

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: DEPARTMENT OF TAX AND REVENUE TITLE NUMBER: 110

CITE AUTHORITY W.VA. CODE §§ 11-10-5 AND 29A-3-1 ET SEQ.

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 PROPOSED: 14

TITLE OF RULE BEING PROPOSED: GASOLINE AND SPECIAL FUEL EXCISE TAX

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.



CHARLES O. LORENSEN
STATE TAX COMMISSIONER



State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

CHARLES O. LORENSEN
SECRETARY

DATE: AUGUST 11 , 1989
TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
FROM: DEPARTMENT OF TAX AND REVENUE
LEGISLATIVE RULE TITLE: GASOLINE AND SPECIAL FUEL EXCISE TAX

1. Authorizing statute(s) citation: W. Va. Code §§ 11-10-5 and 29A-3-1 et seq.
2. a. Date filed in State Register with Notice of Public Comment
July 7, 1989
b. What other notice, including advertising, did you give of the hearing? None
c. Date of public comment period: July 7, 1989 through August 7, 1989
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 11 , 1989
f. Name and phone number of agency person to contact for additional information: John Montgomery - 348-5330

SUMMARY OF RULE AND STATEMENT OF CIRCUMSTANCES

The rule explains and clarifies West Virginia law as it relates to the gasoline and special fuel excise tax imposed by W. Va. Code § 11-14-1 et seq. The rule is necessary as there is no current rule in existence which relates to the subject tax.

PROPOSED
WEST VIRGINIA LEGISLATIVE REGULATIONS
STATE TAX DEPARTMENT
TITLE 110
SERIES 14
1989

GASOLINE AND SPECIAL FUEL EXCISE TAX

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AGENCY APPROVED
WEST VIRGINIA LEGISLATIVE REGULATIONS
STATE TAX DEPARTMENT
TITLE 110
SERIES 14
1989

Filed: August // , 1989

§ 110-14-1. General.

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

1.2 Scope. - These proposed legislative regulations explain and clarify the West Virginia Gasoline and Special Fuel Excise Tax, as stated in W. Va. Code § 11-14-1 et seq.

1.3 Authority. - These proposed legislative regulations are issued under the authority of W. Va. Code § 29A-3-15 and W. Va. Code § 11-10-5.

1.4 Filing date. - These proposed legislative regulations were filed in the State Register as agency approved regulations on August // , 1989.

1.5 Effective date. - These proposed legislative regulations become effective upon approval by the Legislature.

1.6 Citation. - These proposed legislative regulations may be cited as 110 C.S.R. 14, § _____ (1989).

§ 110-14-2. 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 "Actual metered gallons" means, in addition to amounts computed by mechanical devices which measure and record directly in digital terms, all amounts computed by other methods of computing quantities commonly employed by persons engaged in the sale of petroleum products, including, but not limited to, tank or barge strappings and other graduated lineal devices.

2.2 "Aircraft fuel" means gasoline and special fuel suitable for use in any aircraft engine.

2.3 "Commercial watercraft" means any boat, ship, towboat, or barge for hauling freight or passengers, loaded or empty, operating on the waterways of this State; but does not include personal pleasure boats, which is a refundable use, or auxiliary equipment such as pumps, compressors or dredges.

2.4 "Commissioner" or "Tax Commissioner" means the Tax Commissioner of the State of West Virginia or his duly authorized agent.

2.5 "Dealer" as defined in W. Va. Code § 47-11C-2, means any person, other than an agent or employee of a producer, who is engaged in the retail sale of petroleum products under a franchise agreement as defined in this Section.

2.6 "Distributor" or "producer" means and includes every person:

2.6.1 Who produces, manufactures, processes or otherwise alters gasoline or special fuel in this State for use or for sale; or

2.6.2 Who engages in this State in the sale of gasoline or special fuel for the purpose of resale or for distribution; or

2.6.3 Who receives gasoline or special fuel into the cargo tank of a tank wagon in this State for use or sale by such person.

2.7 "Franchise agreement" means a written agreement between a producer and a dealer under which the dealer is granted the right to use a trademark, trade name, service mark, or other identifying symbol or name owned by the producer, or a written agreement between a producer and a dealer by which the dealer is granted the right to occupy premises owned, leased or controlled by the producer, for the purpose of engaging in the retail sale of petroleum products of the producer.

2.8 "Gallon" means two hundred thirty-one cubic inches of liquid measurement, by volume: Provided, That the Commissioner may by rule and regulations prescribe other measurement or definition of gallon.

2.9 "Gasohol" means a mixture of gasoline with alcohol, of which at least ten percent (10%) of the mixture is alcohol. Alcohol contained in gasohol includes ethanol and methanol but not alcohol produced from petroleum or natural gas.

2.10 "Gasoline" means any product commonly or commercially known as gasoline, regardless of classification, suitable for use as fuel in an internal combustion engine, except special fuel as hereinafter defined.

2.11 "Highway" means every way or place of whatever nature open to the use of the public as a matter of right for the purpose of vehicular travel, which is maintained by this State or some taxing subdivision or unit thereof or the federal government or any of its agencies.

2.12 "Importer" means every person, resident or nonresident, other than a distributor, who receives gasoline or special fuel outside this State for use, sale or consumption within this State, but shall not include the fuel in the supply tank of a motor vehicle, or a person paying the motor carrier road tax as provided for in W. Va. Code § 11-14A-1 et seq.

2.13 "Interstate motor carrier" means any taxpayer whose motor carriers operate in interstate commerce and travel upon the highways of West Virginia and states other than West Virginia.

2.14 "Motor carrier" means any passenger vehicle which has seats for more than nine passengers in addition to the driver, or any road tractor, or any

tractor truck, or any truck having more than two axles which is operated or caused to be operated by any person on any highway in this State.

2.15 "Motor vehicle" means automobiles, motor carriers, motor trucks, motorcycles and all other vehicles or equipment, engines or machines which are operated or propelled by combustion of gasoline or special fuel.

2.16 "Person" means and includes any individual, firm, partnership, limited partnership, joint adventure, association, company, corporation, organization, syndicate, receiver, trust or any other group or combination acting as a unit, in the plural as well as the singular number, and means and includes the officers, directors, trustees or members of any firm, partnership, limited partnership, joint adventure, association, company, corporation, organization, syndicate, receiver, trust or any other group or combination acting as a unit, in the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

2.17 "Petroleum carrier" means any person who hauls or transports gasoline or special fuel within this State or on any navigable rivers which are within the jurisdiction of this State.

2.18 "Purchase" means and includes any acquisition of ownership of property or of a security interest for a consideration.

2.19 "Railroad diesel locomotives" means any self-propelled diesel powered railroad equipment that cannot be operated off of the railroad.

2.20 "Receive" means any acquisition of ownership or possession of gasoline or special fuel.

2.21 "Retail dealer" means any person not a distributor or producer who sells gasoline or special fuel from a fixed location in this State to users.

