

**WEST VIRGINIA STATE TAX  
PROCEDURE AND ADMINISTRATION**

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I. Administration of Taxes

The Tax Commissioner of West Virginia is responsible for administering and enforcing the state tax laws. Code § 11-10-5. The West Virginia Tax Procedure and Administration Act provides uniform procedures for assessment and collection of state taxes. Code § 11-10-1 et seq. The Act applies to the following taxes:

1. estate tax;
2. business franchise registration tax;
3. annual tax on incomes of carriers;
4. consumer's sales, service, and use tax;
5. cigarette tax;
6. soft drinks tax;
7. personal income tax;
8. corporation net income tax;
9. gasoline and special fuel excise tax;
10. motor carrier road tax;
11. tax relief for elderly homeowners and  
renters;
12. beer barrel tax; and
13. wine liter tax.

Code § 11-10-2.

The Act does not apply to ad valorem taxes on real and personal property, corporate license tax, or any other tax not

specifically listed. Code § 11-10-3.

In administering and enforcing the tax laws, the Tax Commissioner has the power to make all necessary rules and regulations, prescribe necessary forms, issue and release administrative decisions and technical assistance advisories, conduct investigations, issue subpoenas and subpoenas duces tecum, and abate interest on tax assessment penalties. Code §§ 11-10-5a, 11-10-5b, 11-10-5d.

The State Tax Department maintains a useful website at "WWW.STATE.WV.US/TAXDIV/". The site includes among other things Department addresses and telephone numbers, online forms and publications, administrative notices, and technical assistance advisories.

## II. Tax Returns and Filing

The Tax Commissioner prescribes the form of returns and other documents which are required to be filed by taxpayers. Code § 11-10-5. If, however, any person fails to file a return at the time required by law or regulation or makes and files, wilfully or otherwise, a false or fraudulent return, the Tax Commissioner may make the return from any available information, whether obtained through testimony or otherwise. Code § 11-10-5c.

Tax returns must be timely filed and payment of tax must be timely made. The last date for timely filing and payment includes any extension of time which is authorized by law or

regulation or which is granted by the Tax Commissioner. Code § 11-10-5f(e). In general, timely mailing of a return is deemed to be timely filing. Where a return is delivered by U.S. mail to the Tax Commissioner or the State Tax Department, the date of the U.S. postmarked stamped on the cover is deemed to be the date of delivery as long as the return was in an envelope or other appropriate wrapper with postage prepaid and properly addressed. Code § 11-10-5f(b). If the return is made by registered or certified mail, the date of registration or certification is deemed to be the postmark date. Code § 11-10-5f(d). A return may also be delivered in person to the Tax Commissioner or the appropriate division or officer of the State Tax Department at Charleston, West Virginia during normal business hours. Code § 11-10-5f(a).

When a return is required to be filed on a Saturday, Sunday, or legal holiday in West Virginia, the return is timely filed if it is filed on the next succeeding day which is not a Saturday, Sunday, or legal holiday. Code § 11-10-5g.

Subject to several statutory exceptions, West Virginia tax returns are confidential, and it is unlawful for any officer or employee of the State of West Virginia to divulge or make known in any manner West Virginia tax returns. Code § 11-10-5d(a).

### III. Assessment of Taxes

#### A. Notice of Assessment

If a taxpayer makes a mathematical or clerical error on any tax return, the Tax Commissioner may correct the error and notify the taxpayer in writing of the deficiency in tax. The taxpayer has fifteen (15) days after receipt of the notice to pay the deficiency. If the taxpayer fails to pay the deficiency within the fifteen (15) days, the Tax Commissioner will make an assessment of the deficiency and give the taxpayer written notice thereof. Code § 11-10-6(a).

If a taxpayer files a mathematically correct return which shows a balance due of the tax and if full payment is not made, the Tax Commissioner will notify the taxpayer in writing of the amount of the tax plus additions, penalties, and interest. The taxpayer must pay such amount within fifteen (15) days after receipt of the notice. If the taxpayer fails to make the payment within the time period, the Tax Commissioner may proceed to collect the amount. Code § 11-10-6(b).

The Tax Commissioner must give the taxpayer written notice of any assessment of tax (including amended or supplemental assessments). The assessment becomes final and conclusive and is not subject to administrative or judicial review unless the taxpayer takes one of two steps within sixty (60) days of the service of the notice of assessment. Code § 11-

10-8.

