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

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

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

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

6. "Retailer" means and includes every person en-
gaged in the business of selling tangible personal prop-
erty for use within the meaning of this article: Provided,
however, That when in the opinion of the tax commis-
sioner it is necessary for the efficient administration of
this article to regard any salesmen, representatives,
truckers, peddlers or canvassers as the agents of the
dealers, distributors, supervisors, employers or persons
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, em-
ployers, or persons, the tax commissioner may so regard
them and may regard the dealers, distributors, super-
visors, employers, or persons as retailers for purposes of
this article.

7. "Retailer maintaining a place of business in this
state" or any like term shall mean and include any re-
tailer having or maintaining within this state, directly or
by a subsidiary, an office, distribution houses, sales house,
ware-house, or other place of business, or any agent oper-
at ing within this state under the authority of the retailer
or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state pursuant to section seventy-nine, article one, chapter thirty-one of the code of West Virginia, one thousand nine hundred thirty-one.

8. The word “commissioner” means the state tax commissioner.

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

Sec. 2. Imposition of Tax.—An excise tax is hereby imposed on the use in this state of tangible personal property furnished or delivered within this state to consumers or users within this state on or after the effective date of this article, at the rate of two per cent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to a retailer, or to the state tax commissioner as hereinafter provided.
Purchases of tangible personal property made from the Government of the United States or any of its agencies by ultimate consumers shall be subject to the tax imposed by this section. Industrial materials and equipment owned by the federal government within the state of West Virginia of a character not ordinarily readily obtainable within the state, shall not be subject to use tax when sold, if such industrial materials and equipment would not be subject to use tax if such were sold outside of the state for use in West Virginia.

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

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

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

2. Tangible personal property, the gross receipts from 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
sold by any person for delivery in this state shall be prima facie evidence that such tangible personal property was sold for use in this state.

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

1. The tax upon the use of all tangible personal property, which is sold by a retailer maintaining a place of business in this state, or by such other retailer as the tax commissioner shall authorize pursuant to section seven of this article shall be collected by such retailer and remitted to the state tax commissioner, pursuant to the provisions of sections six to ten, inclusive of this article.

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

Sec. 6. Collection by Retailer.—Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of section three of this
article, shall at the time of making such sales, whether within or without the state, collect the tax imposed by this article from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the tax commissioner, if the tax commissioner shall, by regulation, require such receipt. Each such retailer shall list with the tax commissioner the name and address of all his agents operating in this state, and the location of any and all his distribution or sales houses or offices or other places of business in this state.

Sec. 7. Foreign Retailers.—The tax commissioner may, in his discretion, upon application authorize the collection of the tax herein imposed by any retailer not maintaining a place of business within this state, who, to the satisfaction of the tax commissioner furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax in such manner, and subject to such regulations and agreements as the tax commissioner shall prescribe. When so authorized, it shall be the duty of such retailer to collect the tax upon all tangible personal prop-
property sold to his knowledge for use within this state, in
the same manner and subject to the same requirements as
a retailer maintaining a place of business within this
state. Such authority and permit may be cancelled when,
at any time, the tax commissioner considers the security
inadequate, or that such tax can more effectively be col-
lected from the person using such property in this state.

Sec. 8. Absorbing Tax.—It shall be unlawful for any
retailer to advertise or hold out or state to the public or
to any purchaser, consumer or user, directly or indirectly,
that the tax or any part thereof imposed by this article
will be assumed or absorbed by the retailer or that it will
not be added to the selling price of the property sold, or if
added that it or any part thereof will be refunded. The
tax commissioner shall have the power to adopt and
promulgate rules and regulations for adding such tax, or
the equivalent thereof, by providing different methods
applying uniformly to retailers within the same general
classification for the purpose of enabling such retailers
to add and collect, as far as practicable, the amount of
such tax. Any person violating any of the provisions of
this section within this state shall be guilty of a misde-
meanor and subject to the penalties provided in section
twenty of this article.

