

Charleston Area Tax Group

REVIEW OF CURRENT STATE TAX DEVELOPMENTS

March 18, 2004

I. LEGISLATIVE

The 60-day regular session of the Legislature concluded shortly before 12:00 a.m. March 14, 2004. Pursuant to W. Va. Const. art. VI, § 51, the Governor extended the legislative session for 8 days to give the Legislature time to pass the budget bill for FY 2005. During this period, the Legislature may also act on veto messages.

- 2,127 bills were introduced
 - 737 Senate bills
 - 1,390 House bills
- 450 bills passed one House or the other by the 50th day.
 - 186 Senate bills
 - 264 House bills
- 280 bills were passed by the Legislature
 - 112 Senate bills
 - 168 House bills
- 298 resolutions were introduced
 - 145 Senate Concurrent Resolutions
 - 11 Senate Joint Resolutions
 - 142 House Concurrent Resolutions
 - 14 House Joint Resolutions
 - 1 House Joint Resolution (HJR 114) was adopted

SB 133, the budget bill, is in conference.

Bills Passed by the Legislature - 2004

BILL NO.	DESCRIPTION	
DEPARTMENT OF TAX AND REVENUE		
*HB 4217	Dept of Tax & Revenue combined rules authorization bill	Passed Legislature 3/12/04 (effective 3/12/04)
HB 4607	Conferring the duties of the industrial revenue bond allocation review committee to the board of the West Virginia economic development authority	Passed Legislature 3/13/04 (effective 6/11/04)
SB 149	Reorganizing Department of Tax & Revenue	Passed Legislature 3/13/04 (effective 6/11/04)
ALCOHOL BEVERAGE CONTROL ADMINISTRATION		
SB 166	Reducing allowable blood alcohol content for DUI	Passed Legislature 2/05/04 (effective 05/05/04). Approved by Governor.
SB 574	Allowing ABC Commissioner to sell liquor warehouse (efp)	Passed Legislature 3/13/04 (effective 3/13/04)

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BILL NO.	DESCRIPTION	
SB 722	Repealing prohibition on giving away or selling liquor in building where boxing is held	Passed Legislature 3/12/04 (effective 6/10/04)
BANKING AND INSURANCE		
HB 2914	Relating to rehabilitation and liquidation of insurers subject to regulator authority of Insur Comm	Passed Legislature 3/11/04 (effective 6/9/04)
*HB 4004	Establishing insurance fraud unit within office of insurance commissioner	Passed Legislature 3/13/04 (effective 6/11/04)
*HB 4168	Making WV a wet settlement state (have mortgage funds available at closing)	Passed Legislature 3/10/04 (effective 6/8/04)
*HB 4303	Agent issues - MGAs/Agent CE/Non-resident surplus lines brokers	Passed Legislature 3/13/04 (effective 6/11/04)
HB 4304	Continuing the children's health insurance board	Passed Legislature 3/11/04 (effective 6/9/04)
HB 4371	Extending pilot program for uninsured and underinsured	Passed Legislature 3/12/04 (effective 3/12/04)
HB 4377	Assessing a penalty on those physicians who fail to pay the special assessment.	Passed Legislature 3/13/04 (effective 3/13/04)
HB 4655	Giving the children's health insurance program the right of subrogation	Passed Legislature 3/13/04 (effective 6/11/04)
HB 4740	Establishing patient injury compensation fund; initial funding; operation	Passed Legislature 3/13/04 (effective 6/11/04)
**SB 143	Small employer group health benefit plan for uninsured groups	Passed Legislature 3/13/04 (effective 6/11/04)
*SB 161	Creating model health plan for uninsurable individuals act	Passed Legislature 3/13/04 (effective 7/1/04)
*SB 176	Investments and investment practices of insurance companies	Passed Legislature 3/13/04 (effective 6/11/04)
SB 286	Relating to assessment of regulated consumer lenders	Passed Legislature 3/12/04 (effective 6/10/04)
SB 428	Defining transacting insurance	Passed Legislature 3/13/04 (effective 6/11/04)
**SB 431	Interstate Compact - creating single point of filing & national standards for insurance products	Passed Legislature 3/12/04 (effective 6/10/04)
SB 450	Relating to long-term care insurance	Passed Legislature 3/13/04 (effective 6/11/04)

