

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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DEPT. OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: STATE TAX DIVISION TITLE NUMBER: 110

CITE AUTHORITY W. VA. CODE § 11-10-5

AMENDMENT TO AN EXISTING RULE: YES X NO

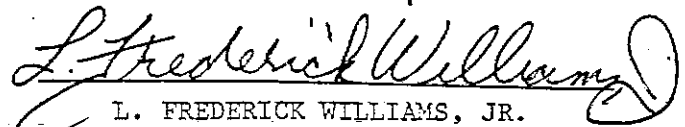
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 19

TITLE OF RULE BEING AMENDED: SOFT DRINKS TAX

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


L. FREDERICK WILLIAMS, JR.
STATE TAX COMMISSIONER



State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

L. FREDERICK WILLIAMS, JR.
SECRETARY

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DEPT. OF REVENUE

CONSENT TO FILE RULE

August 2, 1991

To Whom It May Concern:

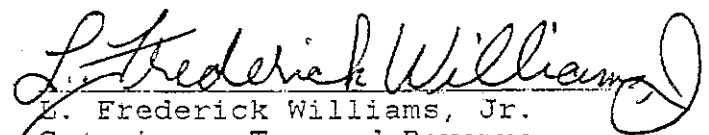
Title of Rule: Soft Drinks Tax

Title Number: 110

Series Number: 19

Pursuant to West Virginia Code § 5E-2-2(a), the undersigned hereby consents to filing of the foregoing rule.

Signed this 2nd day of August, 1991.


L. Frederick Williams, Jr.
Secretary, Tax and Revenue



State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

L. FREDERICK WILLIAMS, JR.
SECRETARY

STATEMENT OF CIRCUMSTANCE

Other than making technical corrections, these regulations include in those items subject to the Soft Drinks Tax certain nonalcoholic beverages which were found to not be subject to any tax.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: SOFT DRINKS TAX

Type of Rule: X Legislative Interpretive Procedural

Agency: State Tax Division Address: State Capitol; Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$	\$	\$
Personal Services	-0-	-0-	-0-	-0-	-0-
Current Expense	-0-	-0-	-0-	-0-	-0-
Repairs and Alterations	-0-	-0-	-0-	-0-	-0-
Equipment	-0-	-0-	-0-	-0-	-0-
Other	-0-	-0-	-0-	-0-	-0-

2. Explanation of above estimates:

There should be no increase or decrease in Departmental expenses.

3. Objectives of these rules:

The rule explains and clarifies the Soft Drinks Tax. The amendments subject to the Soft Drinks Tax certain nonalcoholic beverages which have not been subject to such taxation, further clarifies the use of caps, lids, crowns, etc., describes successor liability as applied under W. Va. Code § 11-10-1 et seq., and clears up minor inconsistencies.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

There may be an increase in revenues resulting from imposition of the tax upon certain nonalcoholic beverages.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

No impact.

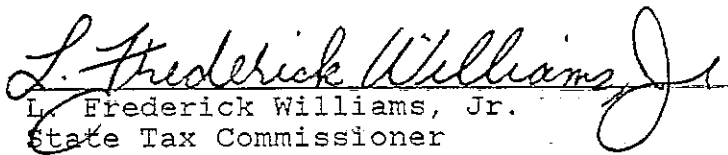
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CIVIL RIGHTS DIVISION
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C. Economic Impact on Citizens/Public at Large.

There may be a negligible economic impact.

Date: August 2, 1991

Signature of Agency Head or Authorized Representative


L. Frederick Williams, Jr.
State Tax Commissioner
Department of Tax and Revenue



State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

L. FREDERICK WILLIAMS, JR.
SECRETARY

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JUL 31 1991
SECRETARY'S OFFICE

August 2, 1991

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: STATE TAX DIVISION

LEGISLATIVE RULE TITLE: SOFT DRINKS TAX

1. Authorizing statute(s) citation: W. Va. Code § 11-10-5
2.
 - a. Date filed in State Register with Notice of Public Comment Period: July 1, 1991
 - b. What other notice, including advertising, did you give of the hearing? None
 - c. Date of public comment period: July 1, 1991 through August 1, 1991
 - d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.
Attached X No comments received
 - e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact) August 8, 1991
 - f. Name and phone number of agency person to contact for additional information: John Montgomery - 348-5330
Keith Larson - 348-5330
3. If the statute under which you promulgated the submitted rules requires certain findings and determination to be made as a condition precedent to their promulgation:
 - a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.
N/A

- b. Date of hearing: _____
- c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor? _____
- d. Attach findings and determinations and reasons:
Attached: _____

COMMENTS AND RESPONSES TO
SOFT DRINKS TAX REGULATIONS

COMMENT: A definition of "nonalcoholic beverages" cannot be included in the Soft Drinks Tax rule because the Soft Drinks Tax statute, W. Va. Code § 11-19-1 et seq., was not amended and there has been no judicial decision on issues involving that definition.

RESPONSE: West Virginia Code § 11-19-1(1) defines "bottled soft drinks" to include "any and all nonalcoholic beverages." The phrase "nonalcoholic beverages" has never been defined, either by statute or regulation. One of the primary reasons (and one of the least controversial reasons) for legislative regulations is to define terms which need to be defined. It seems almost self evident that the term "nonalcoholic beverages" needs to be defined for the definition of bottled soft drinks to have any meaning. To formulate a definition of "nonalcoholic beverage" consistent with logic and existing tax laws, it is necessary to determine the minimum amount of alcohol in a beverage which would render the beverage an "alcoholic beverage."

The Alcohol Beverage Control Commissioner has jurisdiction over alcoholic liquors, wines and nonintoxicating beer, and the Legislature in the 1991 Regular Legislative Session authorized rules which regulate those substances. See, 175 C.S.R. 1, 175 C.S.R. 4 and 110 C.S.R. 16 respectively. In 175 C.S.R. 4, § 2 for example, the following definitions are used:

2.1.3 "Alcoholic liquor" or "liquor" means alcohol, beer, fortified wine and distilled spirits, and any liquid or solid capable of being used as an alcoholic beverage, but shall not include wine with an alcohol content of fourteen percent (14%) or less by volume, nonintoxicating beer or nonintoxicating beverages.

2.1.23 "Nonintoxicating beer" shall mean all cereal malt beverages or products of the brewing industry commonly referred to as beer, lager beer, ale and all other mixtures and preparations produced by the brewing industry, including malt coolers and containing at least one-half of one percent (.5%) alcohol by volume, but not more than four and two-tenths percent (4.2%) of alcohol by weight, or six percent (6%) by volume, whichever is greater, all of which are declared by West Virginia Code § 11-16-3 to be nonintoxicating and the word "liquor" as used in West Virginia Code § 60-1-1 et seq. shall not be construed to include or embrace nonintoxicating beer nor any of the beverages, products, mixtures or preparations included within this definition.

2.1.37 "Wine" means any beverage obtained by the fermentation of the natural content of fruits, or other agricultural products, containing sugar, and includes, but is not limited to, still wines, champagne and other sparkling wines, carbonated wines, imitation wines, vermouth, cider, perry, sake, port, sherry, madeira or other product offered for sale or sold as wine containing not less than seven percent (7%) nor more than twenty-four percent (24%) alcohol by volume: Provided, That for purposes of these regulations, wine shall include wine coolers and similar beverages containing not less than one-half of one percent (.5%) nor more than seven percent (7%) alcohol by volume.

It is quite evident from the foregoing that for cereal malt beverages, products of brewing, and beverages obtained by the fermentation of fruit and other agricultural products, a minimum alcohol percentage of .5% is necessary to be considered as nonintoxicating beer or wine.

Therefore, if a beverage has less than .5% alcohol, it must be considered nonalcoholic, whether or not expressly defined. The fact that W. Va. Code § 11-19-1 et seq. was not amended is a fact without significance to this issue. Legislative authorization of the ABCC rules establishing minimum levels of alcohol for its jurisdiction is sufficient legislative authority to allow development of a definition of "nonalcoholic beverages." There is no bureaucratic overreaching here. If a beverage is not "alcoholic," it must be "nonalcoholic" and the proposed definition of "nonalcoholic beverages" is consistent with this simple and seemingly unarguable principle.

