



Dave Hardy
Secretary of Revenue

Dale W. Steager
State Tax Commissioner

STATE TAX DEPARTMENT

August 6, 2018

The Honorable Mac Warner
Secretary of State
Building 1, Suite 157-K
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Mr. Secretary:

Attached please find an original and two copies of the West Virginia State Tax Commissioner's Notice of Nonacquiescence to the Decision of the West Virginia Office of Tax Appeals in Docket No. 15-310CU. The original is submitted for filing in the West Virginia Register. Please indicate on the two copies the date of filing and return the copies to the Legal Division, 1001 Lee Street, East, 4th Floor, Charleston, WV 25301.

We thank you in advance for your assistance.

Very truly yours,

Mark S. Morton
General Counsel

MSM
Attachment

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NOTICE OF NONACQUIESCENCE

West Virginia State Tax Department Notice of Nonacquiescence to the West Virginia Office of Tax Appeals Decision in Docket Number 15-310CU

Pursuant to West Virginia Code §11-10-10a, the West Virginia State Tax Commissioner hereby gives notice that, although not appealing the decision of the West Virginia Office of Tax Appeals rendered in Docket No. 15-310CU, issued May 3, 2018, he has adopted a position of Nonacquiescence in regard to that Decision.

Nonacquiescence means that the Tax Commissioner does not accept one or more of the adverse conclusions reached by the Office of Tax Appeals, even though no appeal is taken from the decision. The decision is binding on the Tax Commissioner in the case not appealed, but is not binding in any other case. W. Va. Code § 11-10-10a(c).

The issue reviewed in the subject Decision [Docket Number 15-310CU] was whether an out of state travel accommodation business conducting business in West Virginia is subject to sales tax on the commissions and fees it earned for its services. The Petitioner in this matter contacts hotels in West Virginia and obtains lodging accommodations for its corporate clients. These clients request lodging for their employees on job sites in West Virginia, often for extended time periods. Petitioner makes the reservations for its clients' employees with hotels in West Virginia. Petitioner monitors the accommodations and ensures that certain occupancy is maintained in those accommodations. The hotels bill Petitioner for the rooms. Petitioner reviews the bills for accuracy and addresses any errors or issues directly with the hotel. Petitioner then forwards the bills to its clients, after including charges for Petitioner's services. The clients then remit total payment to Petitioner. Petitioner keeps the portion of the payment attributable to its fees, and then remits the balance of the payment to the hotels. In cases where Petitioner is paid a commission by the hotels, after payment is received by the hotel, the hotel then remits the commissions back to Petitioner.

The Office of Tax Appeals erred in both its analysis of the relevant facts, and the application of the law to those facts in its decision. The Office of Tax Appeals expressly ignores two of its own previous decisions, both dealing with out of state entities providing services or selling tangible personal property in West Virginia, but without being physically located in West Virginia. In Decisions 12-432U and 14-081CU, the Office of Tax Appeals previously ruled that entities that provided services (such as snow removal from parking lots) or that sold tangible personal property in West Virginia, but that did not have a physical location, nor any employees in West Virginia (facts identical to the instant case), had sufficient nexus with West Virginia such that the services or sales were subject to sales tax. In both prior cases, entities contracted with businesses in West Virginia to provide services or sell property in West Virginia. In both cases, the Office of Tax Appeals ruled the services were subject to West Virginia Sales Tax, partially relying on Scripto, Inc., v. Carson, 362 US 207, 80 S.Ct. 619 (1960). In Decision 12-432U, the Office of Tax Appeals stated:

