WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1955

ENROLLED

HOUSE BILL No. 127

(By Mr.

PASSED Mar 12 1955

In Effect 90 days from Passage

Filed In the Office of the Secretary of State of West Virginia MAR 18 1955

D. PITT O'BRIEN
SECRETARY OF STATE
ENROLLED
COMMITTEE SUBSTITUTE FOR
House Bill No. 127

[Passed March 12, 1955; in effect ninety days from passage.]

AN ACT to amend and reenact sections two, three, four, six, seven, eight, nine, thirteen, fourteen, sixteen, seventeen, eighteen, eighteen-a, nineteen, twenty-two, and twenty-four, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, to repeal section eleven of said article, and to enact nine new sections, to be designated sections four-a, four-b, eighteen-b, twenty-four-a, twenty-four-b, twenty-four-c, twenty-four-d, twenty-four-e and twenty-four-f, all relating to the consumers' sales and service tax.

Be it enacted by the Legislature of West Virginia:

That sections two, three, four, six, seven, eight, nine, thirteen, fourteen, sixteen, seventeen, eighteen, eighteen-a, nineteen, twenty-two and twenty-four, article fifteen, chapter eleven, of the code of West Virginia, one thousand nine hundred thirty-

one, as amended, be amended and reenacted, that section eleven
of said article be repealed and that nine new sections, desig­
nated sections four-a, four-b, eighteen-b, twenty-four-a, twenty-
four-b, twenty-four-c, twenty-four-d, twenty-four-e, and
twenty-four-f, be enacted all to read as follows:

Section 2. Definitions.—For the purpose of this article:

2 (1) “Persons” shall mean any individual, partnership,
association, corporation, municipal corporation, guardian,
trustee, committee, executor or administrator;

2 (2) “Tax commissioner” shall mean the state tax
commissioner;

7 (3) “Gross proceeds” shall mean the amount received
in money, credits, property or other consideration from
sales and services within this state, without deduction on
account of the cost of property sold, amounts paid for
interest or discounts or other expenses whatsoever. Losses
shall not be deducted, but any credit or refund made for
goods returned may be deducted;

14 (4) “Sale”, “sales” or “selling” shall include any trans-
fer of the possession or ownership of tangible personal
property for a consideration when the transfer or de-
livery is made in the ordinary course of the transferor's business and is made to the transferee or his agent for consumption or use or any other purpose;

(5) "Vendor" shall mean any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property;

(6) "Ultimate consumer" or "consumer" shall mean a person who uses or consumes services or personal property;

(7) "Business" shall include all activities engaged in or caused to be engaged in with the object of gain or economic benefit, direct or indirect, and all activities of the state and its political subdivisions which involve sales of tangible personal property or the rendering of services when those service activities compete with or may compete with the activities of other persons;

(8) "Tax" shall include all taxes, interest and penalties levied hereunder;

(9) "Service" or "selected service" shall include all non-professional activities engaged in for other persons for a consideration, which involve the rendering of a
service as distinguished from the sale of tangible personal property, but shall not include personal services or the services rendered by an employee to his employer or any service rendered for resale;

(10) “Purchaser” shall mean a person who purchases tangible personal property or a service taxed by this article;

(11) “Personal service” shall include those:

(a) Compensated by the payment of wages in the ordinary course of employment;

(b) Rendered to the person of an individual without, at the same time, selling tangible personal property, such as nursing, barbering, shoe shining, manicuring and similar services;

(12) “Taxpayer” shall mean any person liable for the tax imposed by this article.

Sec. 3. Amount of Tax.—For the privilege of selling tangible personal property and of dispensing certain selected services defined in section eight of this article, the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the tax
commissioner in accordance with the provisions of this article.

