

Senate Bill No. 565

(By Senators Walters, D. Hall, Miller and Sypolt)

[Introduced February 23, 2015; referred to the Committee on Finance.]

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10 A BILL to amend and reenact §11-10-11 of the Code of West Virginia, 1931, as amended, relating
11 to authorizing Tax Commissioner to collect tax, interest and penalties due and owing from
12 payments to vendors and contractors from Auditor and other state, county, district or
13 municipal officers and agents; requiring Auditor and other state, county, district or municipal
14 officers and agents to certify to Tax Commissioner identity of payees prior to first payment
15 and prior to any subsequent payments; authorizing Tax Commissioner to identify payees not
16 in good standing with Tax Department; requiring Auditor or issuing officer or agent to
17 forward to Tax Commissioner lesser of amount owed or remaining amount of payment;
18 requiring Auditor or issuing officer or agent to notify vendor or contractor of amount being
19 withheld; requiring payment be withheld until vendor or contractor is in good standing with
20 Tax Department; specifying that, for contracts which are subject to county or municipal
21 business and occupation tax, payments are withheld until released by county or municipality
22 after all business and occupation taxes have been paid, including any authorized transaction

1 fee, additions to tax, interest and penalty; defining terms; excluding employees of this state,
 2 or any county, district or political subdivision thereof who receive no nonemployee
 3 compensation from treatment as vendors and contractors for purposes of specified
 4 provisions; authorizing Tax Commissioner to enter into agreements to comply with mandates
 5 of provision and to protect taxpayer information; authorizing Tax Commissioner and Auditor
 6 propose legislative rules; and specifying effective date.

7 *Be it enacted by the Legislature of West Virginia:*

8 That §11-10-11 of the Code of West Virginia, 1931, as amended, be amended and reenacted
 9 to read as follows:

10 **ARTICLE 10. WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT.**

11 **§11-10-11. Collection of tax.**

12 (a) *General.* -- The Tax Commissioner shall collect the taxes, additions to tax, penalties and
 13 interest imposed by this article or any of the other articles of this chapter to which this article is
 14 applicable. In addition to all other remedies available for the collection of debts due this state, the
 15 Tax Commissioner may proceed by foreclosure of the lien provided in section twelve, or by levy and
 16 distraint under section thirteen.

17 (b) *Prerequisite to final settlement of contracts with nonresident contractor; user personally*
 18 *liable.* --

19 (1) Any person contracting with a nonresident contractor subject to the taxes imposed by
 20 articles thirteen, twenty-one and twenty-four of this chapter, shall withhold payment, in the final
 21 settlement of the contract, of a sufficient amount, not exceeding six percent of the contract price, as
 22 will in the person's opinion be sufficient to cover the taxes, until the receipt of a certificate from the

1 Tax Commissioner to the effect that the above referenced taxes imposed against the nonresident
2 contractor have been paid or provided for.

3 (2) If any person shall fail to withhold as provided in subdivision (1) of this subsection, that
4 person is personally liable for the payment of all taxes attributable to the contract, not to exceed six
5 percent of the contract price. The taxes attributable shall be recoverable by the Tax Commissioner
6 by appropriate legal proceedings, which may include issuance of an assessment under this article.

7 (c) *Prerequisite for issuance of certificate of dissolution or withdrawal of corporation.* -- The
8 Secretary of State shall withhold the issuance of any certificate of dissolution or withdrawal in the
9 case of any corporation organized under the laws of this state, or organized under the laws of another
10 state and admitted to do business in this state, until the receipt of a certificate from the Tax
11 Commissioner to the effect that every tax administered under this article imposed against any
12 corporation has been paid or provided for, or that the applicant is not liable for any tax administered
13 under this article.