First, the taxpayer may file personally or by certified mail a petition for reassessment with the Office of Tax Appeals. Code § 11-10-8(a)(1). The petition for reassessment must be in writing and verified under oath by the taxpayer or the taxpayer's duly authorized agent having knowledge of the facts, which sets forth with particularity the items of the assessment objected to together with the reasons for such objections. Code § 11-10-8(a)(1). When a timely petition for reassessment is filed, the matter will be assigned for a hearing before the Office of Tax Appeals under Code § 11-10A-1.

Second, the taxpayer may remit personally or by certified mail the total amount of the assessment. Code § 11-10-8(a)(2). The timely payment of the assessment does not prohibit the taxpayer from filing a claim for a refund or credit. Code § 11-10-8(b).

Notices of assessment must be served upon the taxpayer either by personal service or substituted service in accordance with Rule 4 of the West Virginia Rules of Civil Procedure or by certified mail. Code § 11-10-5e. In the case of joint income tax returns filed by a husband and wife, the notice of assessment may be a single form unless either spouse had notified the Tax Commissioner that separate residences have been established. Code § 11-10-7(e)(2).

B. Jeopardy Assessment

If the Tax Commissioner believes that collection of a tax will be jeopardized by delay, the Tax Commissioner may make an immediate assessment of the tax. The jeopardy assessment must specifically note the fact. The tax so assessed is immediately due and payable. The jeopardy assessment becomes final unless within twenty (20) after service of the notice the taxpayer posts security and files a petition for reassessment. Code § 11-10-7(b).

C. Overpayments and Claims for Refund

Overpayments of any tax are to be refunded by the Tax Commissioner to the taxpayer, or at the election of the taxpayer, to be credited against the taxpayer's future tax liability. Code § 11-10-14(a). The taxpayer is also entitled to interest on a refund. Id.

If the taxpayer believes that he or she is entitled to a refund or credit of tax, the taxpayer may file a claim for refund or credit with the Tax Commissioner. Code § 11-10-14(c). The claim must be filed within the later of three (3) years after the due date of the return for which the tax was imposed including any extension or two (2) years from the date the tax was paid. If no return was filed, the claim must be filed within two (2) years from the time the tax was paid. Code § 11-10-14(1). After the claim is filed, the Tax Commissioner determines the



claim and notifies the taxpayer in writing of the determination.  
Code § 11-10-14(c).

If the taxpayer is not satisfied with the Tax Commissioner's determination of the claim, or if the Tax Commissioner fails to determine the claim within ninety (90) days, the taxpayer may file either personally or by certified mail with the Office of Tax Appeals a petition for refund or credit. Code § 11-10-14(d)(1). The petition for refund or credit must be filed within sixty (60) days after the service of the notice of denial of the taxpayer's claim. Id. The petition must be in writing, verified under oath by the taxpayer or the taxpayer's duly authorized agent having knowledge of the facts, and set forth with particularity the items of the determination objected to together with the reasons for such objections. Code § 11-10-14(d)(2). When a timely petition for refund or credit is filed, the matter will be assigned for a hearing before the Office of Tax Appeals under Code § 11-10A-1.

D. Tax Appeals for Reassessments or Refunds

1. Adjudication by Office of Tax Appeals

Both petitions for reassessment and petitions for refund or credit are held before the Office of Tax Appeals ("O.T.A.") under Code § 11-10A-1. The O.T.A. also has jurisdiction over appeals from orders of the Tax Commissioner suspending or revoking any license or imposing any civil penalty

for a violation of licensing law. Code § 11-10A-8(3). The Office of Tax Appeals was created starting in 2003 by H.B. 4305 which was passed by the West Virginia Legislature on March 8, 2002. Previously, appeals were held before the Tax Commissioner himself, which was perceived to be a conflict of interest. The new Office of Tax Appeals is an independent quasi-judicial agency separate and apart from the West Virginia Tax Department. Code § 11-10A-1.

A petition before the Office of Tax Appeals must succinctly state the nature of the case, the facts on which the appeal is based, and each question to be presented for review. Code § 11-10A-9(a). Within five (5) days of receipt of a timely petition, the O.T.A. will provide the Tax Commissioner with a copy of the petition. Code § 11-10A-9(c). The Tax Commissioner then has forty-five (45) days to file an answer stating the nature of the case, the facts relied upon by the Commissioner, and an answer to each question presented for review. Id.

