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SECRETARY OF STATE

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May 27, 2009

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: State Tax Department

RULE: 110CSR15J, New Rule, Consumers Sales and Service Tax and Use Tax Exemptions Mandated Pursuant to Executive Order 10-09 Referring to Purchases Of Mobile Homes, Building Materials and Supplies, Bottled Water, Cleaning Supplies and other Supplies used for Flood Relief; Affordable Housing Trust Fee Not Exempt

DATE FILED AS AN EMERGENCY RULE: May 22,2009

DECISION NO. 3-09

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 that reads "Natalie E. Tennant".

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 3-09)

AGENCY: State Tax Department
RULE: 110CSR15J, New Rule, Consumers Sales and Service Tax and Use Tax Exemptions Mandated Pursuant to Executive Order 10-09 Referring to Purchases Of Mobile Homes, Building Materials and Supplies, Bottled Water, Cleaning Supplies and other Supplies used for Flood Relief; Affordable Housing Trust Fee Not Exempt
DATE FILED AS AN EMERGENCY RULE: May 22,2009:

- par. 1 The State Tax Department (Department) 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 Department filed this emergency rule with supporting documents with the Secretary of State May 22, 2009 and with the LRMRC May 22, 2009.
- par. 7 It is the determination of the Secretary of State that the Department 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 §11-10-5 reads:

The tax commissioner shall administer and enforce each tax to which this article applies and, in connection therewith, shall prescribe all necessary forms. The tax commissioner may make all needful rules and regulations for

the taxes to which this article applies as provided in the State Administrative Procedures Act in chapter twenty-nine-a of this code: Provided, That all rules and regulations of the tax commissioner presently in effect on the effective date of this article shall remain in full force and effect until amended or repealed by the tax commissioner in the manner prescribed by law.

par. 9

W. Va. Code §15-5-6 further states:

The provisions of this section shall be operative only during the existence of a state of emergency. The existence of a state of emergency may be proclaimed by the Governor or by concurrent resolution of the Legislature if the Governor in such proclamation, or the Legislature in such resolution, finds that an attack upon the United States has occurred or is anticipated in the immediate future, or that a natural or man-made disaster of major proportions has actually occurred or is imminent within the state, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section. Any such emergency, whether proclaimed by the Governor or by the Legislature, shall terminate upon the proclamation of the termination thereof by the Governor, or the passage by the Legislature of a concurrent resolution terminating such emergency.

So long as such state of emergency exists, the Governor shall have and may exercise the following additional emergency powers:

(a) To enforce all laws, rules and regulations relating to the provision of emergency services and to assume direct operational control of any or all emergency service forces and helpers in the state;

(b) To sell, lend, lease, give, transfer or deliver materials or perform functions relating to emergency services on such terms and conditions as he or she shall prescribe and without regard to the limitations of any existing law and to account to the State Treasurer for any funds received for such property;

(c) To procure materials and facilities for emergency services by purchase, condemnation under the provisions of chapter fifty-four of this code or seizure pending institution of condemnation proceedings within thirty days from the seizing thereof and to construct, lease, transport, store, maintain, renovate or distribute such materials and facilities. Compensation for property so procured shall be made in the manner provided in chapter fifty-four of this code;

(d) To obtain the services of necessary personnel, required during the emergency, and to compensate them for their services from his or her contingent funds or such other funds as may be available to him or her;

(e) To provide and compel the evacuation of all or part of the population from any stricken or threatened area within the state and to take such steps as are necessary for the receipt and care of such evacuees;

(f) To control ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein;

(g) To suspend the provisions of any regulatory statute prescribing the

procedures for conduct of state business or the orders, rules or regulations of any state agency, if strict compliance therewith would in any way prevent, hinder or delay necessary action in coping with the emergency;

(h) To utilize such available resources of the state and of its political subdivisions as are reasonably necessary to cope with the emergency;

(i) To suspend or limit the sale, dispensing or transportation of alcoholic beverages, firearms, explosives and combustibles; (j) To make provision for the availability and use of temporary emergency housing; and

(k) To perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population.

No powers granted under this section may be interpreted to authorize the seizure or confiscation of a firearm from a person unless that firearm is unlawfully possessed or unlawfully carried by the person, or the person is otherwise engaged in a criminal act.

par. 10 It is the determination of the Secretary of State that the Department has not exceeded its statutory authority in promulgating this emergency rule.

par. 11 (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. 12 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. 13 The facts and circumstances as presented by the Department are as follows:

The rule is necessary to provide for additional definitions and per se exemptions for the consumer sales and service tax and use tax in compliance with Executive order No. 10-09 regarding the state of emergency in Boone, Logan, McDowell, Mingo, Raleigh and Wyoming Counties, West Virginia.

par. 14 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). . . "Prevent substantial harm to the public interest."

par. 15

This decision shall be cited as Emergency Rule Decision 3-09 or ERD 3-09 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.



NATALIE E. TENNANT
Secretary of State

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