This is not a situation similar to that in Frame Electric, Inc. v. Caryl, 365 S.E.2d 364 (W. Va., 1986), because the Tax Commissioner is not changing the interpretation of a tax statute. In Frame, the question revolved around the regulatory change of an activity from service to contracting for B&O tax purposes. Here, the Tax Commissioner is providing a definition of a substance which is the subject of the tax in question. The argument that a phrase cannot be defined because it has not been previously defined is without merit, and would prevent imposition of the tax upon items already impliedly subject to the tax even without such a definition.

COMMENT: Far reaching and lengthy comments were received relating to the elimination of tax crowns and tax stamps, elimination of discounts, and the imposition of a new license.

RESPONSE: While these recommendations are worthy of legislative consideration, they require statutory changes prior to implementation in legislative rules.

JACKSON & KELLY

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340-1324

July 31, 1991

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TELEPHONE 304-728-6088

Honorable L. Frederick Williams, Jr.
Secretary of Tax and Revenue
State Tax Commissioner
Room WW-300
State Capitol Building
Charleston, WV 25305

RECEIVED
1991 AUG -1 AM 10:00
STATE TAX DEPARTMENT
LEGAL DIVISION

Re: 1991 Proposed Soft Drinks Tax Regulations

Dear Secretary Williams:

On behalf of the Miller Brewing Company, we urge you to amend the proposed Soft Drinks Tax Regulations (110 C.S.R. 19 (1991)) relating to the new definition of the term "nonalcoholic beverages". For the following reasons, we believe an amendment to the proposed Regulations is required.

Background

The West Virginia Soft Drinks Tax, enacted in 1951, applies an excise tax upon the sale, use, handling or distribution of each bottled soft drink; on each gallon of soft drink syrup; and on each ounce of soft drink dry mixture. W.Va. Code § 11-19-2. Ever since the adoption of the tax, the term "bottled soft drinks" has been defined to include only nonalcoholic beverages. W.Va. Code § 11-19-1(1). In 1976, the Legislature adopted statutory definitions of several key terms used in establishing what constitutes a "bottled soft drink" for purposes of the Soft Drinks Tax. 1976 Acts W.Va. Legis. ch. 128. Despite the attention given to the term "bottled soft drinks," the Legislature did not adopt a special meaning for the term "nonalcoholic" as used in section 11-19-1(1). To the best of our knowledge, the term "nonalcoholic" has consistently since the adoption of the Soft Drinks Tax been interpreted by the Tax Commissioner as that term is normally understood, to wit: the absence of any alcoholic content. Moreover, despite

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Honorable L. Frederick Williams, Jr.
July 31, 1991
Page 2

extensive amendments to virtually every West Virginia tax law in the last five years, the Legislature has not amended the Soft Drinks Tax law for over a decade.

The 1991 Regulations

Notwithstanding the lack of relevant legislative change to the definition of "bottled soft drinks", the Department of Tax and Revenue on July 1, 1991 filed the proposed Soft Drinks Tax Regulations with the following new language:

The term "nonalcoholic beverages" means and includes all beverages which are not among the alcoholic beverages defined in the West Virginia Code and regulations thereto, and which contain less than one-half percent (.5%) alcohol by volume. Alcoholic beverages include "alcoholic liquor," "beer," "spirits," and "wine" as defined in W.Va. Code § 60-1-5; "fortified wine" as defined in W.Va. Code § 60-8-2; "nonintoxicating beer" as defined in W.Va. Code §§ 60-1-5 and 11-16-2; and any other beverage which contains at least one-half percent (.5%) alcohol by volume. Nonalcoholic beverages, which are subject to the soft drink [sic] tax, are exempt from taxation or regulation by the Alcoholic Beverage Commission, and are exclusively subject to the jurisdiction of the Department of Tax and Revenue. Examples of nonalcoholic beverages include "near beer," "malt coolers," and "wine coolers" when such beverages contain less than one-half percent (.5%) alcohol by volume.

Prop. Reg. § 110-19-2.1.2 (1991).

The above quoted provision is a clear attempt by the Department--without legislative direction--to extend the definition of "bottled soft drinks" to include beverages that contain up to one-half percent of alcohol by volume. The "Statement of Circumstances" filed along with the proposed Regulations admits as much by stating that "the regulations

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Honorable L. Frederick Williams, Jr.

July 31, 1991

Page 3

will impose the Soft Drinks Tax on certain nonalcoholic beverages which were found to not be subject to any tax."

Limitations on Changes via Regulation

While West Virginia Code section 11-10-5 gives the Tax Commissioner the power to "make needful rules and regulations" for purposes of various taxes including the Soft Drinks Tax, the power to promulgate rules is limited, especially where the Commissioner's action is inconsistent with past practice. Nowhere is the Tax Commissioner authorized to impose a tax on items or transactions not subject to tax by the underlying statute. In short, regulations are not the proper place for "imposition of a tax" on items which are found "to not be subject to any tax."

The West Virginia Supreme Court of Appeals has consistently imposed limits upon a Tax Commissioner's attempt to change interpretation of a tax statute. In Frame Electric, Inc. v. Caryl, 365 S.E.2d 364 (W.Va. 1986), the Court specifically rebuffed the Tax Commissioner's attempt to change a long-standing definition of a critical tax-related term through regulatory amendment. Frame Electric invalidated the new regulation's attempt to redefine a term "absent either a change in statute or showing that the long-standing prior interpretation was contrary to the existing statute." *Id.* at 371. More recently, the Supreme Court of Appeals rejected a "sudden about-face" by the Tax Commissioner, giving great weight to the long-standing, consistent administration of the tax laws. Cherry River National Bank v. Lorensen, Slip. Op. No. 19999 (W.Va. Sup. Ct. App., June 27, 1991). Here, too, the Department's attempt to "impose a tax" on items "not . . . subject to any tax" is invalid absent an underlying statutory change.

Conclusion

We object to the proposed regulations insofar as they purport to extend the application of West Virginia's forty year old Soft Drinks Tax to beverages heretofore not subject to the tax without any legislative authorization and in contravention to long-standing administrative practice. This belated

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Honorable L. Frederick Williams, Jr.

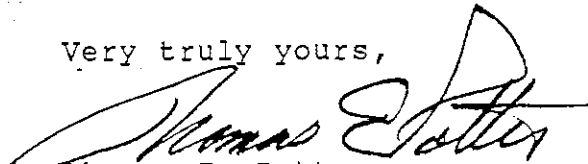
July 31, 1991

Page 4

reinterpretation of the law is unwarranted and without legal foundation. Accordingly, we request that you, pursuant to the authority vested in you by West Virginia Code section 29A-3-6, amend the proposed Regulations by striking newly proposed Regulation section 110-19-2.1.2 and by taking such other actions necessary to reflect long-standing practice of the Department in this regard.

We thank you and appreciate this opportunity to provide written comments to these proposed Regulations. If you have any questions or wish any additional information, please feel free to contact me.

Very truly yours,

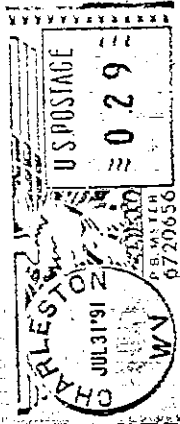


Thomas E. Potter

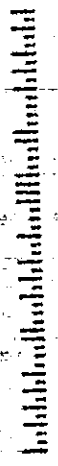
TEP/prb

cc: Richard E. Boyle, Esquire ✓
Mr. Kenneth F. Lane

JACKSON & KELLY
P. O. Box 553
CHARLESTON, WEST VIRGINIA 25322



RICHARD E BOYLE ESQUIRE
LEGAL DIVISION
DEPARTMENT OF TAX AND REVENUE
P O BOX 1005
CHARLESTON WV 25324-1005





RECEIVED
1991 AUG -1 PM 2:00
STATE TAX DEPARTMENT
LEGAL DIVISION

FAX TO:

Legal Division
Dept of Tax Revenue - State Capitol
Building 1

FAX NUMBER:

348-2324

FROM:

Kathryn V. Folio

DATE:

8-1-91

SUBJECT:

PAGES:

5 OF *5*

If there is any problem with transmission, please call
(304)-842 6231 immediately.