The O.T.A. will assign a time and place for a hearing. The taxpayer is notified of the hearing by written notice made at least twenty (20) days in advance. The hearing is to be held within forty-five (45) days of the due date of the Commissioner's answer, unless continued by the O.T.A. for good cause. Code § 11-10A-10(a). The hearing before the O.T.A. is heard *de novo* by an administrative law judge and is conducted pursuant to the

provisions of the State Administrative Procedures Act for Contested Cases set forth in Code § 29A-5-1, et seq. Code § 11-10A-10(b). The O.T.A. is not bound by the rules of evidence, and the judge may admit evidence of a type which is commonly relied upon by a reasonably prudent person. Code § 11-10A-10(c). Generally, the burden of proof is on the taxpayer. Code § 11-10A-10(e).

The Office of Tax Appeals has the power to issue subpoenas and subpoenas duces tecum. Code § 11-10A-13. Hearings are recorded, and transcripts may be prepared. Code § 11-10A-14. A taxpayer appearing before the O.T.A. may appear in person or be represented by an attorney or "any other person as he or she may choose." Code § 11-10A-15.

The decisions of the Office of Tax Appeals are in writing and include a concise statement of the material facts and conclusions of law. Code § 11-10A-16(a). The O.T.A. has plenary authority to affirm, reverse, modify, or vacate an assessment of the Tax Commissioner or to approve or deny a refund or tax credit. Code § 11-10A-12. All final decisions or orders of the O.T.A. must be issued within a reasonable time, not to exceed the later of six months from the filing of the petition or six months for the closing of the hearing. Code § 11-10A-16(b). Final decisions, except for small claims cases explained below, are published in the state register after confidential information is

redacted. Code § 11-10A-16(c).

Unless an appeal is taken to circuit court, a decision from the Office of Tax Appeals is final and conclusive and not subject to additional review. Code § 11-10A-18.

## 2. Appeal to Circuit Court

Either the taxpayer or the Tax Commissioner may appeal the decision of the O.T.A. by filing a petition for appeal to the circuit court within sixty (60) days from service of the notice of the final decision. Code § 11-10A-19(a). If the taxpayer appeals, the appeal is taken to the circuit court of Kanawha County or any county wherein the taxpayer engaged in the activity sought to be taxed, the taxpayer resides, or the will was probated or estate administration granted for a decedent. Code § 11-10A-19(c)(1). If the Tax Commissioner appeals, the appeal is taken to the circuit court of Kanawha County; however, the taxpayer has the right to remove the appeal from Kanawha County to another county which has jurisdiction. Code § 11-10A-19(c)(2).

An appeal to circuit court is instituted by filing a petition for appeal with the circuit court within sixty (60) days from the notice of the decision of the Office of Tax Appeals. Code § 11-10A-19(d). A copy of the petition must be served on all parties appearing of record before the O.T.A. by registered or certified mail. Id. The petition for appeal must state whether the appeal is taken on questions of law, questions of fact, or

both and must set forth the items of the decision objected to and the reasons for the objections. Id.

If the appeal is to an assessment, within ninety (90) days after the appeal is filed, the taxpayer must file with the clerk of the circuit court a cash bond or a bond with corporate surety in a penalty amount equal to the tax and additions, penalty, and interest for which the taxpayer was found to be liable in the decision of the O.T.A. Id. Alternatively, in lieu of a bond, the taxpayer may apply to the Tax Commissioner for certification that the taxpayer has adequate assets to abide by the orders of the circuit court (in other words, to pay the tax due). Id. If the Tax Commissioner refuses to certify to the adequacy of the taxpayer's assets or indemnification, the taxpayer may apply to the circuit court for such certification. Id.

The entire record of the proceedings before the Office of Tax Appeals is transmitted to circuit court, Code § 29A-5-4(d), including the transcript of the hearings. Code § 11-10A-14(c). The circuit court without a jury makes a decision on the record below. Code § 29A-5-4(f). New testimony may only be taken in cases of alleged irregularity in procedure before the O.T.A. Id. The circuit court may allow oral argument and may require written briefs. Id.

### 3. Appeal to West Virginia Supreme Court of Appeals

The final decision of the circuit court in a tax appeal may be appealed by either the taxpayer or the Tax Commissioner to the West Virginia Supreme Court of Appeals. Code § 11-10A-19(h); § 22A-6-1. Tax appeals from circuit court to the Supreme Court are treated like other civil appeals. The Supreme Court's review is discretionary, and the petition for appeal must be filed within four (4) months from the entry of the circuit court's order. Rule 3, W. Va. Rules of Appellate Procedure.