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BILL NO.	DESCRIPTION	
SB 479	Licensing of foreign insurer	Passed Legislature 3/13/04 (effective 6/11/04)
SB 506	Permitting use of bank in name of licensed insurance company	Passed Legislature 3/10/04 (effective 6/8/04)
SB 517	Standard nonforfeiture law for individual deferred annuities	Passed Legislature 3/12/04 (effective 6/10/04)
SB 596	Relating to powers and duties of board of directors of state board of risk and insurance management	Passed Legislature 3/13/04 (effective 6/11/04)
GAMING		
HB 4107	Allowing licensees of charitable bingo and raffle games to transfer game proceeds between their bingo and raffle operations.	Passed Legislature 3/13/04 (effective 3/13/04)
*HB 4257	Increasing amount of prizes that may be given away in conduct of charitable raffles w/o license	Passed Legislature 3/13/04 (effective 6/11/04)
HB 4523	Allowing certain racing associations or licensees qualifying for an alternate tax to increase the number of races each performance	Passed Legislature 3/13/04 (effective 6/11/04)
HB 4622	Relating to exemption of lottery prizes from taxation	Passed Legislature 3/12/04 (effective 3/12/04)
HB 4748	Supplemental Appropriation - Lottery - \$10,000,000	Passed Legislature 3/13/04 (effective 3/13/04)
*SB 197	Distribution of net terminal income of racetrack video lottery terminals	Passed Legislature 3/13/04 (effective 3/13/04)
LOCAL TAXES		
HB 4119	Allowing a phase-in of the transfer of hotel taxing authority when a municipality annexes a hotel to allow the retirement of any debt incurred by the county or to otherwise phase in the transfer of taxing authority to the municipality	Passed Legislature 3/13/04 (effective 6/11/04)
HB 4624	Making technical corrections to property tax increment financing act	Passed Legislature 3/13/04 (effective 3/13/04)
**SB 408	Relating to growth county school facilities act	Passed Legislature 3/13/04 (effective 3/13/04)
SB 672	Relating to municipalities' right to collect public utility fees	Passed Legislature 3/12/04 (effective 6/10/04)
**SB 701	Authorizing certain taxes imposed by municipalities	Passed Legislature 3/13/04 (effective 6/11/04)

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BILL NO.	DESCRIPTION	
TAX DIVISION		
*HB 3189	Reducing the total tax credits available under the capital company act during the fiscal year beginning on July 1, 2004	Passed Legislature 3/13/04 (effective 7/1/04)
HB 4011	WVPIT update bill (efp)	Passed Legislature 2/24/04 (effective 2/24/04). Approved by Governor
HB 4012	WVCNIT update bill (efp)	Passed Legislature 2/23/04 (effective 2/23/04). Approved by Governor
*HB 4047	Creating a high growth business investment tax credit to encourage investment by state citizens and businesses in certain companies started by fellow West Virginians	Passed Legislature 3/12/04 (effective 6/10/04)
HB 4295	Exempting state bonds from taxation	Passed Legislature 3/13/04 (effective 6/11/04)
*HB 4318	Imposing personal income tax on funds withdrawn from a prepaid college tuition contract or other college savings plans	Passed Legislature 3/12/04 (effective 6/10/04)
HB 4349	Relating to consumers sales and service tax and streamlined sales and use tax agreement	Passed Legislature 2/24/04 (effective 2/24/04). Approved by Governor
HB 4451	Capital company act; clarifying that WVEDA and TC may require examination & compliance actions	Passed Legislature 3/13/04 (effective 3/13/04)
*HB 4501	Creating exemptions from the consumers sales and service tax for e-commerce vendors and other high technology businesses (amended to include sales tax holiday)	Passed Legislature 3/13/04 (effective 7/1/04)
HB 4567	Relating to the motor carrier road tax and international fuel tax agreement	Passed Legislature 3/13/04 (effective 6/11/04)
SB 148	Creating Tax Amnesty Program	Passed Legislature 3/13/04 (effective 6/11/04)
**SB 204	Strategic research and development tax credit	Passed Legislature 3/13/04 (effective 7/1/04)
SB 321	Providing WVPIT adjustment to gross income of certain retirees	Passed Legislature 3/13/04 (effective 6/11/04)
*SB 404	Clarifying definition of behavioral health services	Passed Legislature 3/13/04 (effective 3/13/04)
*SB 420	Relating general to motor fuel excise taxes	Passed Legislature 3/13/04 (effective 6/11/04)

