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STATE TAX DEPARTMENT

Technical Assistance Advisory 19-01

SUBJECT: CONSUMER SALES AND SERVICE TAX – EXEMPTION - Domestic single-member LLCs that do not elect to be classified as a corporation for federal income tax purposes, whose sole member is a Trust, may be considered a related party under W. Va. §11-15-9(a)(23) to a corporation, if the grantor of that trust owns 100% in value of the outstanding stock of the corporation.

This Technical Assistance Advisory is issued in response to a letter dated December 17, 2018 requesting issuance of a Technical Assistance Advisory, pursuant to W. Va. Code §11-10-5r, on behalf of Corporation A, Trust 1, Trust 2, and Trust 3 (referred to in the requesting letter as the “Affiliated Group”).

STATEMENT OF FACTS

Mr. X created three irrevocable trusts, one for each of his daughters. These three Trusts are referred to as Trust 1, Trust 2, and Trust 3 (hereinafter collectively referred to as the “Trusts”). These Trusts have co-invested with Mr. X on a number of business ventures.

Mr. X, through the Mr. X Revocable Living Trust, owns 100% of the stock of Corporation A. Corporation A determines the allocable share of expenses attributable to each entity that is a member of the Affiliated Group, and each entity pays for their share of administrative and management services. Corporation A has been collecting Sales Tax on its invoices to its affiliates for such services.

Each of the Trusts owns a single-member LLC, i.e., LLC A; LLC B; and LLC C. According to the request for a Technical Assistance Advisory, beginning January 1, 2019, Corporation A will begin invoicing each of the single-member LLCs, for the benefit of its member, a share of allocable expense.

The request for a Technical Assistance Advisory inquired about whether the management services provided by Corporation A and allocated to each single-member LLC for the benefit of its member were exempt from the West Virginia Consumer Sales Tax under W. Va. Code §11-15-9(a)(23), because they were members of the same controlled group or are related taxpayers as defined in Section 267 of the Internal Revenue Code.

ANALYSIS

The Consumers Sales and Service Tax is imposed on all sales of tangible personal property and most services in this State. See, W. Va. Code §§11-15-1 and 11-15-3. “Services” or “selected services” includes “all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal

property or custom software, but shall not include contracting, personal services or the services rendered by an employee to his employer or any service rendered for resale.” W. Va. Code §11-15-2(b)(18).

All sales are subject to the sales tax unless specifically excepted or exempted. See, W. Va. Code §11-15-6. The sales which are excepted from taxation are sales of professional services, personal services and “services furnished by businesses subject to the control of the public service commission when the service or the manner in which it is delivered is subject to regulation by the public service commission.” W. Va. Code §11-15-8. The sales that are exempted from taxation are listed in the West Virginia Code and in the corresponding Legislative Rule. See, e.g., W. Va. Code §11-15-9 and W. Va. Code St. R. §110-15-9.¹

All sales are presumed to be taxable until the contrary is clearly established. W. Va. Code §11-15-6(b). The burden of proving that a sale or service is exempt from the tax is on the vendor, unless the vendor takes from the purchaser an exemption certificate signed by and bearing the address of the purchaser and setting forth the reason for the exemption and substantially in the form prescribed by the Tax Commissioner. W. Va. Code §11-15-6(a). A tax law under which a person claims an exemption is to be strictly construed against the person claiming the exemption. *Wooddell v. Dailey*, 160 W. Va. 65, 68, 230 S.E.2d 466, 469 (1976). The purchaser is required to pay the appropriate sales tax and the vendor is required to collect and remit the sales tax. See, W. Va. Code §11-15-4. If the vendor fails to collect the sales tax, then the vendor becomes liable for the outstanding tax. W. Va. Code §11-15-4a.

