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December 18, 2001

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

FILED
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OFFICE WEST VIRGINIA
SECRETARY OF STATE

AGENCY: State Tax Department

RULE: Amendment, 110CSR17, Tobacco Products Excise Tax

DATE FILED AS AN EMERGENCY RULE: December 3, 2001

DECISION NO. 14-01

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.

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EMERGENCY RULE DECISION
(ERD 14-01)

AGENCY: State Tax Department
RULE: Amendment, 110CSR17, <u>Tobacco Products Excise Tax</u>
FILED AS AN EMERGENCY RULE: December 3, 2001

par. 1 The State Tax Department (Department) has filed the above amendments to an existing 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) <u>Procedural Compliance</u>: 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 December 3, 2001 and with the LRMRC December 3, 2001.

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 & 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 & regulations for the taxes to which this article applies as provided in the State Administrative Procedures Act in §29A-1-1 et seq. of this code: Provided, That all rules & 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 It is the determination of the Secretary of State that the Department 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 Department are as follows:

The excise tax imposed on tobacco products other than cigarettes is effective January 1, 2002. However, the legislative rule governing the administration of the tax will not become effective until authorized by the Legislature during the 2002 Legislative Session and then final filed with the Secretary of State. As the legislative authorization generally does not occur until toward the end of the legislative session, the legislative rule will not become effective until approximately May 1, 2002, a full 4 months after the tax becomes effective. As a result, there will be a minimum of 4 months during which there will be no rules in effect with the administration of the tax as it relates to tobacco products other than cigarettes.
1. WV Code §11-17-5 requires the excise tax to be paid using the invoice method, but there is no guidance on when the tax liability is incurred.
Section 4.6.1 of the rule states the tax is to be separately stated on the invoice when the tobacco products are sold by the wholesaler, not when the tobacco products are first purchased by a wholesaler in this State.

2. WV Code §11-17-3 requires the Tax to be imposed on "each article or item of tobacco product other than cigarettes sold by the wholesaler or subjobber dealer, whether or not sold at wholesale, or if not sold, then at the same rate upon the use by the wholesaler or dealer." The term "use" is quite broad in effect and may very well result in subjecting some transactions to tax that should not be taxed.
Section 4.6.1 provides necessary guidance in that it states that the "wholesaler shall pay the correct amount of excise tax on any tobacco product that is sold in WV or removed from inventory for any purpose other than to return the other tobacco product to the manufacturer or be exported to another state." This will assure that the following two types of transactions will not be subject to tax; return of the other tobacco product to the manufacturer or exporting the tobacco product to another state. However, without the emergency rule, those transactions, which are forms of use by the wholesaler, will otherwise be taxable because there is nothing to prevent that action.
3. When stamped cigarettes are returned to the manufacturer, the wholesaler is authorized by WV Code §11-17-10 to apply for a refund of 95% of the face value of the tax stamps. Even though it was the intent of the Legislature to provide for a similar refund authorization for other tobacco products as is available for cigarettes, the refund authorization was not clearly stated in the legislation. As a result, wholesalers will be forced to absorb the amount of the tax that was paid when those tobacco products other than cigarettes that were sold by the wholesaler to a retailer are subsequently returned to the wholesaler for return to the manufacturer.
Section 4.6.4, which was inserted at the request of the Legislative Rule-Making Review committee, authorizes treatment similar to that available when stamped cigarettes are returned. This treatment will not be in effect until the earlier of the emergency rule becoming effective or the legislative rule becoming effective; however, if the treatment is not available until the legislative rule becomes effective, there will be no means available for a refund of any tax paid during the intervening months.
4. WV Code §11-17-4 may be interpreted as applying the excise tax to all tobacco products on hand or in inventory after July 1, 2001. However the excise tax is not imposed on tobacco products other than cigarettes until January 1, 2002.
Section 4.7 of the emergency rule clarifies the situation by applying the excise tax to the other tobacco products on hand or in inventory on the effective date of January 1, 2002. The clarification is necessary in order to assure correct reporting & payment by the affected businesses.

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). . . "to prevent substantial harm to the public interest" par. 14 This decision shall be cited as Emergency Rule Decision 14-01 or ERD 14-01 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.

JOE MANCHIN, III
Secretary of State

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