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BILL NO.	DESCRIPTION	
SB 719	Increasing health care provider tax paid by nursing homes	Passed Legislature 3/13/04 (effective 6/11/04)
OTHER		
HB 2991	Relating to the fee charged by fiduciary commissioners in settling an estate	Passed Legislature 3/13/04 (effective 6/11/04)
HB 4140	Requiring ethics commission to establish code of conduct for state administrative law judges	Passed Legislature 3/13/04 (effective 6/11/04)
HB 4266	Requiring regulatory agencies of government, with exceptions, to study ways to expedite issuance of licenses, permits and certificates	Passed Legislature 3/13/04 (effective 6/11/04)
HB 4411	Changing reporting requirements in WV workforce investment act	Passed Legislature 3/13/04 (effective 6/11/04)
HB 4415	Giving the state auditor flexibility in determining when to conduct audits on local government offices	Passed Legislature 3/11/04 (effective 6/9/04)
HB 4672	Relating to calculation of workers' compensation premiums for members of limited liability companies	Passed Legislature 3/12/04 (effective 3/12/04)
SB 71	Requiring verification of legal employment status of workers employed in the state	Passed Legislature 3/13/04 (effective 6/11/04)
SB 100	Prohibiting state and political subdivisions from contracting with vendor owing debt	Passed Legislature 3/11/04 (effective 6/9/04)
*SB 139	Creating tourism development fund	Passed Legislature 3/13/04 (effective 6/11/04)
*SB 209	Requiring review of certain state leases and purchase by joint committee on government and finance	Passed Legislature 2/26/04 (effective 07/1/04). Approved by Governor.
SB 720	Relating to unused state private activity bond volume cap	Passed Legislature 3/12/04 (effective 6/10/04)

II. COURT ACTIVITY

A. United States Supreme Court

1. Decisions

Nothing to report.

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2. Petitions for Certiorari Denied

On February 23, 2004, the U.S. Supreme Court denied the petition for certiorari filed in *Mariana v. Fisher*, 338 F.3d 189 (3rd Cir., 7/30/03), S.Ct. No. 03-806. Here, cigarette smokers sued Pennsylvania's attorney general and secretary of revenue, alleging that the master settlement agreement reached between the tobacco manufacturers and state attorneys general in 1998 violated the Sherman Act, by limiting market entry, and various constitutional provisions. In 2002, the U.S. District Court for the Middle District of Pennsylvania dismissed the complaint, ruling that the state officials were immune from antitrust liability under the Noerr-Pennington doctrine, because the MSA arose out of valid petitioning of the government for redress, and that there was no violation of the Commerce Clause or the Compact Clause of the federal constitution. In 2003, the Third Circuit Court of Appeals affirmed that decision.

Also on February 23, 2004, the U. S. Supreme Court denied the petition for certiorari filed in *California Franchise Tax Board v. Farmer Bros. Co.*, 108 Cal. App. 4th 976 (Cal. Ct. App., 5/21/03), S.Ct. No. 03-776. California allows a deduction from its corporate franchise (income) tax for dividends received that is based upon the amount of property, payroll and sales of the payor attributable to California business, up to seventy percent. In 2001, in a one-page decision, the California Superior Court for Los Angeles County ruled that that deduction violated the Commerce Clause. The court denied the state's claim that the deduction was compensatory, in that it was designed to prevent the imposition of a second tax, on top of the franchise tax, on the stream of income leading to the dividends. (In later addressing the remedies issue, in March 2002, the same court ordered a refund to only the taxpayer involved in the case that went to court, without comment as to remedies for other taxpayers.) In 2003, the California Court of Appeal affirmed the trial court's ruling that the deduction violated the Commerce Clause, while not addressing the remedies issue. The court ruled that the deduction was discriminatory on its face, because it favored dividend-paying corporations doing business in California and paying California taxes over dividend-paying corporations that do not do business and pay taxes in California, thereby discriminating between transactions on the basis of an interstate element. The court also ruled that the deduction did not meet the requirements of a valid compensatory tax.