14 (d) *Prerequisite to ~~final settlement~~ payment of contract with this state or political*
15 *subdivision; authorization for tax commissioner to enter agreements; rule-making authority;*
16 *penalty; effective date.* --

17 (1) Notwithstanding the provisions of section five-d of this article or any other provision of
18 this code, for all contracts made on behalf of this state or any political subdivision thereof for which
19 payment is made by the Auditor on and after January 1, 2016, the Auditor shall provide to the Tax
20 Commissioner, by electronic or other means, no less than three days prior to the first payment and
21 upon all subsequent payments, a list showing the name and the social security number or federal tax
22 identification number of all vendors and contractors who are payees, and such other information as

1 the Tax Commissioner may require. From the certified list, the Tax Commissioner shall certify to
2 the Auditor each delinquent payee and the amount of tax, interest, additions to tax or penalties due
3 and payable. The Auditor shall notify the vendor or contractor of the amount being withheld;
4 forward to the Tax Commissioner the lesser of the entire payment or the amount certified, and pay
5 any amount in excess of the certified amount to the vendor or contractor. Where the vendor or
6 contractor is not in good standing for reasons other than tax, interest or penalty being owed, the Tax
7 Commissioner shall certify as such and the Auditor shall notify the contractor that the contractor is
8 not in good standing, and the reasons therefore, and withhold payment until the contractor is in good
9 standing. For purposes of this subdivision the terms "vendor" and "contractor" do not include
10 employees of this state who for the taxable year receive wages or salary reported on federal form
11 W-2 for purposes of the United States Internal Revenue Code or who receive reimbursements for
12 employment related expenses: *Provided, That any employee who receives nonemployee*
13 compensation, as determined for federal income tax purposes, from this state is still subject to the
14 provisions of this subdivision to the extent of that nonemployee compensation.

15 (2) Notwithstanding the provisions of section five-d of this article or any other provision of
16 this code, on and after January 1, 2016, all state, county, district and municipal officers and agents
17 making contracts on behalf of this state or any political subdivision thereof, for which payment is
18 not made by the Auditor, shall withhold payment, in the final settlement of any contract, until the
19 receipt of a certificate from the Tax Commissioner to the effect that the taxes imposed by articles
20 thirteen, twenty-one and twenty-four of this chapter against the contractor have been paid or
21 provided for: shall provide to the Tax Commissioner, by electronic or other means, no less than
22 three days prior to the first payment and upon all subsequent payments, a list showing the name and

1 the social security number or federal tax identification number of all vendors and contractors who
2 are payees under such contracts and such other information as the Tax Commissioner may require.
3 From the list, the Tax Commissioner shall certify to the state, county, district or municipal officers
4 and agents any delinquent payee and the amount of any tax, interest additions to tax or penalties.
5 The state, county, district and municipal officers and agents shall notify the vendor or contractor of
6 the amount being withheld; forward to the Tax Commissioner the lesser of the entire payment or the
7 amount certified, and pay any amount in excess of the certified amount to the vendor or contractor.
8 Where the vendor or contractor is not in good standing for reasons other than tax, interest, additions
9 to tax or penalty being owed, the state, county, district and municipal officers and agents shall notify
10 the contractor that the contractor is not in good standing, and the reasons therefore, and withhold
11 payment until the contractor is in good standing. For purposes of this subdivision the terms "vendor"
12 and "contractor" do not include employees of this state, or any county, district or any political
13 subdivision thereof who for the taxable year receive wages or salary reported on federal form W-2
14 for purposes of the United States Internal Revenue Code or who receive reimbursements for
15 employment related expenses: *Provided*, That any employee who receives nonemployee
16 compensation, as determined for federal income tax purposes, from this state is still subject to the
17 provisions of this subdivision to the extent of that nonemployee compensation.

18 (3) If the transaction embodied in the contract or the subject matter of the contract is subject
19 to county or municipal business and occupation tax, then the first payment and subsequent payments
20 shall also be withheld until receipt of a release from the county or municipality to the effect that all
21 county or municipal business and occupation taxes levied or accrued against the contractor have been
22 paid.

1 (4) Any authorized transaction fee which may be charged, is in addition to the tax, interest
2 or penalties owed. The Tax Commissioner is authorized to impose an administrative fee, to be set
3 by rule for each offset, under this section, of any payment resulting from tax, interest or penalty
4 owed.

5 (5) The Tax commissioner is authorized to enter into agreements with the Auditor and any
6 state, county, district and municipal officers and agents in order to fulfill this section and to protect
7 a taxpayer's return information as defined in section five-d, of this article.