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STATE TAX DEPARTMENT
LEGAL DIVISION

August 1, 1991

Legal Division
Department of Tax and Revenue
PO Box 1005
Charleston, WV 25324-1005

RE: Title 110
Soft Drinks Tax
Written comments

Dear Gentlemen,

In the interest of bringing West Virginia up to date competitively with the surrounding states as well as to put West Virginia in the position to respond quickly to changes and new items in the soft drink industry we would respectfully request that the rules and regulations governing this industry be amended drastically or struck completely.

Our summary of the current laws, the reality under the current law, recommendations and projected revenues is respectfully submitted herein.

Sincerely,

Kathryn V. Folio
President

Enclosures

SOFT DRINK TAX - SUMMARY

A. CURRENT LAW

1. Any and all nonalcoholic beverages except unflavored water, natural undiluted fruit juice or vegetable juice, white milk are subject to tax.
2. Tax crowns or tax stamps must be affixed to each individual container as evidence of tax being paid.
3. Tax crowns are used by bottlers who actually fill the container.
4. Tax stamps are used by distributors who bring product into West Virginia for resale from manufacturers who are unable or unwilling to deal with tax crowns because of the economics, i.e., Perrier, Quibell, Rock Creek, Elliotts juices, Very Fine juices, Squeeze Its, Kool-Aid, LaCroix, Country Time Lemonade, and all Non-Alcoholic Beer.
5. If a manufacturer purchases tax crowns, he receives 12 1/2% discount.
6. If tax stamps are purchased you receive:
No discount on \$25.00 or less
5% discount on \$25.01 to \$50.00
10% discount on \$50.01 and over
7. Discounts as listed above in 3 & 4 are in lieu of the allowance of claim for refund for breakage, spoilage and loss of destruction of stamps and crowns.

To apply tax stamps, the distributor **BY HAND** must:

- A. Open the outer package containing product. (box, plastic)
- B. Peel off a tax stamp from a flat sheet.
- C. Place a tax stamp on the top only of each container.
- D. Date and Initial each tax stamp.
- E. Replace container in outer package.
- F. Reseal (if able) outer package.

B. REALITY UNDER CURRENT LAW

1. Out of state corporations like Coke and Pepsi are receiving 12 1/2% discount to cover hypothetical breakage in modern bottling facilities. Breakage costs are factored into the daily operating costs. Bottlers see the 12 1/2% discount as extra profit. In addition, they receive full reimbursement of the tax when sold to the customer.

2. Due to a lack of accountability, product is being transshipped. This has led to product liability problems in the market.
3. Due to the high cost of affixing tax stamps by hand, West Virginians are denied the right to purchase certain products (or they bring it back when they go out of state.) They often purchase out of state for this reason. This denies the state even more revenue.
4. Many products on large chain shelves do not have tax crowns or stamps. These chains have been bringing these products in through their out of state warehouses. It has been determined that while a few of these chains pay the tax, many do not. However, in-state distributors have been pressured and harassed to place tax stamps.

C. RECOMMENDATIONS

1. Eliminate tax crowns and tax stamps. (decreases state expense by reducing paper work and management of this aspect of the system and thereby increases revenue.)
2. Eliminate discounts. (increases revenue.)
3. Make bottlers, distributors and chain warehouses purchase an annual license fee of \$1,000.00. (increase state revenue by which the state can offset the expense of the pop division, thereby increasing revenue.)
4. These new licensees must pay the full tax on each invoice and report same on the same monthly form that is currently submitted with the appropriate payment to the Tax Department. (This would provide an audit trail.)
5. These new licensees, in protecting their license will report untaxed/unauthorized items coming into the state. Tax Department can then follow up.
6. These recommendations constitute sound economics, are reasonable, would bring West Virginia up to standard with other states and would increase revenue.

D. REVENUES TO BE GENERATED

1. Savings from the actual purchase price of the tax stamps by the State of West Virginia for resale to distributors, wholesalers, and warehouses.

2. Savings of the wages of employee who oversees the stamps and crowns (approximately \$17,000 + benefits.)
3. Minimum \$2 million by eliminating discounts.
4. Licensing revenues: est. min. 50 licenses \$50,000.
5. As a result of auditing the monthly reports by which the licensees submit the tax by invoice, taxes would be collected on products which are not currently being collected.

AGENCY APPROVED
WEST VIRGINIA LEGISLATIVE REGULATIONS
DEPARTMENT OF TAX AND REVENUE
TITLE 110
SERIES 19
1991

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1991 AUG -8 PM 3:40
OFFICE OF THE ATTORNEY GENERAL
NEW HAVEN, CT 06510

SOFT DRINKS TAX

§ 110-19-1. General.

1.1 **Type of regulation.** - These regulations are agency approved legislative regulations as defined in W. Va. Code § 29A-3-1 et seq.

1.2 **Scope.** - These agency approved legislative regulations explain and clarify the West Virginia Soft Drinks Tax, as stated in W. Va. Code § 11-19-1 et seq.

1.3 **Authority.** - These agency approved legislative regulations are issued under the authority of W. Va. Code § 11-10-5.

1.4 **Filing date.** -

1.5 **Effective date.** -

1.6 **Citation.** - These agency approved legislative regulations may be cited as 110 C.S.R. 19, § ____ (1991).

§ 110-19-2. **Definitions.** - As used in these regulations and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and shall apply in the singular or in the plural.

2.1 "Bottled soft drinks" shall include any and all nonalcoholic beverages, whether carbonated or not, such as soda water, ginger ale, Coca Cola, lime cola, Pepsi Cola, Dr. Pepper, root beer, carbonated water, orangeade, lemonade, fruit juice when any plain or carbonated water, flavoring or syrup is added, or any and all preparations commonly referred to as "soft drinks" of whatever kind, which are closed and sealed in glass, paper, or any other type of container, envelope, package or bottle, whether manufactured with or without the use of any syrup. The term "bottled soft drinks" shall not include fluid milk to which no flavoring has been added, or natural undiluted fruit juice or vegetable juice.

2.1.1 The term "bottled soft drinks" also does not include plain water that is not carbonated artificially, but which is naturally carbonated before it is removed from the ground. See also Section 3.3.4 of these regulations.

2.1.2 The term "nonalcoholic beverages" means and includes all beverages which are not among the alcoholic beverages defined in the West Virginia Code and regulations thereto, and which contain less than one half percent (.5%) alcohol by volume. Alcoholic beverages include "alcoholic liquor," "beer," "spirits" and "wine" as defined in W. Va. Code § 60-1-5; "fortified wine" as defined in W. Va. Code § 60-8-2; "nonintoxicating beer" as defined in W. Va. Code §§ 60-1-5 and 11-16-2; and any other beverage which contains at least one half percent (.5%) alcohol by volume. Nonalcoholic beverages, which are subject to the soft drink tax, are exempt from taxation or regulation by the Alcoholic Beverage Commission, and are exclusively subject to the jurisdiction of the Department of Tax and Revenue. Examples of nonalcoholic beverages include "near beer," malt coolers, and wine coolers when such beverages contain less than one half percent (.5%) alcohol by volume.

2.2 "Natural undiluted fruit juice" shall mean the liquid resulting from the pressing of fruit with or without sweetener being added, or the liquid resulting from the reconstitution of natural fruit juice concentrate by the restoration of water to dehydrated natural fruit juice with or without sweetener being added.

2.3 "Natural undiluted vegetable juice" shall mean the liquid resulting from the pressing of vegetables with or without sweetener being added or the liquid resulting from the reconstitution of natural vegetable juice concentrate by the restoration of water to dehydrated natural vegetable juice with or without sweetener being added.

2.4 "Sweetener" shall mean sugar only, artificial or natural, which singularly flavors the taste of a natural undiluted fruit juice or natural undiluted vegetable juice.

