

## CHAPTER 9

### PROCEDURE AND ADMINISTRATION

By John A. Mairs  
Chris M. Hunter

*John A. Mairs and Christopher M. Hunter are members in the Charleston, West Virginia law firm of Jackson Kelly PLLC. Mr. Mairs's practice primarily involves representation of businesses with West Virginia and local tax issues. Mr. Hunter's practice includes representing West Virginia businesses on state and local tax issues and also involves representing businesses in various environmental matters.*

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#### ¶ 901 Introduction

The Tax Commissioner and State Tax Department: The West Virginia State Tax

Commissioner, appointed by the governor and confirmed by the Senate, is broadly charged with the duty to enforce all state tax laws as the chief executive officer of the Department of Tax and Revenue. Created in 1904, the Tax Division (now with approximately 400 employees statewide collecting about \$5.0 billion annually) is organized along functional lines into the following units: Auditing Division, Compliance Division, Criminal Investigations Division, Information Technology Division, Legal Division, Operations Division, Property Tax Division, Research and Development Division, Revenue Division, Tax Account Administration Division, and Taxpayer Services.. The State Tax Department is under the direct supervision of the Secretary of the Department of Revenue, one of seven “Super Agencies” created in 1989. In 2004, the name of the Department of Tax and Revenue was shortened to Department of Revenue.

## ¶ 902 Overview of Tax Procedure Act

*Law: W. Va. Code § 11-10-1 et seq.*

The West Virginia Tax Procedure and Administration Act of 1978 (the “Tax Procedure Act”), as substantially amended by the Legislature on a number of occasions, provides uniform rules and procedures for tax return filing, return confidentiality, payment of tax, imposition of interest, penalties and additions to tax, investigations, refunds, assessments, statutes of limitation, settlements, hearings, appeals and collection actions, which are designed to simplify and promote efficient compliance with and uniformity in the administration of the tax laws. The provisions of the Tax Procedure Act apply to the following West Virginia taxes: (1) Estate Tax; (2) Business Registration Tax; (3) Business and Occupation Tax; (4) Motor Fuels Excise Tax; (5) Motor Carrier Road Tax; (6) Consumers Sales and Service Tax; (7) Use Tax; (8) Personal Income Tax; (9) Business Franchise Tax; (10) Corporation Net Income Tax; (11) Severance. Tax; (12) Telecommunications Tax; (13) Health Care Provider Tax; (14) Tobacco Products Tax; (15) Solid Waste Assessment Fees; (16) Minimum Severance Tax on Coal; (17) Special Two Cents Per Ton Tax on Coal Production; (18) Soft Drinks Tax; (19) Beer Barrel Tax; (20) Wine Liter Tax; (21) Corporate License Tax; and (22) any other tax or fee administered under the Tax Procedure Act. The Tax Procedure Act also applies to the administration of the major West Virginia tax credit programs and to municipal sales and use taxes imposed under W. Va. Code § 8-13C-1 *et seq.*

*Limits to scope of Tax Procedure Act.* Many important administrative matters (including times for return filing and recordkeeping requirements) remain unique to each individual tax. These provisions are scattered throughout the West Virginia Code. The Tax Procedure Act has no application to Real or Personal Property Taxes. Other West Virginia statutes affecting tax procedure and administration include the West Virginia Tax Crimes and Penalties Act (W. Va. Code § 11-9-1 *et seq.*), the state Administrative Procedure Act (Sec. 29A-1-1 *et seq.*, W. Va. Code), the state Freedom of Information Act (W. Va. Code § 29B-1-1 *et seq.*) and the Uniform Declaratory Judgments Act (W. Va. Code § 55-13-1 *et seq.*).

## ¶ 903 Statements of Administrative Positions

*Law:* W. Va. Code §§ 11-10-5 and 29A-3-1 *et seq.*

*Regulations and forms:* The West Virginia tax law is primarily statutory and is codified for the most part in Chapter 11 of the West Virginia Code. The Tax Commissioner is, however, broadly empowered to administer, interpret and supplement the tax statutes by prescribing forms and by promulgating rules and regulations, with the force and effect of law, as provided in the State Administrative Procedures Act. The Tax Commissioner has exercised his rulemaking power by promulgating regulations for: Business and Occupation Tax, Severance Tax, Telecommunications Tax, Consumers Sales and Service Tax and Use Tax, Personal Income Tax, Motor Fuel Excise Tax, Motor Carrier Road Tax, Business Franchise Tax, and Corporation Net Income Tax, Soft Drinks Tax, Information Disclosure, Electronic Filing, and for numerous state tax credits, including the Industrial Expansion and Revitalization Credit and Economic Opportunity Credit. Many of the regulations have been promulgated as Legislative regulations, which are reviewed by the West Virginia Legislature before becoming final. In addition, the State Tax Department has promulgated numerous regulations applicable to the administration of Real and Personal Property Taxes, which are not otherwise covered by the Tax Procedure Act. Regulations promulgated by the State Tax Department, are codified in the Code of State Rules published by the Secretary of State. (See *generally* Title 110 of the Code of State Rules for tax-related rules.) The State Tax Department's regulations are available on-line at the Secretary of State's website. The rules promulgated by the State Tax Department can all be accessed by checking "search by agency" on the website's Search screen and typing "tax" in the search bar. We note that the consumers sales and use tax regulations, corporation net income tax regulations, business franchise tax regulations, personal income tax regulations and other regulations do not reflect statutory or case law changes subsequent to the effective dates of the regulations. Accordingly, care should be exercised before relying on any State Tax Department Regulations. In addition, regulations do not exist for a number of taxes and tax programs.

*Technical assistance advisories:* The Tax Commissioner is authorized to issue technical assistance advisories (TAAs) to any taxpayer. TAAs are intended to state the Tax Commissioner's position on the tax consequences of any transaction or event. Similar to private letter rulings at the federal level, a TAA generally has no precedential value, except to the taxpayer who requests the advisory, and then only for the specific transaction discussed. Before issuing a TAA, the Tax Commissioner requires that taxpayers specifically request a TAA and that the request be accompanied by declaration (under penalty of perjury) by the taxpayer or by an authorized representative of a taxpayer with knowledge of the facts. "Sanitized" versions of TAAs (in which identifying characteristics regarding taxpayers are omitted) are filed in the Secretary of State's office and published in the State *Register*. (See W. Va. Code § 11-10-5r.) TAAs are also published on the State Tax Department's web site, at <http://www.wvtax.gov>.

*Declaratory rulings:* The Tax Commissioner is empowered (but is not required) to issue declaratory rulings in which the Tax Commissioner applies the appropriate tax

statute and regulations to a given set of facts. Declaratory rulings are legally binding upon the taxpayer and the Tax Commissioner unless set aside by a circuit court upon a timely petition by an aggrieved taxpayer. Thus, a taxpayer has the right to appeal an adverse declaratory ruling, whereas no statutory right to appeal an adverse TAA is granted. (W. Va. Code §§ 29A-4-1 and 29A-5-4.)

*Informal materials:* The State Tax Department provides various informal administrative materials to publicize tax developments, policies and administrative practices. For instance, the State Tax Department regularly publishes articles discussing current law and policy issues on its web site which is located at <http://www.wvtax.gov/index.html>. The State Tax Department also periodically issues general information releases to announce changes in tax statutes, interpretations of significant judicial decisions and clarification of administrative policies and procedures on its web site. These information releases take the form of Publications, Press Releases and Administrative Notices. Furthermore, the Tax Commissioner has traditionally responded in writing to general correspondence from taxpayers and representative groups requesting advice or clarification regarding State Tax Department's policies.

#### **¶ 904 Filing Returns and Paying Taxes**

*Law:* W. Va. Code §§ 11-10-5c, 11-10-5f, 11-10-5g, 11-10-5l, 11-10-5m, 11-10-5t, 11-10-5z, 11-10-6 and 11-10-18a.

*Due dates:* The Tax Procedure Act did not standardize all aspects of state tax administration and compliance. Return filing and tax payment requirements and dates differ depending upon the tax imposed. Most taxes require annual returns, plus monthly or quarterly installment payments.

*Timely filing and payment:* A return is considered timely filed and a payment is timely made if delivered in person to the Tax Commissioner or a designated officer of the State Tax Department during normal business hours on, or before, the date it is required to be filed. If the return is filed or payment is made by mail, the date of the United States postmark is deemed the date of delivery. Where the last day for filing a tax return or making a tax payment falls on a Saturday, Sunday or legal holiday in this State, the filing and payment are considered timely if performed on the next succeeding business day. (W. Va. Code §§ 11-10-5f and 11-10-5g.) For tax years beginning on or after January 1, 2009, taxpayers who had a total annual remittance of \$100,000 for any single tax return, of a tax administered under the Tax Procedures Act, filed for the preceding tax year are required for the current year to file all such tax returns electronically. (W. Va. Code § 11-10-5z.) Effective for tax years beginning on or after January 1, 2011, the threshold for electronic filing has been reduced to \$10,000. (W. Va. Code § 11-10-5z.) Effective for tax years beginning on or after January 1, 2016, the threshold for electronic filing has been increased to \$25,000. (W. Va. Code § 11-10-5z)

*Estimated tax payments:* The payment of an estimated tax installment is considered

payment on account of the tax imposed for the taxable year. In the case of tax payable in installments, if the taxpayer has paid more than the amount determined to be the correct amount, the overpayment is automatically credited against unpaid installments, if any, for the taxable year. Underpayment of estimated taxes may result in additions to tax. (W. Va. Code §§ 11-10-51, 11-10-5m and 11-10-18a.)