8 (6) The Tax Commissioner may propose rules for legislative approval in accordance with the
9 provisions of article three, chapter twenty-nine-a of this code to administer and implement this
10 section and any agreements authorized by this section.

11 (7) The Auditor may propose rules for legislative approval in accordance with the provisions
12 of article three, chapter twenty nine-a of this code to administer and implement this section.

13 (8) Any official violating this section is subject to a civil penalty of \$1,000, recoverable as
14 a debt in a civil action brought by the Tax Commissioner.

15 (e) Limited effect of Tax Commissioner's certificates. -- The certificates of the Tax
16 Commissioner provided in subsections (b), (c) and (d) of this section shall not bar subsequent
17 investigations, assessments, refunds and credits with respect to the taxpayer.

18 (f) Payment when person sells out or quits business; liability of successor; lien. --

19 (1) If any person subject to any tax administered under this article sells out his or her, her or
20 its business or stock of goods, or ceases doing business, any tax, additions to tax, penalties and
21 interest imposed by this article or any of the other articles of this chapter to which this article is
22 applicable shall become due and payable immediately and that person shall, within thirty days after

1 selling out his or her, her or its business or stock of goods or ceasing to do business, make a final
2 return or returns and pay any tax or taxes which are due. The unpaid amount of any tax is a lien
3 upon the property of that person.

4 (2) The successor in business of any person who sells out his or her, her or its business or
5 stock of goods, or ceases doing business, is personally liable for the payments of tax, additions to
6 tax, penalties and interest unpaid after expiration of the thirty-day period allowed for payment:
7 *Provided*, That if the business is purchased in an arms-length transaction, and if the purchaser
8 withholds so much of the consideration for the purchase as will satisfy any tax, additions to tax,
9 penalties and interest which may be due until the seller produces a receipt from the Tax
10 Commissioner evidencing the payment thereof, the purchaser is not personally liable for any taxes
11 attributable to the former owner of the business unless the contract of sale provides for the purchaser
12 to be liable for some or all of the taxes. The amount of tax, additions to tax, penalties and interest
13 for which the successor is liable is a lien on the property of the successor, which shall be enforced
14 by the Tax Commissioner as provided in this article.

15 (g) *Priority in distribution of estate or property in receivership; personal liability of*
16 *fiduciary.* -- All taxes due and unpaid under this article shall be paid from the first money available
17 for distribution, voluntary or compulsory, in receivership, bankruptcy or otherwise, of the estate of
18 any person, firm or corporation, in priority to all claims, except taxes and debts due the United States
19 which under federal law are given priority over the debts and liens created by this article. Any
20 trustee, receiver, administrator, executor or person charged with the administration of an estate who
21 violates the provisions of this section is personally liable for any taxes accrued and unpaid under this
22 article, which are chargeable against the person, firm or corporation whose estate is in

1 administration.

2 (h) *Injunction.* -- If the taxpayer fails for a period of more than sixty days to fully comply
3 with any of the provisions of this article or of any other article of this chapter to which this article
4 is applicable, the Tax Commissioner may institute a proceeding to secure an injunction to restrain
5 the taxpayer from doing business in this state until the taxpayer fully complies with the provisions
6 of this article or any other articles. No bond is required of the Tax Commissioner in any action
7 instituted under this subsection.

8 (i) *Costs.* -- In any proceeding under this section, upon judgment or decree for the Tax
9 Commissioner, he or she shall be awarded his or her costs.

10 (j) *Refunds; credits; right to offset.* --

11 (1) Whenever a taxpayer has a refund or credit due it for an overpayment of any tax
12 administered under this article, the Tax Commissioner may reduce the amount of the refund or credit
13 by the amount of any tax administered under this article, whether it be the same tax or any other tax,
14 which is owed by the same taxpayer and collectible as provided in subsection (a) of this section.