2.5 "Soft drink syrups and powders" shall include the compound mixture or the basic ingredients, whether dry or liquid, practically and commercially usable in making, mixing or compounding soft drinks by the mixing thereof with carbonated or plain water, ice, fruit, milk or any other product suitable to make a soft drink, among such syrups being such products as Coca Cola syrup, Chero Cola syrup, Pepsi Cola syrup, Dr. Pepper syrup, root beer syrup, Nu-Grape syrup, lemon syrup, vanilla syrup, chocolate syrup, cherry smash syrup, rock candy syrup, simple syrup, chocolate drink powder, malt drink powder, or any other prepared syrups or powders sold or used for the purpose of mixing soft drinks commercially at soda fountains, restaurants or similar places as well as those powder bases prepared for the purpose of domestically mixing soft drinks such as Kool Aid, Oh Boy drink, Tip Top, Miracle Aid and all other similar products.

2.5.1 Example. - Although not specifically listed in the definition of "soft drink syrups and powders," Tang would be classified as a soft drink powder. Tang is a powder base prepared for the purpose of domestically mixing a soft drink similar to Kool Aid. The fact that a soft drink product such as Tang may often be consumed at breakfast would not exempt it from the tax, any more than soft drinks such as Pepsi Cola would be exempt when they are consumed at breakfast. The taxability of soft drink products is not affected by how or when they may be used. Nor does the fact that Tang has

vitamin C added to it cause it to be exempt, any more than soft drinks such as Coca Cola would be exempt if they were fortified with vitamins.

2.6 "Simple syrup" shall mean the making, mixing, compounding or manufacturing, by dissolving sugar and water or any other mixtures that will create simple syrup to which may be or may not be added concentrates or extracts.

2.7 "Person" shall mean and include an individual, firm, partnership, association or corporation.

2.8 "Wholesale dealer" includes only those persons who sell any bottled soft drink or soft drink syrup to retail dealers for the purpose of resale.

2.9 "Retail dealer" includes every person other than a wholesale dealer mixing, making, compounding or manufacturing any drink from a soft drink syrup or powder base, or a person selling such syrup or powder.

2.10 "Distributor" shall mean any person who manufactures, bottles, produces or purchases for sale to retail dealers any bottled soft drink or soft drink syrup.

2.11 "Commissioner" means the State Tax Commissioner, and where the meaning of the context requires, all deputies and employees duly authorized by him.

2.12 "Domestic use" shall mean for use exclusively in the home.

2.13 "Commercial use" shall mean for use by restaurants, drive-ins, theaters, canteens, schools, hospitals or any other vendor offering finished drinks to the consumer.

2.14 "Tax stamps or indicia" shall mean any soft drink stamp authorized by the Commissioner to serve as such stamp, and shall be of the design and color prescribed by the Commissioner.

2.15 "Tax crowns" shall mean any caps, lids, labels, cartons, ends or crowns authorized by the Commissioner and shall be of the design prescribed by the Commissioner.

2.15.1 Any caps, lids, labels, cartons, ends or crowns which do not comply with the Commissioner's design specifications shall not be considered tax crowns. See Section § 6.7.5.1.

2.16 "Stamped soft drinks" means that the West Virginia tax stamp or tax crown has been affixed to the soft drink lid or neck of the container.

2.17 "Unstamped soft drinks" means that the West Virginia tax stamp or tax crown has not been affixed to the soft drink container.

2.18 "Tax" or "taxes" means and includes additions to tax, penalties and interest, unless the intention to give the same or more limited meaning is disclosed by the context.

2-18 2.19 "Taxpayer" means and includes any person required to file a report or return for the soft drinks tax, and any person liable for payment of the soft drinks tax.

§ 110-19-3. Excise Tax On Bottled Soft Drinks, Syrups And Dry Mixtures; Disposition Thereof.

3.1 An excise tax is levied and imposed by W. Va. Code § 11-19-2 upon the sale, use, handling or distribution of all bottled soft drinks, soft drink syrups and powders, whether manufactured within or without this State, as follows:

3.1.1 On each bottled soft drink, a tax of one cent (\$.01) on each sixteen and nine-tenths (16.9) fluid ounces, or fraction thereof, or on each one-half (.5) liter, or fraction thereof contained therein.

3.1.2 On each gallon of soft drink syrup, a tax of eighty cents (\$.80), and in like ratio on each part gallon thereof, or on each four (4) liters of soft drink syrup a tax of eighty-four cents (\$.84), and in like ratio on each part four (4) liters thereof.

3.1.3 On each ounce by weight of dry mixture (powder) or fraction thereof used for making soft drinks, a tax of one cent (\$.01) or on each 28.35 grams, or fraction thereof, a tax of one cent (\$.01).

3.2 Any person manufacturing or producing within this State any bottled soft drink or soft drink syrup or powder for sale within this State and any distributor, wholesale dealer or retail dealer or any other person who is the original consignee of any bottled soft drink or soft drink syrup or powder manufactured or produced outside this State, or who brings such drinks or syrups or powders into this State, shall be liable for the excise tax imposed. The excise tax imposed shall not be collected more than once in respect to any bottled soft drink or soft drink syrup manufactured, sold, used or distributed in this State.

3.2.1 **Base products.** - Base products such as hot chocolate flavored drink mix, flavored milk shake bases, concentrated products to which milk or other liquid (including water) is added to make a syrup used to complete a soft drink, and all like items or products, will be taxed as syrups.

3.2.2 **Powders.** - Powders includes compressed powders, crystals, granules or tablets from which soft drinks can be made.

3.2.3 **Powders converted to syrup.** - Whenever a powder is converted to a syrup, the tax per ounce on such powder will be computed in direct ratio to the quantity of ready-to-use syrup produced. An example is that of cocoa powder - generally, one (1) pound of cocoa powder is used in the manufacture of a gallon of chocolate syrup. Because the tax on a gallon of syrup is eighty cents (\$.80) and sixteen (16) ounces of powder is required to produce one (1) gallon of syrup, the tax levied in this instance would be at the rate of five cents (\$.05) per ounce on the powder.

3.2.4 Powders converted to soft drinks. - When a powder is used to make a soft drink without being converted into a syrup, the rate of tax will be one cent (\$.01) per ounce, or fraction thereof, of the powder weight.

3.3 Exemptions. - The following are exempt from the soft drinks tax:

3.3.1 Fluid milk to which no flavoring has been added.

3.3.2 Natural undiluted fruit juice or vegetable juice.

3.3.2.1 This exemption only applies to such juices which are one hundred percent (100%) pure, and which contain no ~~artificial or natural~~ sweeteners; flavorings, or preservatives, carbonation or any other additives other than artificial or natural sweeteners.

Examples:

3.3.2.1.a Even if orange juice is labeled as "100% pure," it would not be exempt if in fact it is not 100% pure. Orange juice which is 100% pure, except for the addition of more water to it than would occur if the juice were freshly squeezed, would be diluted with water, and so would not be "natural undiluted fruit juice" and thus would not be exempt.

3.3.2.1.b Even if tomato juice is otherwise pure, it would not be 100% pure if salt or any other flavoring or substance other than sweeteners has been added subsequent to the harvesting of the tomatoes used to produce the juice.

3.3.2.1.c Fruit juice "sparklers" which sparkle as a result of artificial carbonation are not exempt even if otherwise pure.

3.3.2.1.d A mixture of two or more juices, such as orange and pineapple juices, would be exempt only if the resulting product consists solely of 100% pure juices and contains no additives of any kind other than sweeteners.

3.3.3 Plain water which is uncarbonated.

3.3.4 Water which is naturally carbonated before it is removed from the ground. See also Section 2.1.1 of these regulations.

3.3.4.1 In order for water to be considered naturally carbonated, all of the carbon dioxide which is in the water when it is marketed must have been (1) removed from the same ground as the water and (2) present in the water before the water was removed from the ground. Even if the carbon dioxide was removed from the same ground as the water and was present to some degree in the water before the water is removed from the ground, the water would not be naturally carbonated if any additional amounts of carbon dioxide are added to the water to reach a desired level of carbonation.

§ 110-19-4. Reserved For Future Use.

§ 110-19-5. Affixing Of Tax Stamps Or Tax Crowns.

5.1 The payment of the taxes herein provided shall be evidenced by the affixing of soft drink tax stamps or tax crowns to the original containers or bottles in which any soft drink or syrup is placed, received, stored or handled. Such stamps or crowns, of the appropriate denomination, shall be affixed to each container of syrup and to each bottled soft drink by the person, who under the provisions of W. Va. Code § 11-19-1 et seq. and this regulation, is first required to pay the tax thereon, within twenty-four (24) hours after such person has such bottled soft drink or syrup in his possession for the first time. The provisions of this Section 5.1 shall not apply to syrup used by bottlers in the manufacture of bottled soft drinks, or to bottled soft drinks or syrups which are transported through this State and which are not sold, delivered, used or stored herein, or to any bottled drink or syrup which is manufactured in this State and sold to a purchaser outside this State.

