9 ject to both such fine and confinement in the discretion
10 of the court.

Sec. 20. *Criminal Penalty.*—Any retailer or other per-
2 son failing or refusing within a reasonable time to fur-
3 nish any return herein required to be made, or failing or
4 refusing within a reasonable time to furnish a supple-
5 mental return or other data required by the tax com-
6 missioner, shall be guilty of a misdemeanor and subject

7 to a fine of not to exceed one hundred dollars for each
8 such offense, or to imprisonment for not to exceed thirty
9 days, or to both such fine and imprisonment in the dis-
10 cretion of the court.

Sec. 21. *Books; Examination.*—Every retailer required
2 or authorized to collect taxes imposed by this article
3 and every person using in this state tangible personal
4 property purchased on or after the effective date of this
5 article, shall keep such records, receipts, invoices, and
6 other pertinent papers as the tax commissioner shall
7 require, in such form as the tax commissioner shall re-
8 quire. The tax commissioner or any of his duly author-
9 ized agents is hereby authorized to examine the books,
10 papers, records, and equipment of any person either
11 selling tangible personal property or liable for the tax
12 imposed by this article, and to investigate the character
13 of the business of any such person in order to verify the
14 accuracy of any return made, or if no return was made
15 by such person, to ascertain and determine the amount
16 due under the provisions of this article. Any such books,
17 papers, and records shall be made available within this

18 state for such examination upon reasonable notice when
19 the tax commissioner shall deem it advisable and shall
20 so order. However, where the taxpayer's records must
21 be kept out of state, the taxpayer may upon being noti-
22 fied by the tax commissioner that an examination is to
23 be made, elect to do one of the following: (1) Forthwith
24 transport the required records to a convenient point in
25 West Virginia and notify the tax commissioner that they
26 are available; or (2) pay the reasonable traveling ex-
27 penses of the tax commissioner's representatives from
28 Charleston, West Virginia, to the out of state place where
29 the records are kept, and return, and reasonable living
30 expenses of such representatives while engaged in their
31 examination.

Sec. 22. *Revoking Permits.*—Whenever any retailer
2 maintaining a place of business in this state, or authorized
3 to collect the tax herein imposed pursuant to section
4 seven of this article fails to comply with any of the pro-
5 visions of this article or any orders, rules or regulations
6 of the tax commissioner prescribed and adopted under
7 this article, the tax commissioner may, upon notice and

8 hearing hereinafter provided, by order revoke the store
9 license, if any, issued to such retailer under article
10 thirteen-a, chapter eleven of the code of West Virginia,
11 one thousand nine hundred thirty-one, as amended, or
12 if such retailer is a corporation authorized to do business
13 in this state under section seventy-nine, article one,
14 chapter thirty-one of said code, may certify to the secre-
15 tary of state a copy of an order finding that such retailer
16 has failed to comply with certain specified provisions,
17 orders, rules or regulations. The secretary of state shall,
18 upon receipt of such certified copy, revoke the permit
19 authorizing said corporation to do business in this state,
20 and shall issue a new permit only when such corporation
21 shall have obtained from the tax commissioner an order
22 finding that such corporation has complied with its ob-
23 ligations under this article. No order authorized in this
24 section shall be made until the retailer is given an op-
25 portunity to be heard and to show cause why such order
26 should not be made, and he shall be given twenty days
27 notice of the time, place, and purpose of such hearing.
28 The tax commissioner shall have the power in his dis-

29 cretion to issue a new store permit after such revocation.

Sec. 23. *Tax Imposed is in Addition to all other Taxes*

2 *and Charges.*—The tax imposed under this article shall

3 be in addition to all other taxes, licenses or charges to

4 which the persons taxed herein are subject under the law

5 of this state. It is the purpose of this article to rest a

6 fair share of the tax burden, commensurate with the

7 benefits received, upon those exercising the privilege

8 taxed hereby within this state.

Sec. 24. *Refund.*—All claims for the refund of over-

2 payments of the tax imposed by this article must be ac-

3 companied by amended returns showing the amount of

4 taxes due, the amount paid in error and the amount

5 overpaid. Where such error is not apparent from an

6 examination of the return, the taxpayer must furnish

7 a full and complete statement of the reasons for the dif-

8 ferences between the original and amended returns.

9 Before finally passing upon a claim the tax commissioner

10 may require the production of any further evidence con-

11 sidered necessary in order to arrive at a correct finding.

12 The tax commissioner can issue refunds of the tax im-

13 posed by this article only where application for such
14 refund is made within two years from the date of pay-
15 ment of such tax as provided for in section two-a, article
16 one, chapter eleven of the code of West Virginia, one
17 thousand nine hundred thirty-one, as amended.

Sec. 25. *Administration of Article.*—The administra-
2 tion of this article is vested in and shall be exercised by
3 the tax commissioner who shall prescribe forms and
4 reasonable rules and regulations in conformity with this
5 article for the making of returns and for the ascertain-
6 ment, assessment and collection of the taxes imposed
7 hereunder; and the enforcement of any provisions of this
8 article in any of the courts of the state shall be under the
9 exclusive jurisdiction of the tax commissioner.

Sec. 26. *Proceeds of Tax for Free Schools.*—The pro-
2 ceeds of the tax imposed by this article shall be devoted
3 to the support of the free schools, and be expended in
4 such manner as may be provided by law.

Sec. 27. *Partial Unconstitutionality.*—The provisions of
2 this article shall be deemed to be severable and if for any
3 reason any provision shall be determined to be uncon-

4 stitutional or invalid, such determination shall not be
5 held to affect any other provision hereof.

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STATE OF CALIFORNIA
DEPARTMENT OF REVENUE
SAN FRANCISCO

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Robert C. Bevel

Chairman Senate Committee

James O. Prop
Chairman House Committee

Originated in the Senate.

Takes effect *July 1, 1951* passage.

Howard K. Meyer
Clerk of the Senate

R. G. Cliff
Clerk of the House of Delegates

Robert C. Bevel
President of the Senate

W. E. Kan
Speaker House of Delegates

The within *approved* this the *16th*
day of *March*, 1951.

Okey L. Patterson
Governor.



MADE IN THE OFFICE OF THE CLERK OF THE SENATE
of West Virginia

MAR 16 1951

D. PITT O'BRIEN,
SECRETARY OF STATE