West Virginia Code §11-15-9(a)(23) provides that the following services are exempt from the Consumer Sales and Service Tax:

Dispensing of services performed by one corporation, partnership or limited liability company for another corporation, partnership or limited liability company when the entities are members of the same controlled group or are related taxpayers as defined in Section 267 of the Internal Revenue Code. “Control” means ownership, directly or indirectly, of stock, equity interests or membership interests possessing fifty percent or more of the total combined voting power of all classes of the stock of a corporation, equity interests of a partnership or membership interests of a limited liability company entitled to vote or ownership, directly or indirectly, of stock, equity interests or membership interests possessing fifty percent or more of the value of the corporation, partnership or limited liability company;

Further, the Legislative Rule (W. Va. Code R. §110-15-9.3.12) states:

Dispensing of services performed by one corporation for another corporation when both corporations are members of the same controlled group. Control means ownership, directly or indirectly, of stock possessing fifty percent or more of the total combined voting power of all classes of the stock of a corporation entitled to vote or ownership, directly or indirectly, of stock possessing fifty percent or more of the value of the corporation. Purchases of taxable services from an entity outside the controlled group by a member of the controlled group for use by other members of the controlled group are not exempt from consumers sales and service

¹ The Legislative Rule regarding the Consumer Sales and Service Tax was last updated on July 13, 1993. Exemptions added to the West Virginia Code after that date do not appear in the Legislative Rule.

tax or use tax as a purchase for resale under W. Va. Code §11-15-9(j) or Section 9.3.4.2 of these regulations.

According to the letter, Mr. X, through the Mr. X Revocable Living Trust, owns 100% of the stock of Corporation A. It appears that Mr. X was also the grantor of the three irrevocable trusts for his daughters: Trust 1, Trust 2, and Trust 3 (sometimes collectively referred to as the "Trusts"). Each of the Trusts has 100% ownership of a single-member LLC. You inquired as to whether the services provided by Corporation A and allocated to the single-member LLCs (LLC A, LLC B, and LLC C) for the benefit of its member would be exempt from sales tax under W. Va. Code §11-15-9(a)(23).

West Virginia Code §11-15-9(a)(23) exempts the services performed by one corporation, partnership or LLC to another corporation, partnership or LLC which is part of the same controlled group or are related taxpayers. In this case, as of January 1, 2019, a corporation, Corporation A, is dispensing services to LLCs. The question is whether Corporation A and these LLCs are part of a controlled group or are related parties as defined in Section 267 of the Internal Revenue Code.

The single-member LLCs cannot be considered part of the same controlled group as Corporation A. The single-member LLCs are each 100% owned by Trust 1, Trust 2 or Trust 3. While Mr. X was the grantor of these Trusts, these were described as irrevocable trusts. When a trust is revocable the "rights of the beneficiary are exercisable by and subject to the control of the settlor." Restat. 3d. of Trusts, §74 (2012). However, here the trusts were described as irrevocable. The letter does not describe any control Mr. X, the Mr. X Revocable Living Trust, or Corporation A exercises over these Trusts and, by extension, their single-member LLCs

According to the letter, Mr. X, through the Mr. X Revocable Living Trust, owns 100% of the stock of Corporation A. Therefore, based upon the information in the letter, it appears Mr. X controls Corporation A, but not the Trusts or their LLCs. Furthermore, it does not appear that Mr. X could meet the definition of control under the statute, when the LLCs are wholly owned by each of the Trusts. Control is defined as:

"Control" means ownership, directly or indirectly, of stock, equity interests or membership interests possessing fifty percent or more of the total combined voting power of all classes of the stock of a corporation, equity interests of a partnership or membership interests of a limited liability company entitled to vote or ownership, directly or indirectly, of stock, equity interests or membership interests possessing fifty percent or more of the value of the corporation, partnership or limited liability company

W. Va. Code § 11-15-9(a)(23).

West Virginia Code §11-15-9(a)(23) also exempts the services performed by one corporation, partnership or LLC to another corporation, partnership or LLC if they are related taxpayers as defined in Section 267 of the Internal Revenue Code.

