



STATE OF WEST VIRGINIA

Department of Revenue
State Tax Department

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Governor

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State Tax Commissioner

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DEPT. OF REVENUE
SECRETARY OF STATE
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WEST VIRGINIA STATE TAX DEPARTMENT
Administrative Notice 10-25

SUBJECT: Consumer Sales And Service Tax And Use Tax Professional Services Exception For Persons Certified As Enrolled Agents By The Internal Revenue Service

BACKGROUND: West Virginia imposes a Consumers Sales and Service Tax on sales of tangible personal property, custom software and taxable services in West Virginia. See W. Va. Code § 11-15-3. West Virginia also imposes a Use Tax that is complementary to the Sales Tax.

All sales of tangible personal property and services are subject to the Sales Tax unless they are specifically excepted or exempted. Professional services, are excepted from the consumers sales and service tax and use tax in accordance with W Va. Code §11-15-8.

It is presumed that all sales and services are subject to the tax until the opposite is clearly established. See W. Va. Code § 11-15-6. A tax law under which a person claims an exemption is to be strictly construed against the person claiming the exemption. See, *Woodell v. Dailey*, 160 W.Va. 65, 230 S.E.2d 466 (1976).

ISSUE: The Tax Department has been asked to issue a policy statement addressing taxability, under the West Virginia consumers sales and service tax and use tax, of the services of enrolled agents designated as such by the United States Internal Revenue Service, with specific emphasis on the applicability of the professional services exception.

POLICY:

Section 110-15-8.1.1 of the West Virginia Code of State Rules reads, in relevant part, as follows. That legislative rule includes enrolled agent services among those treated as professional services for purposes of the consumers sales and service tax and use tax.

8.1.1. Professional Services.

8.1.1.1. Professional services, as defined in Section 2 of these regulations, are rendered by physicians, dentists, lawyers, certified public accountants, public accountants, optometrists, architects, professional engineers, registered professional nurses, veterinarians, licensed physical therapists, ophthalmologists, chiropractors, podiatrists, embalmers, osteopathic physicians and surgeons, registered sanitarians, pharmacists, psychiatrists, psychoanalysts,

psychologists, landscape architects, registered professional court reporters, licensed social workers, enrolled agents, professional foresters, licensed real estate appraisers and certified real estate appraisers licensed in accordance with W. Va. Code '37-14-1 et seq., nursing home administrators, licensed professional counselors and licensed real estate brokers. Persons who provide services classified as nonprofessional for consumers sales and service tax purposes include interior decorators, private detectives/investigators, security guards, bookkeepers, foresters, truck driving schools, hearing aid dealers/fitters, contractors, electricians, musicians, and hospital administrators; the foregoing listing is not all-inclusive but intended as containing examples of trades and occupations. The determination as to whether other activities are "professional" in nature will be determined by the State Tax Division on a case-by-case basis unless the Legislature amends W. Va. Code '11-15-1 et seq. to provide that a specified activity is "professional." When making a determination as to whether other activities fall within the "professional" classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements.

...

Emphasis added.

The professional services for which the West Virginia Code §11-15-8 exception applies are only those services that are provided under the professional licensure or certification of the particular professional services provider.

Section 110-15-2.65 defines the term "professional service" as follows:

2.65. "Professional service" means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in W. Va. Code §11-15-1 et seq. to be professional. See Section 8.1.1 of these regulations.

Parsing this section into its components, it defines professional service as falling into 3 classifications:

(1) An activity recognized as professional at common law and its natural and logical derivatives.

Only three professions were recognized at common law. These were often referred to in common law as the "learned professions." They are medicine, law and theology. The logical derivatives of these 3 traditional professions are also included as "professional services."

Medicine – Medicine includes activities of the physician and the logical derivatives of professional medical service. Examples of the "logical and natural derivatives" for this profession are: Performance of medical examinations for the diagnosis of illness, injury or medical condition, performance of medical tests and medical interviews, issuance of prescriptions for medications or other treatments, performance and interpretation of medical and diagnostic tests, administration of medications and medical treatments, performance or surgery, performance of medical procedures for the treatment cure or remediation of diseases or injury to the patient.

