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*Secretary of State*

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December 17, 2003

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: STATE TAX DIVISION

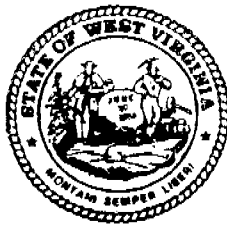
RULE: NEW SERIES, 110CSR15G, CONSUMER SALES & SERVICE TAX & USE TAX

DATE FILED AS AN EMERGENCY RULE: DECEMBER 16, 2003

DECISION NO. 16-03

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

  
JOE MANCHIN, III  
Secretary of State



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EMERGENCY RULE DECISION  
(ERD 16-03)

AGENCY: STATE TAX DIVISION

RULE: NEW SERIES, 110CSR15 ~~6~~ CONSUMER SALES & SERVICE TAX  
& USE TAX

DATE FILED AS AN EMERGENCY RULE: DECEMBER 16, 2003

- par. 1 The State Tax Division (Tax) has filed the above new rule as an emergency rule.
- par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 Tax filed this emergency rule with supporting documents with the Secretary of State December 16, 2003 and with the LRMRC December 16, 2003.

par. 7 It is the determination of the Secretary of State that Tax has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- W. Va. Code §11-10-5 reads:

***§11-10-5. General power; regulations and forms.***

***The tax commissioner shall administer and enforce each tax to which this article applies and, in connection therewith, shall prescribe all necessary forms. The tax commissioner may make all needful rules and regulations for the taxes to which this article applies as provided in the State Administrative Procedures Act in chapter twenty-nine-a of this code: Provided, That all rules and regulations of the tax commissioner presently in effect on the effective date of this article shall remain in full force and effect until amended or repealed by the tax commissioner in the manner prescribed by law.***

par. 9 It is the determination of the Secretary of State that Tax has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

***(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.***

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by Tax are as follows:

During the 2003 legislative session HB 3014 was enacted, which amends WV's consumers sales & use tax laws by incorporating into those laws various provisions of the Streamlined Sales & Use Tax Agreement & amending provisions of the then current law to conform to requirements of the Streamlined Sales & Use Tax Agreement. One such requirement is that, when a term is specifically defined in the Agreement, member states are required to use that definition when the term is used in State's sales & use tax laws & administrative regulations or rules. Terms defined in the Agreement include, but are not limited to, "durable medical goods," "drugs," "mobility enhancing equipment," "prescription," "Prosthetic devices" and other terms. The bill deleted the definition of "drug" then found in W. Va. Code §11-15-2(f). The Legislature also passed SB 531 on March 8, 2003. This bill took effect June 6, 2003, and amended & reenacted sections 11-15-2 & 11-15-9 by the Legislature in HB 3014. WV Code §11-15-33, which amended & reenacted in HB 3014, provides that the provisions of the consumers sales & service tax "amended or added during

the regular legislative session in the year two thousand three shall take effect the first day of January two thousand four, and apply to all sales made on or after that date and to all returns and payments due on or after that day.

In enacting these bills, the Legislature never intended to repeal the exemption for appliances dispensed upon a prescription of a physician or dentist or other person licensed to prescribe drugs in this State. The title to these bills provides no indication that the exemption for durable medical goods, mobility enhancing equipment & prosthetic devices dispensed upon prescription was being eliminated. The unintended consequence of deleting the definition of "drug" in WV Code §11-15-2(f), without amending the exemption in WV Code §11-15-9(a)(11), is that appliances dispensed upon prescription after December 31, 2003, appear to be taxable.

This emergency rule is necessary for the immediate preservation of public peace, health, safety or welfare & to prevent substantial harm to the public interest by ensuring that the exemption for drugs & insulin provided in subdivision 11-15-9(a)(11) continues to be administered & applied like it was administered & applied before enactment of HB 3014 & SB 531. This rule is also necessary to assure vendors who dispense prescriptions drugs, as defined in WV Code §11-15-2(f), after December 31, 2003, that they do not need to collect sales tax & that they will not be held personally liable for not collection sales tax on durable medical goods, mobility enhancing equipment & prosthetic devices dispensed upon prescription.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "Health, safety & welfare"

par. 14 This decision shall be cited as Emergency Rule Decision 16-03 or ERD 16-03 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the State Tax Division, the Attorney General and the Legislative Rule Making Review Committee.

  
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JOE MANCHIN, III  
Secretary of State

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