Section 267(a)(1) of the Internal Revenue Code provides that no deduction shall be allowed in respect of losses from the sales or exchanges of property, directly or indirectly, between persons specified within any one of the paragraphs of subsection (b). The relationships specified in subsection (b) of Section 267 for determining whether parties involved in a transaction are "related parties" and thus come within the provisions of Section 267(a) are:

- (b) Relationships. The persons referred to in subsection (a) are:
- (1) Members of a family, as defined in subsection (c)(4);
 - (2) An individual and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual;
 - (3) Two corporations which are members of the same controlled group (as defined in subsection (f));
 - (4) A grantor and a fiduciary of any trust;
 - (5) A fiduciary of a trust and a fiduciary of another trust, if the same person is a grantor of both trusts;**
 - (6) A fiduciary of a trust and a beneficiary of such trust;
 - (7) A fiduciary of a trust and a beneficiary of another trust, if the same person is a grantor of both trusts;**
 - (8) A fiduciary of a trust and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for the trust or by or for a person who is a grantor of the trust;**
 - (9) A person and an organization to which section 501 [26 USCS § 501] (relating to certain educational and charitable organizations which are exempt from tax) applies and which is controlled directly or indirectly by such person or (if such person is an individual) by members of the family of such individual;
 - (10) A corporation and a partnership if the same persons own--
 - (A) more than 50 percent in value of the outstanding stock of the corporation, and
 - (B) more than 50 percent of the capital interest, or the profits interest, in the partnership;
 - (11) An S corporation and another S corporation if the same persons own more than 50 percent in value of the outstanding stock of each corporation;
 - (12) An S corporation and a C corporation, if the same persons own more than 50 percent in value of the outstanding stock of each corporation; or
 - (13) Except in the case of a sale or exchange in satisfaction of a pecuniary bequest, an executor of an estate and a beneficiary of such estate.

26 USCS § 267(b) (emphasis supplied). Section 267(b) outlines several situations involving grantors, fiduciaries and beneficiaries of trusts. For example, a trust fiduciary and corporation would be related parties if the trust or the grantor of the trust owns more than 50% in value of the outstanding stock of the corporation. Here, Mr. X is the Grantor of the Trusts and owns 100% of the stock of Corporation A through the Mr. X Revocable Living Trust. Accordingly, the fiduciaries of the Trusts and Corporation A may be considered related parties. This applies when fiduciaries are acting in their capacity as fiduciaries and not in their capacity as individuals. Rev. Rule. 59-171, 1959 IRB LEXIS 237.

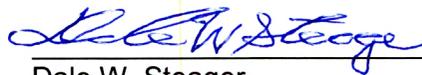
Similarly, the fiduciaries of two different trusts, and the fiduciary and beneficiary of two different trusts, may be considered related parties if the same person is the grantor of both trusts. Therefore, as Mr. X is the grantor of the Trusts and the Mr. X Revocable Living Trust, which owns Corporation A, it appears that the fiduciaries and beneficiaries of the trusts could be considered related parties under Section 267.

DETERMINATION

Given the relationship between the entities, the services provided by Corporation A and allocated to each single-member LLC for the benefit of its member would be exempt from sales tax pursuant to West Virginia Code §11-15-9(a)(23). Domestic single-member LLCs that do not elect to be classified as corporations for federal income tax purposes are generally disregarded entities such that they are not considered separate from their owners for federal income tax purposes. See, 26 CFR §301.7701-2. Each of the single-member LLCs may have the same relationship as their member (the respective Trust, which is its 100% owner) for purposes of determining its relationship to Corporation A. These Trusts are related to Mr. X, as the Grantor of the Trusts, and to Corporation A, because Mr. X, through the Mr. X Revocable Living Trust, owns 100% of the stock of Corporation A.

Precedential Value – Under W. Va. Code §11-10-5r(b), a Technical Assistance Advisory has no precedential value except to the Taxpayer who requests the advisory, unless the Tax Commissioner specifically states that it has precedential value. This technical assistance advisory may not be used or cited as precedent.

Publication - Under W. Va. Code §11-10-5r(e), the Tax Commissioner is required to release Technical Assistance Advisories to the public after they are modified to delete identifying characteristics, unless the taxpayer waives the right to confidentiality. This will be released as Technical Assistance Advisory 2019-01.



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