2.22 "Sale" means any transfer, exchange, gift, barter, or other disposition of any property or security interest for a consideration.

2.23 "Special fuel" means any gas or liquid, other than gasoline, used or suitable for use as fuel in an internal combustion engine. The term "special fuel" shall include products commonly known as natural or casing-head gasoline, but shall not include any petroleum product or chemical compound such as alcohol, industrial solvent, heavy furnace oil, lubricant, etc., not commonly used nor practicably suited for use as fuel in an internal combustion engine.

2.24 "Stationary off-highway turbine engine" means any turbine type engine (not a piston-type engine) which is attached to real property, which is immobile, or which is not portable.

2.25 "Supply tank" means any receptacle on a motor vehicle from which gasoline or special fuel is supplied for the propulsion of the vehicle or equipment located thereon, exclusive of a cargo tank. A supply tank includes a separate compartment of a cargo tank used as a supply tank, and any auxiliary tank or receptacle of any kind from which gasoline or special fuel is supplied

for the propulsion of the vehicle, whether or not such tank or receptacle is directly connected to the fuel supply line of the vehicle.

2.26 "Tank wagon" means and includes any motor vehicle or vessel with a cargo tank or cargo tanks ordinarily used for making deliveries of gasoline or special fuel or both for sale or use.

2.27 "Tax" includes, within its meaning, interest, additions to tax and penalties, unless the intention to give it a more limited meaning is disclosed by the context.

2.28 "Taxpayer" means any person liable for any tax, interest, additions to tax or penalty under the provisions of W. Va. Code § 11-14-1 et seq.

2.29 "User" means any person who purchases gasoline or special fuel for use as fuel and uses such fuel in an internal combustion engine owned or operated by such person.

§ 110-14-3. Imposition Of Tax.

There is levied by W. Va Code § 11-14-1 et seq. and this regulation an excise tax of ten and one-half cents (10½¢) per gallon on all gasoline or special fuel, which tax shall be computed in accordance with the appropriate measure of tax as hereinafter prescribed: Provided, That beginning April 1, 1989, the tax levied shall be fifteen and one-half cents (15½¢) per gallon.

§ 110-14-3a. Applicability Of Rate Increase To Gasoline Or Special Fuel On Hand Or In Inventory.

3a.1 It is declared to be the intent of the Legislature that one rate of excise tax shall be applicable to all quantities of gasoline or special fuel in this State on and after the effective date of any increase in the rate of such tax. Any gasoline or special fuel on hand or in inventory on the effective date of any rate increase is hereby deemed to have been purchased or received on such date.

3a.2 Every distributor, retail dealer or importer subject to the tax imposed under W. Va. Code § 11-14-1 et seq. and this regulation who, on the effective date of any rate increase, has on hand or in inventory any gasoline or special fuel upon which tax or any portion thereof has been previously accrued or paid, shall within thirty (30) days after such effective date take a physical inventory and file a report thereof with the Commissioner in the form prescribed by him, and shall pay to the Commissioner at the time of filing such report any additional tax due under an increased rate.

§ 110-14-4. Computation Of Tax.

4.1 Except as provided in Section 4.8 of these regulations, a distributor or producer shall use as the measure of tax all actual metered gallons of gasoline withdrawn from storage within this State for sale to any other person, or for delivery to any retail service station owned or operated by such distributor or producer, or used as fuel in an internal combustion engine.

4.2 Except as provided in Section 4.8 of these regulations, a distributor or producer shall use as the measure of tax all actual metered gallons of special fuel, withdrawn from storage within this State for use, or sold for use, as fuel in an internal combustion engine, or sold, transferred or delivered to its company operated retail storage or any other retail station or user wherein said special fuel storage is for use or for the sale for use as fuel in an internal combustion engine.

4.3 A retail dealer, or importer, or user shall use as the measure of tax all actual metered gallons of gasoline, not previously included in the measure of tax, received into his storage within this State or used by him as fuel in an internal combustion engine.

4.4 A retail dealer, or importer, or user shall use as the measure of tax all actual metered gallons of special fuel, not previously included in the measure of tax, received into his storage within this State wherein said special fuel storage is for use or for the sale for use as fuel in an internal combustion engine, or used by him as fuel in an internal combustion engine.

4.5 A person not a distributor or producer, retail dealer, importer, or user shall use as the measure of tax all actual metered gallons of gasoline or special fuel subject to tax under this regulation and not previously included in the measure of tax by him or any other person.

4.6 Nothing in W. Va. Code § 11-14-1 et seq. and this regulation shall be construed to require the inclusion in the measure of tax of any gasoline or special fuel previously included in the measure of tax upon which the tax has been previously paid.

4.7 The tax imposed by W. Va. Code § 11-14-1 et seq. and this regulation shall be in addition to all other taxes of whatever character imposed by any other provisions of law.

4.8 The measure of the tax for the quantity of gasoline delivered by a distributor or producer as indicated in Sections 4.1 and 4.2 of these regulations may be calculated by converting actual metered gallons to temperature compensated gallons at 60°F the gallonage transferred to the delivery vehicle.

4.8.1 For periods beginning on or after October 1, 1987, the quantity delivered shall be either the actual metered gallons delivered or the quantity delivered being calculated by converting to 60° Fahrenheit the quantity transferred by means of either temperature compensating meters approved by the West Virginia Department of Labor, Weights and Measures Division, or by mathematical conversion using American Petroleum Institute (API) ASTM-IP Petroleum Measurement Tables for specific gravity and temperature. This measure shall be the same as that required for calculation of the consumers sales tax on gasoline and special fuels imposed by W. Va. Code § 11-15-11 and the motor carrier road tax imposed by § 11-14A-1 et seq. If the metered quantity delivered is not determined by temperature compensating meters, as aforesaid, and the distributor or producer does not convert said gallons delivered to temperature adjusted gallons or, after making a mathematical conversion fails to keep and maintain records to support and substantiate the

conversion, then the amount of tax due shall be determined by the number of metered gallons of gasoline or special fuel delivered without adjustment for temperature. Any distributor or producer using the conversion method for determining the quantity delivered must record the conversion adjustment on each invoice and must continue to use that method for the entire tax year.

4.8.1.1 Example: What is the volume at 60°F of 10,000 US gallons of oil measured at 34°F when the gravity of the oil is 64.80 API at 60°F? To find the volume, the following steps should be performed:

Enter the table in the column "API Gravity at 60°F, headed 64° API, and note that against an "Observed Temperature of 34°F" the factor is 1.0168

Likewise, from the column headed 65° API, note that for the observed temperature of 34°F the factor is 1.0170

This represents an increase of 0.0002 in the factor for an increase of 1.0° API. Therefore, by simple proportion, an increase in gravity from 64.0 to 64.80° API increases the factor by 0.8×0.0002 or 0.0002

Then, one U.S. gallon of oil having a gravity of 64.80° API at 60°F and measured at 34°F occupies at 60°F a volume of $1.0168 + 0.0002$ or 1.0170 U.S. Gallons

Therefore, 10,000 US gallons measured at 34°F occupy at 60°F a volume of $10,000 \times 1.0170$ or 10,170 U.S. Gallons

4.9 Gains or increases in gallons of gasoline and special fuel attributable to condensation shall be included in the computation of tax under W. Va. Code § 11-14-4 and Section 4 of these regulations.