15 (2) The Tax Commissioner may enter into agreements with the Internal Revenue Service that
16 provide for offsetting state tax refunds against federal tax liabilities; offsetting federal tax refunds
17 against state tax liabilities; and establishing the amount of the offset fee per transaction which both
18 agencies may charge each other: *Provided*, That offsets under subdivision (1) of this subsection shall
19 occur prior to offset under this subdivision. At the times moneys are received as a result of an offset
20 of a taxpayer's federal tax refund under the provisions of section 6402(e) of the Internal Revenue
21 Code, the taxpayer is given credit against state tax liability for the amount of the offset less a
22 deduction for the offset fee imposed by the Internal Revenue Service: *Provided, however*, That the

1 amount of the offset fee imposed by the Internal Revenue Service shall be added to the taxes, interest
2 and penalties owed by the taxpayer to this state: *Provided further*, That the amount of the offset fee
3 imposed by the Tax Commissioner shall be deducted from the moneys retained from the taxpayer's
4 state tax refund and then deposited in the special revolving fund which is hereby created and
5 established in the state Treasury and designated as the Tax Offset Fee Administration Fund: *And*
6 *provided further*, That the fees deposited in the Tax Offset Fee Administration Fund may be
7 expended by the Tax Commissioner for the general administration of the taxes administered under
8 the authority of this article.

9 (k) *Spouse relieved of liability in certain cases.* --

10 (1) *In general.* -- Under regulations prescribed by the Tax Commissioner, if:

11 (A) A joint personal income tax return has been made for a taxable year;

12 (B) On the return there is a substantial understatement of tax attributable to grossly erroneous
13 items of one spouse;

14 (C) The other spouse establishes that in signing the return he or she did not know, and had
15 no reason to know, that there was a substantial understatement; and

16 (D) Taking into account all the facts and circumstances, it is inequitable to hold the other
17 spouse liable for the deficiency in tax for the taxable year attributable to the substantial
18 understatement, then the other spouse is relieved of any liability for tax, including interest, additions
19 to tax, and other amounts for the taxable year to the extent the liability is attributable to the
20 substantial understatement.

21 (2) *Grossly erroneous items.* -- For purposes of this subsection, the term "grossly erroneous
22 items" means, with respect to any spouse:

1 (A) Any item of gross income attributable to a spouse which is omitted from gross income;

2 and

3 (B) Any claim of a deduction, credit or basis by a spouse in an amount for which there is no
4 basis in fact or law.

5 (3) *Substantial understatement.* -- For purposes of this subsection, the term "substantial
6 understatement" means any understatement, as defined in regulations prescribed by the Tax
7 Commissioner which exceed \$500.

8 (4) Understatement must exceed specified percentage of spouse's income.

9 (A) *Adjusted gross income of \$20,000 or less.* -- If the spouse's adjusted gross income for the
10 readjustment year is \$20,000 or less, this subsection applies only if the liability described in
11 paragraph (1) of this subsection is greater than ten percent of the adjusted gross income.

12 (B) *Adjusted gross income of more than \$20,000.* -- If the spouse's adjusted gross income for
13 the readjustment year is more than \$20,000, subparagraph (A) of this subdivision is applied by
14 substituting "twenty-five percent" for "ten percent".

15 (C) *Readjustment year.* -- For purposes of this paragraph, the term "readjustment year" means
16 the most recent taxable year of the spouse ending before the date the deficiency notice is mailed.

17 (D) *Computation of spouse's adjusted gross income.* -- If the spouse is married to another
18 spouse at the close of the readjustment year, the spouse's adjusted gross income shall include the
19 income of the new spouse whether or not they file a joint return.

20 (E) *Exception for omissions from gross income.* -- This paragraph shall not apply to any
21 liability attributable to the omission of an item from gross income.

22 (5) *Adjusted gross income.* -- For purposes of this subsection, the term "adjusted gross

- 1 income" means the West Virginia adjusted gross income of the taxpayer, determined under article
- 2 twenty-one of this chapter.

NOTE: The purpose of this bill is to require the Auditor and other state, county, district or municipal officers to certify to the Tax Commissioner the identity of payees prior to issuance of payments, and authorize the Tax Commissioner to identify those payees who are not in good standing with the Tax Department and to require the Auditor or issuing officer to forward to the Tax Commissioner the lesser of the amount of tax interest and penalty owed or the remaining amount of payment. The bill requires the Auditor or issuing officer or agent to notify the vendor or contractor of the amount being withheld, and requires payment be withheld until the vendor or contractor is in good standing. State and local employees receiving only W-2 wages or salary are excluded from the definition of "vendor" or "contractor."

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.