Law – Law includes activities of the lawyer and the logical derivatives of professional legal service. Examples of the “logical and natural derivatives” for this profession are: Appearances in courts of law as legal counsel to a litigant, preparation of legal documents, including deeds, wills, bills of divorcement, pleadings, motions, summonses, complaints, decrees, and orders, providing legal counsel to clients, conducting depositions, voir dire, discovery and trials.

Theology – Theology includes activities of the priest or clergyman and the logical derivatives of that professional service. Examples of the “logical and natural derivatives” for this profession are: Officiating at any religious service or ceremony, such as weddings, funerals, baptisms, church services or mass, officiating at communion services, confessional services, counseling of congregants, chaplaincy services, training of novitiates, preparation and delivery of sermons, providing religious education, leading and providing prayer services, interpretation of scripture and teaching about religious writings and traditions, providing or sponsoring eleemosynary services such as feeding and clothing the poor, caring for the sick and destitute, providing shelter to the homeless, providing protection and refuge for lost, displaced, persecuted and “refugee” persons, and visitation for prisoners and “shut-in” persons.

(2) An activity determined by the State Tax Division to be professional. The Tax Department has determined enrolled agents' services to be professional in 110-15-8.1.1.1. Code of State Rules, quoted above.

and

(3) Any activity determined by the West Virginia Legislature in W. Va. Code §11-15-1 et seq. to be professional.

Section 110-15-8.1.1.3 of the WV Code of State Rules reads as follows:

8.1.1.3. Professional persons who make sales of tangible personal property or who engage in activities which are not professional services shall collect consumers sales and service tax on such sales or services. For example, kennel services provided by a veterinarian are subject to tax.

Emphasis added.

Section **110-15-8.1.1.3** says that non-professional services provided by a licensed professional are taxable.

For example -- a physician's services are excepted from the consumers sales and service tax and use tax on all medical services provided -- i.e., services provided under or pursuant to the medical licensure are excepted.

But, any other services performed by that physician are taxable. So, if the physician has a side business such as a real estate management business or a bookkeeping business, the bookkeeping and real estate management are not services provided under the physician's professional licensure, and so are taxable services under **110-15-8.1.1.3**.

Section 10.4 of U.S. Treasury Department Circular No. 230, 31 CFR 10 (“Circular 230” hereinafter) reads as follows:

§ 10.4 Eligibility for enrollment as an enrolled agent or enrolled retirement plan agent.

(a) *Enrollment as an enrolled agent upon examination.* The Director of the Office of Professional Responsibility may grant enrollment as an enrolled agent to an applicant who demonstrates special competence in tax matters by written examination administered by, or administered under the oversight of, the Director of the Office of Professional Responsibility and who has not engaged in any conduct that would justify the censure, suspension, or disbarment of any practitioner under the provisions of this part.

Section 10.3(c) of Circular 230 reads as follows:

Enrolled agents. Any individual enrolled as an agent pursuant to this part who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service.

Practice before the Internal Revenue Service (“IRS”) is discussed in Circular 230 at Section 10.2(a)(4). Under Internal Revenue Service **Circular 230, Section 10.2(a)(4)**, the services specifically enumerated as **enrolled agent services** are specified as follows:

Practice before the Internal Revenue Service comprehends all matters connected with the presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasions, and representing a client at conferences, hearings and meetings.

These are the services that the enrolled agent is authorized to provide under the IRS Circular 230 “professional licensure or certification.” And these are the enrolled agent services that would be treated as non-taxable “professional services” for purposes of the West Virginia consumers sales and service tax and use tax.

If the enrolled agent also has (for example) a real estate management business or a bookkeeping service, or a building inspection business, these services are outside of the range of services authorized to be performed under the IRS “enrolled agent certification.” Therefore, real estate management, bookkeeping and building inspection services performed by an enrolled agent are subject to the West Virginia consumers sales and service tax and use tax.