#### E. Small Claims Procedure

In lieu of the full administrative hearing before the Office of Tax Appeals, the taxpayer may elect to pursue the petition for reassessment or petition for refund or credit under a small claims procedure if the amount in dispute is less than \$10,000. Code § 11-10A-11(a). The hearing which is held is informal, and the decision which is entered is final and not subject to appeal. Code § 11-10A-11(c). At any time before the commencement of the hearing, the taxpayer may unilaterally withdraw the small claims election and proceed with a full administrative hearing. Code § 11-10A-11(b).

#### F. Limitations on Assessments

Taxes must be assessed within three (3) years after the date the return was filed (even if the return was filed late). An

assessment may be made by the Tax Commissioner at any time if a false or fraudulent return was filed with the intent to evade tax or if no return was filed. Code § 11-10-15(a). Returns which are filed early are considered to be filed on the last date for filing. Code § 11-10-15(b)(1).

The Tax Commissioner and the taxpayer may enter into a written agreement to extend the period for assessment not to exceed two (2) years. Additional extensions which are not in excess of two (2) years may be made by subsequent written agreements which are executed before the expiration of the previous extension period. Code § 11-10-15(c)(1).

When the Internal Revenue Service makes a final determination of a deficiency on the taxpayer's federal income tax return, the period of limitation upon an assessment of West Virginia income tax liability (personal or corporate) does not expire until the later of ninety (90) days after the taxpayer advises the Tax Commissioner of the determination by the I.R.S. or the period of limitations for the assessment has expired. Code § 11-10-15(c)(2).

G. Interest, Additions, and Penalties

Interest is charged on underpayments of tax, and interest is also paid on overpayments of tax. Code § 11-10-17. Interest is adjusted from time to time and is pegged at the adjusted prime rate charged by banks but is never less than 8%.

Code § 11-10-17a. After January 1, 1997, uncontested claims for refunds must be refunded within ninety (90) days after the claim for refund is filed or interest will be payable to the taxpayer. Code § 11-10-14c.

Interest rates on underpayments as fixed by the Tax Commissioner for prior periods are as follows:

Time Period	Rate
Jan. 1, 1987 to Dec. 31, 1987	8%
Jan. 1, 1988 to July 30, 1989	9%
July 1, 1989 to June 30, 1990	11%
July 1, 1990 to Dec. 31, 1991	10%
Jan. 1, 1992 to June 30, 1992	9%
July 1, 1992 to Dec. 31, 1995	8%
Jan. 1, 1996 to Dec. 31, 1996	9%
Jan. 1, 1997 to Dec. 31, 1997	8%
Jan. 1, 1998 to Dec. 31, 1998	9%
Jan. 1, 1999 to June 30, 2000	8%
July 1, 2000 to Dec. 31, 2001	9%
Jan. 1, 2002 to June 30, 2002	8%
July 1, 2002 to Dec, 31, 2003	9.5%

See Administrative Notice 2003-18 (April 15, 2003) (posting of most recent interest rate).



The Tax Commissioner charges certain additions to tax as follows:

Addition	Amount
Failure to file a tax return or to pay tax before the due date	5% of the tax per month up to a maximum of 25%
Negligence or intentional disregard of rules and regulations	5% of the tax per month up to a maximum of 25%
Filing of a false or fraudulent return	50% of the tax

Code § 11-10-18.

Additions to tax are also charged for underpayment of estimated income tax by individuals, estates and trusts, and corporations or underpayment of business franchise tax. Code § 11-10-18a.

Civil penalties are also charged by the Tax Commissioner as follows:

Penalty	Amount
Failure to collect, account for, and pay over tax or attempt to defeat or evade tax	Total amount evaded, not collected, or not accounted for and paid over
Fraudulent statement or failure to furnish statement to employees	\$50 for each failure
Fraudulent claim for refund or credit	50% of the refund or credit
Failure to file correct information return	\$50 for each information return not to exceed in any calendar year \$100,000

Code §§ 11-10-19, 11-10-19a.

#### H. Closing Agreements and Compromises

The Tax Commissioner has authority to enter into an agreement in writing with a taxpayer with respect to the liability for any tax by way of closing agreement or compromise. Code § 11-10-5q. Closing agreements are generally final and conclusive and shall not be reopened or modified except upon showing of fraud, malfeasance, or misrepresentation of a material fact. Code § 11-10-5q(b). In compromising a tax liability of \$15,000 or more, the Tax Commissioner must seek a written recommendation of the Attorney General of West Virginia. Liability for a tax may be compromised by the Tax Commissioner on the grounds of doubt as to liability or doubt as to collectibility. Code § 11-10-5q(c).

