

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #5

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2004 JUL 15 A 10:50

WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OF INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: State Tax Department TITLE NUMBER: 110

CITE AUTHORITY W. Va. Code § 11-10D-4(b)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE X

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES _____ NO _____

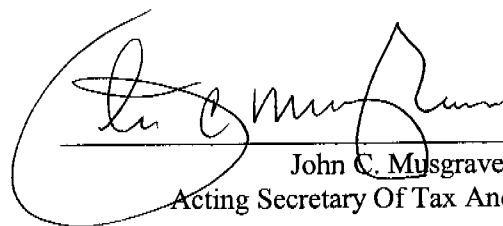
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 10H

TITLE OF RULE BEING ADOPTED: Tax Amnesty Program of 2004

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS August 24, 2004



John C. Musgrave
Acting Secretary Of Tax And Revenue

**TITLE 110
AGENCY ADOPTED
STATE TAX DEPARTMENT**

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**SERIES 10H
TAX AMNESTY PROGRAM OF 2004**

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§11-10H-1. General.

1.1 *Scope* - This rule provides the guidelines the Tax Commissioner believes to be necessary to implement the West Virginia Tax Amnesty Program of 2004, W. Va. Code § 11-10H-1 et seq. (hereafter W. Va. Code § 11-10H), as enacted by passage of Enrolled Senate Bill 148, in effect June 11, 2004.

1.2 *Authority* - W. Va. Code § 11-10H-4(b).

1.3 *Filing Date* -

1.4 *Effective Date* -

§11-10H-2. Legislative intent, findings and purpose.

2.1 *Intent*. -- It is the intent of the Legislature in enacting the tax amnesty program to improve compliance with this State's tax laws and to accelerate and increase collections of certain taxes currently owed to this State.

2.2 *Findings and purpose*. -- It is the Legislature's finding that the public purpose is served by the waiver of tax penalties, additions to tax, a portion of accrued interest, and criminal prosecution in return for the immediate reporting and payment of previously underreported, unreported, unpaid or underpaid tax liabilities that are due and owing and are delinquent as of January 1, 2004. Benefits to be gained by this program include, among other things, accelerated receipt of certain currently owed taxes, permanently bringing into the tax system taxpayers who have been evading tax, and providing an opportunity for taxpayers to clear their records and satisfy tax obligations. It is further the intent of the Legislature that the tax amnesty program not be repeated in the future, since taxpayers' expectations of future amnesty programs could have a counterproductive effect on compliance.

2.2.1 The Tax Commissioner will consider the public purpose of the tax amnesty law when interpreting and applying its provisions. There will be no waiver unless and until there has been a payment in full of tax liabilities in return for the waiver.

§11-10H-3. Definitions.

3.1 *General rule*. -- Terms used in this rule have the meaning ascribed to them in W. Va. Code § 11-10-4, unless the context in which the term is used clearly requires a different meaning, or

the term is defined in subsection 3.2.

3.2 *Terms defined.* -- For purposes of this rule, the term:

3.2.1 "Additions to tax" means that amount imposed by W. Va. Code §§ 11-10-18 or 18a for (1) failure to file a return or pay tax due, (2) negligence or intentional disregard of rules and regulations of the Tax Commissioner, (3) filing a false or fraudulent return, or (4) failure to pay estimated tax, and includes "additions to tax" imposed by any other article of chapter 11 of the West Virginia Code administered under W. Va. Code § 11-10.

3.2.2 "Amnesty program" means the West Virginia Tax Amnesty Program of 2004 as set forth in W. Va. Code § 11-10H and this rule;

3.2.3 "Department" means the West Virginia State Tax Department.

3.2.4 "Interest" means interest imposed pursuant to W. Va. Code §§ 11-10-17 and 17a;

3.2.5 "Penalty" means any civil money penalties imposed by W. Va. Code § 11-10-19 and any other civil money penalty imposed by any article of chapter 11 of the West Virginia Code administered under W. Va. Code § 11-10;

3.2.6 "Tax administered under W. Va. Code § 11-10" means "tax administered under this article" as defined in W. Va. Code § 11-10-4, i.e., any tax to which W. Va. Code § 11-10 applies, as set forth in W. Va. Code § 11-10-3, a copy of which is Appendix 1.

3.2.7 "Tax Commissioner" or "Commissioner" as defined in W. Va. Code § 11-10-4 means the Tax Commissioner of the State of West Virginia or his or her delegate.