*Payment of trust fund taxes:* Taxpayers required to collect or withhold any tax (e.g., consumers sales and service tax, vendor collected use tax, motor fuel excise tax, and employer withholding tax) and pay it over to the Tax Commissioner are deemed to hold the amount of tax so collected or withheld in trust for the State of West Virginia. A taxpayer's failure to properly collect or withhold taxes or failure to pay over taxes collected or withheld renders that taxpayer liable for the taxes, interest, additions and penalties. A special rule in the consumers sales and service tax law imposes personal liability upon corporate officers for the corporation's failure to properly remit collected sales tax and the fact that an officer was not the officer responsible for remittance of the tax is not a defense. (W. Va. Code § 11-15-17.) The State Tax Department applies the tax penalty provisions to "responsible" officers of corporations that fail to pay over personal income tax withheld. (W. Va. Code §§ 11-10-5j, 11-10-19(a) and 11-15-17.)

In 2003, the law was amended to allow the Tax Commissioner to waive imposition of derivative tax liabilities and associated interest and penalties on one or more uncompensated members of the governing board of board of directors of an organization that is exempt from tax under IRC § 501(c)(3). The Tax Commission may issue this waiver pursuant to rules set forth in W. Va. Code § 11-10-5x.

*Method of payment:* Payment of tax may be made by any commercially acceptable means that the Tax Commissioner considers appropriate. Payment is typically made by check or money order but may be made by credit card, debit card or electronic funds transfer. If a taxpayer tenders a permitted form of payment in payment of taxes that is not duly paid, the taxpayer remains liable for the payment of the tax and for all penalties and additions. If any permitted form of payment tendered for payment of taxes is not duly paid, the State also has a lien in that amount on the assets of the financial institution upon which it was drawn, and may recover any charges and fees that the State was charged by a bank, financial institution, or other entity charged the State as a result of the taxpayer's account being closed, the taxpayer having insufficient funds in its account, or the entity refusing to make the payment to the State. (W. Va. Code § 11-10-5n.)

*Payments by credit card, debit card and electronic funds transfer.* Payment may be made by electronic funds transfer (W. Va. Code § 11-10-5t) and by credit or debit card (American Express, Discover Card, Master Card and Visa). However, payment by credit or debit card also requires payment of a convenience charge, currently \$1.00 for payments up to \$40.00 and 2.5% of the payment amount for payments greater than \$40.00. For tax years beginning before January 1, 2011, the Tax Commissioner may require taxpayers to pay any tax by electronic funds transfer if the amount owed for that tax for the preceding year was at least \$120,000. Effective for tax years beginning on or

after January 1, 2011, this threshold has been reduced to \$10,000. (W. Va. Code § 11-10-5t.) For tax years beginning on or after January 1, 2016, the threshold is raised to \$25,000. (W. Va. Code § 11-10-5t.) See: WVCSR §§ 110-10B-1 *et seq.* and 110-10F-1 *et seq.* for rules relating to payments by credit card, debit card and electronic funds transfer.

*Mathematical errors:* When it appears that a taxpayer made a mathematical or clerical error on a return, the Tax Commissioner may correct the error and notify the taxpayer in writing of the deficiency or overpayment of tax. The taxpayer has 15 days after receipt of notice to pay a deficiency before an assessment is issued. (W. Va. Code § 11-10-6.)

*Payment not remitted:* If a taxpayer files a mathematically correct return and full payment of the tax shown thereon is not made, the Tax Commissioner is required to notify the taxpayer in writing of the amount of tax, additions to tax, penalties or interest due. The taxpayer has 15 days after receipt of such notice to make payment. (W. Va. Code § 11-10-6.)

*Failure to file; late filing:* If a taxpayer fails to file a return required by any tax administered pursuant to the Tax Procedure Act, the Tax Commissioner may make a return for the taxpayer. Late filing also tolls the statute of limitations on assessments and may subject the taxpayer to additions to tax or even criminal penalties. (W. Va. Code § 11-10-5c.)

## **¶ 905 Confidentiality and Disclosure of Information**

*Law:* W. Va. Code § 11-10-5d.

*Return confidentiality generally:* As a general rule, it is unlawful for any State employee to disclose any tax return information, any information concerning the personal affairs of any individual, any information concerning the business of a single firm or corporation, or to disclose the amount of income reported in any return filed with the Tax Commissioner or disclosed in any audit performed by the State Tax Department. Claims for refund, petitions for refund, petitions for reassessment (and related background material) and requests for rulings and for TAAs are also protected by the confidentiality provisions. It is a crime for any officer, employee or agent of the State Tax Department to violate the confidentiality provisions.

*Exceptions to return confidentiality:* There are a variety of exceptions to the general rule of confidentiality. Some of the major exceptions include: (1) disclosure of confidential information among State Tax Department personnel when required in an official investigation or audit; (2) disclosure of confidential information when required in a court proceeding, in which the Tax Commissioner is a party, to determine the amount of tax due or to collect taxes due; (3) disclosure to officers or employees of any federal or state agency upon the grant of an *ex parte* order by federal district judge, federal magistrate or state circuit court judge for use in a criminal investigation or proceeding; (4) inspection of reports and returns by an officer of the United States or another state

responsible for the administration of a similar tax if the other jurisdiction grants reciprocal privileges to the Tax Commissioner or West Virginia Attorney General; (5) inspection of state business and occupation tax returns by a municipality's agent; (6) disclosure to the taxpayer's designee, usually the taxpayer's attorney or certified public accountant, after taxpayer executes a waiver of confidentiality on Form WVARI-001; (7) disclosure of return information to a person having a material interest therein (e.g., partners may inspect partnership returns and S corporation shareholders may inspect corporate returns); (8) disclosure of outstanding liability to a person secured by a recorded tax lien who furnishes evidence that he or she has or intends to obtain a right in property subject to such lien; (9) release of statistics compiled with taxpayer information; (10) disclosure of information to Consolidated Public Retirement Board for use in actions relating to whether an individual receiving disability retirement benefits is eligible to receive such benefits; and (11) release of certain taxpayer information to facilitate the enforcement of tax laws.

*Freedom of information:* Under the State Freedom of Information Act, all public records of a public body, including the State Tax Department, are subject to inspection by any person unless an exemption applies. The State Freedom of Information Act exempts disclosure of tax returns and return information covered by the confidentiality provisions, internal memoranda or letters received or prepared by the State Tax Department and certain information relating to the settlement agreements and compromises as provided in the law. Other public records in the custody of the Tax Commissioner are disclosable under the State Freedom of Information Act. (W. Va. Code § 29B-1-1 *et seq.*).

*Disclosure of Certain Taxpayer Information:* The Tax Commissioner is required to annually publish in the State Register the name and address of every taxpayer, and the dollar amount of credit claimed by category of any business investment and jobs expansion credit; industrial expansion, research and development projects credit; certain housing developments and management information services facilities credit; credit for reducing electric and natural gas utility rates for low income residential customers; credit for increased generation of electricity; economic opportunity credit; strategic research and development tax credit; high-growth business investment tax credit; manufacturing investment tax credit; neighborhood investment tax credit; West Virginia film industry tax credit; and the tourism development tax credit. The Tax Commissioner is required, by W. Va. Code § 11-10-5q, to publish in the State Register, certain information regarding any compromise of a pending civil tax case in which the Tax Commissioner is required to seek the written recommendation of the Attorney General and the Attorney General has not recommended acceptance of such compromise, or when the Tax Commissioner compromises any civil tax case for an amount that is more than \$250,000 less than the assessment of tax owed.

The Tax Commissioner may disclose relevant return information to the prosecuting attorney for the county in which venue lies for a criminal offense when there is reasonable cause to believe that a criminal tax law has been or is being violated. The Tax Commissioner may enter into written exchange of information agreements with the

Commissioners of Alcohol Beverage Control, Labor and Employment Security, the Secretary of the Department of Environmental Protection and the State Treasurer. The Tax Commissioner may, with certain restrictions, disclose to the Attorney General specified tax information relevant to enforcement of the Tobacco Master Settlement Agreement. The Attorney General, with the Tax Commissioner's consent, can disclose information provided by the Tax Commissioner to parties participating in: a) arbitration or litigation arising under the Tobacco Master Settlement Agreement; or (b) proceedings relating to administration, implementation, enforcement, defense, settlement or arbitration of laws implementing and enforcing the Tobacco Master Settlement Agreement. The Tax Commissioner can enter into a written exchange agreement with the Auditor to disclose certain taxpayer information to facilitate participation in federal and state offset programs authorized by W. Va. Code § 14-1-37. The taxpayer information disclosed can be used only to facilitate the collection of unpaid and delinquent tax liabilities through offset against state payments due and owing to taxpayers. (W. Va. Code §§ 11-10-5s and 11-10-5v; WVCSR §§ 110-10-1 *et seq.*, 110-50A -1 *et seq.*, and 110-50B-1 *et seq.*)

Every January 15, the Governor is required to submit to the President of the Senate and the House of Delegates a tax expenditure report. Such reports shall be considered together to analyze all tax expenditures by describing the annual revenue loss and benefits of tax expenditure based upon information available to the Tax Commissioner. The term "tax expenditure" includes a provision in the tax laws including but not limited to exclusions, deductions, tax preferences, credits and deferrals designed to encourage certain kinds of activities or to aid taxpayers in special circumstances.

