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June 11, 2004

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: STATE TAX DIVISION

RULE: NEW SERIES, 110CSR15I, CONSUMER SALES & SERVICE TAX & USE TAX - EXECUTIVE ORDERS DECLARING EMERGENCY AND EXEMPTING FROM TAX MOBILE HOMES AND SIMILAR UNITS AND BUILDING MATERIALS USED AND CONSUMED IN REPAIR OR REPLACEMENT OF RESIDENCES AND BUSINESSES DAMAGED IN A DISASTER

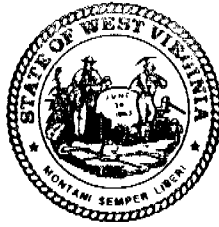
DATE FILED AS AN EMERGENCY RULE: August 24, 2004

DECISION NO. 8-04

FILED  
2004 AUG 31 A 9:31  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

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.

A handwritten signature of Joe Manchin, III, written in black ink over a horizontal line.  
JOE MANCHIN, III  
Secretary of State



FILED

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EMERGENCY RULE DECISION  
(ERD 8-04)

AGENCY: STATE TAX DIVISION

RULE: NEW SERIES, 110CSR15I, CONSUMER SALES & SERVICE TAX & USE TAX - EXECUTIVE ORDERS DECLARING EMERGENCY AND EXEMPTING FROM TAX MOBILE HOMES AND SIMILAR UNITS AND BUILDING MATERIALS USED AND CONSUMED IN REPAIR OR REPLACEMENT OF RESIDENCES AND BUSINESSES DAMAGED IN A DISASTER

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- 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 August 24, 2004 and with the LRMRC August 24, 2004.

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:

In each of the last several years, many counties in West Virginia have been subject to extensive damage from flooding. As a result of each flood, the State Tax Department has, as directed in an executive order issued by the Governor, promulgated a legislative rule exempting from sales tax purchases of materials, mobile homes, etc., used in recovery from the flooding.

On May 28, 2004, flooding occurred in several counties of West Virginia. The Governor issued Executive Order 10-04 directing that certain exemptions from sales tax be implemented in order to assist the flood recovery. As a result of that Executive Order, 110CSR15H was filed. As a result of the probability of future floods and the possibility of other disasters occurring, 110CSR15I was filed and is currently before the Legislative Rule-Making Review Committee as an agency

approved rule.

On August 13, 2004, flooding again occurred. Executive Order 13-04 was issued adding two more counties to those listed in Executive Order 10-04. This emergency rule implements Executive Order 13-04. Additionally, as major flooding may ver well occur prior to the effective date of the rule before the Legislative Rule-Making Review Committee, this rule will facilitate the more rapid acquisition of construction materials, mobile homes and similar units to be used in recovery from the disaster. Rather than promulgating a new rule for each new disaster, the Governor, through issuance of an executive order, may implement this rule each time a disaster occurs, this "jump-starting" the recovery activity.

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 8-04 or ERD 8-04 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.



JOE MANCHIN, III  
Secretary of State

Entered \_\_\_\_\_