§ 110-14-5. Exemptions From Tax.

5.1 There shall be exempted from the excise tax on gasoline or special fuel imposed by W. Va. Code § 11-14-1 et seq. and this regulation the following:

5.1.1 All gallons of gasoline or special fuel exported from this State to any other state or nation.

5.1.2 All gallons of gasoline or special fuel sold to and purchased by the United States or any agency thereof when delivered in bulk quantities of five hundred (500) gallons or more.

5.1.2.1 The five hundred (500) gallon minimum may be a combination of gasoline and special fuel provided the total invoiced amount is five hundred (500) gallons or more.

5.1.2.2 The gasoline and/or special fuel must be delivered to bulk storage owned or leased by the United States Government or agency thereof and not to a retail sales location.

5.1.2.3 Taxable sales may not be made from exempt storage.

5.1.3 All gallons of gasoline or special fuel sold pursuant to a government contract, in bulk quantities of five hundred (500) gallons or more, for use in conjunction with any municipal, county, state or federal civil defense or emergency service program, or to any person on whom is imposed a requirement to maintain an inventory of gasoline or special fuel for the purpose of any such program:

5.1.3.1 That fueling facilities used for these purposes are not capable of fueling motor vehicles and the person in charge of such program has in his possession a letter of authority from the Tax Commissioner certifying his right to such exemption.

5.1.4 All gallons of gasoline or special fuel imported into this State in the fuel supply tank or tanks of a motor vehicle, other than in the fuel supply tank of a vehicle being hauled.

5.1.4.1 This exemption does not relieve a person owning or operating as a motor carrier of any taxes imposed by W. Va. Code § 11-14A-1 et seq.

5.1.5 All gallons of gasoline and special fuel used and consumed in "stationary off-highway turbine engines" as defined in Section 2 of these regulations.

5.1.6 All gallons of special fuel for heating any public or private dwelling, building or other premises.

5.1.6.1 Exempt heating fuel invoices must be stamped or imprinted "Not sold for use in an internal combustion engine" or the seller may be liable if so consumed.

5.1.6.2 Sales facilities used for this purpose shall be marked "not for use as a motor fuel."

5.1.7 All gallons of special fuel for boilers.

5.1.8 All gallons of gasoline or special fuel used as a dry cleaning solvent or commercial or industrial solvent.

5.1.9 All gallons of gasoline or special fuel used as lubricants, ingredients or components of any manufactured product or compound.

5.1.10 All gallons of gasoline or special fuel sold to any municipality or agency thereof for use in vehicles or equipment owned and operated by such municipality or agency thereof and when purchased for delivery in bulk quantities of five hundred (500) gallons or more.

5.1.10.1 The gasoline and/or special fuel must be delivered to bulk storage owned or leased by the municipality or agency thereof and not to a retail sales location.

5.1.11 All gallons of gasoline or special fuel sold to any urban mass transportation authority created pursuant to the provisions of W. Va. Code § 8-27-1 et seq., for use in an urban mass transportation system.

5.1.11.1 Contact Motor Fuel Unit of Accounting Division, State Tax Department at (304) 348-8500 for a listing of urban mass transportation authorities which are exempt.

5.1.12 All gallons of gasoline or special fuel sold for use as aircraft fuel.

5.1.12.1 Aircraft fuel shall mean gasoline or special fuel suitable for use in any aircraft engine.

5.1.13 All gallons of gasoline or special fuel sold for use or used as a fuel for commercial watercraft. For the definition of "commercial watercraft," see Section 2 of these regulations.

5.1.14 All gallons of special fuel sold for use or consumed in railroad diesel locomotives. For the definition of "railroad diesel locomotives," see Section 2 of these regulations.

5.1.15 County Parks and Recreation Commissions are exempt from tax on gasoline and special fuel when meeting requirements under W. Va. Code § 7-11-2.

5.1.16 Emergency ambulance services are exempt from tax on gasoline and special fuel when meeting requirements under W. Va. Code § 7-15-13. For the manner of claiming this exemption, see Section 11a of these regulations.

§ 110-14-5a. Exemption For Bulk Sales To Interstate Motor Carriers.

5a.1 In general. - There shall be exempt from the taxes imposed by W. Va. Code §§ 11-14-1 et seq. and 11-15-1 et seq. and this regulation all gallons of gasoline or special fuel sold by a distributor to an interstate motor carrier having fuel storage tanks in this State which are used solely for the purpose of fueling motor carriers owned, leased or operated by the motor carrier, when the purchase is delivered in bulk quantities of one thousand (1,000) gallons or more into such fuel storage tanks and is purchased for the motor carrier's exclusive use.

5a.1.1 This exemption shall not relieve the person owning or operating a motor carrier from payment of any taxes imposed by W. Va. Code § 11-14A-1 et seq. or W. Va. Code § 11-15A-1 et seq. on gasoline or special fuel used or consumed in this State by the motor carrier.

5a.1.2 Interstate motor carriers may not commingle bulk storage fuel with other motor carriers or lease bulk storage at retail truckstops or service stations selling fuel to others. For the definition of "interstate motor carriers," see Section 2 of these regulations.

5a.1.3 Fuel purchased tax exempt may not be used in equipment other than motor carriers as defined in Section 14.2.9 of these regulations. Separate storage must be maintained for taxable use of fuel.

5a.1.4 Proper records of purchases and withdrawals from bulk storage must be maintained to show exclusive use in interstate motor carriers.

5a.2 Surety bond; release of surety; new bond. - The Commissioner may in his discretion require an interstate motor carrier having fuel storage tanks in this State to file a continuous surety bond in an amount to be fixed by the Commissioner, except that the amount thereof shall not be less than one thousand dollars (\$1,000.00).

5a.2.1 Upon completion of the filing of such surety bond, only an annual notice of renewal shall be required thereafter.

5a.2.2 The surety must be authorized to engage in business within this State.

5a.2.3 This bond shall be conditioned upon the motor carrier's faithful compliance with the provisions of W. Va. Code § 11-14-1 et seq. and this regulation and W. Va. Code § 11-14A-1 et seq. and W. Va. Code § 11-15A-1 et seq. and the regulations thereto with respect to such gasoline or special fuel, including the filing of the returns and payment of all tax due with respect to such gasoline or special fuel.

5a.2.4 Such bond shall be approved by the Commissioner as to sufficiency and by the Attorney General as to form, and shall indemnify the State against any loss arising from the failure of the taxpayer for whatever reason to pay any tax imposed by W. Va. Code § 11-14A-1 et seq. and W. Va. Code § 11-15A-1 et seq. on gasoline or special fuel purchased as provided in this Section which was used or consumed in operation of the motor carrier in this State.