## **¶ 906 Audit Selection and Procedure**

*Law:* W. Va. Code §§ 11-10-5a, and 11-10-5b.

*Authority to audit:* The Tax Commissioner has the power to examine any books, papers, records, memoranda, inventory or equipment bearing upon the matters required to be included in the tax return to ascertain the correctness of a tax return and to make an assessment. The Auditing Division of the State Tax Department is charged by the Tax Commissioner with the exercise of this power. (W. Va. Code § 11-10-5a.)

*Audit procedure:* The State Tax Department expects taxpayers to cooperate with the tax examiner, to provide the examiner with a reasonable place to work, and to knowledgeably answer questions raised by the tax examiner during the course of the audit. The State Tax Department acknowledges that assessments are frequently issued because a tax examiner was not furnished with all material documents and/or was not provided access to the taxpayer's employees who could provide information essential to the computation of taxpayer's tax liability. In addition to examining books and records and interviewing persons (including tax preparers) who can knowledgeably answer tax questions on behalf of the taxpayer, the tax examiner may make test checks of tax yield. Following the audit, the tax examiner will have an exit conference, explaining to the taxpayer any adjustments and the reasons why these adjustments are being proposed. The tax examiner also informs the taxpayer of how the proposed adjustments

may be contested and the deadlines for filing any protests of these amounts. Following the exit conference, the auditor's adjustments are forwarded to the Chief of the Auditing Division for determination whether an assessment should be issued.

*Subpoenas:* The Tax Commissioner is empowered to issue *subpoenas* and *subpoenas duces tecum* in the name of the State Tax Department to compel the attendance of witnesses and the production of any records relevant in administering the tax laws. *Subpoenas* and *subpoenas duces tecum* must be served either by personal service or by registered or certified mail at least five days before the return date. (W. Va. Code § 11-10-5b.) Motions to quash *subpoenas* and *subpoenas duces tecum* must be promptly filed (before the time specified for compliance) with the circuit court in the county in which the hearing will be held or where the *subpoena* or *subpoena duces tecum* was served.

*Pre-assessment conferences:* In addition to exit conferences with tax examiners, the State Tax Department's Auditing Division traditionally affords taxpayers and their representatives the opportunity to informally address issues that arise during or after an audit, but before an assessment is issued. These pre-assessment conferences enable taxpayers to clarify factual misunderstandings that may arise in connection with a wide-ranging audit.

## ¶ 907 Assessments

*Law:* W. Va. Code §§ 11-10-5e, 11-10-7 and 11-10-8.

*Assessments generally:* If the Tax Commissioner believes that any tax administered under the Tax Procedure Act has been insufficiently returned by a taxpayer, he may (with the aid of the Auditing Division) investigate and determine or estimate the tax liability and make an assessment against the taxpayer. If the Tax Commissioner believes that collection of a tax will be jeopardized by delay, and such fact is stated in the notice of assessment, the Tax Commissioner may issue a jeopardy assessment. It is not uncommon for jeopardy assessments to be issued against the responsible officers of corporations that fail to pay over consumers sales and service tax collected. (W. Va. Code §§ 11-10-7(a) and 11-10-7(b).)

*"Netting" audit adjustments:* In the course of auditing typical business taxpayers, it is common that a number of adjustments will be made, some of which increase the taxpayer's tax liability and others which may decrease the taxpayer's liability. The increasing and decreasing adjustments are netted for each tax which is audited and the result is the amount of tax overpaid or underpaid. Thus, even if the Tax Department finds a net overpayment of tax, the taxpayer should closely examine the validity of the individual increasing or decreasing adjustments. In the case of a net overpayment for any taxable year, the taxpayer must timely file a claim for refund or credit; a refund is not automatically issued. The Tax Commissioner is authorized to combine assessments of two or more taxes into a combined single assessment. (W. Va. Code § 11-10-7d.)

*Notice of assessment:* The Tax Commissioner must serve upon the taxpayer written

notice of any assessment, amended assessment or supplemental assessment. (W. Va. Code §§ 11-10-7, 11-10-8.) The Tax Commissioner may designate those assessments, notices, statements of account or other Tax Division documents which shall be sent by personal service or United States Postal Service regular mail, or certified mail or registered mail or by any other means at the discretion of the Tax Commissioner. Any service of notice addressed by United States Postal Service regular mail is presumed to be accepted upon mailing unless proven otherwise by the taxpayer. Any service of notice by certified mail shall be valid if accepted by the taxpayer or if addressed to and mailed to the taxpayer's usual place of business or usual place of abode or last known address and accepted by any officer, partner, employee, spouse or child of the taxpayer over the age of eighteen. Any notice addressed and mailed in the above manner and accepted by any person shall be presumed to be accepted by such person unless proven otherwise by the taxpayer. (W. Va. Code § 11-10-5e.) We have been advised that the position of the Tax Commissioner remains that any notice that requires taxpayer to take some affirmative action to avoid losing certain appeal rights will continue to be served by certified mail.

*Amended and supplemental assessments:* The Tax Commissioner may amend an assessment at any time before it becomes final if he ascertains that the original assessment is imperfect or incomplete in any material respect. The Tax Commissioner may make a supplemental assessment at any time within the period prescribed for assessment, if he ascertains the original assessment is imperfect or incomplete in any material respect. (W. Va. Code §§ 11-10-7(c) and 11-10-7(d).)

*Finality of assessment:* An assessment, other than a jeopardy assessment, becomes final and not subject to either administrative or judicial review unless, within 60 days after service of a notice of assessment, the taxpayer files a petition for reassessment with the West Virginia Office of Tax Appeals. A jeopardy assessment becomes final and not subject to either administrative or judicial review unless, within 20 days after service of a notice of assessment, the taxpayer (1) files a petition for reassessment with the West Virginia Office of Tax Appeals; and (2) remits the amount of security required by the Tax Commissioner.

*Payment of assessment:* The taxpayer may pay the assessment (other than a jeopardy assessment) within 60 days and file a claim for refund or credit within the time prescribed therefor.

## **¶ 908 Administrative Protest and Hearings**

*Law:* W. Va. Code §§ 11-10-5d(k), 11-10-5q, 11-10-7, 11-10-18(d), 11-10A-9 through 11-10A-11; WVCSR §§ 121-1-1 *et seq.*

*Petition for reassessment generally:* Taxpayers may, within 60 days following receipt of a notice of assessment (20 days in the case of a notice of jeopardy assessment), file a written petition for reassessment with the Office of Tax Appeals, setting forth with particularity the items of the assessment objected to and the reasons for such objections. An Administrative Law Judge with the Office of Tax Appeals

presides over the proceeding. The Office of Tax Appeals requires a petition for reassessment to contain the following: (1) a statement of the assessed liability; (2) the nature of tax; (3) the assessment period; (4) the items objected to; (5) taxpayer's reasons for objections; (6) a prayer for relief sought; (7) selection of the site for hearing; (8) if appropriate, selection of small claims procedure; (9) signature of taxpayer or agent with knowledge of facts; and (10) an attached copy of the assessment. An original and one copy of the petition must be filed. If taxpayer is represented by an agent or counsel, a power of attorney should also be included with the petition for reassessment. Once a petition for assessment is timely filed, the assessment is subject to both administrative and judicial review. The general form for a petition for reassessment is sent out by the State Tax Department with the notice of assessment, is included in the Office of Tax Appeals procedural rules at WVCSR § 121-1-1 et seq. and can be found online at the Office of Tax Appeals web site at <http://www.wvota.gov>.

*Petition for reassessment of jeopardy assessments:* A taxpayer who has been served with a jeopardy assessment has 20 days to post security *and* to file a petition for reassessment before the jeopardy assessment becomes final. The Tax Commissioner can grant an extension of the time to file a petition for reassessment within the 20-day period after the jeopardy assessment, but adequate security must be posted notwithstanding the extension. (W. Va. Code § 11-10-7(b).)

*Conversion to refund:* A taxpayer who has timely filed a petition for reassessment may, at any time prior to the issuance of the Tax Commissioner's administrative decision, pay the assessment under protest. The taxpayer's petition is then treated as a petition for refund. If payment is made after the administrative hearing has commenced, a new hearing will not be held but the records will reflect that the amount assessed was paid under protest. (W. Va. Code § 11-10-8(c).)

*Answer of Tax Commissioner:* The Tax Commissioner is required to file, with the Office of Tax Appeals, an answer to any petition for reassessment or petition for refund, as the case may be, within 45 days of receipt of a timely filed petition. (W. Va. Code § 11-10A-9(c).) The answer must succinctly state: (1) the nature of the case; (2) the facts relied upon by the Tax Commissioner; and (3) an answer to each question presented for review.

*Counsel Conferences:* Counsel for the Tax Commissioner and counsel for the petitioner are required by procedural rules of the Office of Tax Appeals to meet, normally within sixty (60) days after the petition was filed, to attempt to resolve the matters in controversy. The failure to schedule and to timely hold this required counsel conference in the manner set forth in Rule 19 may result in a default judgment against any party in default or other sanctions, as set forth in Rule 54. (WVCSR 121-1-19 and 121-1-54.)

