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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 2000



ENROLLED

SENATE BILL NO. 475

(By Senator Tomblin, Mr. President, et al)



PASSED March 11, 2000

In Effect ninety days from Passage

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CLERK OF SENATE
STATE OF WEST VIRGINIA

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Senate Bill No. 475

(BY SENATORS TOMBLIN, MR. PRESIDENT, AND ANDERSON,
BAILEY, BALL, BOLEY, BOWMAN, CHAFIN, CRAIGO, DAWSON,
DEEM, DITTMAR, EDGELL, FANNING, HUNTER, JACKSON,
KESSLER, LOVE, MCCABE, MCKENZIE, MINARD, MINEAR,
MITCHELL, OLIVERIO, PLYMALE, PREZIOSO, REDD, ROSS, SHARPE,
SNYDER, SPROUSE, WALKER, WOOTON, UNGER AND HELMICK)

[Passed March 11, 2000; in effect ninety days from passage.]

AN ACT to amend and reenact section four-a, article twelve, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend chapter sixty of said code by adding thereto a new article, designated article nine, all relating to additional requirements for the sale of cigarettes and other tobacco products; requiring sellers of the same to be licensed; providing criminal penalties for failure to obtain a license; prohibiting certain types of sales; providing for restrictions with respect to distributors; providing for criminal penalties for committing prohibited acts; providing for civil administrative penalties; providing that certain acts shall constitute certain unfair or deceptive acts or practices; providing for seizure and forfei-

ture of contraband; providing for powers, duties, and authority of the state tax commissioner and alcoholic beverage control commissioner with respect to the foregoing; and creating a private cause of action to enforce provisions of article.

Be it enacted by the Legislature of West Virginia:

That section four-a, article twelve, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that chapter sixty of the said code be amended by adding thereto a new article, designated article nine, all to read as follows:

CHAPTER 11. TAXATION.

ARTICLE 12. BUSINESS REGISTRATION TAX.

§11-12-4a. Sellers of cigarettes, tobacco products or cigarette wrappers required to be licensed; business registration certificate is license; criminal penalties.

1 (a) For registration years beginning on or after the first
2 day of July, two thousand, each person who sells ciga-
3 rettes, or other tobacco products or cigarette wrappers at
4 wholesale or retail shall apply for and receive a license to
5 sell cigarettes or other tobacco products or cigarette
6 wrappers. The cigarette license application shall be a part
7 of the business registration certificate application or the
8 renewal application for a business registration certificate.

9 (b) The license shall be printed on the business registra-
10 tion certificate or certificates issued under the provisions
11 of subsection a, section four of this article.

12 (c) Any person or company who sells any cigarettes, or
13 other tobacco products or cigarette wrappers at wholesale
14 or retail after the first day of July, two thousand one,
15 without obtaining the license specified in subsection (a) of
16 this section is guilty of a misdemeanor and, upon convic-

17 tion thereof, shall be fined not less than one hundred
18 dollars nor more than two hundred fifty dollars.

**CHAPTER 60. STATE CONTROL OF
ALCOHOLIC LIQUORS.**

ARTICLE 9. CIGARETTES PRODUCED FOR EXPORT; IMPORTED CIGARETTES.

§60-9-1. Definitions.

1 (a) As used in this article:

2 (1) "Package" means a pack, carton or container of any
3 kind in which cigarettes are offered for sale, sold, or
4 otherwise distributed, or intended for distribution, to
5 consumers.

6 (2) "Importer" means "importer" as that term is defined
7 in 26 U.S.C. 5702(1).

8 (3) "Person" means and includes any individual, firm,
9 association, company, partnership, corporation,
10 joint-stock company, club, agency, syndicate, municipal
11 corporation or other political subdivision of this state,
12 trust, receiver, trustee, fiduciary or conservator, and when
13 used in connection with any penalties imposed by this
14 article, means and includes officers, directors, trustees or
15 members of any firm, copartnership, association, corpora-
16 tion, trust or any other unit acting as a group.

17 (4) "Retailer" means and includes every person in this
18 state, other than a wholesaler or subjobber, as defined in
19 section two, article seventeen, chapter eleven of this code,
20 engaged in the selling of cigarettes at retail to a consumer
21 or to any person for any purpose other than resale.