There shall be no tax on sales where the monetary consideration is five cents or less. The amount of the tax shall be computed as follows:

1. On each sale, where the monetary consideration is from six cents to fifty cents, both inclusive, one cent.

2. On each sale, where the monetary consideration is from fifty-one cents to one dollar, both inclusive, two cents.

3. On each fifty cents of monetary consideration or fraction thereof in excess of one dollar, one cent.

Sec. 4. Purchaser to Pay; Vendor Not to Represent He Will Absorb Tax; Accounting by Vendor; Penalty.—

The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectable as such by the vendor who shall account to the state for all tax paid by the purchaser. The vendor shall keep the amount of tax paid separate from the proceeds of sale exclusive of the tax unless authorized in writing by the
tax commissioner to keep such amount of tax in a different manner. Where such authorization is given, the state's claim shall be enforceable against and shall take precedence over, all other claims against the moneys commingled.

A vendor shall not represent to the public, in any manner, directly or indirectly, that he will absorb all or any part of the tax, or that the tax is not to be considered an element in the price to the purchaser. Any person who violates the provisions of this paragraph shall be guilty of a misdemeanor and upon conviction shall be punishable by a fine of not less than fifty nor more than one thousand dollars, or imprisonment in the county jail for not exceeding one year, or both, in the discretion of the court.

Sec. 4-a. Failure to Collect Tax; Liability of Vendor.—

If any vendor fails to collect the tax imposed by section three of this article, he shall be personally liable for such amount as he failed to collect.

Sec. 4-b. Liability of Purchaser; Assessment and Collection.—If any purchaser refuses to pay to the vendor the tax imposed by section three of this article, or in the case
of a sale exempt from the application of the tax, a pur-
chaser refuses to sign and present to the vendor a proper
certificate indicating the sale is not subject to this tax,
or signs or presents to the vendor a false certificate, or
after signing and presenting a proper certificate uses the
items purchased in such manner that the sale would be
subject to the tax, he shall be personally liable for the
amount of tax applicable to the transaction or transac-
tions.

In such cases the tax commissioner shall have authority
to make an assessment against such purchaser, based
upon any information within his possession or that may
come into his possession. This assessment, the notice,
hearing and appeal shall be made and conducted in ac-
cordance with sections twenty-four, twenty-four-b and
twenty-four-c of this article.

This section shall not be construed as relieving the
vendor from liability for the tax.

Sec. 6. **Vendor Must Show Sale or Service Exempt;**

*Presumption.*—The burden of proving that a sale or service
was exempt from the tax shall be upon the vendor, un-
less he takes from the purchaser an exemption certificate signed by and bearing the address of the purchaser and setting forth the reason for the exemption. To prevent evasion, it shall be presumed that all sales and services are subject to the tax until the contrary is clearly established.

Sec. 7. Tax on Gross Proceeds of Sales of Manufactured, etc., Product.—A person exercising the privilege of producing for sale, profit or commercial use, any natural resources, product or manufactured product, and engaged in the business of selling such product not otherwise exempted herein shall make returns of the gross proceeds of such sales and pay the tax imposed by this article.

Sec. 8. Furnishing of Services Included; Exceptions.—The provisions of this article shall apply not only to selling tangible personal property, but also to the furnishing of all services, except professional and personal services, and except those services furnished by corporations subject to the control of the public service commission.

Sec. 9. Exemptions.—The following sales and services shall be exempt:
(1) Sales of gasoline, taxable under article fourteen, chapter eleven of the code, one thousand nine hundred thirty-one;

(2) Sales of gas, steam and water delivered to consumers through mains or pipes, and sales of electricity;

(3) Sales of text books required to be used in any of the public schools of this state;

(4) Sales of property or services to the state, its institutions or subdivisions, and to the United States, including agencies of federal, state or local governments for distribution in public welfare or relief work;

(5) Sales of motor vehicles which are titled by the department of motor vehicles and which are subject to the tax imposed by section one, article seven, chapter seventeen of the code;

(6) Sales of property or services to churches and bona fide charitable organizations who make no charge whatever for the services they render or to persons engaged in this state in the business of contracting, manufacturing, transportation, transmission, communication, or in the production of natural resources: Provided, however,
That the exemption herein granted shall apply only to services, machinery, supplies and materials directly used or consumed in the businesses or organizations named above;