*Representation of Parties:* The Tax Commissioner is represented by a staff attorney in the Legal Division of the State Tax Department. The taxpayer may represent himself or herself or may be represented by counsel. The rule of the West Virginia Supreme

Court of Appeals defining the practice of law applies to proceedings before the Office of Tax Appeals. Accordingly, the petitioner may also be represented by an attorney licensed to practice law in West Virginia. When the petitioner is represented by an out-of-state attorney, the petitioner must also have local counsel and before the out-of-state attorney can represent the petitioner at a prehearing conference or hearing, the out-of-state lawyer will need to be admitted to practice *pro hac vice*. See: Rule 8.0, *Rules For Admission To The Practice of Law* of the West Virginia Supreme Court of Appeals. See also: WVCSR 121-1-17 (appearance and representation of parties).

*Pre-hearing conferences:* A relatively formal and important pre-hearing conference is held by the Administrative Law Judge several weeks before the date scheduled for the evidentiary hearing. (WVCSR § 121-1-49.) Not less than five (5) days before the pre-hearing conference, the parties must exchange and file with the Office of Tax Appeals, a completed pre-hearing statement form which the Office of Tax Appeals attaches to the notice of hearing. The failure to complete and to submit timely this pre-hearing statement form may result in a default judgment against any party in default or other sanctions. (WVCSR § 121-1-54.)

*Settlement agreements and compromises:* The Tax Commissioner may compromise all or part of any tax liability if there is doubt as to liability or collectability. In all civil cases (in court) involving \$15,000 or more, the Tax Commissioner must seek the written recommendation (but not necessarily the approval) of the Attorney General before entering into a compromise. The Tax Commissioner may enter into closing agreements with taxpayers relating to their tax liability. If such an agreement is entered into, it is final and conclusive except upon a showing of fraud, malfeasance or misrepresentation of a material fact. (W. Va. Code § 11-10-5q.)

*Abatement:* The Tax Commissioner is authorized to abate an assessment which is void, voidable or assessed after the expiration of the period of limitations. The Tax Commissioner is further authorized to abate the unpaid portion of assessment of any tax which has become final if he determines that the administration and collection costs involved would not warrant collection of the amount due. (W. Va. Code § 11-10-7a.)

*Administrative hearing:* The Office of Tax Appeals assigns a time and place for a hearing and notifies the parties in writing of the hearing at least 20 days in advance. A hearing must be held within 45 days from the date the Tax Commissioner's answer is filed unless continued by order of the Office of Tax Appeals for good cause shown. (W. Va. Code § 11-10A-10.)

*Hearing procedure:* The hearing before the Office of Tax Appeals is heard *de novo* and conducted pursuant to the provisions of the contested case procedure set forth in article 5 of the State Administrative Procedures Act, W. Va. Code § 29A-5-1 *et seq.*, to the extent not inconsistent with the provisions of W. Va. Code § 11-10A-1 *et seq.* In case of conflict, the provisions of article 10A govern. The provisions of § 29A-5-5 of the State Administrative Procedures Act relating to exceptions are not applicable to hearings before the Office of Tax Appeals. (W. Va. Code § 11-10A-10(b).)

The Office of Tax Appeals is not bound by the rules of evidence as applied in civil cases in the circuit courts of this State. The Office of Tax Appeals may admit and give probative effect to evidence of a type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs. (W. Va. Code § 11-10A-10(c).)

All testimony shall be given under oath. (W. Va. Code § 11-10A-10(d).)

The Administrative Law Judge may ask the parties to submit proposed findings of fact and conclusions of law prior to the issuance of a decision by the Office of Tax Appeals. (W. Va. Code § 11-10A-10(f).)

*Record of hearings:* It is essential for the taxpayer to develop a complete factual record at the administrative hearing because appeals to circuit court from an adverse administrative decision are taken upon the record established at the administrative hearing. The circuit court reviews appeals of Administrative Decisions of the Office of Tax Appeals on the record made at the administrative hearing. (W. Va. Code § 29A-5-4.)

*Burden of proof:* Assessments issued by the State Tax Department are presumed to be correct, and, except as otherwise provided in the West Virginia Code or legislative rules, the burden of proof at the administrative hearing is upon the taxpayer to show the assessment is incorrect and contrary to law. The taxpayer also has the burden of proof at a hearing on a petition for refund. The sole exceptions to this general rule are the assessment of a civil fraud penalty pursuant to W. Va. Code § 11-10-18(d), in which case the burden of proving fraud is upon the Tax Commissioner; and when the Tax Commissioner wants to use an alternative method of apportionment to determine the West Virginia taxable income of a corporation doing business in West Virginia and in one or more other states. W. Va. Code § 11-24-7(h)(3)(A).

*Record of Proceedings:* Evidentiary hearings before the Office of Tax Appeals are recorded and a transcript made thereof as the Administrative Law Judge deems appropriate. Transcripts are supplied to the parties at such charges as may be fixed or approved by the Office of Tax Appeals. Transcripts duly certified by the person who reported the testimony before the Office of Tax Appeals are admissible in evidence at a later hearing.

*Confidentiality:* Hearings upon a petition for reassessment or petitions for refund or credit are not open to the public, and all evidence submitted at the hearing, the assessment, petition for reassessment and supporting memoranda and briefs are confidential and are exempt from disclosure under the State Freedom of Information Act, unless the taxpayer in effect waives confidentiality of the information by appealing an adverse administrative decision to circuit court. (W. Va. Code § 11-10A-10(g).)

*Administrative decision:* After the hearing and following briefs submitted by the parties in support of their positions, the Administrative Law Judge gives notice to the

parties in writing of his or her ruling by issuing an administrative decision. The administrative decision is written like a court's opinion, including findings of fact, a discussion of law and a conclusion and must be issued within six months after the case is submitted for determination, the record is closed and all required briefs have been filed. The Office of Tax Appeals is required to release to the public administrative decisions in which the taxpayer's identity is not disclosed unless the taxpayer waives confidentiality. Decisions are published in the State Register and posted on the website maintained by the Office of Tax Appeals. Unless an appeal from the administrative decision is taken within 60 days after service on the taxpayer, the administrative decision becomes final and conclusive and is not subject to either administrative or judicial review. (W. Va. Code §§ 11-10-5d(k), 11-10A-16, 11-10A-18 and 11-10A-19.)

*Small claims procedure:* If the amount in dispute on any petition for reassessment does not exceed \$10,000 for any one taxable year, the proceedings in the case may be conducted as a small claim, at the option of the taxpayer and agreement of the Tax Commissioner. Small claims proceedings are intended to be less formal than regular hearings. The Office of Tax Appeals is required to issue a decision with a brief summary of reasons in a small claims case. The decision is not subject to review, and will not be treated as precedent for any other case. At any time before the hearing, the taxpayer may unilaterally withdraw its election to have its case treated as a small claim. (W. Va. Code § 11-10A-11.)

## ¶ 909 Appeals

*Law:* W. Va. Code §§ 11-10A-19 and 29A-5-1 *et seq.*

*Right of appeal:* Taxpayers and the State Tax Department have the right to appeal an adverse administrative decision by petitioning the circuit court within 60 days after being served with notice of the administrative decision. (W. Va. Code § 11-10A-19(a).)

Beginning January 1, 2008, judicial appeals from decisions of state agencies, including the Office of Tax Appeals, must follow the West Virginia Rules of Procedure of Administrative Appeals promulgated by the West Virginia Supreme Court of Appeals. A copy of these rules is available at the Court's website: <http://www.state.wv.us/wvsca/>.

*Venue:* The appeal may be filed in the circuit court of any county: (1) in which the taxable activity was engaged; (2) where the taxpayer resides; (3) in the case of estate tax, where the will of the decedent was probated or letters of administration granted; or (4) in the circuit court of Kanawha County. (W. Va. Code § 11-10A-19(c).) Pursuant to W. Va. Trial Court Rule § 29.04, complex tax appeals in circuit court may be eligible to be referred to the West Virginia Business Court.

*Petition for appeal:* An appeal is instituted by filing a petition with the circuit court within 60 days after service of notice of an adverse administrative decision. An appeal to circuit court will not be heard if the appeal is filed after the 60-day period. (W. Va. Code § 11-10A-19(d).) In the event both the petitioner and the Tax Commissioner

appeal an adverse administrative decision to different circuit courts, the appeals may be consolidated by agreement of the parties or in the circuit court of the county in which the petitioner files its petition for appeal. (W. Va. Code § 11-10A-19(c).)

The petition for appeal must be in writing and must state whether the appeal is taken on questions of law or questions of fact, or both, and set forth with particularity the items of the decision objected to along with the reason or reasons for each objection. (W. Va. Code § 11-10A-19(d).) Additionally, the petition must state the following, in the order indicated:

- (1) Title of the case, as it was before the Office of Tax Appeals to the extent possible. The title shall include the names of the agency, e.g., State Tax Department, the names of the parties to the proceeding, and the administrative case number.
- (2) The kind of proceeding and nature of the ruling by the Office of Tax Appeals.
- (3) A concise statement of the facts of the case.
- (4) The assignments of error relied upon on appeal and the manner in which they were decided by the Office of Tax Appeals.
- (5) Points and authorities relied upon, a discussion of law, and the relief prayed for.
- (6) A copy of the decision, order, rule or ruling from which judicial review is sought.