3.2.8 "Tax amnesty period" or "amnesty period" means the two month period commencing on Wednesday, September 1, 2004, and ending on Monday, November 1, 2004.

3.2.8.1 The two month amnesty period is September and October, but the period is extended to include November 1 because the last day in October is a Sunday.

§11-10H-4. Development and administration of tax amnesty program; implementation of program.

4.1 *General.* -- The Tax Commissioner is required and authorized to develop and administer the tax amnesty program and to take any action needed to implement the program.

4.2 *Rule.* - The Tax Commissioner is promulgating this rule to implement, clarify and explain the tax amnesty program.

§11-10H-5. Duration and application of amnesty program.

5.1 The two-month tax amnesty program applies to payments and returns required pursuant to any tax currently or previously administered under W. Va. Code § 11-10, but only if the obligation for payment or filing of a return, or both, arose after January 1, 1986 and before January 1, 2004, and: (1) The tax return was due before January 1, 2004; (2) the amount of tax shown to be due on the tax return was due and payable before January 1, 2004; or (3) if no tax return was required to be filed, the tax was due and payable before January 1, 2004.

5.1.1 Any obligation for payment or filing a return which becomes delinquent on or after January 1, 2004, is not eligible for amnesty. For example, any such obligation which becomes delinquent during the amnesty period is not eligible for amnesty.

5.1.2 Obligations for payments and returns for taxes not imposed under W. Va. Code § 11-10 (e.g., county and municipal taxes other than the special district excise tax administered under W. Va. Code § 11-10-11a) are not eligible for amnesty. Taxes not payable to the State Tax Department are not imposed under W. Va. Code § 11-10.

5.1.3 Obligations for payments and returns for fees are not taxes administered under W. Va. Code § 11-10 and are not eligible for tax amnesty.

5.2 A taxpayer's eligibility shall be separately determined for each type of tax for which amnesty is applied. A taxpayer may be eligible for amnesty for one or more taxes but not eligible for one or more other taxes.

5.3 Once determined, a taxpayer's eligibility shall be considered to be effective as of the date a complete application was postmarked or received within the amnesty period.

§11-10H-6. Waiver of penalties; criminal immunity; exceptions and limitations.

6.1 *Waiver of penalties, additions to tax and interest.* – Except as otherwise specifically provided in subsection 6.2 or elsewhere in this rule, for any taxpayer who meets the requirements of section seven:

6.1.1 *Waiver.* -- The Tax Commissioner shall waive all penalties (including potential criminal penalties) and additions to tax and 50% of the interest imposed on the late filing of a return or the late payment of any tax for which tax amnesty is granted, which is owed as a result of nonpayment, underpayment, nonreporting, misreporting or underreporting of tax liabilities; and

6.1.2 *Criminal penalties.* -- No criminal action may be brought against the taxpayer for the default for which tax amnesty is granted.

6.1.3 The waivers of interest, additions to tax and penalties apply only to the amount of tax for which amnesty is requested and granted. Imposition of interest, additions and penalties are

not barred with respect to any amount of tax later found to be in excess of that amount.

6.2 *Exceptions.* -- The waiver provisions of this section do not apply to nonpayment or underpayment of tax liabilities, or to nonreported, misreported or underreported tax liabilities for which amnesty is sought if, as of the date the taxpayer's application for amnesty is filed:

6.2.1 The taxpayer is the subject of a criminal investigation (whether or not in relation to taxes) by any agency of this State; or

6.2.2 An administrative proceeding or a civil or criminal court proceeding has been initiated or is pending in any administrative agency or court of this State or of the United States for nonpayment, underpayment, delinquency, fraud or other event of noncompliance in relation to any of the taxes administered under W. Va. Code § 11-10. An administrative or civil proceeding shall no longer be considered to be pending for purposes of this subdivision if the taxpayer withdraws with prejudice (i.e., with finality) from the proceeding prior to the granting of amnesty, pays in full the outstanding tax liability plus 50% of the accrued interest thereon, and otherwise cures any default which is the subject of the proceeding.

6.2.2.1 A person who is liable for the money penalty imposed by W. Va. Code § 11-10-19(a) due to failure to collect, account for, and pay over wage withholding taxes is not eligible for amnesty. The money penalty imposed by this section is equal to the amount of tax not paid over and does not include interest or additions. In re Bowen, 116 Bankr. 477 (Bankr. S.D. W. Va. 1990). Because this penalty is comprised solely of unpaid withholding tax, a waiver of the penalty would result in forgiveness of tax, which is contrary to the intent of the amnesty act.

