

WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION

Form #5

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

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

AGENCY: STATE TAX DIVISION TITLE NUMBER: 110

CITE AUTHORITY: W.Va. CODE § 11-10-5

RULE TYPE: PROCEDURAL \_\_\_\_\_ INTERPRETIVE X

EXEMPT LEGISLATIVE RULE \_\_\_\_\_  
CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES \_\_\_\_\_, NO X

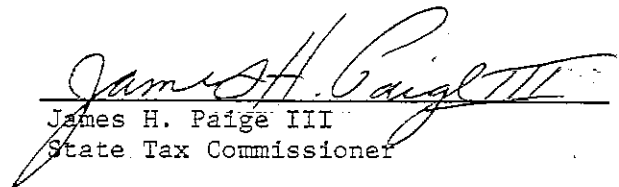
IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 15(I)4

TITLE OF RULE BEING ADOPTED: SERVICES OF CERTAIN COMMUNITY-BASED  
SERVICE ORGANIZATIONS EXEMPT FROM TAX

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS Oct. 2, 1992

  
James H. Paige III  
State Tax Commissioner

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AGENCY APPROVED  
WEST VIRGINIA INTERPRETIVE RULE  
DEPARTMENT OF TAX AND REVENUE  
TITLE 110  
SERIES 15(I).4  
1992

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

SERVICES OF CERTAIN COMMUNITY-BASED NONPROFIT  
SERVICE ORGANIZATIONS EXEMPT FROM TAX

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**§110-15(I)4-1. General.**

1.1 **Type of Rule.** -- This rule is an interpretive rule as defined in W.Va. Code §29A-1-2.

1.2 **Scope.** -- This interpretive rule explains and clarifies the exemption from consumers sales tax provided in W.Va. Code §11-15-11, as added by Com. Sub. for Senate Bill No. 348 (1992), exempting sales of taxable services by certain community-based service organizations such as YMCA's and YWCA's.

1.3 **Authority.** -- This interpretive rule is promulgated under authority of W.Va. Code §11-10-5.

1.4 **Filing Date.** --

1.5 **Effective Date.** -- 30 days after it is filed in the State Register.

1.6 **Citation.** -- This interpretive rule may be cited as Proposed 110 C.S.R. 15(I).4, §\_\_\_\_ (1992).

**§110-15(I)4-2. Interpretive Note.**

This interpretive rule shall be read *in pari materia* with the Consumers Sales and Service and Use Tax legislative regulations (110 C.S.R. 15, § 1 *et seq.*) previously promulgated by the Tax Commissioner pursuant to authority granted by the Legislature in W.Va. Code §64-7-6. The definitions, policies and procedures provided in 110 C.S.R. 15, §1 *et seq.* are equally applicable to this interpretive rule. Should there be any inconsistency between the promulgated legislative rules and this interpretive rule, the legislative rules shall control, except to the extent the legislative rules do not reflect an amendment to the consumers sales and use tax laws which is addressed in this or another interpretive rule promulgated by the Tax Commissioner as provided in article 3, chapter 29A of the West Virginia Code.

**§110-15(I)4-3. Definitions.** -- Unless a specific definition is provided in this section, terms used in this rule are defined as provided in legislative rule 110 C.S.R. 15, §1 et seq., unless the context in which the term is used clearly requires a different meaning. The following terms shall have the meaning ascribed herein, and shall apply in the singular as well as in the plural.

3.1 "Aged" means individuals who are older than sixty-five (65) years of age.

3.2 "Charitable" means of, or for, charity.

3.3 "Charity" means the provision of services or tangible personal property, whether for free, or at or below cost, which assists in the relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deteriorated and juvenile delinquency.

3.4 "Education" means the moral, intellectual and physical training of an individual.

3.5 "Educational" means of, or for, education.

3.6 "Family" means a collective body of two (2) or more individuals related by blood or marriage and living together in one residential unit as their common home.

3.7 "Health and fitness" means physical health and fitness of individuals but does not include mental health and fitness or spiritual health and fitness.

3.8 "Youth" means individuals less than eighteen (18) years of age.

**§110-15(I)4-4. Applicability of Consumers Sales Tax.**

4.1 **General Rule.** -- The consumers sales and service tax is imposed upon the sale of tangible personal property or selected services. All sales are presumed to be taxable unless the sale is either excepted or exempt from the tax.

