

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In this Box

2011 AUG 19 PM 3:22

OFFICE OF VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: State Tax Department TITLE NUMBER: 110

RULE TYPE: Interpretive CITE AUTHORITY W. Va. Code §11-10-5 and 11-15-9m

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 RULE BEING PROPOSED: 15J

TITLE OF RULE BEING PROPOSED: Per se Exemption for Purchases by Contractors Performing Contracting for Government-owned Water or Sewer Utilities or Public Service District Water or Sewer Utilities.

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 SEPTEMBER 23, August 31, 2011 AT 5:00 pm. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Legal Division
State Tax Department
P.O. Box 1005
Charleston, WV 25324-1005

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


Charles O. Lorensen
Cabinet Secretary of the Department of Revenue

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

**PROPOSED
TITLE 110
INTERPRETIVE RULE
SERIES 15J
PER SE EXEMPTION FOR PURCHASES BY CONTRACTORS PERFORMING
CONTRACTING FOR GOVERNMENT-OWNED WATER OR SEWER UTILITIES OR
PUBLIC SERVICE DISTRICT WATER OR SEWER UTILITIES**

RULE SUMMARY

The rule explains and clarifies the per se exemption from Consumers Sales and Service Tax and Use Tax for purchases by contractors providing contracting services to government-owned or public service district water or sewer utilities.

Section 110-15J-2 provides an interpretive note that requires the rule to be read in pari materia with 110 C.S.R. 15, which is the general rule relating to Consumers Sales and Service Tax and Use Tax.

Section 110-15J-3 provides relevant definitions.

Section 110-15J-4 provides the per se exemption as well as specifically excluding its use by a privately owned water utility or privately owned sewer utility.

Section 110-15J-5 states the purchases to which the per se exemption is applicable.

Section 110-15J-6 provides guidance as to how the per se exemption may be claimed.

Section 110-15J-7 states the records retention requirements applicable to both the vendor and the contractor.

Section 110-15J-8 provides the penalties applicable to the unauthorized use of the exemption.

**PROPOSED
TITLE 110
INTERPRETIVE RULE
SERIES 15J
PER SE EXEMPTION FOR PURCHASES BY CONTRACTORS PERFORMING
CONTRACTING FOR GOVERNMENT-OWNED WATER OR SEWER UTILITIES OR
PUBLIC SERVICE DISTRICT WATER OR SEWER UTILITIES**

STATEMENT OF CIRCUMSTANCES

In accordance with West Virginia Code § 11-15-9(b)(2), sales of services, machinery, supplies and materials directly used or consumed in the activity of the provision of public utility services by a public utility are exempt from Consumers Sales and Service Tax and Use Tax. In accordance with West Virginia Code § 11-15-8d(b), a person performing contracting may claim the exemption if the person for which the contracting is occurring can claim the exemption. This is generally claimed by the contractor asserting the pass through exemption through use of the purchaser's direct pay permit.

Utilities quite often do not want to obtain the direct pay permit because even if not used because of no purchases, it still entails filing a "make work" monthly or quarterly return showing essentially no tax is due. In such situations, there is no current method for the exemption available to a public service district to be passed through to the contractor.

West Virginia Code § 11-15-9m authorizes the Tax Commissioner by rule to specify the exemptions for which an exemption certificate or a direct pay permit are not required. The Tax Commissioner has determined that designating tax exempt government owned water and sewer utilities and Public Service District water and sewer utilities as per se exempt will assist the contracting activity by: allowing the contractors to avoid having to pay consumers sales and service tax and use tax on contract purchases where the utility did not have a direct pay permit, and then seek a refund of tax paid; allowing the Taxpayer to avoid all of the paperwork and costs of preparation and submission of these claims for refund and the time costs of waiting for refunds; and allowing the Tax Department to avoid the paperwork and processing costs for these refunds.

This rule accomplishes those results.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Per se Exemption for Purchases by Contractors Performing Contracting for Government-owned Water or Sewer Utilities or Public Service District Water or Sewer Utilities.

Type of Rule: Legislative Interpretive Procedural

Agency: State Tax Department

Address: 1001 Lee Street

Charleston, WV 25301

Phone Number: (304) 558-5330 Email: _____

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The rule explains and clarifies the per se exemption from Consumers Sales and Service Tax and Use Tax for purchases by contractors providing contracting services to government-owned or public service district water or sewer utilities, and will have no effect on costs or revenues of State government.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	\$0	\$0	\$0
Personal Services	\$0	\$0	\$0
Current Expenses	\$0	\$0	\$0
Repairs & Alterations	\$0	\$0	\$0
Assets	\$0	\$0	\$0
Other	\$0	\$0	\$0
2. Estimated Total Revenues	\$0	\$0	\$0

Rule Title: Per se Exemption for Purchases by Contractors Performing Contracting for Government-owned Water or Sewer Utilities or Public Service District Water or Sewer Utilities.