6.3 *No refund or credit.* -- No refund or credit may be granted for any penalty, addition to tax or interest paid prior to the date the taxpayer files his or her application for tax amnesty pursuant to section seven. No refund or credit shall be granted for any tax or interest paid under this amnesty program unless the Tax Commissioner, on his or her own motion, redetermines the amount of tax or accrued interest thereon.

6.4 *Bar to amnesty.* -- A taxpayer shall not be eligible for amnesty for any tax liability if the taxpayer has other liabilities outstanding for any tax administered under W. Va. Code § 11-10 for which the taxpayer has not applied for amnesty. This includes tax deficiencies pending before the Office of Tax Appeals or a court in this State.

6.4.1 A federal bankruptcy court is not considered a "court in this State" for purposes of this subsection. A taxpayer who is a "debtor" as defined in Section 101 of the Federal Bankruptcy Act (11 U.S.C.A. § 101) would generally be eligible for amnesty if approved by the bankruptcy court, but such a taxpayer disputing a state tax liability in bankruptcy court will not be eligible for amnesty with respect to that tax liability.

6.5 If a taxpayer has been determined to be ineligible for amnesty, the amnesty application form, return(s), supporting documentation and payment received shall be treated as if they were

received apart from the amnesty application.

6.6 By participating in the amnesty program, the taxpayer relinquishes the right to subsequently contest the tax liability that is being paid and to withdraw from the amnesty program if determined to be eligible for the program.

§11-10H-7. Application for amnesty; requirements; deficiency assessment.

7.1 *Timely application required.* -- The amnesty program applies to any taxpayer who, during the amnesty period, timely files the application for tax amnesty and voluntarily does all of the following which are applicable:

7.1.1 completes, signs and files amended tax returns to report transactions and other material matters not included on original returns and pays in full all additional taxes shown to be due on the amended return or returns and 50% of the interest imposed on the additional taxes;

7.1.2 completes, signs and files all delinquent tax returns and pays in full all taxes shown to be due on the return or returns and 50% of the interest imposed on the taxes;

7.1.3 completes, signs and files amended tax returns to correct all incorrect, deficient or incomplete original returns and pays in full all taxes shown to be due on the amended return or returns and 50% of the interest imposed on the tax or taxes;

7.1.4 pays in full all previously assessed tax liabilities and other taxes legally collectible under W. Va. Code § 11-10-11 and 50% of the interest due thereon;

7.1.4.1 If a liability has been compromised under W. Va. Code § 11-10-5q prior to the amnesty period, the taxpayer may qualify for waiver of penalties, additions to tax and 50% of the interest owed only if the compromise specifically states the portions of the total compromise amount that are attributable to penalties, additions and interest.

7.1.5 provides proof that the taxpayer has withdrawn with prejudice from any administrative or judicial proceeding, if required by subdivision 6.2.2; and

7.1.6 otherwise complies with the requirements of the amnesty program.

7.1.7 If a taxpayer has more than one West Virginia tax identification number for a single type of tax, the taxpayer shall file a separate return for each number for that type of tax.

Example. Taxpayer has a different identification number for each of three businesses it owns. Taxpayer wishes to participate in the amnesty program to pay sales tax liabilities due under all three of the numbers. Taxpayer must file three separate amnesty returns, one for each identification number.

7.1.8 A tax amnesty return is timely filed if postmarked by the United States Postal Service or received by the State Tax Department during the amnesty period. A return which is not sufficiently complete may not be considered to be timely filed. If a return does not contain sufficient information to identify the taxpayer, tax and tax period for which amnesty is being applied, it is insufficiently complete.

7.1.9 A taxpayer may not file a tax amnesty return by electronic or telephonic means.

7.2 *Due date of tax for which amnesty granted.* -- Except as provided in subsection 7.4 of this section, all tax liabilities for which tax amnesty is sought plus 50% of interest accrued to the date of payment shall be paid (i.e., received) no later than the close of business on November 30, 2004. Interest on the amount of tax due shall be calculated as prescribed in W. Va. Code § 11-10 using the rate for the appropriate taxable year, and shall continue to accrue until the tax liability is paid.

7.2.1 Tax liabilities for which amnesty is sought that are not paid when due under this amnesty may result in amnesty not being granted.