5a.2.5 A noninterest bearing cash deposit may be accepted by the Commissioner in lieu of such bond. The cash deposit shall be in an amount to be fixed by the Commissioner, except the amount thereof may not be less than one thousand dollars (\$1,000.00).

5a.3 Revocation or suspension of exemption.

5a.3.1 The Tax Commissioner may revoke or suspend application of this exemption to a motor carrier if:

5a.3.1.1 The motor carrier filed a false or fraudulent return for the tax imposed by W. Va. Code § 11-14A-1 et seq. and W. Va. Code § 11-15A-1 et seq. on gasoline or special fuel it used or consumed in this State, or,

5a.3.1.2 The motor carrier willfully refused or willfully neglected to file a tax return or willfully failed to report information required by the Tax Commissioner, concerning gasoline or special fuel which it used or consumed in this State, on or before the date specified for filing the return or report, or,

5a.3.1.3 The motor carrier willfully refused or willfully neglected to pay any tax, additions to tax, penalties or interest, or any part thereof, with respect to gasoline or special fuel used or consumed in this State when they became due and payable under W. Va. Code § 11-14-1 et seq. and this regulation, determined with regard to any authorized extension of time for payment.

5a.3.2 Before cancelling or suspending this exemption, the Tax Commissioner shall give written notice to the motor carrier of his intent to suspend or cancel this exemption, the reason for the suspension or cancellation, the effective date of the suspension or cancellation, and the date, time and place where the taxpayer may appear at an informal hearing and show cause why this exemption should not be suspended or canceled. This written notice shall be served on the taxpayer in the same manner as a notice of assessment is served under W. Va. Code § 11-10-1 et seq., not less than twenty (20) days prior to the date of such informal hearing. The taxpayer may appeal suspension or cancellation of its exemption under this Section in the same manner as a notice of assessment is appealed under W. Va. Code § 11-10-1 et seq.

5a.3.2.1 The filing of a petition for appeal shall not stay the effective date of the suspension or cancellation. A stay may be granted only after a hearing is held on a motion to stay filed by the motor carrier, upon finding that state revenues will not be jeopardized by the granting of the stay. The Tax Commissioner may, in his discretion and upon such terms as he may specify, agree to stay the effective date of the suspension or cancellation until another date certain.

5a.3.3 The Tax Commissioner shall promptly give notice to distributors in this State of the name and mailing address of every motor carrier whose exemption under this Section is suspended or cancelled. The effective date of such suspension or cancellation shall be included, and if this exemption is suspended, the date the suspension expires shall also be provided. The affected motor carrier shall promptly give similar written notice to all distributors from whom he purchases gasoline or special fuel exempt from tax as provided in Section 5a.1 of this regulation.

5a.3.4 A motor carrier whose exemption under this Section is cancelled may, after the cancellation has been in effect for twelve (12) months, petition the Tax Commissioner for reinstatement of exemption under this Section. The Tax Commissioner may, in his discretion, and upon such terms as he may require reinstate this exemption, but only if he reasonably believes that the motor carrier will fully and timely comply with W. Va. Code § 11-14-1 et seq. and this regulation and the provisions of W. Va. §§ 11-14A-1 et seq. and 11-15A-1 et seq. and the regulations thereto. Upon reinstatement, the motor carrier shall provide this distributor with a true copy of the Tax Commissioner's order reinstating the exemption.

5a.3.4.1 Those taxpayers requesting an exemption that has been cancelled to be reinstated must provide a surety bond as provided for above.

5a.4 The provisions of Section 5a.3 of this regulation shall apply to gasoline or special fuel delivered after March 31, 1989.

§ 110-14-6. Gasoline Or Special Fuel Exported Or In Interstate Commerce; Distributors Or Producers May Pay Tax Shipments Into State.

6.1 This regulation shall not be construed to require the inclusion in the computation of tax of a distributor or producer, retail dealer, or importer, of any gasoline or special fuel when the same is exported by a person from this State to another state or nation or territories or possessions thereof, nor to require the inclusion in the computation of tax of any gasoline or special fuel shipped in interstate commerce while the same is in transportation; but the gallonage of gasoline or special fuel shipped from another state shall be included in the computation of tax as required by this regulation after the same shall have been divested of its interstate character.

6.1.1 Distributors making shipments of gasoline or special fuel into this State may, as a matter of convenience to purchasers located in this State, assume and pay the tax imposed by W. Va. Code § 11-14-1 et seq. and this regulation when written permission so to do is first obtained from the Commissioner.

6.1.2 Those not electing to collect the tax must file a monthly distributor tax return and required schedules listing all customers in West Virginia so the Commissioner may collect the tax from the customer.

§ 110-14-7. Due Date Of Reports; Reports Required; Records To Be Kept; Examination Of Records; Subpoena Powers; Examination Of Witnesses.

7.1 Every taxpayer subject to the tax imposed by W. Va. Code § 11-14-1 et seq. and this regulation shall make, on or before the twenty-fifth (25th) of each month, to the Commissioner a report of its operations during the preceding month as the Commissioner may require and such other reports from time to time as the Commissioner may deem necessary. The reports prescribed herein are required although a tax might not be due, or no business transacted, for the period covered by the report. For good cause shown, the Commissioner may extend the time for filing said reports for a period not exceeding thirty (30) days.

7.2 The reports and taxes due, as imposed by W. Va. Code § 11-14-1 et seq. and this regulation, shall be deemed as having been timely filed for the purpose of avoiding interest, additions to tax and penalties only if the postmark date thereon is clearly within the said twenty-fifth (25th) of the calendar month, or is received within such period. If the twenty-fifth (25th) falls on a Saturday or Sunday, or a day which is a legal holiday in the State of West Virginia, filing will be considered timely if it is done on the next succeeding day which is not a Saturday, Sunday or legal holiday.

7.3 A taxpayer shall keep such records necessary to verify the reports and returns required by W. Va. Code § 11-14-1 et seq. and this regulation, including inventories, receipts, disbursements, and any other records which the Commissioner by regulation may prescribe, for a period of time not less than three (3) years.

7.4 Unless otherwise permitted, in writing, by the Commissioner, each delivery ticket or invoice for each purchase or sale of gasoline or special fuel shall be recorded upon a serially numbered invoice showing the name and address

of the seller and the purchaser, point of delivery, the date, number of gallons, kind of fuel and price of said fuel. The amount of tax shall be indicated separately or the invoice shall indicate whether or not the tax imposed by this article is included in the total price and such other information as the Commissioner may require.

7.4.1 These invoicing requirements shall not apply to cash sales, and a person making such sales shall maintain such records as may be necessary to verify his return.

