

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

House Bill 5535

By Delegates Hornby, Chiarelli, Willis, Dean, Bridges,
Rohrbach, Hite, and Heckert

[Introduced February 09, 2024; Referred to the
Committee on Health and Human Resources then
Finance]

1 A BILL to amend and reenact §11-17-2, §11-17-3, §11-17-4b, and §11-17-17 of the Code of West
 2 Virginia, 1931, as amended, all relating to applying an excise tax to e-cigarettes and other
 3 heated nicotine products from the tobacco excise tax.

Be it enacted by the Legislature of West Virginia:

ARTICLE 17. TOBACCO PRODUCTS EXCISE TAX ACT.

§11-17-2. Definitions.

1 (a) When used in this article, words, terms and phrases defined in subsection (b) of this
 2 section, and any variations thereof required by the context, have the meaning ascribed to them in
 3 this section, except where the context indicates a different meaning is intended.

4 (b) *Definitions.* --

5 (1) "Cigarette" means:

6 (A) Any roll for smoking made, wholly or in part, of tobacco, irrespective of size or shape
 7 and whether or not the tobacco is flavored, adulterated or mixed with any ingredient, the wrapping
 8 or cover of which is made of paper or any substance or material, except tobacco.

9 (B) Any roll of tobacco wrapped in any substance containing tobacco which, because of its
 10 appearance, the type of tobacco used in the filler, or its packing and labeling, is likely to be offered
 11 to, or purchased by, consumers as a cigarette described in paragraph (A) of this subdivision.

12 (C) "Cigarette", for tax purposes, does not include a "heated tobacco product", "heated
 13 nicotine product" "e-cigarette" or "e-cigarette liquid" as defined herein.

14 (2) "Commissioner" means the State Tax Commissioner and, where the meaning of the
 15 context requires, all deputies or agents and employees duly authorized by him or her.

16 (3) "Consumer" means a person who receives or in any way comes into possession of
 17 tobacco products for the purpose of consuming or giving them away or disposing of them in any
 18 way other than by sale, barter or exchange.

19 (4) "Counterfeit stamp" means any stamp, label or print, indicium or character, that
 20 evidences, or purports to evidence, the payment of any tax levied under this article and that has

21 not been printed, manufactured or made by authority of the commissioner, as provided in this
22 article, and has not been issued, sold or circulated by the commissioner.

23 (5) "Heated tobacco product" means a product containing tobacco that produces an
24 inhalable aerosol (i) by heating the tobacco by means of a device without combustion of the
25 tobacco or (ii) by heat generated from a combustion source that only or primarily heats rather than
26 burns the tobacco.

27 (6) "Heated nicotine product" means a product that does not contain tobacco but does
28 contain nicotine in solid or semi-solid form and not in a solution or liquid form that that produces an
29 inhalable aerosol (i) by heating the tobacco by means of a device without combustion of the
30 tobacco or (ii) by heat generated from a combustion source that only or primarily heats rather than
31 burns the tobacco;

32 (5) (7) "Manufacturer" means a person who manufactures or produces a tobacco product.

33 (8) "Nicotine product" means any a "heated nicotine product", a "(oral/alternative/modern)
34 nicotine product" or "E-cigarette liquid" that contains nicotine and does not contain tobacco.

35 (9) "(Oral/Alternative/Modern) Nicotine Product" means any noncombustible product
36 containing nicotine that does not contain tobacco and that is intended for human consumption or
37 placement in the oral cavity for absorption into the human body by any means other than
38 inhalation. Oral nicotine products are not a substitute for tobacco nor is any oral nicotine product
39 included in the definition of any other tobacco product, vapor product, cigarette, or any product
40 regulated as a drug or device by the United States Food and Drug Administration under Chapter V
41 of the Food, Drug, and Cosmetic Act.

42 (6)(10) "Other tobacco product" or "tobacco products other than cigarettes" means snuff
43 and chewing tobacco and any other tobacco product that is intended by the seller to be consumed
44 by means other than smoking and any cigar, pipe tobacco or other tobacco product other than
45 cigarettes.

46 "Other tobacco product" or "tobacco products other than cigarettes" for tax purposes, does

47 not include a "heated tobacco product", a "heated nicotine product" or a "(oral/alternative/modern)
48 nicotine product" as defined herein.

49 ~~(7)~~ (11) "Package" means the individual package, box or other container in or from which
50 retail sales of tobacco products are normally made or intended to be made.