The IRS enrolled agent certification relates only to authorization of the individual enrolled agent to practice before the Internal Revenue Service. Internal Revenue Service enrolled agent certification does not provide authorization for the enrolled agent to engage in any other activity.

Enrolled agent certification does not authorize the enrolled agent to represent a client before the West Virginia Office of Tax Appeals or before any West Virginia Circuit Court or the Supreme Court of Appeals of West Virginia.

We note parenthetically that section 121-1-17 of the Code of State Rules, the procedural rules of practice and procedure before the West Virginia Office of Tax Appeals, refers to representation of a petitioner before the Office of Tax Appeals by "**virtually any . . . adult person**" through an executed power of attorney. Enrolled agents are among the named examples. This rule does not confer professional services status to an enrolled agent's representation of a petitioner before the Office of Tax Appeals.

Enrolled agent representation of a petitioner before the Office of Tax Appeals is taxable under the West Virginia consumers sales and service tax and use tax.

Enrolled agents are authorized to present, to the Internal Revenue Service, matters relating to a client's rights, privileges or liabilities under laws and regulations administered by the Internal Revenue Service. Enrolled agents are also authorized to represent a client at hearings before the Internal Revenue Service, and to prepare and file necessary documents, correspondence and communications related to that representation.

Only the following services provided by enrolled agents are non-taxable for purposes of the consumers sales and service tax and use tax. All other services provide by an enrolled agent are typically taxable.

- (1) Oral or written presentation to the Internal Revenue Service its officers or employees of documents, correspondence and communications, directly relating to the rights, privileges, or liabilities of a client of the enrolled agent, under laws or regulations administered by the Internal Revenue Service.

This includes preparation for any such presentation and preparation and filing of business or individual Federal tax returns with the Internal Revenue Service, including schedules, forms and other required Federal return documents, amended returns, claims for refund, and affidavits on behalf of a client.

- (2) The rendering of written or oral Federal tax advice to a client of the enrolled agent directly relating to the rights, privileges, or liabilities of the client under laws or regulations administered by the Internal Revenue Service.
- (3) Representing a client at conferences, hearings and meetings with the Internal Revenue Service its officers or employees, if the conferences, hearings and meetings directly relate to the rights, privileges, or liabilities of a client of the enrolled agent, under laws or regulations administered by the Internal Revenue Service. This includes preparation for such conferences, hearings and meetings.

Limitations and requirements

The rendering of written or oral advice and related preparation and research by an enrolled agent with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion must conform to Circular No. 230, §10.35, §10.37 and related sections, in order to be excepted from the West Virginia consumers sales and service tax and use tax. Guidance as to what is considered written advice or a covered opinion may be found in Circular No. 230 and related, federal materials.

The rendering of any service enumerated under items (1) through (3) above by an employee of an enrolled agent is excepted from the consumers sales and service tax and use tax only if the performance of that service is done under the specific supervision of the enrolled agent. Rendering of routine services and routine preparation of documents by an employee of an enrolled agent is taxable unless the service is among those enumerated in items (1) through (3) above and is done under the specific supervision of the enrolled agent.


Preparation of any document or tax return for State or local tax filings on behalf of a client of the enrolled agent or as necessary to represent a client of the enrolled agent before any state or local governmental agency or before or in communication with any person, entity agency other than the Internal Revenue Service is **taxable**.

Bookkeeping services, accounting services, and any other service provided by an enrolled agent, other than those specifically listed in this notice as excepted are taxable unless a statutory exemption or exception other than the professional services exception of West Virginia Code §11-15-8 applies.

DISCLAIMER: Nothing in this administrative notice or the professional service exception may be construed as authorizing persons who are not members of the bar to practice law.

Notice of this determination will be filed in the State Register.

Issued: September 9, 2010



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State Tax Commissioner

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