

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1955



ENROLLED

HOUSE BILL No. 127

(By Mr. Barks)



PASSED Mar 12 1955

In Effect 90 days for 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one, as amended, be amended and reenacted, that section eleven of said article be repealed and that nine new sections, designated sections four-a, four-b, eighteen-b, twenty-four-a, twenty-four-b, twenty-four-c, twenty-four-d, twenty-four-e, and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, be enacted all to read as follows:

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

- 2 (1) “Persons” shall mean any individual, partnership,
3 association, corporation, municipal corporation, guardian,
4 trustee, committee, executor or administrator;
- 5 (2) “Tax commissioner” shall mean the state tax
6 commissioner;
- 7 (3) “Gross proceeds” shall mean the amount received
8 in money, credits, property or other consideration from
9 sales and services within this state, without deduction on
10 account of the cost of property sold, amounts paid for
11 interest or discounts or other expenses whatsoever. Losses
12 shall not be deducted, but any credit or refund made for
13 goods returned may be deducted;
- 14 (4) “Sale”, “sales” or “selling” shall include any trans-
15 fer of the possession or ownership of tangible personal
16 property for a consideration when the transfer or de-

17 livery is made in the ordinary course of the transferor's
18 business and is made to the transferee or his agent for
19 consumption or use or any other purpose;

20 (5) "Vendor" shall mean any person engaged in this
21 state in furnishing services taxed by this article or mak-
22 ing sales of tangible personal property;

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

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

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

35 (9) "Service" or "selected service" shall include all
36 non-professional activities engaged in for other persons
37 for a consideration, which involve the rendering of a

38 service as distinguished from the sale of tangible personal
39 property, but shall not include personal services or the
40 services rendered by an employee to his employer or any
41 service rendered for resale;

42 (10) "Purchaser" shall mean a person who purchases
43 tangible personal property or a service taxed by this
44 article;

45 (11) "Personal service" shall include those:

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

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

52 (12) "Taxpayer" shall mean any person liable for the
53 tax imposed by this article.

Sec. 3. *Amount of Tax.*—For the privilege of selling tan-
2 gible personal property and of dispensing certain selected
3 services defined in section eight of this article, the vendor
4 shall collect from the purchaser the tax as provided under
5 this article, and shall pay the amount of tax to the tax

6 commissioner in accordance with the provisions of this
7 article.

8 There shall be no tax on sales where the monetary con-
9 sideration is five cents or less. The amount of the tax
10 shall be computed as follows:

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

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

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

Sec. 4. Purchaser to Pay; Vendor Not to Represent

2 *He Will Absorb Tax; Accounting by Vendor; Penalty.—*

3 The purchaser shall pay to the vendor the amount of tax
4 levied by this article which shall be added to and con-
5 stitute a part of the sales price, and shall be collectable as
6 such by the vendor who shall account to the state for all
7 tax paid by the purchaser. The vendor shall keep the
8 amount of tax paid separate from the proceeds of sale
9 exclusive of the tax unless authorized in writing by the

10 tax commissioner to keep such amount of tax in a different
11 manner. Where such authorization is given, the state's
12 claim shall be enforceable against and shall take precedence
13 over, all other claims against the moneys commingled.
14 mingled.

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

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

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

Sec. 4-b. *Liability of Purchaser; Assessment and Collection.*—
2 If any purchaser refuses to pay to the vendor the
3 tax imposed by section three of this article, or in the case

4 of a sale exempt from the application of the tax, a pur-
 5 chaser refuses to sign and present to the vendor a proper
 6 certificate indicating the sale is not subject to this tax,
 7 or signs or presents to the vendor a false certificate, or
 8 after signing and presenting a proper certificate uses the
 9 items purchased in such manner that the sale would be
 10 subject to the tax, he shall be personally liable for the
 11 amount of tax applicable to the transaction or transac-
 12 tions.

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

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

Sec. 6. *Vendor Must Show Sale or Service Exempt;*
 2 *Presumption.*—The burden of proving that a sale or service
 3 was exempt from the tax shall be upon the vendor, un-

4 less he takes, from the purchaser an exemption certifi-
5 cate signed by and bearing the address of the purchaser
6 and setting forth the reason for the exemption. To pre-
7 vent evasion, it shall be presumed that all sales and
8 services are subject to the tax until the contrary is
9 clearly established.

Sec. 7. *Tax on Gross Proceeds of Sales of Manufactured,*
2 *etc., Product.*—A person exercising the privilege of pro-
3 ducing for sale, profit or commercial use, any natural re-
4 sources, product or manufactured product, and engaged
5 in the business of selling such product not otherwise
6 exempted herein shall make returns of the gross proceeds
7 of such sales and pay the tax imposed by this article.