§60-9-2. Cigarettes produced for export – prohibitions.

1 (a) It is unlawful for any person:

2 (1) To sell or distribute to consumers in this state, to
3 acquire, hold, own, possess or transport, for sale or
4 distribution in this state, or to import, or cause to be
5 imported, into this state for sale or distribution in this
6 state:

7 (A) Any cigarettes the package of which:

8 (i) Bears any statement, label, stamp, sticker, or notice
9 indicating that the manufacturer did not intend the
10 cigarettes to be sold, distributed, or used in the United
11 States, including, but not limited to, labels stating "for
12 export only," "U.S. tax-exempt," "for use outside U.S." or
13 similar wording; or

14 (ii) Does not comply with:

15 (I) All requirements imposed by or pursuant to federal
16 law regarding warnings and other information on pack-
17 ages of cigarettes manufactured, packaged or imported for
18 sale, distribution, or use in the United States, including,
19 but not limited to, the precise warning labels specified in
20 the Federal Cigarette Labeling and Advertising Act, 15
21 U.S.C. 1333; and

22 (II) All federal trademark and copyright laws;

23 (B) Any cigarettes imported into the United States in
24 violation of 26 U.S.C. 5754 or any other federal law or the
25 implementing federal regulations;

26 (C) Any cigarettes that the person otherwise knows or
27 has reason to know the manufacturer did not intend to be
28 sold, distributed or used in the United States; or

29 (D) Any cigarettes for which there has not been submit-
30 ted to the secretary of the United States department of
31 health and human services, the list or lists of the ingredi-
32 ents added to tobacco in the manufacture of such ciga-

33 rettes required by the Federal Cigarette Labeling and
34 Advertising Act, 15 U.S.C. 1355a;

35 (2) To alter the package of any cigarettes, prior to sale or
36 distribution to the ultimate consumer, so as to remove,
37 conceal or obscure:

38 (A) Any statement, label, stamp, sticker or notice
39 described in subparagraph (i), paragraph (A), subdivision
40 (1), subsection (a) of this section; or

41 (B) Any health warning that is not specified in, or does
42 not conform with the requirements of, the Federal Ciga-
43 rette Labeling and Advertising Act, 15 U.S.C. 1333; or

44 (3) To affix any stamp required pursuant to article
45 seventeen, chapter eleven of this code to the package of
46 any cigarettes described in subdivision (1), subsection (a)
47 of this section or altered in violation of subdivision (2),
48 subsection (a) of this section.

§60-9-3. Imported cigarettes – requirements.

1 On the first business day of each month, each person
2 authorized to affix the state tax stamp to cigarettes shall
3 file with the state tax commissioner, for all cigarettes
4 imported into the United States to which the person has
5 affixed the tax stamp in the preceding month, the follow-
6 ing:

7 (1) A copy of the permit issued pursuant to the Internal
8 Revenue Code, 26 U.S.C. 5713, to the person importing the
9 cigarettes into the United States allowing such person to
10 import the cigarettes; and

11 (2) A copy of the customs form containing, with respect
12 to the cigarettes, the internal revenue tax information
13 required by the U.S. bureau of alcohol, tobacco and
14 firearms; and

15 (3) A statement, signed by the person under penalty of
16 perjury, which shall be treated as confidential by the
17 commissioner and exempt from disclosure under the
18 freedom of information act, article one, chapter twenty-
19 nine-b of this code, identifying the brand and brand styles
20 of all the cigarettes, the quantity of each brand style of
21 such cigarettes, the supplier of the cigarettes, and the
22 person or person, if any, to whom the cigarettes have been
23 conveyed for resale; and a separate statement signed by
24 the individual under penalty of perjury, which shall not be
25 treated as confidential or exempt from disclosure, sepa-
26 rately identifying the brands and brand styles of the
27 cigarettes; and

28 (4) A statement, signed by an officer of the manufacturer
29 or importer under penalty of perjury, certifying that the
30 manufacturer or importer has complied with:

31 (A) The package health warning and ingredient reporting
32 requirements of the Federal Cigarette Labeling and
33 Advertising Act, 15 U.S.C. 1333 and 1335a, with respect to
34 the cigarettes; and

35 (B) The provisions of article nine-d, chapter sixteen of
36 this code, including a statement indicating whether the
37 manufacturer is, or is not, a participating tobacco manu-
38 facturer within the meaning of that statute.

