



OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

Betty Ireland

Secretary of State

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

December 30, 2005

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: State Tax Department

RULE: New Rule, 110CSR15H, Consumers Sales & Service Tax & Use Tax -
Reduced Sales Tax on Food

DATE FILED AS AN EMERGENCY RULE: December 22, 2005

DECISION NO. 11-05

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

A handwritten signature in cursive script, appearing to read "Betty Ireland", written over a horizontal line.

BETTY IRELAND
Secretary of State

Building 1, Suite 157-K
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EMERGENCY RULE DECISION
(ERD 11-05)

AGENCY: State Tax Department
RULE: New Rule, 110CSR15H, Consumers Sales & Service Tax & Use Tax
- Reduced Sales Tax on Food
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- par. 1 The State Tax Department (Tax) has filed the above new rule as an emergency rule.
- par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Tax filed this emergency rule with supporting documents with the Secretary of State December 22, 2005 and with the LRMRC December 22, 2005.
- par. 7 It is the determination of the Secretary of State that the Tax has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. Code §11-15-31 reads:

§11-15-3a. Rate of tax on food and food ingredients intended for human consumption; reduction of tax beginning January 1, 2006; exceptions; legislative, emergency and other rules.

(a) Rate of tax on food and food ingredients. -- Notwithstanding any provision of this article or article fifteen-a of this chapter to the contrary, the rate of tax on sales, purchases and uses of food and food ingredients intended for human consumption after the thirty-

first day of December, two thousand five, shall be five percent of its sales price, as defined in section two, article fifteen-b of this chapter.

(b) Calculation of tax on fractional parts of a dollar. -- The tax computation under this section shall be carried to the third decimal place, and the tax rounded up to the next whole cent whenever the third decimal place is greater than four and rounded down to the lower whole cent whenever the third decimal place is four or less. The seller may elect to compute the tax due on a transaction on a per item basis or on an invoice basis provided the method used is consistently used during the reporting period.

(c) Exceptions. -- The reduced rate of tax provided in this section shall not apply to sales, purchases and uses by consumers of "Prepared food," as defined in article fifteen-b of this chapter, which shall remain taxable at the general rate of tax specified in section three of this article and section two, article fifteen-a of this chapter.

(d) Federal food stamp and women, infants and children programs, other exemptions. -- Nothing in this section shall affect application of the exemption from tax provided in section nine of this article for food purchased by an eligible person using food stamps, electronic benefits transfer cards or vouchers issued by or pursuant to authorization of the United States Department of Agriculture to individuals participating in the federal food stamp program, by whatever name called, or the women, infants, and children (WIC) program, or application of any other exemption from tax set forth in this article or article fifteen-a of this chapter.

(e) Legislative rules; emergency rules. -- The Tax Commissioner may promulgate legislative rules and emergency rules explaining and implementing this section, which rules shall be promulgated in accordance with the provisions of article three, chapter twenty-nine-a of this code. The authority to promulgate rules includes authority to amend or repeal those rules. If proposed legislative rules for this section are filed in the State Register before the fifteenth day of December, two thousand five, those rules may be promulgated as emergency legislative rules, as provided in article three of said chapter twenty-nine-a.

par. 9 It is the determination of the Secretary of State that the Tax has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Tax are as follows:

On September 13, 2005, the Legislature enacted HB401 which reduced from 6% to 5% the Consumers Sales and Service Tax and Use Tax imposed on the sale of food and food ingredients sold for human consumption; however, the reduction does not apply to the sale of prepared food. The reduction in tax is effective January 1, 2006.

The legislation enacting the reduction in tax was enacted subsequent to the time frame established in WV Code §29A-3-1 et seq., for the filing of a proposed legislative rule; as a result the earliest the proposed rule could proceed through the rule-making procedure is the 2007 Legislative Session. However, due to the fact the reduction in tax applies to sales of food and food ingredients but not to sales of prepared food, there could be considerable confusion among members of the public as well as among vendors, especially those vendors that use computerized cash registers.

It is because of the possible confusion and complexity that this rule must be effective January 1, 2006, the date the tax reduction is effective. The only means to accomplish this is through the use of an emergency rule. Additionally, WV Code §11-15-3a(3) the Tax Commissioner to "promulgate legislative rules and emergency rule explaining and implementing" the reduction in the rate of tax imposed on the sales, purchases and uses of food and food ingredients intended for human consumption.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . mandated by the Legislature and "time limitation"

par. 14 This decision shall be cited as Emergency Rule Decision 11-05 or ERD 11-05 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the State Tax Department, the Attorney General and the Legislative Rule Making Review Committee.



BETTY IRELAND
Secretary of State

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