7.2.2 Interest can be computed using the Interest and Additions to Tax Calculator located at www.state.wv.us/taxdiv. This calculator or a link to it will also be available at the Department's Amnesty website, www.wvtaxamnesty.gov.

7.3 *Payments.* -- Payments made by the taxpayer under this tax amnesty program shall be in United States currency or by certified check, cashier's check or post office money order, payable to the West Virginia State Tax Department.

7.3.1 The taxpayer may not make payments by credit card, debit card or electronic funds transfer.

7.3.2 Payments received under this amnesty program shall be applied first to the oldest tax period and then chronologically to the next most recent period until all the payments have been applied.

7.4 *Installment payment agreements.* -- The Tax Commissioner may, at his or her discretion and upon such terms and conditions as the Commissioner may prescribe, enter into an installment payment agreement with the taxpayer instead of the full immediate payment required by subsection 7.2 of this section if full immediate payment would create a severe financial hardship.

7.4.1 Each installment payment agreement shall provide for payment of the tax due and 50% of the statutory interest on the outstanding amount of tax due, computed to the date the installment payment agreement is executed by the taxpayer. The amount of tax and interest due from the taxpayer shall be stated in the installment payment agreement as the installment payment agreement amount.

7.4.2 *Down payment.* -- The installment payment agreement shall require payment of

25% of the installment payment agreement amount or \$1,000, whichever amount is greater, at the time the installment payment agreement is submitted to the Tax Commissioner for acceptance and signature.

7.4.3 *Interest.* -- Interest on the installment payment agreement amount shall be calculated at the rates determined under W. Va. Code §§ 11-10-17 and 17a, as applicable to the installment payment period, and shall accrue on the declining balance of the installment payment agreement amount from the date the installment payment agreement is signed by the taxpayer to the date the last installment payment is made.

7.4.3.1 Interest on installment payments is computed at the statutory interest rate, not 50% of that rate.

7.4.4 *Lien securing payment.* -- When payments are made under an installment payment agreement, the amount due shall be secured by recordation of a tax lien against the property of the taxpayer (and also by recordation of a tax lien against the property of any person guaranteeing payment of the installment payment agreement amount, should there be a guarantor) unless the Tax Commissioner determines that existing recorded tax liens are adequate to secure the payment. Liens required by this subdivision shall be recorded in each county of this State in which the taxpayer (and the guarantor, if any) owns an interest in property and shall be released by the Tax Commissioner upon full payment of the amount stated in the installment payment agreement plus applicable interest.

7.4.5 *Failure to comply with installment payment agreement.* -- Failure of the taxpayer to fully comply with the terms of the installment payment agreement shall render the grant of amnesty and the waiver of penalties, additions to tax and interest under this amnesty program null and void, unless the Tax Commissioner excuses the noncompliance due to reasonable cause. In the event of an unexcused noncompliance with the terms of the agreement, the taxpayer shall immediately pay the unpaid balance of the agreement amount plus the interest and all additions to tax and penalties waived under section six.

7.4.6 *Late payment of installment payment.* -- Notwithstanding the provisions of subdivision 7.4.5 of this subsection, payment of an installment payment after the date it is due under the installment payment agreement shall not void the agreement, provided the amount of the payment, plus a late payment fee of \$10 or one half of one percent (.005) of the amount of the late installment payment, whichever is the greater amount, is paid within 20 days after the payment was due under the agreement.

7.4.7 *Failure to timely pay current taxes.* -- If a taxpayer with an installment payment agreement fails to timely file returns and remit current tax liabilities by their statutory due date or dates, the agreement shall be rendered null and void, unless the Tax Commissioner determines that the failure was due to reasonable cause. In the event an installment payment agreement becomes null and void, the taxpayer shall immediately pay the unpaid balance of the agreement plus interest and all additions to tax and penalties that were waived when the Tax Commissioner accepted the

agreement.

7.5 Understatement of tax due. -- If, subsequent to termination of this tax amnesty program, the Tax Commissioner determines there was a defect in the amnesty application or in the materials submitted in support of the amnesty application and subsequently issues a deficiency assessment upon the application or a return or amended return filed pursuant to W. Va. Code § 11-10H and this rule, the Tax Commissioner has the authority to collect the additional tax due, impose applicable penalties, additions to tax and interest and to pursue any criminal prosecution as may ordinarily be brought with respect to the defect as if no amnesty had been granted the taxpayer.