(7) An isolated transaction in which any tangible personal property is sold, transferred, offered for sale, or delivered by the owner thereof or by his representative for the owner's account, such sale, transfer, offer for sale or delivery not being made in the ordinary course of repeated and successive transactions of like character by such owner or on his account by such representative;

(8) Sales of tangible personal property and services rendered for use or consumption in connection with the conduct of the business of selling tangible personal property to consumers or dispensing a service subject to tax under this article and sales of tangible personal property and services rendered for use or consumption in connection with the commercial production of an agricultural product the ultimate sale of which will be subject to the tax imposed by this article: Provided, however, That sales of tangible personal property and services to be
used or consumed in the construction of or permanent
improvement of real property shall not be exempt;
(9) Sales of tangible personal property for the pur-
pose of resale in the form of tangible personal property;
(10) Sales of property or services to nationally char-
tered fraternal or social organizations for the sole purpose
of free distribution in public welfare or relief work.

Sec. 13. Collection of Tax When Sale on Credit.—A
vendor doing business wholly or partially on a credit
basis shall require the purchaser to pay the full amount
of tax due upon a credit sale at the time such sale is made
or within thirty days thereafter.

Sec. 14. When Separate Records of Sales Required.—
Any vendor engaged in a business subject to this tax,
who is at the same time engaged in some other kind of
business, occupation or profession, not taxable under this
article, shall keep records to show separately the trans-
actions used in determining the tax base herein taxed.
In the event such person fails to keep such separate rec-
ords there shall be levied upon him a tax based upon the
entire gross proceeds of both or all of his business.
Sec. 16. Tax Return and Payment; Penalty for Non-payment.—The taxes levied by this article shall be due and payable in monthly installments, on or before the fifteenth day of the month next succeeding the month in which the tax accrued. The taxpayer shall, on or before the fifteenth day of each month, make out and mail to the tax commissioner a return for the preceding month, in the form prescribed by the tax commissioner, showing:

(a) the total gross proceeds of his business for that month;
(b) the gross proceeds of his business upon which the tax is based; (c) the amount of the tax for which he is liable; and (d) any further information necessary in the computation and collection of the tax which the tax commissioner may require. A remittance for the amount of the tax shall accompany the return. A monthly return shall be signed by the taxpayer or his duly authorized agent.

Any taxpayer who fails to pay the tax imposed by this article within the time provided by law shall be considered delinquent and shall be required to pay a penalty of six per cent of the tax for the first month, or fraction
thereof, during which he is delinquent and one per cent
of the tax for each succeeding month, or fraction thereof,
during which he is delinquent: Provided, however, That
if the failure to pay is due to reasonable cause, the tax
commissioner may waive or remit this penalty in whole
or in part. For purposes of the imposition of this penalty,
a payment postmarked after the fifteenth day of the
month shall be considered delinquent.
If the failure is due to fraud or intent to evade this
article or the rules and regulations promulgated there-
under, there shall be added an additional penalty of
twenty-five per cent of the amount of the tax, exclusive
of penalties.
The penalties so added shall be collected at the same
time and in the same manner and as a part of the tax.

Sec. 17. Tax a Debt; Lien of Unpaid Tax; Recordation
of Lien.—A tax due and unpaid under this article shall
be a debt due the state. It shall be a personal obligation
of the taxpayer and shall be a lien upon all the property
of the taxpayer: Provided, That such lien shall be sub-
ject to the restrictions and conditions embodied in article
If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax may be enforced against them as against the association or corporation which they represent.

Sec. 18. **Enforcement of Lien.**—A lien for taxes under this article shall attach when the obligation to pay the tax to the tax commissioner accrues. The lien shall be enforceable by the tax commissioner by suit in equity.

Sec. 18-a. **Receivership; Bankruptcy; Priority of Tax.**—In the distribution, voluntary or compulsory, in receivership, bankruptcy or otherwise, of the property or estate of any person, all taxes due and unpaid under this article shall be paid from the first money available for distribution in priority to all claims and liens except taxes and debts due the United States which under federal law are given priority over the debts and liens created by this
article. Any person charged with the administration or
distribution of any such property or estate who shall
violate the provisions of this section shall be personally
liable for any taxes accrued and unpaid under this article
which are chargeable against the person whose property
or estate is in administration or distribution.