7.4.2 Consumers Sales Tax, when charged, must be listed on all invoices as a separate line item.

7.5 In addition to the Tax Commissioner's powers set forth in W. Va. Code § 11-10-5, the Commissioner may inspect or examine the records, books, papers, storage tanks, meters and any equipment records of a taxpayer or any other person to verify the truth and accuracy of any report or return to ascertain whether the tax imposed by W. Va. Code § 11-14-1 et seq. and this regulation has been properly paid.

7.6 In addition to the Tax Commissioner's powers set forth in W. Va. Code § 11-10-5, as a further means of obtaining the records, books and papers of a taxpayer or any other person and ascertaining the amount of taxes and the reports due under W. Va. Code § 11-14-1 et seq. and this regulation, the Commissioner shall have the power to examine witnesses under oath; and if any witness shall fail or refuse at the request of the Commissioner to grant access to the books, records and papers, the Commissioner shall certify the facts and the names to the circuit court of the county having jurisdiction of the party and such court shall thereupon issue a subpoena duces tecum to such party to appear before the Commissioner, at a place designated within the jurisdiction of such court, on a day fixed.

§ 110-14-8. Tax Due.

8.1 The tax imposed by W. Va. Code § 11-14-1 et seq. shall be paid by each taxpayer on or before the last day of each calendar month by check, bank draft, certified check or money order, payable to the Commissioner, for the amount of tax due, if any, for the preceding month: Provided, That pursuant to W. Va. Code § 11-15-18(f), the due date of the tax is changed as indicted in the following Section 8.2.

8.2 To facilitate ease of administration and compliance by taxpayers, the Tax Commissioner requires distributors, importers and other persons liable for the sales and service tax imposed on sales of gasoline or special fuel and for the Gasoline and Special Fuel Excise Tax imposed by W. Va. Code § 11-14-1 et seq., and this regulation to file a combined return and make a combined payment of the sales and service tax due and the excise tax due. In order to facilitate the use of a combined return and the making of a single payment, the due date for the gasoline and special fuel excise tax and its return is changed to the twenty-fifth (25th) day of each calendar month.

§ 110-14-9. Reserved For Future Use.

§ 110-14-10. Refund Of Taxes Illegally Collected, Etc.; Refund For Gallonage Exported Or Lost Through Casualty or Evaporation; Change Of Rate; Petition For Refund.

10.1 The Commissioner is authorized to refund from the funds collected under the provisions of W. Va. Code § 11-14-1 et seq. and this regulation any tax, interest, additions to tax or penalties which have been erroneously or illegally collected from any person.

10.2 If any distributor or producer, retail dealer or importer, while he shall be the owner thereof, loses any gallons of gasoline or special fuel through fire, lightning, breakage, flood or other casualty, which gallons have been previously included in the tax by or for such person, he shall be refunded a sum equal to the amount of the tax paid upon such gallons so lost.

10.3 Any distributor or producer, retail dealer or importer or other person who purchases or receives gasoline or special fuel in this State upon which the tax imposed by W. Va. Code § 11-14-1 et seq. and this regulation has been paid, and who subsequently exports the same from this State (except in a supply tank), shall be entitled to a refund for the amount of tax paid.

10.4 Any dealer as defined in Section 2 of these regulations, who purchases or receives gasoline or special fuel in this State upon which the tax imposed by W. Va. Code § 11-14-1 et seq. has been paid, shall be entitled to an annual refund for gallons lost through evaporation. Such refund shall be computed at the rate of tax imposed per gallon under W. Va. Code § 11-14-3 and Section 3 of these regulations on all gallons of gasoline or special fuel actually lost due to evaporation, not exceeding one half of one percent (.5%) of the adjusted total accountable gallons.

10.4.1 Each dealer must file a separate petition for refund for each retail location showing the evaporation loss for each such retail location.

10.4.2 A dealer owning two (2) or more retail locations may not aggregate and average evaporation losses between or among such retail locations.

10.5 Every distributor or producer, retail dealer or importer shall be entitled to a refund from this State of the amount resulting from a change of rate decreasing the tax under the provisions of W. Va. Code § 11-14-1 et seq. on gasoline and special fuel on hand and in inventory on the effective date of such rate change, which gasoline and special fuel shall have been included in any previous computation by which the tax imposed at the previous rate has been paid by him.

10.6 No refund shall be made under Section 10 of this regulation unless a written petition therefor sets forth the circumstances upon which said refund is claimed. A claim for refund shall be subject to the provisions of W. Va. Code § 11-10-14. The petition shall be in such form and with such supporting records as required by the Commissioner and shall be made under the penalty of perjury. Petitions for refunds other than for evaporation loss shall be filed with the Commissioner within three (3) years from the end of the month in which the tax was erroneously or illegally paid or the gallons were exported or lost by casualty, or in which a change of rate took effect, as provided in this Section

10. Petitions for refund for evaporation loss shall be filed within three (3) years from the end of the year in which such evaporation occurred.

§ 110-14-11. Refund Of Tax Because Of Certain Nonhighway Uses; Statute Of Limitations And Effective Date.

11.1 The tax imposed by W. Va. Code § 11-14-1 et seq. shall be refunded to any person who shall buy in quantities of twenty-five (25) gallons or more, at any one time, tax-paid gasoline or special fuel, when consumed for the following purposes:

11.1.1 As a special fuel for internal combustion engines not operated upon highways of this State; or

11.1.2 Gasoline consumed to operate tractors and gas engines or threshing machines for agricultural purposes, when such operation is not, in whole or in part, upon the highways of this State; or

11.1.2.1 For purposes of these regulations, agricultural purposes shall not include such things as landscaping, lawn mowing or horticultural activities (e.g., growing flowers and ornamental plants).

11.1.3 Gasoline used by any railway company subject to regulation by the Public Service Commission of West Virginia, for any purpose other than upon the highways of this State; or

11.1.4 Gasoline consumed in the business of manufacturing or producing natural resources or in mining or drilling therefor, or in the transportation of natural resources solely by means of unlicensed vehicles or vehicles licensed under the motor vehicle laws of this State, either as a motor fuel or for any other purpose and which gasoline is not in any part used upon the highways of this State; or

11.1.5 Gasoline consumed in motorboats or other watercraft operated upon the navigable waters of this State; or

11.1.6 Gasoline or special fuel used to power a power take-off unit on a motor vehicle. When a motor vehicle with auxiliary equipment uses fuel and there is no auxiliary motor for such equipment or separate tank for such a motor, the person claiming the refund may present to the Tax Commissioner a statement of his claim and shall be allowed a refund for fuel used in operating a power take-off unit on a cement mixer truck or garbage truck equal to twenty-five percent (25%) of the tax imposed by W. Va. Code § 11-14-1 et seq. paid on all fuel used in such a truck.

11.2 Such tax shall be refunded upon presentation to the Commissioner of an affidavit accompanied by the original or top copy sales slips or invoices, or certified copies thereof, from the distributor or producer or retail dealer, showing such purchases, together with evidence of payment thereof, which affidavit shall set forth the total amount of such gasoline or special fuel purchased and consumed by such user, other than upon any highways of this State, and how used; and the Tax Commissioner upon the receipt of such affidavit and

such paid sales slips or invoices shall cause to be refunded such tax paid on gasoline or special fuel purchased and consumed as aforesaid.