*Docketing Statement:* The Petition must be accompanied by a completed Docketing Statement in the form required by the circuit court.

*Service of Petition:* The petitioner must serve a copy of the Petition and the Docketing Statement upon all parties and counsel of record who participated in the proceeding before the Office of Tax Appeals by registered or certified mail.

*Proof of Service:* A Petition and accompanying Docketing Statement filed in circuit court must include proof of service in the form of a Certificate of Service, as defined in the Court's Rules. If the Petitioner obtains a Return Receipt or other delivery confirmation in connection with service of the Petition by registered or certified mail, the Return Receipt or other delivery confirmation must be filed with the office of the circuit clerk of the circuit court affixed to the certificate of service. If the Return Receipt or other delivery confirmation is not available at the time of the filing of the Petition and accompanying Docketing Statement, it must be filed with the circuit court promptly thereafter.

*Response to Petition:* – No response or answer to a Petition is required to be filed

unless so ordered by the circuit court. When the circuit court does not order the filing of a responsive pleading, the declarations contained in the petition for judicial review are taken as denied. If a party respondent desires, a response may be filed within 15 days of service of the petition.

*Appeal Bond:* – The Court’s Rules provide that no appeal bond shall be required to perfect an appeal of an Office of Tax Appeals decision or final order in a contested case. (Rule 2(h) of the Court’s Rules.) However, W. Va. Code § 11-10A-19(e) requires the petitioner-taxpayer to file an appeal bond unless the appeal is of a jeopardy assessment for which a bond was previously posted. If the taxpayer appeals an administrative decision affirming an assessment, the taxpayer must file, within 90 days after the petition is filed, a cash bond or corporate surety bond with the clerk of the circuit court. The appeal bond must be conditioned upon the petitioner performing the orders of the court. The penalty of the bond may not be not less than the total amount of tax, additions to tax, penalties and interest for which the taxpayer was found liable in the administrative decision of the Office of Tax Appeals. Notwithstanding the foregoing and in lieu of the bond, the Tax Commissioner, upon application of the petitioner, may upon a sufficient showing by the taxpayer, certify to the clerk of the circuit court that the assets of the taxpayer are adequate to secure performance of the orders of the court. If the Tax Commissioner refuses to certify that the assets of the taxpayer or other indemnification are adequate to secure performance of the orders of the court, then the taxpayer may apply to the circuit court for the certification. No bond may be required of the Tax Commissioner. The appeal bond requirement is jurisdictional, and failure to timely file bond will result in dismissal of the appeal with prejudice. (See *Entertainment Ventures, Inc. v. Caryl*, Cir. Ct., Cabell Co., No. 86-C-1342, May 8, 1987, decided under W. Va. Code § 11-10-10(c), which was superseded by W. Va. Code § 11-10A-19(e).)

*Designation and Filing of Record:* Upon filing of the Petition, the petitioner must designate those parts of the record deemed material to the questions presented in the appeal, including the relevant proceedings to be transcribed, and serve notice of such designation upon all parties below. If the petitioner has not designated the entire record, the respondent(s) shall have 15 days to file a cross-designation of additional portions of the record for review. In lieu thereof, the parties may, by written stipulation, jointly designate the parts of the record to be prepared for appeal.

Within fifteen days after receipt of a copy of the petition and the complete designation of the record by the Office of Tax Appeals, or within such further time as the court may allow, the Office of Tax Appeals must transmit to such circuit court the original or a certified copy of the entire record of the proceeding under review. If the transcripts are not yet complete, the agency has 15 days after receipt of the transcripts to transmit the record to the circuit court. The Office of Tax Appeals must provide notice to all parties that the record has been transmitted to the circuit court.

The record includes a copy of the final opinion, order or decision being appealed. Unless otherwise provided by designation or stipulation of the parties, the record also includes a transcript of all testimony and all papers, motions, documents, exhibits,

evidence and records as were before the Office of Tax Appeals, all Office of Tax Appeals staff memoranda submitted in connection with the case, all orders promulgated in the proceeding by the Office of Tax Appeals and a statement of matters officially noted. The papers must be arranged, as nearly as possible, in the order of the filing and entry thereof, with a table of contents or index.

The reasonable expense of preparing such record is taxed as a part of the costs of the appeal, unless otherwise provided by law. Upon order of the court, the petitioner must provide security for costs satisfactory to the court. If both parties appeal, the costs are shared equally. Unless otherwise prohibited by statute, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs involved.

Upon demand by any party to the appeal, the Office of Tax Appeals must furnish, at the cost of the party requesting same, unless such party is indigent, a copy of such record. In the event the complete record is not filed with the court within the time provided for in Rule 4, the petitioner may apply to the court to have the case docketed, and the court shall order such record filed.

Unless required to do so by statute, the parties may mutually waive the filing of a transcript or otherwise limit the record on appeal.

*Briefs and Oral Argument;* The circuit court may, on its own motion, or motion of any party, issue a schedule providing for submission of briefs as provided herein by any party, and may hold oral argument, or may issue a ruling on the petition and response, if any, without oral argument.

*Hearing of appeal:* The West Virginia Rules of Civil Procedure (WVRCP) do not apply to appeals from administrative decisions of the Tax Commissioner. (WVRCP § 81.) As mentioned above, the relevant statute and rule governing appeals is W. Va. Code § 29A-5-4 and Rule 6 of the Supreme Court of Appeals which provide that the circuit court may only consider evidence which was made part of the record in the proceeding before the Office of Tax Appeals, unless there are alleged irregularities in the procedure before the Office of Tax Appeals, not shown on the record.

In the event a party alleges irregularities in the procedure before the Office of Tax Appeals, the circuit court may hold a hearing and consider other testimony and evidence solely on that issue. A request for oral argument or an evidentiary hearing on matters not in the record below must be made by the Petitioner with the filing of the petition. Respondent may request and/or respond to Petitioner's request for oral argument or an evidentiary hearing at the time of filing a response to the petition. The court must rule on the request within thirty (30) days of the petition, and the granting thereof is at the court's discretion.

Appeals taken on questions of law or fact, or on both, are heard by the circuit court

upon assignment of errors filed in the appeal or in the briefs of the appellant. Errors not argued by brief may be disregarded. The court or judge sets a date and time for the hearing on the petition, but such hearing, unless by agreement of the parties, may not be heard sooner than 10 days after the filing of the petition. Notice of the hearing must be given to the Tax Commissioner. The review is conducted by the court upon the record made before the Office of Tax Appeals, except that in cases of alleged irregularities in procedure before the Office of Tax Appeals, not shown in the record, testimony thereon may be taken before the court. The court may hear oral argument and require written briefs. (W. Va. Code § 29A-5-4.) The Tax Commissioner is represented in court by the Attorney General's office.

The circuit court may reverse or affirm the order or decision of the Office of Tax Appeals or may remand the case for further proceedings. It must reverse, vacate or modify the order or decision of the Office of Tax Appeals if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. (W. Va. Code § 29A-5-4(9).)

In the case of a complex tax case, the taxpayer may wish to have the case transferred to the Business Court Division pursuant to W. Va. TRC § 29.

*Appeal from circuit court:* If the taxpayer prevails before the circuit court, the Tax Commissioner must correct the assessment in accordance with the circuit court's decision unless the Tax Commissioner files an appeal and prevails thereon. The judgment of the circuit court is final unless reversed, vacated or modified on appeal to the West Virginia Supreme Court of Appeals in accordance with the provisions of section one, article six of this chapter. (W. Va. Code § 29A-5-4(h).) An appeal of the circuit court's decision may be taken by the taxpayer or the Tax Commissioner to the West Virginia Supreme Court of Appeals. (W. Va. Code § 11-10A-19(h).) The petition for appeal to the Supreme Court of Appeals must be submitted within four months of the entry of the circuit court's order and bond must be given within two months. (W. Va. Code §§ 29A-6-1 and 56-5-16.)

Unless otherwise provided by statute, a final judgment shall be entered in an administrative appeal within six (6) months of the filing of the appeal. The court's ruling may affirm, reverse, vacate or modify the order or decision of the Office of Tax Appeals, or remand the case with instructions to the Office of Tax Appeals for further proceedings. The judgment of the circuit court is final unless reversed, vacated or modified by the West Virginia Supreme Court of Appeals, in accordance with West Virginia Code § 29A-6-1.

## **¶ 910 Refunds and Credits of Overpayments**

*Law:* W. Va. Code § 11-10-14.

*Overpayments generally:* A taxpayer that has overpaid any tax may file a claim for refund to require the Tax Commissioner to refund the amount of overpayment or, if the taxpayer so elects, to apply the overpayment as a credit against the taxpayer's liability for other periods.

*Claims for refund or credit:* To be entitled to a refund or credit of an overpayment, the taxpayer must timely file a claim with the Tax Commissioner. With respect to personal or corporation net income taxes, a return which shows an overpayment on its face constitutes a claim for refund or credit. Generally, the Tax Commissioner determines the correctness of taxpayer's claim and notifies taxpayer in writing of such determination. (W. Va. Code § 11-10-14(a).)