§60-9-4. Criminal penalties.

1 Any person that commits any of the acts prohibited by
2 section two of this article, either knowing or having reason
3 to know he or she is doing so, or that fails to comply with
4 any of the requirements of section three of this article, is
5 guilty of a felony and, upon conviction thereof, shall be
6 fined not more than five thousand dollars, or imprisoned
7 in a state correctional facility not more than five years, or
8 both fined and imprisoned.

§60-9-5. Administrative sanctions.

1 (a) The state tax commissioner may revoke or suspend
2 the authorization to affix the tax stamp of any person for
3 a violation of this article or any legislative rule related to
4 this article that is promulgated by the commissioner
5 pursuant to chapter twenty-nine-a of this code and, in
6 conjunction, the alcohol beverage control commissioner
7 may impose on the person a civil penalty in an amount not
8 to exceed the greater of five hundred percent of the retail
9 value of the cigarettes involved or five thousand dollars,
10 upon finding a violation by such person of this enactment,
11 or the rules promulgated by the commissioner.

12 (b) Cigarettes that are acquired, held, owned, possessed,
13 transported in, imported into or sold or distributed in this
14 state in violation of this article are considered contraband
15 under article seventeen, chapter eleven of this code and are
16 subject to seizure and forfeiture as provided therein. Such
17 cigarettes are considered contraband whether the violation
18 of this article is knowing or otherwise.

19 (c) The state tax commissioner may assess tax due,
20 penalty, and interest on any product acquired, possessed,
21 sold, or offered for sale in violation of this article.

22 (d) Any monetary penalty assessed and collected by the
23 alcohol beverage control commissioner shall be transmit-
24 ted to the state treasurer for deposit into the state treasury
25 to the credit of "the alcohol beverage control enforcement
26 fund," established pursuant to section thirteen, article
27 seven, chapter sixty of this code. All moneys collected,
28 received and deposited in the "alcohol beverage control
29 enforcement fund" shall be kept and maintained for
30 expenditures by the commissioner for the purpose of
31 enforcement of this article and rules pertaining to ciga-
32 rettes and shall not be treated by the state treasurer or

33 state auditor as any part of the general revenue of the
34 state.

35 (e) Any person aggrieved by the imposition of a civil
36 penalty pursuant to this article may request a hearing,
37 within ten days of receipt of the notice imposing penalties,
38 before the alcohol beverage control commissioner in the
39 manner set forth herein. The commissioner may not hold
40 a hearing or impose any civil penalties until after at least
41 ten days' notice to the person of the time and place of such
42 hearing, which notice shall contain a statement or specifi-
43 cation of the charges, grounds or reasons for such penalty,
44 and which shall be served upon the person as notices under
45 the West Virginia rules of civil procedure or by certified
46 mail, return receipt requested; at which time and place, so
47 designated in the notice, the person has the right to appear
48 and produce evidence in his or her behalf, and to be
49 represented by counsel.

50 The commissioner may summon witnesses in the hearing
51 before him or her, and fees of witnesses summoned on
52 behalf of the state in proceedings shall be treated as a part
53 of the expenses of administration and enforcement. The
54 fees shall be the same as those in similar hearings in the
55 circuit courts of this state. The commissioner may, upon
56 a finding of violation, assess a sum, not to exceed two
57 hundred dollars per violation, to reimburse the commis-
58 sioner for expenditures of witness fees, court reporter fees
59 and travel costs incurred in holding the hearing. Any
60 moneys so assessed shall be transferred to the alcohol
61 beverage control enforcement fund.