11.2.1 Photocopies of original or top copy sales slips or invoices of special fuels may be substituted for original or top copies.

11.3 The right to receive any refund under the provisions of this Section shall not be assignable and any assignment thereof shall be void and of no effect, nor shall any payment be made to any person other than the original person entitled thereto using gasoline or special fuel as hereinbefore in this Section 11 set forth. The Tax Commissioner shall cause a refund to be made under the authority of this Section only when the claim for such refund is filed with the Tax Commissioner, upon forms prescribed by the Tax Commissioner, within six (6) months from the month of purchase or delivery of the gasoline or special fuel, except that any application for refund made under authority of Section 11.1.2 above shall be filed within twelve (12) months from the month of purchase or delivery of such gasoline or special fuel. Any claim for a refund not timely filed shall not be construed to be or constitute a moral obligation of the State of West Virginia for payment. Such claim for refund shall also be subject to the provisions of W. Va. Code § 11-10-14.

11.3.1 To be entitled to claim a refund, the person (as defined in Section 2 of these regulations) purchasing and invoiced for the gasoline and/or special fuels must also be the consumer of the gasoline and/or special fuels in the person's own or leased equipment.

11.3.1.1 If gasoline and/or special fuels are purchased by one "person" and used by another "person," neither person is entitled to claim or receive a refund under this Section.

11.3.2 Inventories are depleted by using the accounting method, FIFO (first in - first out). The first fuel purchased is presumed to be the first fuel consumed. Therefore, consumption will first be used to reduce inventory prior to current purchases. Inventories are determined for timely filing by the date(s) of the invoice(s) making up the inventory.

11.3.3 Special fuels consumed in equipment used both on and off-highway may be apportioned for refund purposes based on the ratio of miles on-highway to miles off-highway. Records must be kept to verify such fuel consumption and mileage.

11.4 Effective date. - The provisions of W. Va. Code § 11-14-11 shall apply to all gasoline and special fuels purchased or delivered on or after the first day of July, one thousand nine hundred eighty-six, and the provisions of that Section in effect prior to the said first day of July, shall apply to gasoline and special fuels purchased or delivered prior to July 1, 1986.

§ 110-14-11a. Refund Of Tax Used By Volunteer Fire Departments, Nonprofit Ambulance Services And Emergency Rescue Services.

11a.1 Upon certification by the county commissioner to the Tax Commissioner that an organization in the county is a bona fide volunteer fire department, nonprofit ambulance service or emergency rescue service, the tax

imposed by W. Va. Code § 11-14-1 et seq. and this regulation and paid by such organization shall be refunded.

11a.2 Such tax shall be refunded upon presentation to the Commissioner of an affidavit accompanied by the original or top copy sales slips or invoices, or certified copies thereof, as provided in Section 11 of these regulations, from the distributor or producer or retail dealer, showing such purchases, together with evidence of payment thereof, which affidavit shall set forth the total amount of such gasoline or special fuel purchased and consumed by such user, and the Commissioner upon the receipt of such affidavit and such paid sales slips or invoices shall cause to be refunded such tax paid on gasoline or special fuel purchased and consumed as aforesaid.

11a.3 The right to receive any refund under the provisions of this Section shall not be assignable and any assignment thereof shall be void and of no effect, nor shall any payment be made to any person other than the original person entitled thereto using gasoline or special fuel as hereinbefore in this Section 11a set forth. The Commissioner shall cause a refund to be made under the authority of this Section 11a only when the application for such refund is filed with the Commissioner, upon forms prescribed by the Commissioner, no later than August 31st for purchases of fuel during the preceding fiscal year ending June 30th. Any claim for a refund not timely filed shall not be construed to be or constitute a moral obligation of the State of West Virginia for payment. Such claim for refund shall also be subject to the provisions of W. Va. Code § 11-10-14.

§ 110-14-12. Partial Refund Of Tax On Tax-Paid Gallonage Consumed In Buses.

12.1 Any person regularly operating any vehicle under a certificate of public convenience and necessity or under a contract carrier permit for transportation of persons, when such person (1) purchases tax-paid gasoline or tax-paid special fuel, as required by W. Va. Code § 11-14-1 et seq., in an amount of twenty-five (25) gallons or more and (2) complies with all the requirements of Section 11 of these regulations, with the exception of off-highway use, may be refunded an amount equal to six cents (6¢) per gallon under authority of this Section 12.

12.1.1 In order to qualify for such refund, said gallons of gasoline or special fuel must have been consumed in the operation of urban and suburban bus lines, and the majority of passengers use the bus for traveling a distance not exceeding forty (40) miles, measured one way, on the same day between their places of abode and their places of work, shopping areas or schools. There shall be presented to the Commissioner a claim for refund accompanied by proof of such purchase and payment as required by Section 11 of these regulations. The right to a refund under this Section 12 shall not be assignable, and any assignment so made shall be void. Such claim for refund shall also be subject to the provisions of W. Va. Code § 11-10-14.

§ 110-14-13. Surety Bonds Required; Release Of Surety; New Bond.

13.1 The Commissioner may require a taxpayer to file a continuous surety bond in an amount to be fixed by the Commissioner, except that the amount shall not be less than one thousand dollars (\$1,000.00). Upon completion of the

filing of such surety bond, only an annual notice of renewal shall be required thereafter. The surety must be authorized to engage in business within this State. The bond shall be conditioned upon faithful compliance with the provisions of W. Va. Code § 11-14-1 et seq. and this regulation, including the filing of the returns and payment of all tax prescribed by said article. Such bond shall be approved by the Commissioner as to sufficiency and by the Attorney General as to form, and shall indemnify the State against any loss arising from the failure of the taxpayer to pay any tax imposed by W. Va. Code § 11-14-1 et seq. for any cause whatever.

13.2 Any surety on a bond furnished hereunder shall be relieved, released and discharged from all liability accruing on such bond after the expiration of sixty (60) days from the date the surety shall have lodged, by certified mail, with the Commissioner a written request to be discharged. This shall not relieve, release or discharge the surety from liability already accrued, or which shall accrue before the expiration of the sixty day (60) period. Whenever any surety shall seek discharge as herein provided, it shall be the duty of the principal of such bond to supply the Commissioner with another bond, or pledge of property equal in value to the original bond, such pledge to be in the form of a tax lien on the property pledged and said lien shall be duly perfected in the office of the clerk of the county commission of the county wherein such property is situated and shall be submitted to the Commissioner along with a certified appraisal statement as to the value of the property pledged prior to the expiration of the original bond.

§ 110-14-14. Enforcement Powers.

14.1 Any employee or agent of the Commissioner so authorized by the Commissioner shall have all the lawful powers delegated to members of the Department of Public Safety to enforce the provisions of W. Va. Code § 11-14-1 et seq. and this regulation, when bonded as hereinafter provided in this Section.