*Petition for refund or credit; hearing:* If the taxpayer is not satisfied with the Tax Commissioner's determination of his claim for refund or credit or if the Tax Commissioner has not determined the taxpayer's claim within 90 days after filing, or six months when the claim for refund or credit is for personal income tax, business franchise tax or corporation net income tax, the taxpayer may file a petition for refund or credit with the Office of Tax Appeals. No petition for refund or credit may be filed more than 60 days after the taxpayer is served with notice of denial of his claim for refund. Like a petition for reassessment, a petition for refund or credit must be filed in writing, and verified under oath by the taxpayer setting forth with particularity the items of the determination objected to with the reasons for the objections. All hearings on petitions for refund or credit are conducted in the same manner as hearings on petitions for reassessment. (W. Va. Code § 11-10-14)

*Erroneous refund or credit:* If the Tax Commissioner believes that an erroneous refund has been made or an erroneous credit has been established, he may issue an assessment or institute a civil action to recover such amount.

*Refunds due to unconstitutionality:* If a tax is found to be unconstitutional, the Tax Commissioner may refund such taxes in installments over a period not to exceed three years from the date of the final decision entitling taxpayer to retroactive monetary relief. (W. Va. Code § 11-10-14b (e).)

## ¶ 911 Time Limitations

*Law:* W. Va. Code §§ 11-10-14(e), 11-10-15, 11-10-16(a)--11-10-16(d)

*Limitations on assessment:* All tax, additions to tax, penalties and interest to which the Tax Procedure Act applies must be assessed within three years after the date the return was filed. A return filed before the last day prescribed for filing is considered filed on the last day for filing. There are several exceptions to the three-year rule. In the case of a false or fraudulent return filed with intent to evade tax, or in the case that no return was filed, an assessment may be made at any time. In a case where taxpayer fails to disclose a listed transaction, as defined in Section 6707A of the Internal Revenue Code, the assessment period is six years. The assessment period may be extended pursuant to written agreement between the taxpayer and the Tax Commissioner. The assessment period is also extended for personal income tax or corporation net income tax if a federal income tax deficiency is finally determined. Furthermore, the filing of an amended return, application of certain loss carrybacks, adjustment of certain credits and/or bankruptcy may extend the assessment period. (W. Va. Code § 11-10-15.)

*Limitations on claims for refund or credit:* In general, claims for refund must be filed within three years after the due date of the return with respect to which the tax was imposed or within two years from the date the tax was paid, whichever of such period expires later. If no return was filed by the taxpayer (as is the case with respect to consumers sales and service tax paid by a purchaser-taxpayer to a vendor), a claim for refund must be filed within two years from the time the tax was paid. The time period for claiming refunds may be extended by agreement and is extended automatically for personal income tax or corporation net income tax after a final determination of an overpayment of federal income taxes. Special rules apply for refunds of the motor fuel excise tax and the motor carrier road tax. (W. Va. Code § 11-10-14(e).)

*Limitations on collection:* A collection proceeding for an amount due under an assessment which has become final must be brought within ten years after the date the assessment becomes final. A collection proceeding for an amount determined to be due as provided by law other than by the issuance of an assessment (e.g., where a taxpayer files a return but fails to remit tax stated to be due) must be commenced within ten years after the date on which the taxpayer filed the annual return. If the taxpayer files a false or fraudulent return or fails to file a return, no limitation on collection applies. Furthermore, the Tax Commissioner and a taxpayer may enter into a written agreement to extend the period within which the Tax Commissioner may institute collection proceedings. (W. Va. Code §§ 11-10-16(a)-(b) and 11-10-16(d).)

## ¶ 912 Collection of Tax--In General

*Law:* W. Va. Code §§ 11-1D-5h, 11-10-11 and 11-10-17.

*Enforcement generally:* The Tax Commissioner is empowered to collect all taxes, additions to tax, penalties and interest imposed by the State of West Virginia. Enforcement of the collection provisions of the Tax Procedure Act in any state court is under the exclusive jurisdiction of the Tax Commissioner. The Tax Commissioner may

be represented in any civil collection action by the Attorney General, the prosecuting attorney of the county in which the action is instituted or by any attorney employed by the Tax Commissioner and designated by the Attorney General as a Special Assistant Attorney General. In addition to the other remedies available for the collection of debts due West Virginia, the Tax Commissioner may proceed by foreclosure of lien or by levy and distraint. (W. Va. Code § 11-10-5h.)

*Special rules regarding tax enforcement:* There are several special rules that enhance the Tax Commissioner's tax enforcement powers, possibly at the expense of the unwary. In addition to the typical powers of creating liens and levying upon property of delinquent taxpayers, the collection provisions authorize the Tax Commissioner to seek payment of delinquent tax from persons other than the "taxpayer."

*Nonresident contractors:* Every person contracting with a "nonresident contractor" is required to withhold a sufficient amount in the final settlement of the contract (not exceeding 6% of the contract price) to cover B&O tax, personal income tax or corporate net income tax owed by the contractor to the state. Amounts are to be withheld until the receipt of a certificate from the Tax Commissioner that West Virginia taxes imposed against the nonresident contractor have been paid. Failure to withhold as provided above may cause such person to become personally liable for the payment of the contractor's delinquent taxes, not to exceed 6% of the contract price. (W. Va. Code § 11-10-11(b).)

*Contracts with state or political subdivision:* State, county and municipal officers making contracts on behalf of the state or any political subdivision are required to withhold payment in the final settlement of any contract until receipt of a certificate from the Tax Commissioner stating that B&O tax, personal income tax or corporate net income tax, imposed against the contractor have been paid. A similar rule applies when municipal B&O tax applies to the subject matter of the contract. The Tax Commissioner has ruled that 10% of the contract price should be withheld on government contracts until certification is provided. The Tax Commissioner is authorized to sue a public official for \$1,000 for failing to comply with this withholding requirement. (W. Va. Code § 11-10-11(d).)

*Ceasing business:* If any person subject to a tax administered under the Tax Procedure Act sells out or ceases doing business, all tax, additions to tax, penalties and interest become due and payable immediately. Final returns and payment of all such taxes must be made within 30 days after selling out or ceasing to do business. The unpaid amount of any such tax is a lien upon the property of such person.

*Successor liability:* A successor in business of any person who sells his business or ceases doing business becomes *personally liable* for the payment of tax, additions to tax, penalties and interest unpaid after the expiration of the 30-day period. Furthermore, a predecessor's unpaid tax becomes a lien on the *successor's* property. However, if the business is purchased in an arms-length transaction and the purchaser withholds so much of the consideration for the purchase as will satisfy the

liabilities which may be due until such time as the seller produces a receipt from the Tax Commissioner evidencing the payment thereof, the purchaser will not be personally liable. This broad successor liability provision must be carefully addressed with respect to the purchase or sale of any business in West Virginia. (W. Va. Code § 11-10-11(f).)

*“Innocent” spouse relief from liability:* Where a joint personal income tax return has been filed on which there is a substantial understatement of tax, attributable to grossly erroneous items of one spouse, the other spouse may be relieved of liability for tax if he or she establishes that, in signing the return, he or she did not know, and had no reason to know, of the substantial understatement. (W. Va. Code § 11-10-11(k).)

*Offset of refunds or credits:* Whenever a taxpayer has a refund or credit due to an overpayment of any tax administered under the Tax Procedure Act, the Tax Commissioner may reduce the amount of such refund or credit by the amount of any other tax owed. The converse is not true (i.e., the taxpayer does not have right to offset unless specifically authorized by statute). (W. Va. Code §§ 11-10-11(j) and 11-15-9b(c).)

*Injunction:* If any taxpayer fails for a period of more than 60 days to fully comply with provisions of the Tax Procedure Act, the Tax Commissioner may institute a proceeding to secure an injunction to restrain the taxpayer from doing business in West Virginia until the taxpayer has fully complied with the provisions of the Tax Procedure Act. (W. Va. Code § 11-10-11(h).)

*Dissolving corporations:* The Secretary of State is required to withhold the issuance of a certificate of dissolution to a corporation organized under West Virginia law or a certificate of withdrawal to a corporation organized under the laws of another state and admitted to do business in West Virginia until receipt of a certificate from the Tax Commissioner stating that all West Virginia taxes imposed against the corporation have been paid. (W. Va. Code § 11-10-11(c).)

## **¶ 913 Collection of Tax-Liens**

*Law:* W. Va. Code §§ 11-10-11(f), 11-10-12(a)-11-10-12(e), 11-10-13 and 38-10C-1.

*Liens generally:* Any tax, additions to tax, penalties or interest due and payable under the Tax Procedure Act is a debt due the state and lien upon the taxpayer’s real and personal property. (W. Va. Code § 11-10-12(a).)

*Duration of lien:* Tax liens remain in effect until the liability for tax, additions to tax, penalties and interest is satisfied or become unenforceable by reason of lapse of time. (W. Va. Code § 11-10-12(b).)

*Recording of liens:* No lien in favor of the state, except a lien for property taxes, is enforceable against a purchaser of real estate or personal property without notice

unless recorded in the office of the clerk of the county commission of the county where such real estate or personal property is located. An unrecorded tax “lien” is, however, effectively enforceable against a successor in business. (W. Va. Code §§ 11-10-11(f), 11-10-12(c), 38-10C-1 *et seq.*)

*Release, subordination, or withdrawal of liens;* The Tax Commissioner may release a tax lien when the debt is paid or adequately secured by bond or other security. The Tax Commissioner may also partially release or subordinate any lien if an amount not less than the value of the state’s interest in such property is paid. The Tax Commissioner may withdraw a lien that was recorded prematurely, inadvertently or otherwise erroneously. (W. Va. Code §§ 11-10-12(d), 38-10C-2.)