7.6 Mistake or misrepresentation of material fact. -- The Tax Commissioner may review all cases in which amnesty has been granted and may on the basis of a mistake or misrepresentation of a material fact, rescind the grant of amnesty, or in lieu thereof, may obtain appropriate review of the grant of amnesty or otherwise proceed under The West Virginia Tax Crimes and Penalties Act (W. Va. Code § 11-9) or The West Virginia Tax Procedure and Administration Act (W. Va. Code § 11-10), or both. The taxpayer may appeal the Tax Commissioner's order rescinding the grant of amnesty by filing a petition for appeal with the Office of Tax Appeals within 30 days after receipt of the Tax Commissioner's order, which shall be served by personal service or by certified mail.

7.7 False or fraudulent amnesty return. -- Any taxpayer who files an amnesty application, tax return or amended return that is false or fraudulent shall be subject to applicable civil penalties and be referred for criminal prosecution.

7.8 Attempt to evade or defeat tax. -- Any taxpayer who attempts in any manner to defeat or evade payment of tax or interest under this amnesty program shall be subject to applicable civil penalties and be referred for criminal prosecution.

§11-10H-8. Examination of amnesty returns and taxpayer books and records.

8.1 The Tax Commissioner may examine the tax returns, books, papers, records and equipment of any taxpayer or other relevant person in order to verify the accuracy and completeness of the application for amnesty or of any tax return filed or payment made under the amnesty program as provided in W. Va. Code § 11-10, and to ascertain and assess any tax or other liability owed to the State for any tax administered under W. Va. Code § 11-10.

8.2 Any tax return or other tax information filed under the amnesty program will remain subject to verification and review after the amnesty period.

8.3 Tax amnesty applications, returns and information are confidential. No application, tax return or tax information filed with the Commissioner will be subject to disclosure, except as provided by W. Va. Code §§ 11-10-5d and 5s.

§11-10H-9. Penalty on liabilities eligible for amnesty when taxpayer fails to apply for or comply with amnesty.

9.1 If a taxpayer has a liability that would be eligible for amnesty but the taxpayer fails to apply for amnesty within the designated amnesty period, or after applying for amnesty fails to satisfy all of the requirements for amnesty, then a nonparticipation penalty in the amount of 10% of the unpaid liability shall be added to the amount of any unpaid taxes eligible for amnesty.

9.1.1 Under W. Va. Code § 11-10-4, unpaid taxes includes unpaid additions to tax, penalties and interest. Thus, the 10% penalty is in addition to any other penalties or additions to tax that are applicable.

9.2 The Tax Commissioner shall assess the penalty provided in subsection 9.1 of this section unless:

9.2.1 The taxpayer provides evidence satisfactory to the Commissioner that the taxpayer's failure to apply for amnesty or to satisfy all of the requirements for amnesty was not an intentional attempt to evade the payment of taxes and was based on the taxpayer's mistaken belief that he or she did not have any liability eligible for amnesty; or

9.2.2 In the case of an assessment issued before the start of or during the amnesty period, the taxpayer is contesting the disputed liability in an administrative or judicial forum, including bankruptcy court.

Appendix 1

§11-10-3. Application of this article.

(a) The provisions of this article apply to the inheritance and transfer taxes, the estate tax, and interstate compromise and arbitration of inheritance and death taxes, the business registration tax, the annual tax on incomes of certain carriers, the minimum severance tax on coal, the corporate license tax, the business and occupation tax, the severance tax, the telecommunications tax, the interstate fuel tax, the consumers sales and service tax, the use tax, the tobacco products excise tax, the soft drinks tax, the gasoline and special fuel excise tax, the motor fuel excise tax, the motor carrier road tax, the health care provider tax, and the tax relief for elderly homeowners and renters administered by the state tax commissioner. This article shall not apply to ad valorem taxes on real and personal property or any other tax not listed in this section, except that in the case of ad valorem taxes on real and personal property, when any return, claim, statement or other document is required to be filed, or any payment is required to be made within a prescribed period or before a prescribed date, and the applicable law requires delivery to the office of the sheriff of a county of this state, the methods prescribed in section five-f [§ 11-10-5f] of this article for timely filing and payment to the tax commissioner or state tax department are the same methods utilized for timely filing and payment with the sheriff.

(b) The provisions of this article apply to the beer barrel tax levied by article sixteen of this chapter and to the wine liter tax levied by section four [§ 60-8-4], article eight, chapter sixty of this code.

(c) The provisions of this article also apply to any other article of this chapter when the application is expressly provided for by the Legislature.