3. Petitions for Certiorari Granted

Nothing to report.

4. Petitions for Certiorari Filed

On January 20, 2004, a petition for certiorari was filed in *AT&T Corp. v. Allen* (Okla. Civ. App., 6/10/03, unpub.), S.Ct. No. 03-1046. Here, the Oklahoma Court of Civil Appeals affirmed a trial court order certifying a class action against a telecommunications company, based on the assertion that the company charged long-distance customers for municipal taxes that were not due because the customers did not reside in the taxing municipalities, as a result of the company's use of a billing system that imposed taxes based on a customer's zip code. The appellate court determined that the trial court had jurisdiction over the matter, despite that the plaintiffs had not first sought a refund of the taxes from the state, because it was not clear that state law prohibited pursuit of a remedy against a vendor who had collected an improper amount of tax; the administrative remedies would present an insurmountable barrier to an individual customer seeking redress without access to the company's records; and, the administrative remedies would not provide the injunctive relief sought by the plaintiffs to prevent the company from continuing its erroneous practices. In its appeal to the U.S. Supreme Court, the company asks the Court to decide whether fundamental principles of state sovereignty and the Due Process Clause prohibit a state court

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in Oklahoma from asserting jurisdiction over claims challenging the collection of a municipal sales tax in 27 other states by certifying a class action encompassing the claims of customers from those 27 states (CCH Tax News Direct, 2/9/04).

On January 30, 2004, a petition for certiorari was filed in the U.S. Supreme Court in *Granholm v. Heald* (below: *Heald v. Engler*), 342 F.3d 517 (6th Cir., 8/28/03), S.Ct. No. 03-1116. Here, Michigan's wine-importation system was declared unconstitutional. Michigan has a three-tier system of alcohol distribution from out-of-state producers, under which only state licensees may import alcoholic beverages into the state; alcoholic beverages are imported into the state by wholesalers and then sold to retail licensees. Therefore, while Michigan wine producers may ship directly to Michigan customers, without first having to ship the product to a wholesaler or other licensee, all out-of-state wine sources must first ship their product to an in-state, licensed wholesaler or other licensee. The Sixth Circuit Court of Appeals reversed a district court decision and ruled that Michigan's wine-importation scheme constituted a facial violation of the Commerce Clause because it was only applied to sales from outside the state, and that that discrimination could not be justified as addressing core concerns under the Twenty-first Amendment. The court rejected the state's argument that the Twenty-first Amendment provides clear congressional authority to states to control all issues involving commerce in alcoholic beverages. (On February 2, 2004, a petition was filed in a companion case, *Michigan Beer & Wine Wholesalers Ass'n v. Heald* (below: *Heald v. Engler*), 342 F.3d 517 (6th Cir., 8/28/03), S.Ct. No. 03-1120.)

On February 13, 2004, a petition for certiorari was filed with the Supreme Court in *Zelinsky v. New York Tax Appeals Tribunal*, 801 N.E.2d 840 (N.Y., 11/24/03), S.Ct. No. 03-1177. In a case involving a professor who taught at a law school in New York City, but lived and performed his non-classroom activities in Connecticut, the Court of Appeals of New York affirmed a decision of the Appellate Division, providing that the state could impose its personal income taxes on the professor's full earnings from the school without apportionment. This ruling affirms the "convenience of the employer" test, under which, when a nonresident individual employed by an in-state employer performs services both at the employer's in-state facility and at the employee's out-of-state home, under circumstances in which the services could have been performed at the employer's in-state facility, the employee is viewed as having chosen to work at home for his convenience and not for the employer's necessity, and the compensation for the employee's work on such days is considered New York-source income and subject to the state's tax. The court first ruled that the taxpayer's choice to cross state lines did not implicate the Commerce Clause, because it did not impact on any interstate market in which residents and nonresidents compete. The court also noted, however, that, even if the Commerce Clause was implicated, New York's tax on the taxpayer's nonresident income was fairly apportioned, consistent with the requirement of external consistency, the only aspect of the *Complete Auto Transit* test that was in dispute, because the entirety of the taxpayer's salary was derived from New York sources. The court also ruled that any multiple taxation of the taxpayer's income by Connecticut "does not automatically transgress the Commerce Clause if, as here, the challenged tax is in fact fairly apportioned," also noting that it was the taxpayer's own choice to allocate his income to Connecticut, and Connecticut's refusal to provide a credit to its resident for all of the nonresident income tax the taxpayer paid to New York, that created the threat of double taxation. Finally, the court ruled that there was no violation of the Due Process Clause, because the taxpayer clearly had the requisite minimum connection to the state by virtue of his employment there, and because no extraterritorial values were being taxed.