*Foreclosure:* The Tax Commissioner may foreclose upon tax liens recorded against any property subject to the lien by civil action in the circuit court of the county where such property is located. The court may appoint a receiver to ascertain and report all liens, claims and interests in and upon such property and the validity, amount and priority of each. After notice to all parties having any interest in the property, the court will adjudicate all remaining matters and decree a sale of such property. (W. Va. Code § 11-10-12(e).)

#### **¶ 914 Collection of Tax-Levy**

*Law:* W. Va. Code §§ 11-10-13(a), 11-10-13(e), 11-10-13(d), 11-10-13a through 11-10-13k.

*Levy and distraint generally:* If any tax administered under the Tax Procedure Act which is shown to be due on a return is not paid when required or if an assessment of such tax becomes final and the person liable to pay the tax neglects or refuses to pay the assessment within 15 days after notice and demand, the Tax Commissioner may collect the tax by levy or successive levies (including the power of distraint and seizure by any means) upon all property and rights to property belonging to the taxpayer or upon which there is a lien for payment of the tax. If the Tax Commissioner finds that the collection of the tax is in jeopardy, notice and demand for immediate payment may be given and, upon failure or refusal to pay, collection by levy is authorized without regard to the 15-day notice. (W. Va. Code § 11-10-13(a) and (c).)

*Distress warrant:* A levy on property is made by the issuance of a distress warrant by the Tax Commissioner to the sheriff of the county in which the property is located or to any officer or employee of the State Tax Department commanding such person to levy upon and sell taxpayer’s property. (W. Va. Code § 11-10-13(d).)

*Continuing levy on property and wages:* The Tax Commissioner may levy upon the salary or wages of any person owing unpaid tax. The Tax Commissioner must notify such person in writing of his intention to make such levy ten days in advance. The levy on salary or wages payable to a taxpayer is continuous from the date the levy is made until the tax liability is satisfied or becomes unenforceable by reason of lapse of time. (W. Va. Code § 11-10-13(e).)

*Property exempt from levy:* Certain types and amounts of property are statutorily exempt from levy, including but not limited to wearing apparel, furniture, personal effects, tools of the trade, annuity and pension payments, workers compensation benefits, unemployment benefits, judgments for support of minor children and a certain minimum amount of wages, salary or other income. (W. Va. Code § 11-10-13a.)

*Surrender of property subject to levy:* Persons in possession of property or rights to property upon which a levy has been made must surrender such property, upon demand of the Tax Commissioner, except items subject to prior attachment, execution or levy. Refusal to surrender such property upon the demand of the Tax Commissioner will result in such person becoming personally liable to the state in an amount equal to the amount of taxes for which the levy has been made, together with costs and interest on such sum. In addition, the penalty imposed for failure to surrender property without reasonable cause is fifty percent of the amount recovered. Persons in possession of property subject to levy, who, upon demand of the Tax Commissioner, surrender such property, are discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. (W. Va. Code § 11-10-13b.)

*Sale of seized property generally:* Following the seizure of property, the Tax Commissioner must give notice to the owner and publish notice of sale not less than five days prior to the date of sale. The sale is conducted by public auction or by public sale under sealed bids. The Tax Commissioner may determine the minimum price for which a property will be sold and if the minimum price is not offered, the property will be declared purchased at the minimum price by the State of West Virginia. Indivisible property owned jointly by the delinquent taxpayer and an innocent third party may be sold by the Tax Commissioner and the proceeds divided, based on the parties respective interests in the property immediately prior to the levy. (W. Va. Code § 11-10-13c.)

*Perishable goods:* If the Tax Commissioner determines that any seized property is liable to perish or become greatly reduced in value by keeping, he appraises the property and, if the owner pays an amount equal to the appraised value or gives a bond to secure payment of the appraised amount, returns it to the owner. If the owner does not pay such amount or furnish a bond, the Tax Commissioner must sell the perishable property as soon as practicable. (W. Va. Code § 11-10-13d.)

*Redemption of seized property:* Persons whose property has been levied on have the right to pay the amount due plus the Tax Commissioner's expenses prior to sale and have the property restored. Owners of any real estate levied upon and sold are permitted to redeem the property within 180 days after the sale upon payment to the purchaser the amount paid by the purchaser, plus interest. (W. Va. Code § 11-10-13e.)

*Certificate of sale or deed to property.* The Tax Commissioner will provide the purchaser of personal property a certificate of sale upon payment of the purchase price. In the case of any real property sold and not redeemed by the owner, the Tax Commissioner will provide the purchaser a deed. (W. Va. Code §§ 11-10-13f and 11-10-13g.)

*Application of proceeds of levy.* Any money realized from a levy shall be applied in the following order of priority: (1) against the expenses of the levy and sale; (2) against the liability upon which the levy was made; and (3) surplus proceeds are credited or refunded to the person legally entitled thereto. (W. Va. Code § 11-10-13j.)

*Application of lottery prizes to tax liabilities.* The Tax Commissioner may divert lottery prizes to offset tax liabilities of lottery winners. (W. Va. Code § 11-10-5bb.)

*Release of levy.* The Tax Commissioner may release a levy upon all or part of any property or rights to property where he determines that such action will facilitate the collection of the liability. Such release does not operate to prevent subsequent levy. (W. Va. Code § 11-10-13k.)

## **¶ 915 Interest, Additions to Tax and Penalties**

*Law:* W. Va. Code §§ 11-10-17, 11-10-17a, 11-10-18, 11-10-18a, 11-10-18b, 11-10-19 and 11-10-19a.

*Interest on underpayments:* Interest is charged on the amount of any tax, administered under the Tax Procedure Act, which is not paid on or before the last day for payment. If a refund is made or credit established upon an erroneous claim, interest on the amount refunded or credited is charged from the date the refund was made to the date such amount is recovered. The following special rules apply to interest on underpayments: (1) interest payable to the state may be collected in the same manner as taxes (e.g., by levy and distraint); (2) no interest is imposed on interest; (3) interest is imposed on penalties and additions to tax if not paid within 15 days from the date of notice and demand therefore; (4) if notice and demand is made for payment of any tax and such tax is paid within 15 days after the date of such notice and demand, interest is not imposed for the period after the date of notice and demand; and (5) interest is not imposed on any failure to pay estimated business and occupation, severance, telecommunications, business franchise, personal or corporation net income taxes (but additions to tax may apply). (W. Va. Code §§ 11-10-17 and 11-10-17(a).)

*Interest on overpayments:* Subject to various special rules, interest is allowed on any amount which is administratively or judicially determined to be an overpayment of tax administered under the Tax Procedure Act with the exception of the business registration tax and motor carrier road tax. Interest on overpayments only begins to accrue on the date a claim for credit or refund is filed. Within 30 days after a final determination of entitlement to refund, the Tax Commissioner will authorize a refund or establish a credit as requested by the taxpayer. No interest is payable if the Tax

Commissioner authorizes a refund or establishes a credit within 90 days after the date a claim for refund is filed, except in the case of claims for refunds of personal or corporation net income taxes no interest is allowed on overpayments if the Tax Commissioner authorizes a refund or establishes a credit within six months after the date a claim for refund or credit is filed.

*Rate of interest:* The Tax Commissioner is required to establish interest rates for tax underpayments and overpayments based on the adjusted prime rate. These rates may not be less than eight (8) percent per annum for taxable years beginning prior to January 1, 2017 and are determined every six months. After December 31, 2016, the interest rate will be the adjusted prime rate, plus three percentage points as of the first business day of December. This rate will apply for the next calendar year. This rate will be adjusted annually rather than biannually. In the case of underpayments of tax, the applicable refund interest rate is increased by one and one half percent to help fund the Office of Tax Appeals.

The interest rates are as follows:

	On Underpayments	On Overpayments
July 1, 1989 through June 30, 1990 -	11%	11%
July 1, 1990 through December 31, 1991 -	10%	10%
January 1, 1992 through June 30, 1992 -	9%	9%
July 1, 1992 through December 31, 1995 -	8%	8%
January 1, 1996 through December 31, 1996 -	9%	9%
January 1, 1997 through December 31, 1997 -	8%	8%
January 1, 1998 through December 31, 1998 -	9%	9%
January 1, 1999 through June 30, 2000 -	8%	8%
July 1, 2000 through December 31, 2001 -	9%	9%
January 1, 2002 through June 30, 2002 -	8%	8%
July 1, 2002 through December 31, 2015 -	9.5%	8%
January 1, 2016 through June 30, 2016	9.5%	8%
July 1, 2016 through December 31, 2016	9.5%	8%
January 1, 2017 through December 31, 2017	8.0%	6.5%

*Failure to file returns or pay tax:* If a taxpayer fails to file a required return of any tax administered under the Tax Procedure Act on or before the due date, unless such failure is due to reasonable cause and not willful neglect, an addition to tax will be added to the amount shown as tax on the return equal to 5% of the amount of such tax if the failure is for not more than one month, with an additional 5% for each additional month not to exceed 25% in the aggregate. If a taxpayer fails to pay the tax shown on any required return on or before the due date, unless it is shown that such failure is due to reasonable cause and not willful neglect, an addition to tax is added to the tax shown on the return equal to 0.5% of the tax if the failure is for not more than one month with an additional 0.5% for each additional month not to exceed 25% in the aggregate. Finally, if a taxpayer fails to timely pay tax that should have been shown on a tax return within 15 days after notice and demand therefore, an addition to tax of 0.5% of the amount not timely paid is assessed if

the failure is for not more than one month with an additional 0.5% for each additional month such failure continues not to exceed 25% in the aggregate, unless the failure was due to reasonable cause and not due to willful neglect. Special rules limit the aggregate additions to tax assessed for failure to pay and failure to file. (W. Va. Code § 11-10-18(a)(1).)