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues:

There should be no increase or decrease in fees.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

The rule merely explains and clarifies the per se exemption from Consumers Sales and Service Tax and Use Tax for purchases by contractors providing contracting services to government-owned or public service district water or sewer utilities. The purchases affected are currently not subject to Sales Tax, and there will be no change in that status.

Date: 7/14/11

Craig A. Griffith
State Tax Commissioner

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Per se Exemption for Purchases by Contractors Performing Contracting for Government-owned Water or Sewer Utilities or Public Service District Water or Sewer Utilities.

Type of Rule: Legislative Interpretive Procedural

Agency: State Tax Department

Address: 1001 Lee Street
Charleston, WV 25301

Phone Number: (304) 558-5330 Email: _____

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The rule explains and clarifies the per se exemption from Consumers Sales and Service Tax and Use Tax for purchases by contractors providing contracting services to government-owned or public service district water or sewer utilities, and will have no effect on costs or revenues of State government.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	\$0	\$0	\$0
Personal Services	\$0	\$0	\$0
Current Expenses	\$0	\$0	\$0
Repairs & Alterations	\$0	\$0	\$0
Assets	\$0	\$0	\$0
Other	\$0	\$0	\$0
2. Estimated Total Revenues	\$0	\$0	\$0

Rule Title: Per se Exemption for Purchases by Contractors Performing Contracting for Government-owned Water or Sewer Utilities or Public Service District Water or Sewer Utilities.

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues:


There should be no increase or decrease in fees.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

The rule merely explains and clarifies the per se exemption from Consumers Sales and Service Tax and Use Tax for purchases by contractors providing contracting services to government-owned or public service district water or sewer utilities. The purchases affected are currently not subject to Sales Tax, and there will be no change in that status.

Date: 7/14/11



Craig A. Griffith
State Tax Commissioner

FILED

2011 AUG 19 PM 3: 22

**PROPOSED
TITLE 110
INTERPRETIVE RULE
WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE**

OFFICE OF THE
SECRETARY OF STATE

SERIES 15J

**PER SE EXEMPTION FOR PURCHASES BY CONTRACTORS PERFORMING
CONTRACTING FOR GOVERNMENT-OWNED WATER OR SEWER UTILITIES OR
PUBLIC SERVICE DISTRICT WATER OR SEWER UTILITIES**

§110-15J -1. General.

1.1. Scope. – This interpretive rule specifies, explains and clarifies the per se exemption from Consumers Sales and Service Tax and Use Tax for purchases by contractors providing contracting services to government-owned or public service district water or sewer utilities.

1.2. Authority. – W. Va. Code §§ 11-10-5 and 11-15-9m.

1.3. Filing Date. –

1.4. Effective Date. –

§110-15J-2. Interpretive Note.

2.1. This interpretive rule incorporates by reference the Department's rule, Consumers Sales and Service Tax and Use Tax, 110 C.S.R. 15, and shall be read in pari materia with that rule. The definitions, policies, and procedures provided in 110 C.S.R. 15 are equally applicable to purchases made under this interpretive rule: Provided, That to the extent that this interpretive rule differs from 110 C.S.R. 15, then for the purpose of the per se exemption for purchases by certain contractors providing specified contracting services to government-owned or public service district water or sewer utilities, this interpretive rule shall control. However, for all other purposes, 110 C.S.R. 15 governs the application of the Consumers Sales and Service Tax and Use Tax.

§110-15J-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 in this rule.

3.1. "Government-owned water utility" and "government-owned sewer utility" means a water system or a sewer system, or both, that is acquired, constructed, or established by a municipality or a county and operated under the authority of West

Virginia Code §§ 8-19-1 et seq., or 8-20-1 et seq., and includes the provision of stormwater services

3.2. "Public service district water utility" or "public service district sewer utility" means a water utility or sewer utility constructed or purchased and maintained and operated by a public service district created and operated under the authority of West Virginia Code §§ 16-13A-1 et seq., and includes the provision of stormwater services

3.3. "Public utility" means a government-owned water utility, a government-owned sewer utility, a public service district water utility or a public service district sewer utility, or any combination thereof.

§110-15J-4. Applicability of Consumers Sales and Service Tax and Use Tax.

4.1. General Rule. – The Consumers Sales and Service Tax and Use Tax is imposed upon the sale of tangible personal property and selected services. All sales are presumed to be taxable unless the sale is either excepted or exempt from the tax.