#### IV. Collection of Taxes

##### A. Tax Liens

Tax together with interest, additions, and penalties is a personal obligation of the taxpayer and is a lien upon the real and personal property of the taxpayer. Code § 11-10-12(a). The lien continues until satisfied or until ten (10) years from the later of the date the tax is due and payable or the date the tax return is filed. Code § 11-10-12(b). The lien, however, is not good as to a bone fide purchaser for value without notice unless a notice of tax lien is docketed and recorded in the office of the clerk of the county commission where the property is situate.

Code §§ 11-10-12(c), 38-10C-1. When the tax has been satisfied, the Tax Commissioner will issue and record a release. Code § 11-10-12(d). The Tax Commissioner may foreclose a tax lien by commencing an action in the circuit court of the county where the property is located. Code § 11-10-12(e).

Two special tax liens exist. First, there is a lien upon all property when the taxpayer sells out or quits a business, with attendant personal liability on the successor in the business. Code § 11-10-12(f). Second, all property of a decedent located in West Virginia is subject to a lien for West Virginia estate tax if estate tax is due. Code § 11-11-17. Prior to the amendment to the estate tax lien statute in 1998, the West Virginia estate tax lien applied to estates of all decedents, regardless of whether or not the estate was subject to estate tax, and the Tax Commissioner was not required to file a notice of estate tax lien. Under the new statute, the estate tax lien applies only to taxable estates, and the Tax Commissioner will file notice of estate tax lien when the appraisement of the estate indicates that the estate will be taxable.

B. Levy and Distraint

The Tax Commissioner may collect any assessment which has become final by levying upon all property and rights belonging to the taxpayer or upon which a tax lien exists. Prior to levying, the Tax Commissioner sends a fifteen (15) day notice

and demand for payment. If the Tax Commissioner determines that the collection of the tax is in jeopardy, the notice and demand may be made for immediate payment without regard to the fifteen (15) day period. Code § 11-10-13(a). Levy includes the power of distraint and seizure by any means. The Tax Commissioner may seize real property, tangible personal property, or intangible personal property. Code § 11-10-13(b).

The Tax Commissioner may issue a distress warrant to the sheriff or tax department officer commanding him or her to levy upon and sell property. The distress warrant must be executed within sixty (60) days from its issuance, and the sheriff must return the warrant and any money collected within sixty-five (65) days from issuance. Code § 11-10-13(d).

Levy may be made upon the salary, wages, property, or rights of any person only after the Tax Commissioner has notified such person of the intention to levy given not less than ten (10) days before the levy. The notice may be given in person, left at the dwelling house of such person, or sent by certified mail to such person's last known address. No notice is required for a jeopardy collection. Code § 11-10-13(e). Property which is seized by the Tax Commissioner pursuant to a levy may be sold by public auction or public sale under sealed bids. Code § 11-10-13c.

Certain properties are exempt from levy by the Tax Commissioner and are set forth in detail the statute. Code § 11-

C. Injunction

The Tax Commissioner may secure an injunction to restrain a taxpayer from doing business in West Virginia if the taxpayer fails for a period of more than sixty (60) days to comply with the state tax code. No bond is required of the Tax Commissioner for the injunction. Code § 11-10-11(h).

D. Limitations on Collection

Every proceeding instituted by the Tax Commissioner to collect the assessment of a tax which has become final must be brought or commenced within ten (10) years after the date on which the assessment became final. Code § 11-10-16(a).

V. Tax Crimes and Penalties

The West Virginia Tax Crimes and Penalties Act makes certain acts relating to the tax laws criminal offenses (generally misdemeanors). Code § 11-9-1 et seq. The following crimes are proscribed by the statute:

1. Failure to pay tax or file return or report;
2. Failure to account for and pay over another's tax;
3. Failure to collect or withhold tax;
4. False statements to purchasers, lessees, or employees relating to tax;

5. Willful failure to maintain records or supply information or misuse of an exemption certificate;

6. Aiding, abetting, assisting, or counseling in criminal violation;

7. Attempt to evade tax;

8. Engaging in business without payment of business franchise registration tax or posting business franchise registration certificate; and

9. Engaging in business without a business franchise registration certificate.

In general, the Criminal Investigation Division of the State Tax Department enforces the criminal tax laws. Code § 11-9-2a. Venue for tax crimes is in the county wherein the defendant resides if an element of the offense occurred in the county of residence or otherwise in the county where the offense was committed. Code § 11-9-14. The statute of limitations for prosecution is three (3) years after the offense was committed. Code § 11-9-15.