4.2 **Exemption for Taxable Services Provided by Certain Community-Based Nonprofit Service Organizations.** -- Sales of taxable services by a community-based nonprofit corporation or organization that meets the requirements specified in subsection

4.3 of this rule are exempt from consumers sales tax, unless the gross income derived from the sale is taxable under Section 511 of the Internal Revenue Code of 1986, as amended.

4.2.1 This exemption does not apply to sales of tangible personal property.

4.2.2 This exemption does not apply when the gross income derived from selling the service is taxable under Section 511 of the Internal Revenue Code.

4.2.3 This exemption does not apply to the sale of taxable services by a non-qualifying corporation or organization even though the sale occurs or takes place through the sponsorship of or at the facilities of a qualifying corporation or organization. To illustrate, the charges imposed by a business which provides scuba diving lessons to its students at a YMCA are taxable even though the YMCA receives a portion of the charges paid by the participants. In contrast, if the YMCA contracts with a third party to provide scuba diving lessons at the YMCA's pool but the students contract with the YMCA for the lessons rather than with the third party, the charges paid by the students will be exempt.

4.2.4 This exemption does not apply to a 501(c)(3) hospital or nursing home.

**4.3 Requirements for Exemption.** -- The exemption provided in W. Va. Code §11-15-11 does not apply unless the community-based service organization satisfies all of the requirements specified in this subsection 4.3.

4.3.1 The corporation or organization must be exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

4.3.1.1 The corporation or organization must have a determination letter from the Internal Revenue Service finding that it is exempt from federal income tax under Section 501(c)(3), and that letter must be in effect for the current taxable year.

4.3.2 The corporation or organization must be organized and operated primarily for charitable or educational purposes and its activities and programs must contribute importantly to (1) promoting the general welfare of youth, families and the aged, (2) improving health and fitness, and (3) providing recreational opportunities to the public.

4.3.2.1 The charitable or educational purposes for which the corporation or organization is organized must be stated in the corporation's or organization's articles of incorporation or by-laws.

4.3.2.2 A corporation or organization is not operated primarily for charitable or educational purposes unless the normal usage of its facilities and programs are predominantly for charitable or educational purposes, as those terms are defined in this rule. See Section 110-15(I)4-3.

4.3.3 The corporation or organization must offer memberships or participation in its programs and activities to the general public, and the charges, fees or dues for membership or participation must allow its programs and activities to be accessible by a reasonable cross-section of the community.

4.3.3.1 The programs and activities of the corporation or organization must be available to the general public, regardless of ability to pay for participation.

4.3.3.2 The memberships, programs and activities must be obtainable regardless of race, creed, color or national origin.

4.3.4 The corporation or organization must offer financial assistance, on a regular and on-going basis, to individuals unable to afford the corporation's or organization's membership dues, or its fees or charges, imposed for participation in any of its programs or activities.

4.3.4.1 The corporation or organization must have official guidelines or rules on eligibility for financial assistance.

4.3.4.2 While the corporation or organization may require sufficient information to satisfy it that financial assistance is needed, the standards for determining the awarding of financial assistance may not be such that only those individuals who are destitute qualify for such assistance.

4.3.4.3 Financial assistance to qualifying individuals may take the form of reduced dues, fees or charges, or the provision of free taxable services.

**4.4 Method of Claiming Exemption.** -- A community-based nonprofit service organization of corporation that qualifies for

this exemption is not required to obtain an exemption certificate or any other proof of exemption from persons participating in the organization's tax exempt activities.

**4.5 Organization Required to Keep Accurate Records.** -- A community-based nonprofit service organization is required to keep accurate books and records to support the accuracy of gross receipts it claims are exempt from consumers sales tax and the basis for the exemption(s) claimed.

**4.6 Effective Date of Exemption.** -- Exemption 11-15-11 takes effect June 5, 1992.



State of West Virginia  
Department of Tax and Revenue

GASTON CAPERTON  
GOVERNOR

TAX DIVISION

P. O. Box 2389  
Charleston, WV 25328-2389

JAMES H. PAIGE III  
SECRETARY

CONSENT TO FILE RULE

September 1, 1992

RECEIVED  
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OFFICE OF THE SECRETARY  
SECRETARY

To Whom It May Concern:

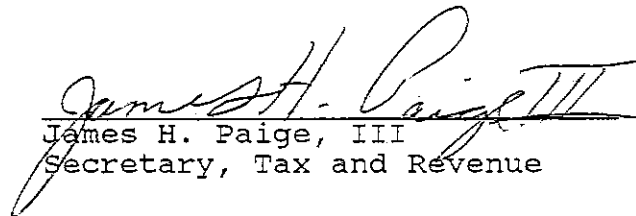
Title of Rule: Services of Certain Community-Based Service  
Organizations Exempt From Tax

Title Number: 110

Series Number: 15(I)4

Pursuant to West Virginia Code § 5F-2-2(a), the undersigned  
hereby consents to the filing of the foregoing rule.