4.2. Contractor and Subcontractor Per Se Exemption. -- Purchases of services, machinery, supplies, or materials, except gasoline and special fuel, to be directly used or consumed in the construction, alteration, repair or improvement of a new or existing public utility structure or system by a contractor or subcontractor providing contracting services to a public utility are per se exempt from Consumers Sales and Service Tax and Use Tax.

4.3. Exclusion From Per Se Exemption. -- This per se exemption is not available to and may not be claimed by a privately owned water utility or privately owned sewer utility, or by a contractor providing contracting services to a privately owned water utility or privately owned sewer utility.

§110-15J-5. Application of per se exemption.

5.1. The per se exemption applies to purchases of tangible personal property that remain on the construction site after the construction activity is completed.

5.1.1. Rentals of cranes, bulldozers, and other equipment rented only for use on the specifically identified job by the contractor, or the hiring of a subcontractor to provide bulldozer services, crane services, etc., with an operator of the machine also qualify for the per se exemption.

5.1.2. Purchases by a subcontractor, who is working for a prime contractor, where the prime contractor is entitled to this per se exemption, are also exempt in the same manner and with the same restrictions as are applicable to the prime contractor.

5.2. The per se exemption does not apply to purchases of tools, bulldozers, cranes, etc. that become the property of the construction contractor or subcontractor and are removed from the site after construction is completed.

§110-15J-6. Method of claiming the exemption.

6.1. Contractors or subcontractors making qualified purchases may claim the per se exemption by one of two methods:

6.1.1. The contractor or subcontractor may pay the appropriate amount of Sales Tax and claim a refund from the Tax Department; or

6.1.2. The contractor or subcontractor may use Form WV CST-286, "Special Contractors Exempt Purchases Certificate" using the public utility's tax identification number for each qualified purchase.

§110-15J-7. Records required.

7.1. Vendors shall obtain and retain the following records for each transaction claimed to be per se exempt from Consumers Sales and Service Tax or Use Tax:

7.1.1. A properly completed Form WV CST-286;

7.1.2. Demonstrable proof that the purchaser has a valid Business Registration Certificate; and

7.1.3. A copy of the sales slip or purchase invoice evidencing the transaction and showing the purchaser's name, address and Business Registration Certificate Number.

7.1.4. The vendor shall maintain a reasonable method of record keeping that associates each per se exempt sale transaction to the customer using the Special Contractors Exempt Purchases Certificate.

7.1.5. The vendor shall retain each Special Contractors Exempt Purchases Certificate for at least three years after the due date of the last tax return to which it relates, or at least three years after the date when such return was filed, if later.

7.2. Requirements for contractors and subcontractors:

7.2.1. The contractor or subcontractor, as applicable, is required to possess a valid Business Registration Certificate.

7.2.2. The contractor or subcontractor, as applicable, shall properly complete the WV CST-286 by properly signing the form and checking all applicable boxes.

7.2.3. The contractor or subcontractor, as applicable, shall retain the sales slip or purchase invoice evidencing each transaction and showing the vendor's name, address and Business Registration Certificate Number.

7.2.4. The above records must be retained for at least three years after the due date of the last tax return to which it relates, or at least three years after the date when such return was filed, if later.

§110-15J-8. Unauthorized use of the exemption; penalties.

8.1. A vendor or purchaser who engages in any business activity in West Virginia without possessing a valid Business Registration Certificate may be subject to criminal and civil penalties.

8.2. A contractor's Business Registration Certificate (and any duplicates) may be suspended or revoked if the contractor, or someone acting on the contractor's behalf, willfully issues the Special Contractors Exempt Purchases Certificate to make a tax exempt purchase that is not used in a tax exempt manner.

8.3. When property or services are purchased tax exempt with a Special Contractors Exempt Purchases Certificate, but later used or consumed in a non-exempt manner, the purchaser shall pay to the West Virginia State Tax Department the proper amount of Consumers Sales and Service Tax or Use Tax on the purchase price.

8.3.1 A penalty of up to 50% of the tax shall be added to the amount of Consumers Sales and Service Tax or Use Tax for the misuse of the Special Contractors Exempt Purchases Certificate with intent to evade the Sales or Use Tax.

8.3.2 The Consumers Sales and Service Tax or Use Tax on a false or fraudulent use of the Special Contractors Exempt Purchases Certificate may be assessed at any time subsequent to such use.

8.4. The willful issuance of a false or fraudulent Special Contractors Exempt Purchases Certificate with the intent to evade Consumers Sales and Service Tax or Use Tax is a misdemeanor.

8.5. The tax, interest and penalties are in addition to any other penalty imposed by law upon the willful misuse of the Special Contractors Exempt Purchases Certificate.