51 ~~(8)~~ (12) "Person" means and includes any individual, firm, association, company,
52 partnership, corporation, joint-stock company, club, agency, syndicate, limited liability company,
53 other legal entity, municipal corporation or other political subdivision of this state, trust, receiver,
54 trustee, fiduciary or conservator, and when used in connection with any penalties imposed by this
55 article, means and includes officers, directors, trustees or members of any firm, copartnership,
56 association, corporation, trust or any other unit acting as a group.

57 ~~(9)~~ (13) "Place of business" means a place where a tobacco product is sold or where a
58 tobacco product is brought or kept for the purpose of sale or consumption, including a vessel,
59 airplane, train or vending machine.

60 ~~(10)~~ (14) "Retail dealer" includes every person in this state, other than a wholesaler or
61 subjobber, engaged in the selling of tobacco products at retail to a consumer or to any person for
62 any purpose other than resale.

63 ~~(11)~~ (15) "Sale" means selling, exchange, transfer of title, barter, gift, offer for sale or
64 distribution or disposition of cigarettes or other tobacco products.

65 ~~(12)~~ (16) "Sale at retail" or "retail sale" means a sale to a consumer or to any person for any
66 purpose other than resale.

67 ~~(13)~~ (17) "Sale by wholesaler" means and includes any bona fide transfer of title to tobacco
68 products by a wholesaler for a valuable consideration, made in the ordinary course of trade or in
69 the usual conduct of the wholesaler's business.

70 ~~(14)~~ (18) "Stamp" or "meter impression" means any cigarette stamp or any meter or ink
71 impression or other indicia authorized by the Tax Commissioner to serve as a stamp and shall be
72 of the design and color as prescribed by the Tax Commissioner.

73 ~~(15)~~ (19) "Stamped cigarettes" means that the stamp or meter impression, as required by
74 this article, has been affixed to the bottom of the package of cigarettes.

75 ~~(16)~~ (20) "Subjobber" or "subjobber dealer" includes any person who purchases stamped
76 cigarettes or tax-paid tobacco products from a wholesaler or from any other person who
77 purchases from the manufacturer or importer and who purchases the tax-paid tobacco products
78 solely for the purpose of bona fide resale to retail dealers.

79 ~~(17)~~ (21) "Tax-not-paid tobacco product" means a tobacco product upon which the tax
80 imposed by this article has not been paid.

81 ~~(18)~~ (22) "Tax-paid tobacco products" means a tobacco product upon which the tax
82 imposed by this article has been paid.

83 ~~(19)~~ (23) "Tobacco product" includes cigarettes and ~~any other tobacco product.~~ "heated
84 tobacco product."

85 ~~(20)~~ (24) "Transportation company" means a person operating or supplying to common
86 carriers, cars, boats or other vehicles for the transportation or accommodation of passengers and
87 engaged in the sale of a tobacco product at retail.

88 ~~(21)~~ (25) "Transporter" means a person importing or transporting into this state a tobacco
89 product obtained from a source located outside this state or transporting within this state tobacco
90 products belonging to another person.

91 ~~(22)~~ (26) "Unstamped cigarettes" means that the stamp or impression as required by this
92 article has not been affixed to the bottom of the package of cigarettes.

93 ~~(23)~~ (27) "Vending machine operator" means any person operating one or more vending
94 machines for the sale of tobacco products. The sale of tobacco products through a vending
95 machine will be construed as sales at retail and subjects the vending machine operator to this
96 article and rules pertaining to retail dealers.

97 Whenever any tobacco products vending machine operator purchases tax-not-paid
98 tobacco products directly from the manufacturer or any other person, the vending machine

99 operator shall be considered to be a wholesaler and is liable for payment of the excise tax imposed
100 by this article and the affixing of the required stamps.

101 ~~(24)~~ (28) "Wholesale price" means the gross invoice price, including all federal excise
102 taxes, at which the manufacturer of the tobacco product sells the tobacco product to unaffiliated
103 distributors, excluding all trade discounts and other reductions in the manufacturer's price. If the
104 taxpayer buys from other than a manufacturer, "wholesale price" means the gross invoice price,
105 including all federal excise taxes and excluding all trade discounts and other similar reductions in
106 price.