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III. ADMINISTRATIVE ACTIVITY

A. Administrative Decisions

- **CONSUMERS' SALES AND SERVICE TAX -- ADDITIONS NOT WAIVED -- ILLEGAL USE OF COLLECTED TAX FOR VENDOR'S BUSINESS** -- Petitioner's practice of segregating consumers' sales and service tax and subsequently spending same for its own personal use is an illegal use of the State's moneys and clearly does not constitute reasonable cause for waiver of additions to tax as required by W. Va. Code § 11-10-18(a)(1)-(2) [1986]; however, said failure to remit tax does not preclude Petitioner from filing accurate consumers' sales and service tax returns in lieu of the estimated assessment. ADMIN DEC -- 03-410 C. ISSUED -- 02/20/04.
- **CONSUMERS' SALES AND SERVICE TAX -- AUDIT SAMPLE'S TAXABLE PERCENTAGE CALCULATION NOT SHOWN TO BE CLEARLY UNREASONABLE** -- The Petitioner's-taxpayer's evidentiary submissions (direct pay permits and tax exemption certificates) at and shortly after the evidentiary hearing did not show that the taxable percentage calculation utilized in the audit sample was so flawed and unrepresentative that it must be disregarded totally, in favor of a detailed (exhaustive) audit method. ADMIN DEC. -- 03-480 C. ISSUED -- 02/10/04.
- **CONSUMERS' SALES AND SERVICE TAX -- APPROPRIATE DELETIONS FROM AUDIT SAMPLE** -- On the other hand, as conceded by counsel for the Commissioner at and shortly after the evidentiary hearing, the Petitioner has carried the burden of proof with respect to the factual issue of whether the sales to a couple of the significant customers should be deleted (as nontaxable) from the audit sample. ADMIN DEC. -- 03-480 C. ISSUED -- 02/10/04.
- **PURCHASERS' USE TAX -- PROVEN SEPARATE SALE OF ASPHALT IN CONNECTION WITH ROAD MAINTENANCE ACTIVITIES TAX EXEMPT** -- Due to the practice of the West Virginia Division of Highways ("DOH") of using separate and distinct bids for materials, for hauling, and for lay-down of asphalt in connection with road maintenance activities, coupled with Petitioner's practice of selling asphalt to DOH by the use of separate, distinct, non-dependent and arms-length bids, the separate sale of said asphalt is exempt from use tax, as set forth in 110 C.S.R. 15, 112.1.2 (May 1, 1992) *et. seq.* ADMIN DEC. -- 02-317 U. ISSUED -- 02/23/04.
- **PURCHASERS' USE TAX -- ROYALTY FEES NOT TAXABLE** -- Royalty fees paid by the Petitioner in order to retain the commercial benefit of the franchisor's trademark and the corresponding goodwill, are in no respect consideration for taxable services rendered to the Petitioner by the franchisor. ADMIN DEC. -- 03-283 U. ISSUED -- 02/06/04.
- **SEVERANCE TAX -- VALUATION OF PRODUCED GAS -- NO ADDITIONS FOR PURCHASERS' EXPENSES** -- The value of natural gas at the point where title passes shall be measured by the gross proceeds received, less transportation to the point of sale, without adding back any sums deducted by purchasers for items incurred by purchasers in marketing said natural gas to others. ADMIN DECS. -- 03-106 SV, 03-107 SV, 03-108 SV, 03-109 SV, 03-109 SV, 03-110 SV, 03-111 SV, 03-112 SV, 03-113 SV, 03-114 SV, 03-115 SV, 03-116 U & 03-117 U. ISSUED -- 02/05/04.
- **SEVERANCE TAX -- GROUP OR COMBINATION ACTING AS A UNIT** -- Pursuant to W. Va. Code § 11-13A-5(a), joint ventures established and operated by Petitioners for the purpose of producing oil should have reported all gross proceeds as a separate reporting unit because the same are deemed to be a "group or combination acting as a unit and one person" as defined by W. Va. Code § 11-13A-2. ADMIN DECS. -- 03-106 SV, 03-107 SV, 03-108 SV, 03-109 SV, 03-109 SV, 03-110 SV, 03-111 SV, 03-112 SV, 03-113 SV, 03-114 SV, 03-115 SV, 03-116 U & 03-117 U. ISSUED -- 02/05/04.