5.2 Alternate method to pay soft drink tax on breakfast drinks, ades, punches, powder bases, and non-carbonated fruit drinks. - All soft drinks are required to have the appropriate tax stamp or indicia or tax crown affixed to the container except items on which the wholesaler, distributor or retail dealer is permitted to file a report and pay the tax on the fifteenth (15th) day of the month following the month of receipt or manufacturing of certain bottled drinks, ades, punches, powder bases, powdered drink mixes, and non-carbonated fruit drinks as referenced in Section 14 of these regulations.

5.3 Except as otherwise provided in W. Va. Code § 11-19-4 and in this Section 5 of this regulation, it shall be unlawful for any person to sell, use, handle or distribute any bottled soft drink or soft drink syrup to which the required tax stamps or tax crowns are not affixed, and any person who shall violate this provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500), or by imprisonment for not more than six (6) months, or by both such fine and imprisonment.

§ 110-19-5a. Cancellation And Removal Of Stamps.

5a.1 Any person subject to the tax imposed by W. Va. Code § 11-19-1 et seq. and this regulation who affixes a soft drink stamp to a container shall be required to immediately cancel the stamp by writing or marking initials thereon and the date upon which the stamp was affixed. When any container to which a stamp has been affixed is emptied, the person emptying the same or on whose behalf the same has been emptied shall be required to immediately remove or deface the tax stamp thereon.

§ 110-19-5b. Disposition Of Unused Crowns; Penalty For Violation.

5b.1 Unused tax crowns upon which the tax imposed by W. Va. Code § 11-19-1 et seq. and this regulation has not been paid and which the original purchaser has not used and does not intend to use, and which are fit for use, shall be disposed of in the following manner only:

5b.1.1 By returning same to the manufacturer thereof and receiving from such manufacturer a certificate which shall indicate the name of the person returning the crowns, the date of return, the name of the crown manufacturer, and the number and denominations of crowns returned; or

5b.1.2 By transferring such crowns to any person and receiving in exchange therefor a certificate issued by the Commissioner authorizing the transferee to acquire such crowns; or

5b.1.3 By requesting a refund of tax actually paid in the case of the destruction of unused tax-paid crowns or, for bonded accounts handling tax-not-paid crowns, by requesting permission to make an adjustment reducing inventory. In either case, the destruction must be witnessed by a representative of the State Tax Department, and any request for refund or inventory adjustment must be accompanied by an affidavit stating the date, the quantity, and denomination of crowns involved, and the method of their destruction.

5b.2 Upon receipt of either such certificate, the Commissioner shall credit the account of the original purchaser in the amount indicated by the certificate.

5b.3 In the event of the disposition of such crowns in a manner not authorized by W. Va. Code § 11-19-1 et seq. and this regulation, the original purchaser thereof or his estate, and/or any person (whether acting in an official capacity or otherwise) who shall make such unauthorized disposition shall be liable for the amount of tax which the crowns represent; and, in addition, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of five thousand dollars (\$5,000) and imprisonment in the county jail for not less than sixty (60) days nor more than one (1) year, in the discretion of the court.

§ 110-19-6. Purchase Of Tax Stamps Or Tax Crowns; Discounts And Commissions; Bonds; Refunds And Statute Of Limitations.

6.1 Manufacturers or distributors of crowns may be required to furnish bond to ensure faithful compliance with such regulations. Any person desiring to purchase such crowns shall obtain from the Commissioner an authorization to do so, which shall specify the number of crowns to be purchased, and upon shipment thereof the manufacturer shall transmit to the Commissioner a copy of the invoice of such shipment. The Commissioner will not authorize the purchase of crowns by any person who is in default in the payment of any tax required by W. Va. Code § 11-19-1 et seq. and this regulation, or who has not obtained a West Virginia business registration certificate.

6.2 The Commissioner shall sell the tax stamps required by W. Va. Code § 11-19-1 et seq. and this regulation, or may authorize any sheriff, or any bank or trust company in this State, to sell such stamps as his deputy, and may allow as a commission a fee of one half of one percent (.5%) of the face value of all stamps sold by such deputy. In the sale of such stamps the Commissioner shall allow the following discounts:

6.2.1 On a sale of less than twenty-five dollars (\$25), no discount; on a sale of twenty-five dollars (\$25) or over and less than fifty dollars (\$50), a discount of five percent (5%); and on a sale of fifty dollars (\$50) or more, a discount of ten percent (10%).

6.3 In the case of stamps, the tax imposed by W. Va. Code § 11-19-1 et seq. and this regulation shall be paid in advance at the time the stamps are purchased. In the case of tax crowns, the tax shall be paid in advance at the time the Commissioner authorizes the purchase of such tax crowns, unless the purchaser applies for and obtains credit as provided in Section 6.4.

6.4 Bonds. - Whenever any person applies for an authorization to purchase tax crowns, he may apply for an extension of credit on the tax due with respect to such crowns, and if he files a bond in the form prescribed by the Commissioner, with satisfactory corporate surety, in an amount not less than twenty-five percent (25%) more than the tax due with respect to the tax crowns to be purchased, the Commissioner shall issue the necessary authorization. Any person who obtains such credit shall, on or before the fifteenth (15th) day of each month, file with the Commissioner on forms prescribed by him a return stating the number of tax crowns used by such person during the preceding month, and he shall at the same time pay to the Commissioner the tax due on the crowns so used.

6.4.1 Duration of bond. - The West Virginia soft drinks tax crown purchase bond is to continue in full force and effect so long as the principal remains subject to liability for said tax, and an annual renewal certificate is required on the anniversary date of the bond.

6.4.2 Cancellation of bond. - If the bonded person or the bonding company elects to cancel the bonds, at least sixty (60) days notice of intent shall be given to the Commissioner in writing. Should the Commissioner elect to discontinue any further extension of credit and desire a cancellation of the contract, he may proceed with the dissolution upon written notice to both parties, terminating the bond sixty (60) days from date of cancellation notice. The Commissioner will notify both parties of the dissolution by certified mail.

6.5 Discount. - The Commissioner shall allow to each purchaser of tax crowns, whether for cash or credit, a discount of twelve and one half percent (12.5%) of the tax value of such crowns. The value of such crowns for purposes of determining such discount shall be the actual gross costs of manufacturing the crowns and shall not be based on gross receipts from sales. Such discount, and the discount allowed on the sale of tax stamps, shall be in lieu of the allowance of any claim for refund by reason of the breakage or destruction of containers stamped or crowned as provided in W. Va. Code § 11-19-1 et seq. and this regulation, the spoilage of the soft drinks or syrups, or the loss or destruction of tax stamps or tax crowns.

6.5.1 Bottlers taking a credit of the twelve and one-half percent (12.5%) discount on their monthly soft drink tax return must include the tax for the indicia lost during manufacturing since this loss is compensated for by the discount allowed at the time of purchase or use of the indicia.

6.6 Refunds. - Unused Soft Drink Stamps may be returned to the Tax Department for a refund, less the appropriate discount allowed at the time of purchase: **Provided**, That a refund application is filed for the amount returned and the correct amount is deducted from the closing inventory on the monthly Soft Drink Tax Return.

6.6.1 When the tax stamps or crowns or soft drinks, soft drink powders, soft drink syrups or soft drink invoice products from the representative list referenced in Section 14 of these regulations, upon which tax has been paid are destroyed by fire, lightning or flood; and when soft drinks, syrups or powders upon which tax has been paid to the State of West Virginia are exported from this State or are required to be destroyed pursuant to federal or State order, the taxpayer may file a claim for refund for an amount equal to the amount of tax actually paid for such stamps, crowns or invoice products. The Commissioner shall cause a refund to be made only when a claim for refund is filed within one hundred and eighty (180) days from the date the tax stamps or crowns were destroyed or the soft drink product upon which tax was paid were destroyed or exported from this State. Any claim for refund not timely filed shall not be construed to be or to constitute a moral obligation of this State for payment. Such claim for refund shall also be subject to the provisions of W. Va. Code § 11-10-14 et seq. At the election of the taxpayer, the amount of any refund may be established as a credit. The amount refunded or credited shall not be subject to the interest provisions of W. Va. Code § 11-10-17(d).