107 ~~(25)~~ (29) "Wholesaler" or "wholesale dealer" includes any person in this state who
108 purchases tax-not-paid tobacco products directly from the manufacturer, or such other seller as
109 may be approved by the Tax Commissioner. Any distributor, dealer, subjobber, subjobber dealer,
110 retailer or any other person that imports or transports tax-not-paid tobacco products into this state,
111 or that causes tax-not-paid tobacco products to be imported or transported into this state is a
112 wholesaler liable for the tax imposed under this article and, in the case of cigarettes purchased, is
113 liable for affixing tax indicia in accordance with the requirements of this article. No wholesaler or
114 other person may purchase tax-not-paid tobacco products from any seller not approved by the Tax
115 Commissioner.

§11-17-3. Levy of tax; ratio; dedication of proceeds.

1 (a) *Tax on cigarettes and tobacco products other than cigarettes.* — For the purpose of
2 providing revenue for the General Revenue Fund of the state, an excise tax is hereby levied and
3 imposed on sales of cigarettes and tobacco products other than cigarettes.

4 (b) *Tax rate on cigarettes.* — Effective May 1, 2003, the excise tax rate levied and imposed
5 on the sale of cigarettes is 55 cents on each twenty cigarettes or in like ratio on any part thereof:
6 *Provided*, That on and after July 1, 2016, the excise tax rate levied and imposed on the sale of
7 cigarettes is \$1.20 on each twenty cigarettes or in like ratio on any part thereof. Only one sale of
8 the same article shall be used in computing the amount of tax due under this subsection.

9 (c) *Tax on tobacco products other than cigarettes.* — Effective January 1, 2002, the excise
 10 tax levied and imposed on the sales or use of tobacco products other than cigarettes at the rate
 11 equal to seven percent of the wholesale price of each article or item of tobacco products other than
 12 cigarettes sold by the wholesaler or subjobber dealer, whether or not sold at wholesale, or if not
 13 sold, then at the same rate upon the use by the wholesaler or dealer: *Provided*, That on and after
 14 July 1, 2016, the excise tax rate levied and imposed on the sales or use of tobacco products other
 15 than cigarettes is at the rate equal to twelve percent of the wholesale price of each article or item of
 16 tobacco products other than cigarettes sold by the wholesaler or subjobber dealer, whether or not
 17 sold at wholesale, or if not sold, then at the same rate upon the use by the wholesaler or dealer.
 18 Only one sale of the same article shall be used in computing the amount of tax due under this
 19 subsection.

20 (d) Tax rate on "heated tobacco products" and "heated nicotine products" — Effective July
 21 1, 2024, the excise tax rate levied and imposed on the sale of "heated tobacco products" and
 22 heated nicotine products at the rate is 60 cents on each 20 heat sticks or in like ratio on any part
 23 thereof:

24 (d) (e) *Effective date of amendments.* — Amendments to this section enacted in the year
 25 2003 apply in determining tax imposed under this article from May 1, 2003, through June 30, 2016.
 26 Amendments to this section enacted in the year 2016 apply in determining tax imposed under this
 27 article effective on and after July 1, 2016.

**§11-17-4b. Levy of tax on e-cigarette liquid; definitions; rate; invoice; report; payment;
 authority of the Tax Commissioner to inspect and examine witnesses; presumption;
 bond.**

1 (a) *Definitions.* — When used in this section, words, terms and phrases defined in this
 2 subsection, and any variations thereof required by the context, have the meaning ascribed to them
 3 in this subsection, except where the context indicates a different meaning is intended.

4 (1) "E-cigarette" means an electrical or electronic device that provides a smoke, vapor, fog,

5 mist, gas or aerosol suspension of nicotine or another substance that, when used or inhaled,
6 simulates the activity of smoking. The term e-cigarette includes, but is not limited to, a device that
7 is composed of a heating element, battery or electrical or electronic circuit, or a combination of
8 heating element, battery and electrical or electronic circuit, which works in combination with e-
9 liquid to produce an inhalable product. The term e-cigarette includes, but is not limited to, any so
10 designed, or similarly designed, product that is manufactured, distributed, marketed or sold as an
11 e-cigarette, e-cigar, e-pipe or under any other name or descriptor. The term "simulates the activity
12 of smoking", in the context of this definition, means replicating, mimicking or reproducing an
13 experience similar to inhaling, or otherwise drawing into the mouth or nose, or exhaling the smoke
14 or combustion product of burning tobacco or any other product or material that can be used in a
15 similar fashion. "E-cigarette" does not include a "heated tobacco product" or a "heated nicotine
16 product" for tax purposes, as defined in §11-17-2 of this code.