Signed this 1st day of September, 1992.

  
James H. Paige, III  
Secretary, Tax and Revenue



BOWLES RICE  
MCDAVID GRAFF & LOVE

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qualify for an exemption from sales tax on taxable services, including that its programs be offered to the general public and are accessible to a reasonable cross-section of the community and that it offer financial assistance on a regular and on-going basis. The statute does not require that all services be provided free of charge. However, the reference to "gift" in defining the term "charitable" might be otherwise construed and for this reason we propose the following possible alternative definitions.

A. Restatement of Trusts Definition.

The Restatement of Trusts defines the term "charitable purposes" to include the concept of community benefit. As such, we believe that such a definition would be more consistent with the purposes and intent of W.Va Code 11-15-11.

The Restatement definition of charitable purposes is as follows:

Charitable purposes include

- (a) the relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion;
- (d) the promotion of health;
- (e) governmental and municipal purposes;
- (f) other purposes the accomplishment of which is beneficial to the community.

B. IRS Regulation Definition.

As a second alternative, another definition of charity for your consideration would be to adopt a definition similar to that contained in IRS regulations governing charitable organizations. Treas. Reg. § 1.501(c)(3)-1(d)(2) states that the term "charitable" is to be used in its generally accepted legal sense and includes the promotion of

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social welfare. A definition based on federal regulations would also be consistent with the general sales tax regulation definition of "charitable organization" in 110-15-2.12, which tracks the federal definition of Section 501(c)(3) organizations.

We therefore propose the following possible alternative definition of "charitable" based on federal regulations governing charitable organizations and expressly including promotion of health:

The term "charitable" is to be applied in its generally accepted legal sense, including relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening the burdens of Government; promotion of health; and promotion of social welfare.

Either of the above alternative proposals would offer a definition of "charity" that would eliminate any potential future confusion over the term "gift" as used in the current definition of "charity" in the proposed regulations.

II. Requirement that Programs be Available Without Ability to Pay

We also recommend deletion of proposed § 110-15(I)4-4.3.3.1, which requires that programs and activities "must be available to all members of the general public, regardless of ability to pay for participation."

The above-quoted language is susceptible to the interpretation that YMCAs and similar groups must offer unlimited free services, regardless of their financial ability to do so. While we do not anticipate that the YMCAs would be so overwhelmed by the request for financial aid that they must be compelled to deny assistance, we believe it would be imprudent for them to be committed to unlimited free services. There is nothing in the

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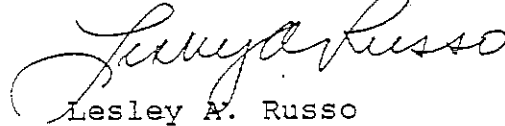
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statute to support this requirement. The statute requires only that fees and dues be affordable by a cross-section of the public and that financial assistance be available on a regular and ongoing basis. Both of these requirements are fully set forth in the statute and the proposed regulations. We would therefore recommend that the quoted language set forth above be stricken from the proposed regulations.

We would be happy to discuss our comments on the proposed regulations with the appropriate members of the Legal Division. In addition, please let me know if we can provide you with any information or additional comments in your consideration of finalizing the proposed regulations.

Very truly yours,

BOWLES RICE MCDAVID GRAFF & LOVE



Lesley A. Russo

LAR/cc  
cc: James Paige, Secretary  
West Virginia YMCA  
Executive Directors

55148

COMMENTS AND RESPONSES TO  
COMMUNITY-BASED SERVICE ORGANIZATION'S EXEMPTION

COMMENT 1: The definition of "charity" should be amended to remove the reference to a "gift."

RESPONSE: The definition of "charity" was amended to remove "gift."

COMMENT 2: The requirement that programs be available regardless of ability to pay should be deleted.

RESPONSE: The requirement that programs be available to all members of the general public, regardless of ability to pay was eliminated.