6.6.2 No refund will be given on soft drinks or tax indicia for breakage or destruction of stamped or crowned containers, spoilage of soft drinks or syrups, or the loss or destruction of tax stamps or crowns while in the process of manufacturing.

6.7 Tax paid crowns. - Any person using tax paid crowns as evidence of the payment of the soft drinks tax must comply with all requirements established by the Commissioner.

6.7.1 No soft drink tax crowns of any style may be sold to any soft drink manufacturer by any crown manufacturer without authorization from the Commissioner. Authorization will be made by the issuance of an official Soft Drinks Tax Crown Certificate. The certificate will entitle the soft drink manufacturer to receive from the crown manufacturer the quantity of crowns specified.

6.7.2 The crown manufacturer shall be responsible for the safe keeping of all crowns manufactured for sale until such time as they are delivered to the purchaser in accordance with the certificate issued by the Commissioner specifying the exact amount of crowns authorized. Crowns shall not be sold or delivered in excess of the exact number specified by the certificate.

6.7.3 To secure delivery of crowns, soft drinks manufacturers are required to pay the tax in full, or have executed a bond in an amount not less than one hundred twenty-five percent (125%) of the tax involved, represented by the number of crowns desired or secure a certificate authorizing the crown manufacturer to make delivery of the number of crowns specified by the certificate. Nothing contained herein shall prevent soft drink manufacturers from purchasing crowns on both cash basis (prepaid) and bond account at the same time. The crown company or soft drinks manufacturer will be liable for the tax value of the crowns delivered in excess of the number of crowns indicated by the certificate.

6.7.4 Certificate release numbers will be issued by the Commissioner on soft drink tax requisition forms for soft drink manufacturers who hold a West Virginia Business Registration Certificate, (W. Va. Code § 11-12-1 et seq.) indicating the number of crowns, the crown manufacturer and the denomination of crowns desired. If no bond has been executed and filed with the Commissioner, the soft drink tax requisition form must include remittance for the full tax less discount.

6.7.5 All crown manufacturers authorized by the Commissioner to manufacture official West Virginia crowns will be required to conform to such special regulations or instructions as may be issued. Crown manufacturers will be required to file monthly reports on forms prescribed and furnished by the Commissioner. All records pertaining thereto are subject to examination by the Commissioner.

6.7.5.1 Tax paid crowns shall meet the following specifications. The outline of the State of West Virginia shall appear around the face of the crown at any place where, by reason of other display matter on the crown, this outline would not be obscure; or, it shall appear apart from other display matter in such a manner that it could be easily distinguished at a glance as evidence of tax payment. The overall dimensions of the outline map of West Virginia shall be not less than one-quarter (1/4) of an inch nor more than five-sixteenths (5/16) of an inch from the uppermost to the lowermost outside of the outline boundary or from one side to the other at the greatest width of the outline map. The line of the outline boundary map shall be not less than one sixty-fourth (1/64) of an inch in width and shall be a single line.

6.7.5.2 Every design for soft drink tax paid crowns shall be approved in writing by the Tax Commissioner before any such crowns shall be manufactured, sold or distributed.

6.7.6 All soft drink manufacturers desiring to use crowns will be required to conform to the regulations of the Commissioner with regard to such crowns. All records of the soft drinks manufacturer pertaining to the purchase and use of crowns are subject to examination by the Commissioner.

6.7.7 All soft drink manufacturers not operating on a bond or credit account are required to file a monthly report. These reports are due in the office of the Commissioner on or before the fifteenth (15th) day of the month showing the transactions of the previous month. The reports must reflect invoice payment method schedules if applicable, the beginning inventory, the various purchases, the sales made, the stamps purchased and applied against sales, and closing inventories.

6.7.8 All soft drink manufacturers who operate on both cash basis and bond account are required to file a monthly report. These reports are due in the Commissioner's office on or before the fifteenth (15th) day of the month showing the transactions of the previous month.

6.7.9 The Commissioner will not authorize the purchase of crowns by any person who is in default in the filing of monthly reports and the tax due on the tax indicia.

6.7.10 **Canning or packing plants.** - In the event a manufacturer of soft drink items, subject to the West Virginia soft drinks tax, elects to arrange for a canner to bottle, can or pack his products, the manufacturer shall apply to the Commissioner for crown certificates and pay the applicable tax or furnish a surety bond as provided in W. Va. Code § 11-19-1 et seq. The manufacturer shall file monthly reports on forms prescribed by the Commissioner on or before the fifteenth (15th) day of the month showing the transactions of the previous month.

6.7.11 Soft drink manufacturing companies located outside of West Virginia who have sales in West Virginia may secure crown certificates and pay the tax. The soft drink manufacturer located outside of West Virginia will be allowed credit on their monthly soft drink tax return for out-of-state sales of soft drink product with West Virginia tax indicia affixed.

6.7.12 The soft drinks manufacturer shall obtain permission from the Commissioner to return soft drinks tax crowns to the crown manufacturer. The crown manufacturer is prohibited from accepting such returns without written authorization from the Commissioner.

6.7.13 The crown manufacturer may not reject any official or tax paid crowns from his inventory without written notice to the Commissioner.

6.7.14 The exchanging, borrowing or purchasing of crowns between soft drink manufacturers is strictly prohibited.

6.7.15 Any crown for which credit is being claimed shall be stored until the exact count is verified by the Commissioner, after which credit may be taken in the crown inventory. The Commissioner will not authorize the purchase of crowns by any person who is in default in the payment of tax or who has not filed his monthly report as required. Any person who obtains credit shall file a report and remit the tax. Such report and tax is due in the Commissioner's office on or before the fifteenth (15th) day of the month showing transactions for the preceding month.

§ 110-19-6a. Due Date Of Reports; Additional Reports; Extensions Of Time.

6a.1 Every person subject to the tax imposed by W. Va. Code § 11-19-1 et seq. and this regulation shall on or before the fifteenth (15th) day of each month make and file with the Commissioner a report of such person's operations for the preceding month to verify liability for that tax. This report shall be in a form prescribed by the Commissioner.

6a.2 The Commissioner may by fifteen (15) days' written notice require the filing of such additional reports as he deems necessary to verify a person's liability under W. Va. Code § 11-19-1 et seq.

6a.3 Upon written application setting forth good cause, the Commissioner may extend the time for filing such reports or additional reports on such terms and conditions as he may require.

6a.4 A monthly report shall be filed by the following:

6a.4.1 Dairies and soft drink manufacturers. - Filed by all manufacturers and canners or bottlers of soft drinks.

6a.4.2 Wholesalers and/or distributors of syrups, powders, and soft drinks. - Filed by all persons who are not actually canning or bottling soft drinks.

6a.4.3 Retailers of syrups, powders, and soft drinks. - Filed by all dealers other than wholesale dealers involved in the mixing, making, compounding, or manufacturing of any drink from a soft drink syrup or powder base, or a person selling any soft drink product upon which the tax has not been paid.

§ 110-19-6b. Additional Penalty For Late Filing Or Payment.

6b.1 In addition to the additions to tax, penalties and interest authorized in W. Va. Code § 11-10-1 et seq., if any taxpayer fails to file a return or pay the proper amount of tax within the time specified herein, the Commissioner shall refuse to authorize the purchase of tax stamps or crowns by the delinquent taxpayer: **Provided**, That if the failure to pay was due to reasonable cause, the Commissioner may waive this penalty.

6b.2 The taxpayer may request a hearing within sixty (60) days after service of notice of the refusal of the Commissioner to authorize the purchase of the tax stamps or crowns. Upon receipt of a written request for a hearing filed within the time prescribed, the provisions for hearing and appeal in W. Va. Code §§ 11-10-9 and 10 shall be applicable.

§ 110-19-6c. Reserved For Future Use.

§ 110-19-6d. Interstate Sales.