14.2 Each employee or agent so authorized by the Commissioner shall execute a bond with security in the sum of thirty-five hundred (\$3,500.00) dollars, payable to the State of West Virginia, and conditioned for the faithful performance of his duties, as such, and such bond shall be approved as to form by the Attorney General, and the same shall be filed with the Secretary of State and preserved in his office.

§ 110-14-15 through § 110-14-18. Reserved For Future Use.

§ 110-14-19. Penalty For Failure To File Required Return When No Tax Due.

In the case of any failure to make or file a return when no tax is due, as required by W. Va. Code § 11-14-1 et seq. and this regulation, on the date prescribed therefor, unless it can be shown that such failure is due to reasonable cause and not due to willful neglect, there shall be collected a penalty of twenty-five dollars (\$25.00) for each month of such failure or fraction thereof.

§ 110-14-20 to 110-14-24. Reserved For Future Use.

§ 110-14-25. Receivership Or Insolvency Proceeding.

In the event that a business of a person subject to the tax imposed by W. Va. Code § 11-14-1 et seq. and this regulation shall be operated in connection with a receivership or insolvency proceeding, the court under whose direction such business is operated or was caused to be operated shall, by entry of a proper order in the cause, make provisions for the regular payment of such taxes as the same become due.

§ 110-14-26 to 110-14-28. Reserved For Future Use.

§ 110-14-29. Severability.

If any provision of this regulation or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect, impair or invalidate other provisions or applications of the regulation, and to this end the provisions of this regulation are declared to be severable.

§ 110-14-30. General Procedure And Administration.

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 Gasoline and Special Fuel Excise Tax imposed by W. Va. Code § 11-14-1 et seq. and this regulation with like effect as if said act were applicable only to such Gasoline and Special Fuel Excise Tax imposed by W. Va. Code § 11-14-1 et seq. and this regulation and were set forth with respect thereto in extenso in W. Va. Code § 11-14-1 et seq. and this regulation.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Gasoline and Special Fuel Excise Tax

Type of Rule: X Legislative Interpretive Procedural

Agency: Tax Department 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:

The fiscal impact of this rule should not vary from that envisioned by the Legislature when it enacted the tax.

3. Objectives of these rules:

There is no current rule in existence which governs the administration of this tax. Therefore, this rule explains and clarifies West Virginia law as it relates to the subject tax.

JACKSON & KELLY

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August 7, 1989

Honorable Charles O. Lorensen
Secretary, Department of Tax and Revenue
State Tax Department
Legal Division
P. O. Drawer 1005
Charleston, West Virginia 25305

RECEIVED
AUG 7 1989

STATE TAX
COMMISSIONER

Re: Comments regarding proposed
Amendments to § 110 CSR 15
Gasoline and Special Fuel Excise Tax

Dear Secretary Lorensen:

The following comments regarding § 110-14-10 of the proposed new Gasoline and Special Fuel Excise Regulations, which deal with refunds of gallonage lost through evaporation, are made on behalf of Go-Mart, Inc., a West Virginia gasoline distributor and dealer.

Section 110-14-10.4 restates the statute and provides:

10.4 Any dealer as defined in Section 2 of these regulations, who purchases or receives gasoline or special fuel in this State upon which the tax imposed by W. Va. Code § 11-14-1 et seq. has been paid, shall be entitled to an annual refund of gallons lost through evaporation. Such refund shall be computed at the rate of tax imposed per gallon under W. Va. Code § 11-14-3 and Section 3 of these regulations on all gallons of gasoline or special fuel actually lost due to evaporation, not exceeding one half of one percent (.5%) of the adjusted total accountable gallons.

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The regulation then requires refund claims on a location by location basis as follows:

10.4.1 Each dealer must file a separate petition for refund for each retail location showing the evaporation loss for each such retail location.

10.4.2 A dealer owning two (2) or more retail locations may not aggregate(sic) evaporation losses between or among such retail locations.

We submit that the proposed regulations §§ 10.4.1 and 10.4.2, which would require dealers who operate more than one retail location to file a separate claims for refund for each retail location are contrary to the West Virginia Constitution, the intent of the Legislature and exceed the Commissioner's regulatory authority.

Go-Mart is a dealer which files claims for refunds for evaporation losses as allowed by W. Va. Code § 11-14-10. Go-Mart sells fuel from more than 40 convenience store locations within the state. Losses through evaporation can occur at each retail location between the time the gasoline is delivered into the storage tanks at the station and the time it is sold. At some locations, the loss might be less than the one-half of one percent limitation, and at other locations it may exceed that amount. Also, certain stores occasionally, have "evaporation gains". Go-Mart is currently filing its annual evaporation loss refund claims on a company-wide basis. Its refund claims are prepared by aggregating total evaporation losses at all retail locations experiencing losses and then subtracting total evaporation gains at retail locations experiencing gains therefrom. The resulting loss for which a refund may be claimed may not, of course, exceed the one-half of one percent limitation. It is submitted that this company-wide method of reporting is correct. The proposed regulations for the first time would require that separate refund claims be filed for each retail location. That is contrary to the West Virginia Constitution and the intent of Legislature as expressed in the tax statute.

By requiring gasoline tax refund claims to be filed on a location-by-location basis, the regulations discriminate

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against dealers with more than one retail location in favor of those who sell from a single retail location by, in effect, limiting the claims for refund of the former to less than the one-half of one percent limitation established by the Legislature. Take for example, a dealer with more than one retail location. At some locations, the evaporation losses are less than one-half of one percent, and at other locations the losses exceed one-half of one percent, or evaporation gains occur. Such dealer's refunds will be limited under the proposed regulations to the actual losses at locations where the losses were less than one-half of one percent; to one-half of one percent at locations where the losses exceed that amount; and the dealer will be required to pay additional tax on those locations where evaporation gains occur. This dealer's actual refund could be substantially less than the one-half of one percent allowed by the Legislature even when total losses equal or exceed one-half of one percent. On the other hand, the dealer with only one retail location is only limited by the one-half of one percent cap established by the Legislature.

West Virginia Constitution, Article 10, Section 1 provides "taxation shall be equal and uniform throughout the state." The regulation, as proposed, will clearly result in a Gasoline and Special Fuels Excise Tax that is not equal and uniform between dealers.

The proposed regulation is also contrary to the intent of the Legislature as expressed in the statute. The Gasoline and Special Fuels Excise Tax statute specifically provides that "taxpayer" means any person liable for tax, interest, additions to tax or penalty under the provisions of this article. For purposes of the Gasoline and Special Fuel Excise Tax, "person" includes an individual, firm, partnership, limited partnership, joint adventure, association, company, corporation or organization, syndicate, receiver, trust, or any other group or combination acting as a unit. W. Va. Code § 11-14-2. The requirement that a company file a refund claim on a retail location by a retail location basis rather than on the basis on which the entity filed its original tax return is contrary to the Gasoline Tax statute and is inconsistent with principals of West Virginia tax law generally. The company, i.e. the dealer, is the taxpayer required to pay the tax and claim refunds, not each of the retail locations. The Legislature did not intend otherwise.

