

WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION

Form #2

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1988 JUL -7 AM 12:24

SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: STATE TAX DEPARTMENT TITLE NUMBER: 110

RULE TYPE: LEGISLATIVE; CITE AUTHORITY W.VA. CODE §§ 11-10-5 and 29A-3-15

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 15

TITLE OF RULE BEING AMENDED: CONSUMERS SALES AND SERVICE TAX AND USE TAX

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON AUGUST 8, 1988 AT 5:00 P.M. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

STATE TAX COMMISSIONER

WW-300

STATE CAPITOL

CHARLESTON, WV 25305

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

*Dale W. Steager*

OFFICE OF THE STATE COMMISSIONER BY  
DALE W. STEAGER, GENERAL COUNSEL  
WEST VIRGINIA STATE TAX DEPARTMENT

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
**KEN HECHLER**  
**ADMINISTRATIVE LAW DIVISION**

Form #2

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FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE June 1, 1988  
ADMINISTRATIVE LAW DIVISION

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STATE TAX COMMISSIONER

ROOM W-300

STATE CAPITOL

CHARLESTON, WV 25305

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MICHAEL E. CARYL  
STATE TAX COMMISSIONER

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

**WV PRESS**  
ASSOCIATION

1988 SEP 16 PM 2:45

SECRETARY OF STATE

William F. Childress  
Executive Director

**RECEIVED**  
JUN 23 1988

STATE TAX  
COMMISSIONER

June 22, 1988

Michael E. Caryl  
State Tax Commissioner  
Room W-300  
State Capitol  
Charleston, WV 25305

**RECEIVED**  
1988 JUN 28 AM 10:50  
STATE TAX DEPARTMENT  
LEGAL DIVISION

RE: Emergency Regulations, Title 110, Series 15, 1987

Dear Commissioner Caryl:

In the Emergency Regulations filed May 31, 1988 to implement the increase in the consumer sales/use tax to 6 percent, substantial changes were made in a paragraph not at all related to the temporary rate increase, namely, § 110-15-9, paragraph 9.2.14.

This paragraph refers to the per se exemption granted by law to sales of advertising space in newspapers and billboard, and to sales of radio and television commercial time.

The proposed changes in this regulation depart from the wording of the statute to a degree that we believe exceeds both statutory authority and legislative intent. The law is clear; the proposed wording of the regulation is ambiguous. We also find no necessity of changing this paragraph to bring the overall regulations into compliance with statutory changes relating to the temporary increase in the consumer sales/use tax rate.

Prior to this Emergency Regulation, paragraph 9.2.14 was identical in wording to §11-15-9(o) of the Code of West Virginia. We urge that the statutory wording be reinstated in the Tax Department's regulations.

Sincerely,



W. F. Childress,  
Executive Director

cc: Delegate Tom Knight, chairman, Legislative Rulemaking Review Committee

LAW OFFICES  
**HARRY P. HENSHAW, III**  
SUITE 1726, CHARLESTON NATIONAL PLAZA  
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE (304) 343-5613

August 8, 1988

RECEIVED

1988 AUG -8 PM 4:52

STATE TAX DEPARTMENT  
LEGAL DIVISION

Dale Steager  
General Counsel  
State Tax Commissioner  
Room WW-300  
State Capitol  
Charleston, WV 25305

Hand Delivered

Dear Mr. Steager:

I am writing to comment on the Emergency Regulations of the State Tax Department, Title 110 Series 15 (1987) filed July 7, 1988 regarding the consumer sales and service tax. The views expressed herein are on behalf of the West Virginia Society of Travel Agents, the American Society of Travel Agents and AAA Travel Agency. After you have reviewed the points discussed in this letter, we would like the opportunity to discuss this matter with you and your staff and will be willing to answer any questions that you might have.

#### Description Of The Businesses Of Travel Agencies

Travel agencies are agents of airlines, cruise lines, hotels, motels, bus operators, rail operators and automobile rental companies etc. Travel agencies enter into contracts with these various suppliers of travel services, whereby the suppliers will pay a commission based on the sales generated by the travel agency. On the average this commission comes to approximately 10% of the sale.

Public perception of the travel agency is probably incorrect in that it is often believed that the purchaser of the travel service is employing the travel agency as their agent which is not the case. For purposes of analyzing the effect of the West Virginia sales and service tax, it is important that this be kept in mind. Travel agencies work for and are compensated by the suppliers of travel services such as airlines, hotels, car rental companies, etc.

Typically the average commission income generated by a travel agency is broken down roughly as follows: airline commissions 80% to 85%, cruise ships 5% to 10%, and hotels, auto rentals, etc. 5% to 15%. Since each of these types of sales presents different problems they are discussed separately herein.