6d.1 Sales of products subject to the West Virginia soft drinks tax which are shipped to out-of-state dealers are not taxable.

6d.1.1 Interstate sales of a dealer using non-tax crowns. - If the manufacturer elects to use non-tax crowns for out-of-state sales, he will be required to furnish a detailed accounting of his crown stock. Even though non-tax crowns are used for interstate sales, the manufacturer shall maintain a complete sales record. The record must show the purchaser, his address, the date of sale and the number of cases sold. Such sales records shall be open for inspection by agents of the Commissioner at all times during regular office hours.

6d.1.2 Interstate sales of a dealer using tax crowns. - The soft drinks intended for interstate sales may be capped with official West Virginia crowns and credit taken when computing the tax payable to the Commissioner. The manufacturer or dealer proceeding on this basis shall indicate the date of sale, the consignee and the number of cases sold on forms as may be prescribed and furnished by the Commissioner. This Section applies to both soft drink manufacturers and dairies.

6d.1.3 Merchandising. - No manufacturer or his representatives may distribute bottled soft drinks for promotional purposes unless the West Virginia soft drinks tax has been paid.

6d.1.4 Records and audits. - Every dealer of bottled soft drinks or soft drinks syrups and powders or other items subject to the soft drinks tax manufactured or imported, sold, used, consumed or distributed in this State shall maintain a complete record of all transactions. The records shall be kept for at least three (3) years. Records are subject to audit by the Commissioner at any time during regular business hours. All soft drink products are subject to inspection at any time during regular business hours. The records shall include:

6d.1.4.1 A monthly inventory of such stock taken at the close of business on the last business day of the month. Such inventory shall reflect the stamped and unstamped stock. Reports and all records must be prepared on the calendar month rather than by periods due to the accounting process involved.

6d.1.4.2 Total purchases of such goods during the month from all sources supported by copies of invoices from each source of supply.

6d.1.4.3 Total sales of items in West Virginia subject to the tax, tax paid or exempted by regulations, supported by sales slips, invoices or other records or methods as may be required by the Commissioner to each customer.

6d.1.4.4 Total sales to out-of-state dealers. Separate records are to be maintained for each state into which shipments are made. A stamp or crown account shall be kept which reflects:

6d.1.4.4.1 Crowns or stamps on hand at close of business on the last day of preceding month. If tax paid crowns and non-tax paid crowns are in stock on that date, then a definite accounting of each.

6d.1.4.4.2 Crowns or stamps bought and received during the month.

6d.1.4.4.3 Crowns or stamps used during the month.

6d.1.4.4.4 Crowns or stamps on hand at close of business on last business day of the month.

§§ 110-19-7 and 110-19-8. Reserved For Future Use.

§ 110-19-8a. Seizure And Sale Of Soft Drink Syrups By Commissioner; Forfeiture; Collection Of Tax.

8a.1 Whenever the Commissioner shall discover any soft drink syrups or powders, subject to tax as provided by W. Va. Code § 11-19-1 et seq. and this regulation and upon which the tax has not been paid as herein required, the Commissioner is hereby authorized and empowered forthwith to seize and take possession of such soft drink syrups, which shall thereupon be deemed to be

forfeited to the State, and the Commissioner shall within a reasonable time thereafter sell such forfeited soft drink syrups and from the proceeds of such sale shall collect the tax and interest due thereon, together with a penalty of fifty percent (50%) of the tax due and the cost incurred in such proceedings, and pay the balance, if any, to the person in whose possession such soft drink syrups were found.

8a.2 Such seizure and sale shall not be deemed to relieve any person from fine or imprisonment provided for violation of any provision of W. Va. Code § 11-19-1 et seq. and this regulation. Such sale shall be made in the county where most convenient and economical. Notice of such sale shall be published as a Class I legal advertisement in compliance with the provisions of W. Va. Code § 59-3-1 et seq., and the publication area for such publication shall be the county wherein such seizure was made and the county wherein the sale is to take place. Notice shall be published at least five (5) days prior to the sale.

8a.3 The Commissioner, within ten (10) days after seizure, shall give the owner of the soft drink syrups written notice of the seizure and forfeiture. The owner may, within twenty (20) days after receipt of the notice, request a hearing before the Commissioner or his examiner. The hearing shall be held as provided in W. Va. Code § 11-10-9 and the owner may appeal the decision of the Commissioner as provided in W. Va. Code § 11-10-10.

§ 110-19-9. Reserved For Future Use.

§ 110-19-10. Altering, Counterfeiting Or Reusing Tax Stamps Or Tax Crowns; Penalty.

10.1 Any person who falsely or fraudulently makes, forges, alters, or counterfeits any tax stamp or tax crown prescribed by the Commissioner under the provisions of W. Va. Code § 11-19-1 et seq. and this regulation, or who knowingly or willfully utters, passes or tenders as true any such false, altered, forged or counterfeited stamp or crown, or who uses more than once any stamp or crown for the purpose of evading such tax shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than one (1) year nor more than five (5) years.

§ 110-19-11. Penalties; Crimes; Tax Crimes and Penalties Act Applicable.

11.1 Any person who violates any of the provisions of W. Va. Code § 11-19-1 et seq. and this regulation under the authority of W. Va. Code § 11-10-1 et seq. for the violation of which no other penalty is provided by law, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars (\$25) nor more than one hundred dollars (\$100).

11.2 Each and every provision of the West Virginia Tax Crimes and Penalties Act set forth in W. Va. Code § 11-9-1 et seq. shall apply to the tax imposed by W. Va. Code § 11-19-1 et seq. with like effect as if said Act were applicable only to the tax imposed by W. Va. Code § 11-19-1 et seq. and were set forth in extenso in W. Va. Code § 11-19-1 et seq. See W. Va. Code § 11-9-2.

§ 110-19-12. Separability.

12.1 The provisions of the several Sections of W. Va. Code § 11-19-1 *et seq.* and this regulation shall be deemed to be separable insofar as they or their meaning is not inseparably connected, and if any provisions of W. Va. Code § 11-19-1 *et seq.* or this regulation shall be held unconstitutional, such holding shall not affect any of the other provisions thereof.

§ 110-19-13. General Procedure And Administration.

13.1 Each and every provision of the "West Virginia Tax Procedure and Administration Act" set forth in W. Va. Code § 11-10-1 *et seq.* shall apply to the tax imposed by W. Va. Code § 11-19-1 *et seq.* and this regulation with like effect as if said act were applicable only to the tax imposed by W. Va. Code § 11-19-1 *et seq.* and this regulation and were set forth in extenso in W. Va. Code § 11-19-1 *et seq.* and this regulation.

§ 110-19-14. Representative List Of Taxable Soft Drink Products.

14.1 A detailed listing of soft drink products, including their classification and stamp or alternate tax payment method, is available upon request:

State Tax Department
Accounting Division
Soft Drink Tax Unit
Revenue Center
1001 Lee Street, East
Charleston, WV 25301

§ 110-19-15. Liability of Successor. - If any person sells out his or its business or stock of goods, or ceases doing business, any tax, additions to tax, penalties and interest shall become due and payable immediately and such person shall, within thirty days after selling out his or its business or stock of goods or ceasing to do business, make a final return or returns and pay any tax or taxes which may be due. The unpaid amount of any such tax shall be a lien upon the property of such person. The successor in business of any person who sells out a business or stock of goods, or ceases doing business, shall be liable for the payment of tax, additions to tax, penalties and interest unpaid after expiration of the thirty (30) day period allowed for payment by the predecessor.

15.1 A successor is any person who directly or indirectly purchases, acquires, or succeeds to the business or the stock of goods of any person quitting, selling, or otherwise disposing of a business or stock of goods. The purchase or acquisition of a business may give rise to successor liability whether the consideration is money, property, assumption of liabilities or cancellation of indebtedness.

15.2 The liability of a successor arises from any sale, transfer, assignment or other acquisition of a business or stock of goods. A person who purchases or acquires a portion of a business or stock of goods may become liable as a successor where he purchases or acquires substantially all of the business assets or stock of goods of such business. If two or more persons purchase or acquire a business or stock of goods, their liability as successor

is in proportion to the value of the business assets or stock of goods acquired by each person.