17 (2) "E-cigarette liquid" means any of the liquids or liquid mixtures used in e-cigarettes and
18 is also known as e-juice, e-fluid, e-liquid or e-liquid product. E-cigarette liquid includes e-cigarette
19 liquid mixing kits and e-cigarette liquid mixing kit components. When used in, or with, an e-
20 cigarette, e-cigarette liquid is vaporized or otherwise converted into an inhalable product. E-
21 cigarette liquid may or may not include, without limitation, propylene glycol, vegetable glycerin,
22 nicotine from any source or flavorings. "E-cigarette liquid" does not include a "heated tobacco
23 product" or a "heated nicotine product" for tax purposes, as defined in §11-17-2 of this code.

24 (b) *Levy of tax; rate.* —

25 (1) On and after July 1, 2016, an excise tax is levied and imposed on sales of e-cigarette
26 liquid at the rate of 7.5 cents per milliliter or fraction thereof, or if not sold, then at the same rate
27 upon the use by the wholesaler or dealer. For purposes of this article, any distributor, dealer,
28 subjobber, subjobber dealer, retailer or any other person that imports or transports e-cigarette
29 liquids into this state, or that causes e-cigarette liquids to be imported or transported into this state,
30 is hereby deemed to be a wholesaler for purposes of this section and is liable for the tax imposed

31 under this article. No wholesaler or other person may purchase e-cigarette liquids from any seller
32 not approved by the Tax Commissioner. E-cigarette liquid mixing kits and e-cigarette liquid mixing
33 kit components shall be taxed in accordance with the amount of e-cigarette liquid, in milliliters, that
34 can be produced by or from the kit or components thereof, as determined by the Tax
35 Commissioner.

36 (2) Only one sale of e-cigarette liquid shall be used in computing the amount of tax due
37 under this section.

38 (c) *How tax paid; invoice required; reports required; due date; records to be kept.* —

39 (1) The tax imposed in this section on e-cigarette liquid shall be paid using an invoice
40 method prescribed by the Tax Commissioner.

41 (2) The tax will be paid on any and all e-cigarette liquid coming into the state for the
42 purpose of sale or use in this state on and after July 1, 2016.

43 (3) *Contents of delivery ticket or invoice.* — Unless otherwise permitted in writing by the
44 Tax Commissioner, each delivery ticket or invoice for each purchase or sale of e-cigarette liquid
45 must be recorded upon a serially numbered invoice showing:

46 (A) The name and address of the seller and the purchaser;

47 (B) The point of delivery;

48 (C) The date;

49 (D) (i) The number of e-cigarette cartridges, apparatus, containers or other devices; (ii) the
50 quantity in milliliters of each cartridge, apparatus, container or other device; (iii) the wholesale
51 price of each e-cigarette cartridge, apparatus, container or other device delivered in this state; or
52 (iv) if sold outside of a cartridge or other device or container, the total quantity in milliliters of e-
53 cigarette liquid not in cartridges, apparatus or other device or container delivered in this state and
54 the wholesale price of the e-cigarette liquid;

55 (E) The invoice must either set out the amount of tax imposed by this article separately on
56 the invoice or the invoice may instead indicate that the tax imposed under this article is included in

57 the total price; and

58 (F) Any other information required by the Tax Commissioner.

59 (4) *Reports and payments due date.* — On or before the fifteenth day of each month,
60 manufacturers, importers, every place of business as defined in this article, retail dealers,
61 subjobbers, vending machine operators and wholesale dealers and their agents, shall file a report
62 covering the business transacted in the previous month providing any information the Tax
63 Commissioner determines necessary for the ascertainment or assessment of the taxes imposed
64 by this article. Reports shall be signed under penalty of perjury and be in a form as prescribed by
65 the Tax Commissioner. The amount of tax shown to be due on the monthly report, if any, shall be
66 remitted on or before the due date of the monthly report. The first report due for e-liquid sales is
67 August 15, 2016, for the sales completed in July 2016.

68 (5) *Reports required.* — The reports prescribed in this article are required, although a tax
69 may not be due or no business transacted, for the period covered by the report. In the case of any
70 failure to file a report on the date prescribed for filing when no tax is due, unless it is shown that the
71 failure was due to reasonable cause, there is hereby imposed a penalty of \$25 for each month or
72 fraction of a month that such report is delinquent, until the report is filed, in addition to any penalties
73 imposed under section nineteen-a of this article.

74 (6) *Records.* — Each person required to file a report shall make and keep the records
75 necessary to substantiate the accuracy of the reports required by this section including, but not
76 limited to, records of inventories, receipts, disbursements and sales. Records shall be retained for
77 a period of time not less than three years from the time the report is due or the time when the report
78 is filed, whichever is later.