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

Sec. 10. Payment to Tax Commissioner.—Each re-
tailer required or authorized, pursuant to sections six or
seven, to collect the tax herein imposed, shall be required
to pay to the tax commissioner the amount of such tax on
or before the fifteenth day of the month next succeeding
each quarterly period, the first such quarterly period
being the period commencing on the first day of July, one
thousand nine hundred fifty-one, and ending on the thir-
tieth day of September, one thousand nine hundred fifty-
one. At such time, each retailer shall file with the tax com-
missioner a return for the preceding quarterly period in
such form as may be prescribed by the tax commissioner
showing the sales price of any or all tangible personal prop-
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14 erty sold by the retailer during such preceding quarterly period, the use of which is subject to the tax imposed by this article, and such other information as the tax commissioner may deem necessary for the proper administration of this article. The return shall be accompanied by a remittance of the amount of such tax, for the period covered by the return, provided that where such tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof, is extended over a period longer than sixty days from the date of the sale thereof, the retailer may collect and remit each quarterly period that portion of the tax—equal to two per cent of that portion of the purchase price actually received during such quarterly period. The tax commissioner, if he deems it necessary in order to insure payment to the state of the amount of such tax, may in any or all cases require returns and payments of such amount to be made for other than quarterly periods. The tax commissioner may, upon request and a proper showing of the necessity therefor, grant an extension of time not to exceed thirty
days for making any return and payment. Returns shall be signed by the retailer or his duly authorized agent, and must be certified by him to be correct.

Sec. 11. Liability of User.—Any person who uses any tangible personal property upon which the tax herein imposed has not been paid either to a retailer or direct to the tax commissioner as herein provided, shall be liable therefor, and shall on or before the fifteenth day of the month next succeeding each quarterly period pay the tax herein imposed upon all such property used by him during the preceding quarterly period in such manner and accompanied by such returns as the tax commissioner shall prescribe. All of the provisions of section ten with reference to such returns and payment shall be applicable to the returns and payments herein required.

Sec. 12. Bond to Secure Payment.—The tax commissioner may, when in his judgment it is necessary and advisable to do so in order to secure the collection of the tax levied under this article, authorize any person subject to such tax, and any retailer required or authorized to collect such tax pursuant to the provisions of sections
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six and seven, to file with him a bond issued by a surety company authorized to transact business in this state and approved by the insurance commissioner as to solvency and responsibility, in such amount as the tax commissioner may fix, to secure the payment of any tax, amount, and/or penalties due or which may become due from such person. In lieu of such bond, securities approved by the tax commissioner, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the state treasurer and may be sold by him at public or private sale, after notice to the depositor thereof, if it becomes necessary to do so in order to recover any tax and/or penalties due. Upon any such sale, the surplus, if any, above the amounts due under this article shall be returned to the person who deposited the securities.

Sec. 13. Determination by Tax Commissioner.—If any return required by this article is not filed, or if a return when filed is incorrect or insufficient and the maker fails to file a corrected or sufficient return within twenty days after the same is required by notice from the tax commiss-
sioner, such tax commissioner shall determine the amount of the tax due, from such evidence as he may be able to obtain. The tax commissioner shall give notice of such determination to the person liable for the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days after the giving of notice of such determination apply to the tax commissioner for a hearing or unless the tax commissioner of his own motion shall reduce the same. At such hearing evidence may be offered to support such determination or to prove that it is incorrect. After such hearing the tax commissioner shall within a reasonable time give notice of his decision to the person liable for the tax.

Sec. 14. Appeal.—An appeal may be taken by the taxpayer to the circuit court of the county in which he resides, or in which his principal place of business is located, within thirty days after he shall have received notice from the tax commissioner of his determination as provided for in section thirteen of this article.

The appeal shall be taken by a written notice to the tax
commissioner and served as an original notice. When said notice is so served it shall with the return thereon, be filed in the office of the clerk of said circuit court, and docketed as other cases, with the taxpayer as plaintiff and the tax commissioner as defendant. The plaintiff shall file with such clerk a bond for the use of the defendant, with sureties approved by such clerk, in penalty at least double the amount of tax appealed from, and in no case shall the bond be less than fifty dollars, conditioned that the plaintiff shall perform the orders of the court.

The court shall hear the appeal in equity and determine anew all questions submitted to it on appeal from the determination of the tax commissioner. In such appeal the burden of proof shall be upon the taxpayer. The court shall render its decree thereon and a certified copy of said decree shall be filed by the clerk of said court with the tax commissioner who shall then correct the assessment in accordance with said decree. An appeal may be taken by the taxpayer or the tax commissioner to the Supreme Court of Appeals of this state in the same manner that appeals are taken in suits in equity.
Sec. 15. Service of Notice.—Any notice, except notice of appeal, authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended by registered mail, addressed to such person at the address given in last return filed by him pursuant to the provisions of this article, or if no return has been filed, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provision of this article by the giving of notice shall commence to run from the date of registration and posting of such notice.

Sec. 16. Failure to Pay; Penalties.—Any person failing to file a return or corrected return or to pay any tax and/or amount required to be paid by this article within the time required by this article, shall be subject to a penalty of five per cent of the amount due plus one per cent of such amount for each month of delay or fraction thereof, after such return was required to be filed or such tax or amount became due; but the tax commissioner, if
satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the tax commissioner. Unpaid penalties may be enforced in the same manner as the tax imposed by this article. The certificate of the tax commissioner to the effect that a tax and/or amount required to be paid by this article has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this article, shall be prima facie evidence thereof.