Sec. 18-b. Persons Selling or Quitting Business; Suc-
cessor to Withhold Purchase Money.—If any person liable
for the tax imposed by this article shall sell his business
or stock of merchandise or quit his business, the taxes
and penalties imposed by this article shall become due
and payable immediately and such persons shall make a
final return within fifteen days after the date of selling
or quitting business. The taxes and penalties shall be
a lien upon the property of such person. His successor, if
any, shall withhold sufficient of the purchase money to
cover the amount of such taxes and penalties due and
unpaid until such time as the former owner shall produce
a receipt from the tax commissioner showing that the
taxes and penalties have been paid or a certificate indi-
cating no taxes are due. If the purchaser of the business
or stock of goods fails to withhold purchase money, as
above provided, he shall be personally liable for the pay-
ment of the taxes and penalties accrued and unpaid on
account of the operation of the business by the former
owner.

Sec. 19. Other Times of Filing Returns.—The tax com-
missioner may, upon written request, authorize a tax-
payer whose books and records are not kept on a monthly
basis to file returns at times other than those specified in
section sixteen, but in no event shall a taxpayer make less
than one return a calendar month, except as provided
by section twenty or as may be authorized in writing
by the tax commissioner.

Sec. 22. Consolidated Returns.—A person operating two
or more places of business of like character from which
are made or dispensed sales or services which are taxable
hereunder shall file consolidated returns covering all such
sales or services to which a schedule must be attached
showing total sales and charges made for rendering such
services and total tax collections for each place of busi-
ness.
Sec. 23. *Keeping and Preservation of Records; Inspection Thereof.*—Each taxpayer shall keep complete and accurate records of taxable sales and of charges, together with a record of the tax collected thereon, and shall keep all invoices, bills of lading and such other pertinent documents in such form as the tax commissioner may by regulation require. Such records and other documents shall be open at any time, during business hours, to the inspection of the tax commissioner and his agents and shall be preserved for a period of five years, unless the tax commissioner shall consent in writing to their destruction within that period or by order required that they be kept longer.

Sec. 24. *Assessment and Collection of the Tax When Insufficiently Returned.*—If the tax commissioner believes that the tax imposed by this article is insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investi-
gate and determine or estimate the tax liability of the
taxpayer and make an assessment thereon.

Provided, however, That if the tax commissioner be-
lieves that the tax yield as compared to the taxpayer's
gross proceeds is deficient, he shall make test checks of
the tax yield as compared to gross proceeds. Such test
checks shall be conducted in the following manner: The
tax commissioner shall notify the taxpayer by mail that
he intends to make test checks upon not less than five
business days over a period of at least one month. The
taxpayer may designate in writing two of the days to be
checked or two-fifths of the days to be checked and the
tax commissioner shall designate the remainder. Dur-
ing the days designated for test checks the taxpayer shall
keep a record of individual sales and the amount of tax
collected on such sales. The totals of the sales and the
tax for each day checked shall, at the close of the business
day, be certified by representatives of the taxpayer and
the tax commissioner. When the checks are completed,
the sales for all days checked shall be totaled and the
tax collected thereon shall be totaled and from such totals
the percentage of tax yield determined. If the percentage
of tax previously returned by the taxpayer for any taxable
period is in excess of one-tenth of one per cent less than
the percentage resulting from the checks, the tax imposed
by this article shall be deemed to have been insufficiently
returned for said period and the tax commissioner shall
make an assessment based upon the percentage resulting
from the checks and applied to the taxpayer's gross pro-
cceeds for each period thus shown to be deficient, with
credit for the tax previously paid.

Sec. 24-a. Jeopardy Assessments.—If the tax commis-
sioner believes that the collection of the tax imposed by
this article will be jeopardized by delay, he shall there-
upon make an assessment of the tax, noting that fact
upon the assessment. The amount assessed shall be imme-
diately due and payable. Unless the taxpayer against
whom a jeopardy assessment is made petitions for re-
assessment within twenty days after service of notice of
the jeopardy assessment, such an assessment becomes
final.