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While it is clear that the Legislature allows the Commissioner reasonable authority to determine the amount of refund claims, it did not intend to require refund claims on a retail location by retail location basis as opposed to a company-wide basis. The statute is consistent as to the entity required to file returns and pay tax and the entity entitled to claim refunds. The regulations should be similarly consistent. Moreover, the regulation appears revenue-motivated and would arbitrarily require taxpayers to file multiple returns when one is and always has been deemed sufficient. The proposed location by location reporting requirement is no more logical than if the regulations required separate refund claims on a pump by pump basis.

For the foregoing reasons, Go-Mart respectfully requests that §§ 10.4.1 and 10.4.2 be stricken from the proposed regulations.

We appreciate your consideration of this comment. If you have any questions or need further information, please advise.

Sincerely,



Thomas G. Freeman, II

TGF,II/clr

cc: John D. Heater

PUBLIC COMMENTS ON THE PROPOSED
GASOLINE AND SPECIAL FUEL EXCISE TAX REGULATIONS

FILED

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OFFICE OF THE STATE
SECRETARY OF REVENUE

Set forth below are public comments received by the State Tax Department pertaining to the Gasoline and Special Fuel Excise Tax Regulations. For purposes of responding to the issues presented, the comments have been condensed rather than repeated verbatim. Copies of original correspondence containing comments are attached for your review.

A comment was received on the following provisions of the Regulations:

10.4.1 Each dealer must file a separate petition for refund for each retail location showing the evaporation loss for each such retail location.

10.4.2 A dealer owning two (2) or more retail locations may not aggregate and average evaporation losses between or among such retail locations.

Comment: Sections 110-14-10.4.1 and 10.4.2 of the proposed Gasoline and Special Fuel Excise Tax regulations respectively (1) require dealers to file a separate petition for refund for each retail location and (2) prohibit dealers with two or more locations from aggregating and averaging evaporation losses between retail locations. In doing so, the Tax Commissioner has (1) exceeded his regulatory authority, (2) violated Legislative intent, and (3) violated the constitutional requirement that taxation shall be equal and uniform statewide. A dealer with multiple retail locations should be permitted to file a single refund claim for all its locations, and the .5% statutory refund ceiling should not be applied to each location separately but to all locations collectively.

Response: West Virginia Code § 11-14-10 provides in pertinent part:

Any dealer as defined in section two [§ 47-11C-2], article eleven-c, chapter forty-seven of the Code, who purchases or receives gasoline or special fuel in this State upon which the tax imposed by this article has been paid, shall be entitled to an annual refund for gallons lost through evaporation. Such refund shall be computed at the rate of tax imposed per gallon under this article on all gallons of gasoline or special fuel actually lost due to evaporation, not exceeding one half of one percent of the adjusted total accountable

gallons, computed as determined by the commissioner. (emphasis added)

The proposed sections concerning this statutory .5% ceiling on evaporation refunds are in fulfillment of this statutory mandate that refunds are to be "computed as determined by the Commissioner." When the Tax Commissioner properly promulgates regulations pursuant to statutory authority, he is not exceeding his regulatory authority. Moreover, this statutory language indicates that the Legislature's intent was for the Tax Commissioner to determine the method of computing the refund. The commentator claims that legislative intent supports his position that refunds should be aggregated and averaged between multiple retail locations of the same retail chain, yet cites no statutory authority for this view of legislative intent. Furthermore, while this is a new regulation, it is not a new policy but rather a codification of long standing policy. Thus the commentator is incorrect in alleging that these proposed regulations would for the first time require that separate refund claims be filed for each retail location. While courts may consider long standing administrative interpretation of statutes as indicative of Legislative intent, these proposed regulations would settle this question of legislative intent.

As indicated above, the refund for actual evaporation loss is limited to "any dealer as defined in W. Va. Code § 47-11C-2, which states:

"Dealer" means any person, other than an agent or employee of a producer, who is engaged in the retail sale of petroleum products under a franchise agreement as defined by this section;

Since the Gasoline and Special Fuel Excise Tax is imposed inter alia on "retail dealers," but the refund for evaporation losses is only available to "dealers" as defined above who sell under a franchise agreement with a producer of gasoline or special fuel, the legislative intent is to create a narrow refund. The proposed regulations are consistent with that intent. Refund statutes, like exemptions statutes, are to be narrowly construed.

In essence, the commentator proposes that the correct method of computing a refund for evaporation losses is to take any losses above the statutory .5% ceiling and transfer them to retail locations where the evaporation losses are below that ceiling, thereby maximizing refunds and minimizing tax liability. For example, if a dealer owned three locations where the evaporation losses were, respectively, .7%, .5% and .3%, the present policy and proposed regulation would allow the maximum .5% refund only for the first two locations. The third location would only be able to claim the .3% level of refund. But under

the commentator's proposal, the .5% refund ceiling would also be reached by the station with only the .3% level of evaporation loss. This would be accomplished by aggregating the .7%, .5% and .3% losses, (which total 1.5%), and then averaging them to reach .5%, the maximum refund. There is nothing in the statutory language suggesting that the Legislature intended to permit taxpayers to use the method of calculating refunds most favorable to themselves.

The commentator also argues that the proposal resolutions violate the requirement of W. Va. Constitution Article 10 § 1 that taxation must be equal and uniform throughout the State. The courts have never required perfect equality or exact uniformity of taxation of results under this constitutional provision. Also, there is no unreasonable classification in the proposed regulations, because there are no classifications at all - all retail locations are treated the same. In effect, the commentator argues that the proposed regulations are unfair because they treat multiple retail location dealers and single location dealers the same. That is, since the .5% ceiling applies to each retail location, argues the commentator, a single location dealer is only limited by one .5% refund ceiling, whereas the multiple location dealer is limited by multiple .5% refund ceilings, which in actual practice may limit the multiple dealer to a smaller percentage average refund per location than for the single dealer. However, even if such an outcome does occur, that would not make the regulations unconstitutional. Different results will often occur under a uniform and equal system of taxation, especially when the situation of taxpayers is different. But the proposed regulations, which treat each retail location the same, whether it is a single location "mom and pop" store in Logan or a chain store in Morgantown, clearly treat taxpayers uniformly and equally.

Conversely, if the commentator's proposed method for calculating refunds were allowed, that would place the single location dealer at a disadvantage, since the single location dealer would not be able to transfer any losses over the .5% ceiling to any other location. Thus, it is the commentator's proposal which would create a risk of being declared unconstitutional, since it would discriminate against the single location dealer. The proposed regulation levels the playing field for both single and multiple location dealers by favoring neither type of dealer.

Also, if the commentator's proposals are accepted, significant revenue losses would result.