Sec. 8. *Furnishing of Services Included; Exceptions.*—
2 The provisions of this article shall apply not only to sell-
3 ing tangible personal property, but also to the furnishing
4 of all services, except professional and personal services,
5 and except those services furnished by corporations sub-
6 ject to the control of the public service commission.

Sec. 9. *Exemptions.*—The following sales and services
2 shall be exempt:

3 (1) Sales of gasoline, taxable under article fourteen,
4 chapter eleven of the code, one thousand nine hundred
5 thirty-one;

6 (2) Sales of gas, steam and water delivered to con-
7 sumers through mains or pipes, and sales of electricity;

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

10 (4) Sales of property or services to the state, its in-
11 stitutions or subdivisions, and to the United States, in-
12 cluding agencies of federal, state or local governments
13 for distribution in public welfare or relief work;

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

18 (6) Sales of property or services to churches and bona
19 fide charitable organizations who make no charge what-
20 ever for the services they render or to persons engaged in
21 this state in the business of contracting, manufacturing,
22 transportation, transmission, communication, or in the
23 production of natural resources: *Provided, however,*

24 That the exemption herein granted shall apply only to
25 services, machinery, supplies and materials directly used
26 or consumed in the businesses or organizations named
27 above;

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

35 (8) Sales of tangible personal property and services
36 rendered for use or consumption in connection with the
37 conduct of the business of selling tangible personal prop-
38 erty to consumers or dispensing a service subject to tax
39 under this article and sales of tangible personal property
40 and services rendered for use or consumption in connec-
41 tion with the commercial production of an agricultural
42 product the ultimate sale of which will be subject to the
43 tax imposed by this article: *Provided, however, That*
44 sales of tangible personal property and services to be

45 used or consumed in the construction of or permanent
46 improvement of real property shall not be exempt;

47 (9) Sales of tangible personal property for the pur-
48 pose of resale in the form of tangible personal property;

49 (10) Sales of property or services to nationally char-
50 tered fraternal or social organizations for the sole purpose
51 of free distribution in public welfare or relief work.

Sec. 13. *Collection of Tax When Sale on Credit.*—A

2 vendor doing business wholly or partially on a credit
3 basis shall require the purchaser to pay the full amount
4 of tax due upon a credit sale at the time such sale is made
5 or within thirty days thereafter.

Sec. 14. *When Separate Records of Sales Required.*—

2 Any vendor engaged in a business subject to this tax,
3 who is at the same time engaged in some other kind of
4 business, occupation or profession, not taxable under this
5 article, shall keep records to show separately the trans-
6 actions used in determining the tax base herein taxed.
7 In the event such person fails to keep such separate rec-
8 ords there shall be levied upon him a tax based upon the
9 entire gross proceeds of both or all of his business.

Sec. 16. *Tax Return and Payment; Penalty for Non-*

2 *payment.*—The taxes levied by this article shall be due
3 and payable in monthly installments, on or before the
4 fifteenth day of the month next succeeding the month in
5 which the tax accrued. The taxpayer shall, on or before
6 the fifteenth day of each month, make out and mail to
7 the tax commissioner a return for the preceding month,
8 in the form prescribed by the tax commissioner, showing:
9 (a) the total gross proceeds of his business for that month;
10 (b) the gross proceeds of his business upon which the
11 tax is based; (c) the amount of the tax for which he is
12 liable; and (d) any further information necessary in the
13 computation and collection of the tax which the tax com-
14 missioner may require. A remittance for the amount of
15 the tax shall accompany the return. A monthly return
16 shall be signed by the taxpayer or his duly authorized
17 agent.

18 Any taxpayer who fails to pay the tax imposed by this
19 article within the time provided by law shall be con-
20 sidered delinquent and shall be required to pay a penalty
21 of six per cent of the tax for the first month, or fraction

22 thereof, during which he is delinquent and one per cent
23 of the tax for each succeeding month, or fraction thereof,
24 during which he is delinquent: *Provided, however, That*
25 if the failure to pay is due to reasonable cause, the tax
26 commissioner may waive or remit this penalty in whole
27 or in part. For purposes of the imposition of this penalty,
28 a payment postmarked after the fifteenth day of the
29 month shall be considered delinquent.

30 If the failure is due to fraud or intent to evade this
31 article or the rules and regulations promulgated there-
32 under, there shall be added an additional penalty of
33 twenty-five per cent of the amount of the tax, exclusive
34 of penalties.

35 The penalties so added shall be collected at the same
36 time and in the same manner and as a part of the tax.

Sec. 17. Tax a Debt; Lien of Unpaid Tax; Recordation

2 of *Lien*.—A tax due and unpaid under this article shall
3 be a debt due the state. It shall be a personal obligation
4 of the taxpayer and shall be a lien upon all the property
5 of the taxpayer: *Provided, That* such lien shall be sub-
6 ject to the restrictions and conditions embodied in article

7 ten-c, chapter thirty-eight of the code, one thousand nine
8 hundred thirty-one, and any amendment made or which
9 may hereafter be made thereto.