A petition for reassessment by a person against whom
a jeopardy assessment has been made must be accom-
panied by such security as the tax commissioner may
deez necessary to insure compliance with this article.

Sec. 24-b. Notice of Assessment; Petition for Reassess-
ment; Hearing.—The tax commissioner shall give to the
taxpayer written notice of any assessment made pursuant
to this article. Unless the taxpayer to whom a notice of
assessment is directed shall, within thirty days after serv-
ice thereof, (except in the case of jeopardy assessments)
either personally or by registered mail, file with the tax
commissioner a petition in writing, verified under oath
by said taxpayer or his duly authorized agent, having
knowledge of the facts, setting forth with definiteness
and particularity the items of the assessment objected to,
together with the reason for such objections, said assess-
ments shall become and be deemed conclusive and the
amount thereof shall be payable at the end of the thirty
day period. In every case where a petition for reassess-
ment as above described is filed, the tax commissioner
shall assign a time and place for the hearing of same and
shall notify the petitioner of such hearing by written
notice at least twenty days in advance thereof and such
hearing shall be held within sixty days from the filing
of the petition for reassessment unless continued by agree-
ment or by the tax commissioner for good cause. The hear-
ing shall be informal and may be conducted by an ex-
aminer designated by the tax commissioner. At such
hearing evidence may be offered to support the assess-
ment or to prove that it is incorrect. After such hearing
the tax commissioner shall, within a reasonable time,
give notice in writing of the decision. Unless an appeal
is taken within thirty days from service of this notice,
the tax commissioner's decision shall be final.

Sec. 24-c. Appeal.—An appeal may be taken by the tax-
payer to the circuit court of the county in which the
activity taxed was engaged in, or in which the taxpayer
resides, or in the circuit court of Kanawha county, within
thirty days after he shall have received notice from the
tax commissioner of his determination as provided in
section twenty-four-b.

The appeal shall be taken by 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 the 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 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 a certified copy of the tax commissioner's assessment shall be admissible and shall constitute prima facie evidence of the tax due under the provisions of this article. 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 the state in the same manner that appeals are taken in equity.

Sec. 24-d. Collection by Action or Suit; Injunction.—

The tax commissioner may collect any tax, interest and penalty due and unpaid under the provisions of this article by action in debt, assumpsit, motion for judgment or other appropriate proceeding in the county in which (a) the activity taxed was engaged in or (b) the taxpayer resides; or by a suit to enforce the lien therefore in any county in which property of the taxpayer may be found; or, if the tax due and unpaid under this article is three hundred dollars or less, by suit in the court of any justice having jurisdiction of the taxpayer or of his property.

If the failure of any taxpayer to comply with the provisions of this article shall have continued sixty days, the tax commissioner may proceed to obtain an injunction restraining the taxpayer from doing business in this state until he fully complies with the provisions of this article. In any proceeding under this section upon judgment or decree for the plaintiff he shall be awarded his costs.
Sec. 24-e. *Collection by Distraint.*—The tax commis-
2 sioner may distrain upon any goods, chattels or intangibles
3 represented by negotiable evidence of indebtedness of
4 any taxpayer delinquent under this article for the tax,
5 interest and penalty accrued and unpaid hereunder. The
6 tax commissioner may require the assistance of the sheriff
7 of any county of the state in levying such distress in the
8 county of which such sheriff is an officer. A sheriff so
9 collecting taxes due hereunder shall be entitled to com-
10 pensation in the amount of all penalties collected over
11 and above the principal amount of the tax due, but in no
12 case shall such compensation exceed twenty-five dollars.
13 All moneys so collected shall be returned to the tax com-
14 missioner within ten days after collections.

Sec. 24-f. *Service of Notice.*—Any written notice re-
2 quired by this article shall, unless otherwise specifically
3 provided, be served upon the taxpayer personally or by
4 registered mail.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the House of Delegates

Takes effect 90 days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within approved this the 17th day of March, 1955.

Governor

Filed in the Office of the Secretary of State of West Virginia, MAR 18 1955

Secretary of State