#### Airline Ticket Commissions

Any travel agency selling airline tickets must be approved by the Airline Reporting Corporation (the "ARC"). The ARC is a nonprofit corporation organized by the air carriers to channel the flow of funds from travel agents to the airline companies through an established settlement plan and to act as a clearing house for claims the airline carriers might have against one another. If a travel agency sells an airline ticket for cash, the agency must pay to the ARC the total amount collected for the tickets less the commission earned by the agency. However, if the sale is by credit card, as the vast majority of such sales are, the entire amount goes to the ARC which subsequently pays the travel agency its commission. The failure to make the required weekly deposits to the ARC means a loss of ARC status and loss of the ability to sell airline tickets.

The Airport and Airway Revenue Act of 1970 imposes a federal tax on domestic airline tickets and a head tax on international flights outside of the United States. At the time this legislation was passed, a number of states were imposing various types of taxes on airlines and air travelers. As a result there was an immediate legal controversy over whether such state taxes were still enforceable in light of the new federal law. This legal battle over dual taxation was settled by the United States Supreme Court in 1972 in Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, 405 U.S. 707 (1972). In that case the Supreme Court ruled that states were not preempted by the 1970 federal statute. Congress thought the combination of state and federal taxes would interfere unduly with interstate commerce and enacted the Airport Development Acceleration Act of 1973 which, as amended, is currently codified at 49 U.S.C. sec. 1513. That section provides in its pertinent parts as follows:

"(a) no state .... shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons travelling in air commerce or on the sale of air transportation or the gross receipts derived therefrom... (emphasis added)

(b) ....nothing in this section shall prohibit a State .... from the levy or collection of taxes other than those enumerated in subsection (a) of section, including property taxes, net income taxes, franchise taxes and sales and use taxes on the sales of goods or services;"

Therefore the legality of a sales tax on the commission earned by travel agents depends on whether it is considered a tax or charge on "the sale of air transportation or on the gross receipts derived therefrom" which is prohibited by subsection (a) or whether it is considered a tax "other than enumerated in subsection (a)" which is permitted by subsection (b).

No court has directly considered the question of the taxation of commissions of travel agents for airline ticket sales. The cases which uphold sales taxes on airlines concern taxes which involve something other than the sale of airline tickets. However, the taxation of travel agents on the sale of airline tickets seems to clearly violate the language of the statute. This can not be avoided by imposing the tax on the agent rather than on the principal, the air carrier. It is still a charge on the proceeds from the sale of air transportation which is prohibited by the statute. It has been noted that the agencies of air carriers cannot be separated from their principals under the Federal Aviation Act. (Salem Transportation Co. v. Port Authority of New York and New Jersey, 611 F. supp. 254 (S.D.N.Y. 1985). Also travel agents and tour operators who arrange package tours have been characterized as "indirect air carriers" under that Act. (Arkin v. Trans. International Airlines, Inc., 568 F. S. supp. 11 (E.D.M.Y. 1985)) In Aloha Airlines v. Director of Taxation of Hawaii, 4664 U.S. 7 (1983) the Supreme Court's decision stated that even though Congress' primary intent in 1973 was to void head taxes, there is nothing in the statute or legislative history to indicate that the statutory preemption was restricted to that kind of particular tax. The court went on to state that the statute unambiguously prohibits a direct or indirect tax on the gross receipts from the sale of air transportation regardless of the description of the tax. Certainly this can not be avoided by taxing only the share of the proceeds of air transportation given to the agents of airline carriers.

Sec. 110-15-81.1 of the regulations seems to try to avoid

the foregoing problem by stating that the service of "reserving airline tickets" is subject to tax rather than the sale of airline tickets. However, travel agencies do not receive a commission on reserving an airline ticket. In fact, if an airline ticket is reserved by a travel agency and then actually purchased at the airport, the travel agency receives no compensation. Therefore, a travel agency's compensation comes exclusively from the sale of airline tickets not from the service of reserving airline tickets.

A second legal and practical problem is also raised under the regulations. Since section 110-15-81.3 states that a travel agency that earns commissions by arranging reservations for various businesses such as airlines, is rendering a marketing service subject to the sales and service tax. The regulations go on to state, "these persons (presumably the travel agencies) should either collect and remit the tax due on the services or obtain a direct pay permit from the entity for whom services were rendered." It may be that the regulations mistakenly think the travel agencies are agents for the customers of the airline and are compensated by the air travelers. As previously discussed their compensation comes from the ARC which is a clearing house set up by the airline companies. The airlines and the ARC have set uniform prices for the sale of tickets throughout the country, and a consumer cannot pay more for the same ticket in West Virginia than he would pay in New York or any other state. (In the case of international air taxes the ticket price is set by treaty and any variance from this price by a travel agency would be illegal.) The ARC has also set uniform rates for commissions for the sale of tickets and will not reimburse travel agents for any sales and service

tax levied on the services provided to the airlines, since the ARC and air carriers are clearly exempted by federal statute from paying any tax on the sale of airline tickets.