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B. Administrative Notices

None

C. Property Tax Rulings

04-03 Tangible personal property used for a highway repair project and located on July 1, 2003, in a county other than the county wherein the business office is located, is subject to ad valorem taxation in the county where the property was located as required by West Virginia Code § 11-5-4. Issued February 26, 2004.

04-07 and 04-12

A leasing corporation which owns a taxable interest in tangible personal property in the possession of another is subject to ad valorem taxation under the authority of West Virginia Code § 11-3-7a. Issued 2/26/04.

04-08 and 04-10

Tangible personal property in the form of materials waiting to be used in the manufacturing activity (generally referred to as "raw materials inventory") and materials which are undergoing the manufacturing activity (generally referred to as "work in progress") are not exempt from ad valorem taxation under the authority of West Virginia Constitution Article X, Section 1c. Once the manufacturing activity is completed, as evidenced by the manufactured product being available for loading into tank cars or other shipping containers and destined for delivery out of West Virginia, the manufactured products in the form of finished goods are then exempt from ad valorem taxation under the authority of West Virginia Constitution Article X, Section 1c and West Virginia Code § 11-5-3a(b). Issued 2/23/04.

04-09 Real property composed of both land and structures situated thereon that is owned by a county commission and leased to a taxpayer is not exempt from ad valorem taxation because sufficient information was not provided by the taxpayer to demonstrate that the Assessor's decision is incorrect. Issued 2/25/04.

04-11 Real property in the form of an apartment house owned by an I.R.C. § 501(c)(3) organization and used to provide residences for chronically mentally ill individuals is exempt from ad valorem taxation as provided in W. Va. Code § 11-3-9. Issued 2/26/04.

04-13 Property owned by a section 501(c)(3) organization and used for day-care and other activities, property that is vacant and property that is duplex housing are not exempt from ad valorem taxation because insufficient information was provided to establish an exemption as provided in 110 C.S.R. 3 and W. Va. Code § 11-3-9. Issued 2/27/04.

04-14 Motor vehicles held in a vehicle trust and used by missionaries, teachers and supervisory personnel, and housed at the personal residences of those persons are not exempt from ad valorem taxation as defined in 110 C.S.R. 3, section 12, because exempt use of the property has not been established. Issued 3/1/04.

D. Other Publications

- Form: WV/SEV-401W (Revised: January 2004)
Waste Coal - WV Annual Severance Tax Return

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- Form: WV/SEV-400W (Revised: January 2004)
Waste Coal - WV Severance Tax Quarterly Estimate
- Form: IT-140X (Revised: March 2004)
Amended Income Tax Return *Taxable Years 2003 & Thereafter*
- Publication: TSD-110 (Revised: March 2004)
West Virginia Tax Credits
- Form: WV/BCS-1 (Revised: March 2004)
Business Investment & Jobs Expansion Credit & Corporate Headquarters Relocation Credit
- Form: WV/MITC-1 (Revised: March 2004)
Credit for Manufacturing Investment
- Form: WV/SRDTC-1 (Originated March 2004)
Strategic Research & Development Tax Credit for Qualified Investment Items Placed into Service for Periods after December 31, 2002
- Publication: TSD-1 (Revised: March 2004)
Publications Available
- Publication: TSD-405 (Revised: March 2004)
Consumers Sales Tax Responsibilities Regarding Coin Operated Machines or Devices

For the latest changes to tax forms and publications, please visit the State Tax Department's website and link for recent updates at <http://www.state.wv.us/taxrev/updates.htm>.

E. Internet Sites

State Tax Department's website for forms/publications: <http://www.state.wv.us/taxrev/forms.html>

West Virginia Legislature's Home Page: <http://www.legis.state.wv.us/>

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