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

Sec. 18. *Seller Must Show Sale Not at Retail; Presumption.*—The burden of proving that a sale was not at retail shall be upon the seller, unless he takes from the pur-
chaser a certificate signed by and bearing the address of
the purchaser to the effect that the property was pur-
chased for resale. To prevent evasion it shall be pre-
sumed that all proceeds are subject to the tax until the
contrary is clearly established.

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

Sec. 20. Criminal Penalty.—Any retailer or other per-
son failing or refusing within a reasonable time to fur-
nish any return herein required to be made, or failing or
refusing within a reasonable time to furnish a supple-
mental return or other data required by the tax com-
missioner, shall be guilty of a misdemeanor and subject
to a fine of not to exceed one hundred dollars for each such offense, or to imprisonment for not to exceed thirty days, or to both such fine and imprisonment in the discretion of the court.

Sec. 21. Books; Examination.—Every retailer required or authorized to collect taxes imposed by this article and every person using in this state tangible personal property purchased on or after the effective date of this article, shall keep such records, receipts, invoices, and other pertinent papers as the tax commissioner shall require, in such form as the tax commissioner shall require. The tax commissioner or any of his duly authorized agents is hereby authorized to examine the books, papers, records, and equipment of any person either selling tangible personal property or liable for the tax imposed by this article, and to investigate the character of the business of any such person in order to verify the accuracy of any return made, or if no return was made by such person, to ascertain and determine the amount due under the provisions of this article. Any such books, papers, and records shall be made available within this
state for such examination upon reasonable notice when
the tax commissioner shall deem it advisable and shall
so order. However, where the taxpayer's records must
be kept out of state, the taxpayer may upon being noti-
ified by the tax commissioner that an examination is to
be made, elect to do one of the following: (1) Forthwith
transport the required records to a convenient point in
West Virginia and notify the tax commissioner that they
are available; or (2) pay the reasonable traveling ex-
penses of the tax commissioner's representatives from
Charleston, West Virginia, to the out of state place where
the records are kept, and return, and reasonable living
expenses of such representatives while engaged in their
examination.

Sec. 22. Revoking Permits.—Whenever any retailer
maintaining a place of business in this state, or authorized
to collect the tax herein imposed pursuant to section
seven of this article fails to comply with any of the pro-
visions of this article or any orders, rules or regulations
of the tax commissioner prescribed and adopted under
this article, the tax commissioner may, upon notice and
hearing hereinafter provided, by order revoke the store license, if any, issued to such retailer under article thirteen-a, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, or if such retailer is a corporation authorized to do business in this state under section seventy-nine, article one, chapter thirty-one of said code, may certify to the secretary of state a copy of an order finding that such retailer has failed to comply with certain specified provisions, orders, rules or regulations. The secretary of state shall, upon receipt of such certified copy, revoke the permit authorizing said corporation to do business in this state, and shall issue a new permit only when such corporation shall have obtained from the tax commissioner an order finding that such corporation has complied with its obligations under this article. No order authorized in this section shall be made until the retailer is given an opportunity to be heard and to show cause why such order should not be made, and he shall be given twenty days notice of the time, place, and purpose of such hearing. The tax commissioner shall have the power in his dis-
Sec. 23. Tax Imposed is in Addition to all other Taxes and Charges.—The tax imposed under this article shall be in addition to all other taxes, licenses or charges to which the persons taxed herein are subject under the law of this state. It is the purpose of this article to rest a fair share of the tax burden, commensurate with the benefits received, upon those exercising the privilege taxed hereby within this state.

Sec. 24. Refund.—All claims for the refund of overpayments of the tax imposed by this article must be accompanied by amended returns showing the amount of taxes due, the amount paid in error and the amount overpaid. Where such error is not apparent from an examination of the return, the taxpayer must furnish a full and complete statement of the reasons for the differences between the original and amended returns. Before finally passing upon a claim the tax commissioner may require the production of any further evidence considered necessary in order to arrive at a correct finding. 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.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Robert C. Byrd
Chairman Senate Committee

James O. Peery
Chairman House Committee

Originated in the Senate.

Takes effect July 1, 1951, passage.

Frank H. Kennard
Clerk of the Senate

W. Clifford Metcalfe
Clerk of the House of Delegates

W. E. Kanawha
President of the Senate

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

Okey L. Patterson
Governor

[Signature]

D. Pitt O'Brien
Secretary of State