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July 14, 2010

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: State Tax Department

RULE: New rule, 110CSR15J, Consumers Sales and Service Tax and Use Tax Exemptions Mandated Pursuant to Executive Order 4-10 and 7-10 Referring to Purchases of Mobile Homes, Building Materials and Supplies, Bottled Water, Cleaning Supplies, and Other Supplies Used for Flood Relief; Affordable Housing Trust Fee Not Exempt

DATE FILED AS AN EMERGENCY RULE:

DECISION NO. 9-10

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 in black ink, appearing to read "Natalie E. Tennant", written over a horizontal line.

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 9-10)

AGENCY: State Tax Department
RULE: New rule, 110CSR15J, July 9, 2010

- par. 1 The State Tax Department (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 July 9, 2010 and with the LRMRC July 9, 2010.
- 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:

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:

On June 25, 2010, the Governor entered Executive Order No. 4-10 and on July 7, 2010 entered Executive Order No. 07-10 declaring a state of emergency for Logan, McDowell, Mingo, Wyoming and Lewis Counties, West Virginia. The Orders were entered as a result of a storm system of heavy rains that caused severe flooding, flash flooding, river flooding, mudslides and landslides throughout West Virginia. The Orders exempt the purchase of mobile homes, house trailers, modular homes, and the service of installation from Consumer Sales and Service Tax and Use Tax. The Orders also provide for the exemption from Consumer Sales and Service and Use tax on the purchase of certain specified building construction supplies, cleaning supplies, bottled water and other supplies for flood relief.

This rule is adopted, in accordance with WV Code §11-10-5 and 15-5-6, to provide necessary definitions and per se exemptions.

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). . . "immediate preservation of public peace, health, safety or welfare" and "prevent substantial harm to the public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 9-10 or ERD 9-10 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the State Tax Department, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
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