In summary, travel agencies can not collect a sales and service tax from the purchaser of airline tickets, since they are not performing (selling) their service for (to) such purchaser, they are agents of the air carriers and compensated by commissions which are a portion of the receipts from the sale of air transportation. Travel agents can not collect the sales and service tax from the air carriers since this is prohibited by federal statute and since the commissions are uniform under the ARC throughout the country. Therefore, the sales and service tax on travel agencies will not work as the State Tax Department has initially presumed, since the sales tax can not be collected from the purchasers of airline tickets and can not be collected from the air carriers.

#### Package Tours

Package tours are often sold by travel agencies although this is not a substantial portion of their business. Typically such a tour would be air transportation from a city in West Virginia to some destination, such as Florida, and would include a hotel room and return air fare. A fixed amount would be charged for this package of air and hotel. As a practical matter a travel agency could, in this instance, add on a sales and service tax as contemplated by sec. 110-15-81.2 although they are still the agents of the hotel, car rental company, etc. The problem with this is that when a package to Florida is sold for instance, Florida will collect a sales tax on the

sale of the same rooms, and West Virginia's taxation of this again will constitute double taxation of the same transaction. Therefore, West Virginia's taxation of extra territorial services provided by out of state hotels, automobile rental companies, etc. which are often subject to taxation in the state in which the travel services are performed would clearly be unconstitutional double taxation. (Complete Auto Transit, Inc. v. Bradley, 430 U.S. 274, 279 (1977)) It might be possible for West Virginia to constitutionally tax a travel agent's commission or gross profit on the sale of group tours, but it would be difficult, if not impossible, for West Virginia travel agents to pass on this tax since the package could be bought from numerous out of state travel agencies and no tax would be paid. Therefore it would put West Virginia's travel agencies at a competitive disadvantage to the extent of the tax which they would have to collect. As a result the travel agencies would simply work out some arrangement where the sale for all package tours was consummated from an out of state office and the gross profit then forwarded to their office in West Virginia.

Commission On Hotels, Car Rentals, Etc.  
Which Are Not Part Of A Package

The third type of business which travel agencies undertake is the sale of hotel rooms, car rentals, etc. which are not part of a fixed price package. Here again, the travel agents are the agents of such hotels, car rental companies, etc. and are compensated by their principals; they are not the agents of the public who are purchasing the travel service. The travel agency's commissions are based upon actual hotel room rentals or car rentals and not upon their making a reservation. Therefore, if a travel agency makes a reservation for a

family at a hotel in Florida for a week and the family in fact only spends two days, its commission is based on the two days that the family actually stayed. The hotel forwards to the travel agency the commission based on this actual occupancy. As a result the commission due can not be computed by the travel agency at the time the reservations are made. This means that the sales tax and service tax can not be calculated at that point and therefore can not be collected at that point. Also, the purchaser is not compensating or employing the travel agent, so it would not be appropriate under a sales and service tax even if possible.

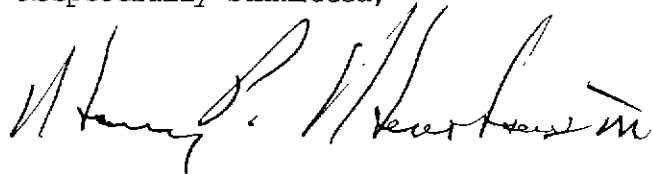
An out of state hotel or car rental company who may be paying a sales and service tax in their state will not add on to their charges any West Virginia sales and service tax since this would be unconstitutional double taxation. As a result there is no way for a West Virginia travel agency to pass on the sales and service tax as contemplated by the regulations. There is not even any method for travel agencies to calculate the amount of the sales and service tax due until they receive an accounting from the hotels, car rental agencies, etc. As a result the sales and service tax on travel agencies sale of hotel rooms, car rentals, etc. will not work as contemplated by the regulations, since the tax can not be passed on to the consumer for both practical and constitutional reasons.

#### Conclusion

I would like to emphasize that a number of states have taken the same approach that West Virginia has in its regulations under the sales and service tax. Texas, Florida and Arizona all have attempted

to impose a similar sales and service tax on travel agencies. When these states reviewed the problems in detail, all of these states came to the conclusion that such a tax was legally and practically unworkable. I hope that West Virginia will also come to the same conclusion. I know that the State Tax Department is under considerable pressure from a number of businesses regarding the extension of the sales and service tax to these businesses, but I sincerely believe that the situation of the travel agencies presents unique problems that have been recognized by other states. Consequently the American Society of Travel Agencies informs us that there is no state which currently imposes a sales and service tax on travel agencies.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Harry P. Henshaw, III".

Harry P. Henshaw, III

cc: National Travel Service  
West Virginia Society of Travel Agents  
American Society of Travel Agents  
AAA Travel Agency

HPH/hmym  
NTCOM.TXT