*Negligence or intentional disregard of rules and regulations:* If any part of an underpayment of tax administered under the Tax Procedure Act is due to negligence or intentional disregard of the rules and regulations, an amount equal to 5% of the tax due will be added if the underpayment is for not more than one month, with an additional 5% for each additional month, not to exceed 25% in the aggregate. Additions to tax due to negligence or intentional disregard of rules and regulations are imposed only on the net amount of tax due and are imposed in lieu of any additions to tax for failure to file or pay. (W. Va. Code § 11-10-18(c).)

*False or fraudulent returns:* In the case of the filing of any false or fraudulent return with intent to evade tax or in the case of willful failure to file a return with the intent to evade tax, an addition to tax is added equal to 50% of the tax due. The addition to tax is added to the tax due and shall be in lieu of any additions to tax for failure to file or pay or for negligence. The burden of proving fraud, willfulness or intent to evade tax is upon the Tax Commissioner. (W. Va. Code § 11-10-18(d).)

*Failure to pay estimated tax:* In the case of an underpayment of estimated tax, an addition to tax in an amount determined at the rate established for paying interest under W. Va. Code §§ 11-10-17 or 11-10-17a on the amount of underpayment of estimated tax for the period of underpayment is imposed. The amount of the underpayment is defined as the excess of the amount of the installment which would be required to be paid if the estimated tax were an amount equal to 90% of the tax shown on the *return* for the taxable year, divided by the number of installments the taxpayer was required to make for the taxable year (or, if no return was filed, 90% of the tax for the tax year divided by the number of installment payments the taxpayer was required to make for the tax year), over the amount of any installments paid on or before the last date prescribed for payment. The period of underpayment runs from the date the installment was required to be paid to the earlier of the following dates: (1) the due date of taxpayer's annual return; or (2) the date on which the estimated tax was paid, and without *regard* to any extension of time granted for filing the return.

*Failure to collect, account for and pay over tax, or attempt to defeat or evade tax:* Any person required to collect, account for and pay over to the Tax Commissioner any tax administered under the Tax Procedure Act, who willfully fails to truthfully account for and pay over such tax or willfully attempts to evade or defeat such tax, is liable for a penalty equal to the total amount evaded, not collected or not accounted for and paid over. This penalty provision is applied in lieu the provisions regarding additions to tax. The 100% penalty is used by the

State Tax Department against responsible officers of corporations that fail to pay personal income tax withholdings. See W. Va. Code § 11-10-4(b), W. Va. Code (included in definition of “person” is an officer of a corporation who is under a duty to perform an act). (W. Va. Code § 11-10-19.)

*Fraudulent statement or failure to furnish statement to employees:* Any person required under the provisions of the personal income tax law to furnish a statement to an employee who willfully furnishes a false or fraudulent statement or willfully fails to furnish a statement is subject to a penalty of \$50.

*Fraudulent claim for refund or credit:* A penalty is imposed where a person has received a refund or credit for taxes previously paid, as a result of filing of a false or fraudulent claim for refund or credit with the intent to defraud the state. The amount of the penalty is 50% of the amount erroneously refunded or credited. The burden of proving fraud or intent to defraud is upon the Tax Commissioner. (W. Va. Code § 11-10-19(c).)

## **¶ 916 Criminal Penalties**

*Law:* W. Va. Code § 11-9-1 *et seq.*

*Powers of enforcement officers:* For the purpose of enforcing the criminal provisions of the tax laws, employees of the State Tax Department so designated by the Tax Commissioner have all lawful powers delegated to members of the state police except the power to carry firearms. The West Virginia Department of Public Safety, any county sheriff or any municipal police officer, upon request of the Tax Commissioner, are also authorized to assist in enforcing the criminal provisions of the tax code. (W. Va. Code § 11-10-5i.)

*Failure to file a return or pay tax:* Any person who willfully fails to file a return or willfully fails to pay any tax more than 30 days after the date such tax is required to be paid by law is guilty of a misdemeanor and upon conviction thereof may be fined not less than \$100 nor more than \$1,000 and/or imprisoned in the county jail not more than six months. Each failure to pay tax or file a return is a separate offense and punishable accordingly. Thirty days prior to instituting criminal proceedings the Tax Commissioner must give such person written notice of any failure to pay tax or file a return. (W. Va. Code § 11-9-4.)

*Failure to account for or pay over another's tax:* Any person required to collect or withhold, account for and pay over any tax who willfully fails to truthfully account for and pay over such tax is guilty of a felony if the amount of tax not paid over is \$1,000 or more and upon conviction thereof may be fined not less than \$5,000 nor more than \$25,000 or imprisoned in the penitentiary not less than one nor more than three years or in the discretion of the court, confined in the county jail not more than one year, or both fined and imprisoned. If the amount of tax not paid over is less than \$1,000, the person is guilty of a misdemeanor and upon conviction thereof will be fined not less than \$500 nor more than \$5,000 and/or

imprisoned in the county jail not more than six months. Thirty days prior to instituting a criminal proceeding under this section, the Tax Commissioner must give such person written notice of the failure to truthfully account for and pay over tax. (W. Va. Code § 11-9-5.)

*Failure to collect or withhold tax:* Any person required to collect or withhold any tax who willfully fails to collect or withhold such tax is guilty of a misdemeanor and upon conviction thereof shall he fined not less than \$100 nor more than \$500 and/or imprisoned in the county jail not more than six months. (W. Va. Code § 11-9-6.)

*False statements to purchasers, lessees or employees relating to tax:* Any person required by law to collect or withhold any tax who represents to the public or any purchaser, lessee or employee that he will absorb or assume payment of any part of such tax or that such tax is not to be considered as part of or added to the sales price or wages payable is guilty of a misdemeanor and upon conviction thereof will be fined not less than \$100 nor more than \$1,000 and/or imprisoned in the county jail not more than six months. (W. Va. Code § 11-9-7.)

*Aiding, abetting, assisting or counseling in criminal violation:* Any person who knowingly aids, abets, assists, or counsels another person in the commission of a tax crime is guilty of a misdemeanor and upon conviction thereof may be fined not less than \$100 nor more than \$1,000 and/or imprisoned in the county jail for not more than six months. (W. Va. Code § 11-9-9.)

*Tax evasion:* Any person who knowingly files a false or fraudulent return or any other document or willfully attempts in any other manner to evade any tax is guilty of a felony and upon conviction shall he fined not less than \$1,000 nor more than \$10,000 and/or imprisoned in the penitentiary not less than one nor more than three years or in the discretion of the court confined in the county jail not more than one year, or both fined and imprisoned. (W. Va. Code § 11-9-10.)

*Tax shelter penalties:* Reportable transactions, as defined in W. Va. Code § 11-10E-5, must be listed with the State Tax Commissioner. Penalties similar to those imposed by the Internal Revenue Code are imposed for promoting tax shelters and failure to report listed transactions. (W. Va. Code § 11-10-18(f).) See also W. Va. Code § 11-10E-5 (penalty for failure to report reportable transactions), § 11-10E-6 (penalty for failure to register tax shelters) and § 11-10E-7 (penalty for promoting tax shelters).

*Engaging in business without payment of business registration tax:* If any person engages in business for more than 30 days without payment of the business franchise registration tax or engages in business after expiration of the period of time for which such certificate was granted or after such certificate was revoked, such person is guilty of a misdemeanor and upon conviction thereof may be fined \$100. Each day or part thereof that any violation continues is a separate

offense and punishable accordingly. (W. Va. Code § 11-9-11.)

*Engaging in business without a business registration certificate:* If any person engages in business without first obtaining a business franchise registration certificate, such person is guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$1,000 nor more than \$10,000. (W. Va. Code § 11-9-12.)

*Operation of Automated Sales Suppression Device:* Any person who willfully and knowingly sells, purchases, installs, transfers or possesses software or a device that falsifies the electronic records of electronic cash registers and other point-of-sale systems is guilty of a felony and, upon conviction thereof, shall be confined in a correctional institution for not less than one nor more than five years, or fined not less than \$10,000 nor more than \$100,000, or both confined and fined. (W. Va. Code § 61-3-22a.)

## **¶ 917 Specimen Documents**

The following appeals forms are available from the Office of Tax Appeals at the following website: <http://www.wvota.gov>

- Form petition for reassessment
- Form petition for refund
- Form for service of process
- Form for subpoena and subpoena duces tecum
- Power of attorney – Form WV/2848
- Form for withdrawal of petition
- Prehearing Statement

The following form is available from the State Tax Department at the following website: <http://tax.wv.gov/Documents/Legal/ari001.pdf>

Form WV ARI-001 Authorization to release information

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