15.3 The business assets include all assets of a business. Business assets include real property or any interest therein; tangible personal property, including fixtures, equipment, machinery, furniture and vehicles; and intangible property, including accounts receivable, contracts, business name, business goodwill, customer lists, delivery routes, patents, trademarks or copyrights. Any asset owned by a corporation is a business asset.

15.4 The stock of goods include the inventory or merchandise that the taxpayer is in the business of selling, but does not include fixtures, equipment, machinery or vehicles used in connection with such business or any other assets of the business.

15.4 If any taxpayer operates more than one business, each at separate locations, and each location is required to have a separate business registration certificate, each business location is a separate business and has a separate stock of goods and separate business assets for purposes of determining successor liability. The cessation of business at any one location, or the sale of the business assets or stock of goods of any one location, may result in successor liability. A successor of the business or stock of goods of any business location is subject to liability as a successor with respect to the tax attributable to that location even if he or it does not purchase the business or stock of goods of all the locations.

15.5 A change in the form of a business will generally give rise to potential successor liability. A change in the form of a business would include changes such as the incorporation of a sole proprietorship or partnership, the voluntary or involuntary dissolution of a corporation, the merger or consolidation of two or more corporations, or the formation of a partnership from one or more sole proprietorships or corporations.

16.6 Successor liability does not arise in connection with sales or transfers pursuant to: assignments for the benefit of creditors, deeds of trust, security interests, conditional sales, statutory liens, or judgment liens; or sales or transfers by personal representatives, executors, administrators, receivers, trustees, or any public officer, unless the previous owner receives purchase money from the transfer or sale. No business operated under Title 11 of the United States Bankruptcy Code, which is purchased or acquired by another person, shall give rise to successor liability.

15.6.1 If a business or stock of goods is voluntarily sold or transferred to a creditor, and the creditor operates the business, the creditor is a successor. If the creditor does not operate the business or operates the business in liquidation with the sole purpose to recover its debt, the creditor is not a successor.

15.7 The purchaser of the business or stock of goods in an arms-length transaction will be released from liability if he withholds from the purchase price an amount sufficient to cover the tax liability of the seller or former owner, and pays such liability in full, including all applicable penalties, additions to tax and interest or if the seller obtains a certificate from the

Tax Department stating that no taxes are due from the seller or former owner. Purchase price is not limited to cash transferred to the seller, but includes any consideration flowing directly or indirectly to a seller.

15.7.1 The requirement to withhold does not necessarily mean to retain or hold physical assets, but means dealing with the purchase consideration in such a manner as to deny the seller the benefit of the purchase consideration and to make it available to the State for the satisfaction of the tax liability.

15.8 The liability of a successor extends to taxes incurred in the course of operation of the business by the former owner and any successor liability of the former owner. The liability may include any liability of the former owner for tax, interest, additions to tax, and penalties that is due and payable, and any such liability that is not due and payable because the former owner has not filed tax returns at the time required by law. The liability includes all taxes, penalties, interest, and additions to tax, whether assessed or unassessed against the former owner, without regard to whether a tax lien has been issued or perfected against the former owner. If any former owner is given a certificate from the Tax Department stating that no taxes are due from his predecessor, then the successor shall only be liable for the tax liability of his predecessor not covered by the said certificate.

15.8.1 The liability of a successor includes taxes that are required by law to be paid prior to the sale or transfer of the business or stock of goods, even if the liability of the former owner is not determined at the time of the sale or transfer. However, if an audit conducted after the sale or transfer shows a deficiency for periods prior to the sale or transfer, the deficiency is a liability of the former owner and a liability of the successor.

15.9 The liability of a successor in business is not limited to the amount of purchase money or consideration received by the former owner, unless the successor avoids liability or limits liability by one or more of the following methods.

15.9.1 If the purchase of a business or stock of goods is an arms-length transaction, the purchaser may avoid any successor liability by requiring the seller to produce a receipt from the Tax Commissioner showing all taxes of the seller have been paid, or by withholding enough of the purchase money to satisfy the tax liability of the seller.

15.9.2 If the purchase or transfer of a business or stock of goods is not an arms-length transaction, the purchaser or transferee may avoid any successor liability only by requiring the seller or transferor to produce a receipt from the Tax Commissioner showing all taxes of the seller or transferor have been paid.

15.10 The liability of a successor is determined by law and cannot be avoided or altered by contracts or agreements between the former owner and successor. Thus, a contract or other agreement providing that the purchaser, transferee, seller, or transferor is or is not responsible for the tax liability of the former owner, or that the former owner has or does not have tax liability, does not alter the liability of the successor.

15.11 The liability of a successor may be determined or estimated and an assessment made against such successor. An assessment against a successor is considered to be a proceeding for the collection of the tax liability of the former owner. If the liability of the former owner is determined to be due by an assessment which has become final, an assessment against a successor must be made within five years after the date on which the former owner filed his or its annual return, or if no annual return is required, five years after the latest periodical return required to be filed in any year is filed.

§ 11-19-16. Priority of Tax in Distributions of Property and Estates.

16.1 In the distribution, voluntary or compulsory, in receivership, bankruptcy or otherwise, of the property or estate of any person, all soft drinks taxes due and unpaid shall be paid from the first money available for distribution in priority to all claims and liens, except for any taxes and debts due the United States which under federal law are given priority. Any person charged with the administration or distribution of any such property or estate who shall violate the provisions of this section shall be personally liable for any taxes accrued and unpaid under this article which are chargeable against the person whose property or estate is in administration or distribution.

16.2 There is a priority for all unpaid soft drinks tax in distributions of the property or estate of any person, and the tax must be paid from the first money available for distribution in priority to all other claims and liens, except for any taxes and debts due the United States which under federal law are given priority.

16.2.1 The distribution of property subject to federal tax liens is subject to the priority of such liens provided in the Internal Revenue Code of 1986 (26 U.S.C. § 1 et seq.).

16.2.2 The distribution of property in federal bankruptcy proceedings is subject to the priorities of debts and liens provided in the United States Bankruptcy Code (11 U.S.C. § 101 et seq.).

16.2.3 This priority applies to the amount of tax, interest, additions to tax and penalties.

16.3 The priority applies to all distributions of the property or estate of any person. A "distribution" of property or estate is the sale or transfer of the property, or the disbursement of money resulting from the sale or transfer of the property or estate of any person. Distributions include, but are not limited to, the transfer of property or disbursement of proceeds of sales of property by any executor, administrator, receiver, trustee, fiduciary, special commissioner, or any public officer under judicial process; and distributions in any proceedings such as bulk sale, liquidation sale, estate sale, assignment for the benefit of creditors, interpleader action, and administrative or judicial proceeding for the dissolution of a partnership or corporation.

16.4 The priority does not apply to transactions that do not constitute distributions of property. These transactions include the sale, transfer or liquidation of less than a substantial part of the property of any person; the sale or transfer of property in the ordinary course of the business of the owner

of the property; sales or transfers of any property by the owner or for consideration payable to the owner by the purchaser or transferee.

16.5 The priority applies to the distribution of all property, including but not limited to real property or any interest therein; tangible personal property, including fixtures, equipment, machinery, furniture and vehicles; intangible property, including accounts receivable, contract rights, bank accounts, stocks and bonds; and the proceeds from the sale or liquidation of any such property.

16.6 The priority requires payment of the tax from the first money that is available for distribution to lienors, creditors, beneficiaries, or any other person, after payment of costs, commissions, fees and any other expenses incurred in the preservation, storage, liquidation, or transportation of the property or estate.

16.7 The debt or claim for soft drinks taxes has priority over all claims and liens, except debts due the United States which under federal law are given priority.

16.7.1 Claims subject to this priority include any debt or obligation, liquidated or unliquidated, that does not constitute a lien upon the property or estate.

16.7.2 Liens subject to this priority include any charge or encumbrance on the property or estate for payment of any claim, debt or obligation, such as a deed of trust, judgment lien, security interest, vendors lien, execution lien, tax lien, mechanics lien, landlords lien and municipal lien.

16.7.3 The priority of the soft drinks tax debt in such distributions is not determined by the presence or absence of a perfected notice of tax lien, by the presence or absence of a perfected lien securing any competing claim or debt, or by the order in which any such competing liens were perfected.