10 If the taxpayer is an association or corporation, the
11 officers thereof shall be personally liable, jointly and sev-
12 erally, for any default on the part of the association or
13 corporation, and payment of the tax may be enforced
14 against them as against the association or corporation
15 which they represent.

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

Sec. 18-a. *Receivership; Bankruptcy; Priority of Tax.*—
2 In the distribution, voluntary or compulsory, in receiver-
3 ship, bankruptcy or otherwise, of the property or estate
4 of any person, all taxes due and unpaid under this article
5 shall be paid from the first money available for distri-
6 bution in priority to all claims and liens except taxes and
7 debts due the United States which under federal law are
8 given priority over the debts and liens created by this

9 article. Any person charged with the administration or
10 distribution of any such property or estate who shall
11 violate the provisions of this section shall be personally
12 liable for any taxes accrued and unpaid under this article
13 which are chargeable against the person whose property
14 or estate is in administration or distribution.

Sec. 18-b. *Persons Selling or Quitting Business; Suc-*
2 *cessor to Withhold Purchase Money.*—If any person liable
3 for the tax imposed by this article shall sell his business
4 or stock of merchandise or quit his business, the taxes
5 and penalties imposed by this article shall become due
6 and payable immediately and such persons shall make a
7 final return within fifteen days after the date of selling
8 or quitting business. The taxes and penalties shall be
9 a lien upon the property of such person. His successor, if
10 any, shall withhold sufficient of the purchase money to
11 cover the amount of such taxes and penalties due and
12 unpaid until such time as the former owner shall produce
13 a receipt from the tax commissioner showing that the
14 taxes and penalties have been paid or a certificate indi-
15 cating no taxes are due. If the purchaser of the business

16 or stock of goods fails to withhold purchase money, as
17 above provided, he shall be personally liable for the pay-
18 ment of the taxes and penalties accrued and unpaid on
19 account of the operation of the business by the former
20 owner.

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

Sec. 22. *Consolidated Returns.*—A person operating two
2 or more places of business of like character from which
3 are made or dispensed sales or services which are taxable
4 hereunder shall file consolidated returns covering all such
5 sales or services to which a schedule must be attached
6 showing total sales and charges made for rendering such
7 services and total tax collections for each place of busi-
8 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-

8 gate and determine or estimate the tax liability of the
9 taxpayer and make an assessment thereon.

10 *Provided, however,* That if the tax commissioner be-
11 lieves that the tax yield as compared to the taxpayer's
12 gross proceeds is deficient, he shall make test checks of
13 the tax yield as compared to gross proceeds. Such test
14 checks shall be conducted in the following manner: The
15 tax commissioner shall notify the taxpayer by mail that
16 he intends to make test checks upon not less than five
17 business days over a period of at least one month. The
18 taxpayer may designate in writing two of the days to be
19 checked or two-fifths of the days to be checked and the
20 tax commissioner shall designate the remainder. Dur-
21 ing the days designated for test checks the taxpayer shall
22 keep a record of individual sales and the amount of tax
23 collected on such sales. The totals of the sales and the
24 tax for each day checked shall, at the close of the business
25 day, be certified by representatives of the taxpayer and
26 the tax commissioner. When the checks are completed,
27 the sales for all days checked shall be totaled and the
28 tax collected thereon shall be totaled and from such totals

29 the percentage of tax yield determined. If the percentage
30 of tax previously returned by the taxpayer for any taxable
31 period is in excess of one-tenth of one per cent less than
32 the percentage resulting from the checks, the tax imposed
33 by this article shall be deemed to have been insufficiently
34 returned for said period and the tax commissioner shall
35 make an assessment based upon the percentage resulting
36 from the checks and applied to the taxpayer's gross pro-
37 ceeds for each period thus shown to be deficient, with
38 credit for the tax previously paid.

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

11 A petition for reassessment by a person against whom

12 a jeopardy assessment has been made must be accom-
13 panied by such security as the tax commissioner may
14 deem necessary to insure compliance with this article.