79 (d) *Inspection of records and stocks; examination of witnesses; registration of e-cigarette*
80 *sellers; presumption of nontax paid.* —

81 (1) The Tax Commissioner has the authority to inspect or examine the records, books and
82 papers, and any equipment or e-cigarette apparatus, and any stock of e-cigarette liquid kept in or

83 upon the premises of persons who sell, possess or store e-cigarette liquid, for the purpose of
84 determining the quantity and value of e-cigarette liquid acquired, on hand or disbursed, to verify
85 the truth and accuracy of any statement, return, form or report and to ascertain whether the tax
86 imposed by this article has been properly paid.

87 (2) In addition to the Tax Commissioner's powers set forth in article ten of this chapter, the
88 Tax Commissioner or the Tax Commissioner's agent may examine witnesses under oath in order
89 to ascertain the amount of taxes and reports due under this article. If a witness or person fails or
90 refuses to testify or grant access to records, books, papers, equipment or e-cigarette apparatus, or
91 any stock of e-cigarette liquid, necessary or useful to ascertain the amount of taxes and reports
92 due under this article, the Tax Commissioner shall certify the facts and names to the circuit court of
93 the county having jurisdiction of the party and the court shall issue a summons to the party to
94 appear before the Tax Commissioner at a place designated within the jurisdiction of the court, on a
95 day fixed, to be continued as the occasion may require for good cause shown, to testify and give
96 evidence and to produce for inspection any books, records and papers that may be required and to
97 grant access to records, books, papers, equipment or e-cigarette apparatus, or any stock of e-
98 cigarette liquid, for the purpose of ascertaining the amount of tax and reports due, if any.

99 (3) Each wholesale dealer of e-cigarette liquid must register with the Tax Commissioner
100 and maintain a business registration certificate, showing the wholesale dealer of e-cigarette liquid
101 to be registered as a seller of tobacco products or seller of both cigarettes and tobacco products
102 prior to the sale or delivery of e-cigarette liquid to any retail dealer or subjobber in this state. A
103 wholesale dealer may sell tax-paid e-cigarette liquid only to another wholesaler or a retail dealer or
104 subjobber in this state. No person may purchase nontaxed e-cigarette liquid from any seller not
105 approved by the Tax Commissioner.

106 (4) Whenever e-cigarette liquid is found in the place of business of any retail dealer, without
107 evidence that the tax imposed by this section has been paid, it shall be presumed that the e-
108 cigarette liquid is kept on the premises in violation of this article.

109 (e) *Bond.* — The Tax Commissioner may require wholesalers, subjobbers or retail dealers
 110 to file a continuous surety bond in an amount to be fixed by the Tax Commissioner but no less than
 111 \$1,000. The bond shall be conditioned upon faithfully complying with the provisions of this article
 112 including the filing of the returns and payment of all taxes prescribed by this article.

113 (f) *Administration and enforcement.* — The provisions of this article and articles nine and
 114 ten of this chapter apply to administration and enforcement of the excise tax on e-cigarette liquid in
 115 the same manner and to the same extent as they apply to administration and enforcement of the
 116 excise tax on tobacco products, as imposed under this article.

117 (g) *Criminal sanctions.* — The criminal sanctions imposed in section nineteen-a of this
 118 article are hereby imposed with equal force and application with relation to actions, transactions
 119 and responsibilities prescribed under this section and under this article. For the purpose of
 120 applying and interpreting the provisions of section nineteen-a of this article, the words "container
 121 of tobacco products" shall be interpreted to mean and include the words "container of tobacco
 122 products or e-cigarette liquid".

§11-17-17.

Enforcement

powers.

1 Any employee or agent of the Tax Commissioner, so designated by the Tax Commissioner,
 2 shall have all the lawful powers delegated to members of the department of public safety to
 3 enforce the provisions of this article in any county or municipality in this state.

4 Such employee shall execute a bond with security in the sum of \$3,500, payable to the
 5 State of West Virginia conditioned for the faithful performance of his or her duties, as such, and
 6 such bond shall be approved as to form by the Attorney General, and the same shall be filed with
 7 the Secretary of State and preserved in his or her office.

8 The state department of public safety or any county sheriff or his or her deputy is, upon
 9 request of the commissioner, hereby authorized and required to assist in the enforcement of the
 10 provisions of this article.

NOTE: The purpose of this bill is to apply an excise tax to e-cigarettes and other heated

nicotine products excise tax.

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