62 The action of the commissioner imposing a civil penalty
63 is subject to review by the circuit court of Kanawha
64 County, West Virginia, in the manner provided in chapter
65 twenty-nine-a of this code. Petition for such review must
66 be filed with the circuit court within a period of thirty
67 days from and after the date final imposition of the civil

68 penalty following hearing, if any, and any person obtain-
69 ing an order for such review shall be required to pay the
70 costs and fees incident to transcribing, certifying and
71 transmitting the records pertaining to such matter to the
72 circuit court. An application to the supreme court of
73 appeals of West Virginia for a writ of error from any final
74 order of the circuit court in any matter shall be made
75 within thirty days from and after the entry of the final
76 order. All hearings before the commissioner shall be held
77 in the offices of the commissioner in Charleston, Kanawha
78 County, West Virginia, unless otherwise provided in the
79 notice, or agreed upon between the person and the com-
80 missioner; and when the hearing is held elsewhere than in
81 the commissioner's office, the person may be required to
82 make deposits of the estimated costs of such hearing.

§60-9-6. Unfair trade practices.

1 A violation of section two or section three of this article
2 constitutes an unlawful trade practice as provided in
3 article eleven-a, chapter forty-seven of this code and, in
4 addition to any remedies or penalties set forth in this
5 article, is subject to any remedies or penalties for a
6 violation of that article.

7 The alcohol beverage control commissioner shall enforce
8 each and every provision of the unfair trade practices act
9 set forth in article eleven-a, chapter forty-seven of this
10 code with respect to packages of cigarettes with like effect
11 as if said article were set forth in extenso herein.

§60-9-7. Unfair cigarette sales.

1 For purposes of this article, cigarettes imported or
2 reimported into the United States for sale or distribution
3 under any trade name, trade dress, or trademark that is
4 the same as, or is confusingly similar to, any trade name,
5 trade dress, or trademark used for cigarettes manufactured
6 in the United States for sale or distribution in the United

7 States shall be presumed to have been purchased outside
8 of the ordinary channels of trade.

§60-9-8. General enforcement provisions.

1 (a) This article shall be enforced by the state tax com-
2 missioner and the alcohol beverage control commissioner
3 and for the purpose of enforcing this article, the commis-
4 sioners may request information from any state agency,
5 constitutional officer or local agency and, notwithstanding
6 the provisions of section five-d, article ten, chapter eleven
7 of this code or any other provision of this code, may share
8 information with, and request information from, any
9 federal agency and any agency or constitutional officer of
10 this or any other state or any local agency thereof.

11 (b) A person that acquires, holds, owns, possesses,
12 transports in or imports into this state cigarettes that are
13 subject to this article shall, with respect to the cigarettes,
14 maintain and keep all records required pursuant to article
15 seventeen, chapter eleven of this code.

16 (c) In addition to any other remedy provided by law, any
17 person may bring an action for appropriate injunctive or
18 other equitable relief for a violation of this article; actual
19 damages, if any, sustained by reason of the violation; and,
20 as determined by the court, interest on the damages from
21 the date of complaint, taxable costs, and reasonable
22 attorney's fees. If the trier of fact finds that the violation
23 is flagrant, it may increase recovery to an amount not in
24 excess of three times the actual damages sustained by
25 reason of the violation.

§60-9-9. Applicability.

1 This article does not apply to cigarettes allowed to be
2 imported or brought into the United States for personal
3 use, and cigarettes sold or intended to be sold as duty-free
4 merchandise by a duty-free sales enterprise in accordance

5 with the provisions of 19 U.S.C. 1555(b) and any imple-
6 menting regulations: *Provided*, That this article does
7 apply to any cigarettes that are brought back into the
8 customs territory for resale within the customs territory.
9 The penalties provided in this article are in addition to any
10 other penalties imposed under other law.

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

[Handwritten Signature]
.....
Chairman Senate Committee

[Handwritten Signature]
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

[Handwritten Signature]
.....
Clerk of the Senate

[Handwritten Signature]
.....
Clerk of the House of Delegates

[Handwritten Signature]
.....
President of the Senate

[Handwritten Signature]
.....
Speaker House of Delegates

The within..... *approved* this the..... *3rd* ..
Day of..... *April* .., 2000.
[Handwritten Signature]
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 3/31/00

Time 2:55pm