Three times the U.S. Supreme Court has been confronted with facts like those before this Tribunal and each time it has ruled for the taxing authority. To be clear, those facts are, an out of state seller with no employees, property or other direct presence in the taxing state, but with some person or persons operating on the seller's behalf, or helping the seller establish a market in the taxing state. When one looks at all the cases cited above, this matter could be decided on the basis of *National Geographic* alone. The sales at issue there were mail order sales, just like *Bellas Hess* and *Quill*. Nonetheless, the Court found nexus there based upon two offices; two offices in a state of approximately twenty million people and that did not support the mail order business in any fashion. Even if one were to rely just on *Scripto* or *Tyler Pipe* the Petitioner's argument would still be unpersuasive. The bottom line is this, based upon the facts; a citizen of Florida could certainly buy a *Scripto* writing instrument without dealing with one of the company's salesmen. Someone in Washington could have no contact with a *Tyler Pipe* salesperson, and still purchase a pipe or fitting from that company. And everyone in California who bought maps, books or globes from a *National Geographic* catalogue had no contact whatsoever with the Society's two advertising sales offices. Yet in all three cases the Supreme Court found sufficient nexus. Here, as the Tax Commissioner correctly points out, without the independent contractors operating on the Petitioner's behalf, nothing happens. The Petitioner call sell all the window washing services it wants, but without people in West Virginia to do the washing, it's out of business. If the U.S. Supreme Court found sufficient nexus for California to tax *National Geographic's* catalogue sales, when the Society's employees in that state did **nothing** to support those sales, how can there be insufficient nexus here, when without the independent contractors, the Petitioner before us is out of business? [Emphasis added].

Decision 12-432U, 9-10.

In the instant case, without the hotels located in West Virginia, Petitioner would be unable to provide any of its services. Independent contractors located in West Virginia in Decision 12-432U were sufficient to impart sales tax nexus. Consequently, the hotels in West Virginia (and the hotels' employees located in West Virginia, as well as Petitioner's customers and their employees) allow Petitioner to conduct business in West Virginia. Without the hotels, Petitioner is unable to provide any services to its clients in West Virginia, just as the independent contractors were necessary for the taxpayer in Decision 12-432U to provide its services in West Virginia. Further, the entire purpose of Petitioner's services is to procure lodging to allow its clients to have many employees located, and often residing for extended periods of time, in West Virginia.

In Decision 12-432U, the Office of Tax Appeals also declared the taxpayer's situation identical to that of internet travel companies, and stated further:

Of particular interest to this Tribunal are the cases involving internet travel companies. While the facts of those cases are different, conceptually they are identical to the case before us. We can see no legal difference for tax purposes between the Taxpayer who says, "I can get you a hotel room in Morgantown" and one who says, "I can have someone plow the snow in your parking lot in Morgantown." This conceptual similarity is critical because it distinguishes the few cases where a service is being provided from the cases involving sales of tangible personal property. There are a lot of the latter cases, but in many of those the

substantial nexus questions hinges on how much the Taxpayer's representative helps them sell stuff. The implicit question in many of those cases is, could the Taxpayer sell as much stuff without the help? In the case before us, as in the internet travel cases, that is not the question. Hotels.com is not going to build hotels and the Taxpayer before us is not going to plow snow. [Emphasis added].

Decision 12-432U, 10-11. The Office of Tax Appeals stated, "We can see no legal difference for tax purposes between the Taxpayer who says, 'I can get you a hotel room in Morgantown' and one who says, 'I can have someone plow the snow in your parking lot in Morgantown.'" The Petitioner in this case is mirroring internet travel companies. Petitioner is telling his customers, "I can get you many hotel rooms in Morgantown," just as an internet travel company tells its customers, "I can get you a hotel room in Morgantown."

Further, Petitioner contacts the hotels to obtain the lowest price accommodations for its clients. Petitioner reserves the rooms. Petitioner monitors the lodging situation to ensure that all rooms have suitable occupancy. Petitioner receives the bill for the rooms. Petitioner reviews the bill for accuracy and addresses any irregularities directly with the hotel. Petitioner eventually remits the money to the hotel. Petitioner has more contact with the hotels in West Virginia, than any internet travel company, yet the Office of Tax Appeals simply declares Petitioner a "travel agency," ignoring identical facts in a previous case, and its previous legal analysis of those facts.

Because the Office of Tax Appeals failed to identify the relevant facts and to correctly and consistently apply those facts to previous decisions of the Office of Tax Appeals, the Tax Commissioner unequivocally adopts this position of Nonacquiescence.

Issued: 8-03-2018



Dale W. Steager
State Tax Commissioner