Sec. 24-b. *Notice of Assessment; Petition for Reassess-*
2 *ment; Hearing.*—The tax commissioner shall give to the
3 taxpayer written notice of any assessment made pursuant
4 to this article. Unless the taxpayer to whom a notice of
5 assessment is directed shall, within thirty days after serv-
6 ice thereof, (except in the case of jeopardy assessments)
7 either personally or by registered mail, file with the tax
8 commissioner a petition in writing, verified under oath
9 by said taxpayer or his duly authorized agent, having
10 knowledge of the facts, setting forth with definiteness
11 and particularity the items of the assessment objected to,
12 together with the reason for such objections, said assess-
13 ments shall become and be deemed conclusive and the
14 amount thereof shall be payable at the end of the thirty
15 day period. In every case where a petition for reassess-
16 ment as above described is filed, the tax commissioner
17 shall assign a time and place for the hearing of same and
18 shall notify the petitioner of such hearing by written

19 notice at least twenty days in advance thereof and such
20 hearing shall be held within sixty days from the filing
21 of the petition for reassessment unless continued by agree-
22 ment or by the tax commissioner for good cause. The hear-
23 ing shall be informal and may be conducted by an ex-
24 aminer designated by the tax commissioner. At such
25 hearing evidence may be offered to support the assess-
26 ment or to prove that it is incorrect. After such hearing
27 the tax commissioner shall, within a reasonable time,
28 give notice in writing of the decision. Unless an appeal
29 is taken within thirty days from service of this notice,
30 the tax commissioner's decision shall be final.

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

8 The appeal shall be taken by written notice to the tax
9 commissioner and served as an original notice. When

10 said notice is so served it shall, with the return thereon,
11 be filed in the office of the clerk of the circuit court and
12 docketed as other cases with the taxpayer as plaintiff and
13 the tax commissioner as defendant. The plaintiff shall
14 file with such clerk a bond for the use of the defendant,
15 with sureties approved by such clerk, in penalty double
16 the amount of tax appealed from, and in no case shall
17 the bond be less than fifty dollars, conditioned that the
18 plaintiff shall perform the orders of the 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 a
22 certified copy of the tax commissioner's assessment shall
23 be admissible and shall constitute prima facie evidence
24 of the tax due under the provisions of this article. The
25 court shall render its decree thereon and a certified copy
26 of said decree shall be filed by the clerk of said court
27 with the tax commissioner who shall then correct the
28 assessment in accordance with said decree. An appeal
29 may be taken by the taxpayer or the tax commissioner

30 to the supreme court of appeals of the state in the same
31 manner that appeals are taken in equity.

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

2 The tax commissioner may collect any tax, interest and
3 penalty due and unpaid under the provisions of this
4 article by action in debt, assumpsit, motion for judgment
5 or other appropriate proceeding in the county in which
6 (a) the activity taxed was engaged in or (b) the taxpayer
7 resides; or by a suit to enforce the lien therefore in any
8 county in which property of the taxpayer may be found;
9 or, if the tax due and unpaid under this article is three
10 hundred dollars or less, by suit in the court of any justice
11 having jurisdiction of the taxpayer or of his property.
12 If the failure of any taxpayer to comply with the pro-
13 visions of this article shall have continued sixty days,
14 the tax commissioner may proceed to obtain an injunc-
15 tion restraining the taxpayer from doing business in this
16 state until he fully complies with the provisions of this
17 article. In any proceeding under this section upon judg-
18 ment or decree for the plaintiff he shall be awarded his
19 costs.

Sec. 24-e. *Collection by Distraint.*—The tax commissioner may distrain upon any goods, chattels or intangibles represented by negotiable evidence of indebtedness of any taxpayer delinquent under this article for the tax, interest and penalty accrued and unpaid hereunder. The tax commissioner may require the assistance of the sheriff of any county of the state in levying such distress in the county of which such sheriff is an officer. A sheriff so collecting taxes due hereunder shall be entitled to compensation in the amount of all penalties collected over and above the principal amount of the tax due, but in no case shall such compensation exceed twenty-five dollars. All moneys so collected shall be returned to the tax commissioner within ten days after collections.

Sec. 24-f. *Service of Notice.*—Any written notice required by this article shall, unless otherwise specifically provided, be served upon the taxpayer personally or by registered mail.

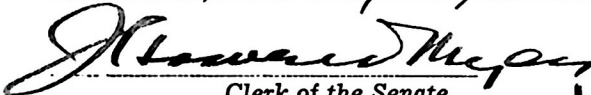
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.



Chairman Senate Committee

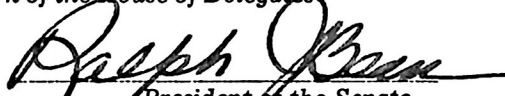

Chairman House Committee

Originated in the House of Delegates

Takes effect 90 Days from passage.

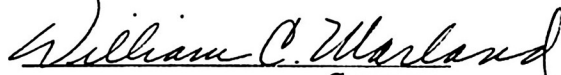

Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker House of Delegates

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


Governor

Filed in the Office of the Secretary of State
of West Virginia MAR 18 1955
D. PITT O'BRIEN
SECRETARY OF STATE