

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

DEPARTMENT OF REVENUE REGULATION NO. 15-400

COMMERCIAL MOTION PICTURES; SALES AND USE TAX

May 14, 1998

We have reviewed this proposed regulation from the Department of Revenue (Department) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to clarity and organization. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Inconsistent use of the words "Exemption" and "Exclusion." - Clarity

The regulation uses the terms "exemption" and "exclusion" inconsistently. The term "exclusion" or "exclude" is used in Sections 32.38(b)(3), (b)(4), (f)(i), and (f)(ii). The term "exemption" or "exempt" is used in Section 32.38(b)(1), (c)(1), (d), and (e).

We note that part of the problem relating to applying these two terms is caused by the statute itself. The statutory amendment which prompted this rulemaking, Section 2 of Act 7-1997, was added to Section 204 of the Tax Reform Code of 1971 as Subsection 54 (72 P.S. § 7204(54)). Section 204 is captioned "*Exclusions from Tax*" but the language of Subsection 54 uses only the term "*exempt*" from tax (emphasis added).

As we understand it, "exclusions" are not taxable and any burden of proof to establish the contrary is on the Department. In contrast, "exemptions" may be subject to tax and the burden of proof is on the taxpayer claiming the exemption. The clear inference of Subsection 54 is that unless all of the requirements of that subsection have been complied with, a tax will apply to the transaction or activity. That is also the basic premise of this rulemaking, which is intended to implement Subsection 54.

For improved clarity, the Department should apply the correct terminology consistently throughout the final-form regulation. We recommend that the most appropriate term to use is "exemption" and recommend the Department use it consistently throughout the regulation.

2. Section 32.38(b). Scope. - Clarity

The Department has captioned Section 32.38(b) as "Scope." However, the subsection does describe the extent of the scope of the regulation.

If the Department believes Section 32.38 needs a “scope” section, we recommend that the following sentences be used:

This regulation sets forth the Department’s interpretation of Section 2 of Act 7-1997, which added a new Subsection 54 to the Tax Reform Code of 1971 (72 P.S. § 7204(54)). It deals with the exemption from sales and use tax available to a producer of a feature-length commercial motion picture which is distributed to a national audience.

If this change is made, we also recommend that the provisions set forth in the current Subsection (b) appear under a new Subsection (c) captioned “Application.” The remaining current subsection headings should be reset accordingly (i.e., as Subsections (d) through (g)).

Also, for improved clarity, we recommend that the current Subsection (b)(3) be amended as follows (new language underlined):

The exclusion from sales and use tax provided for property and services directly used in production of a commercial motion picture does not apply to either:....

3. Section 32.38(e). Utilities used in production. - Clarity

In Section 32.38(e), the Department gives examples of property subject to tax and property exempt from tax. We recommend that the Department group examples exempt from tax in one subsection and those subject to tax in a second subsection. At present, there is a blending of the two. For improved clarity, they should be reorganized and segregated.

4. Section 32.38(f). Exemption certificates. - Clarity

The Subsection 54 statutory amendment provides that the retail purchaser of tangible personal property under this section shall furnish to the vendor a certificate substantially in the form as the Department of Community and Economic Development (DCED) may prescribe by regulation. This proposed regulation, however, does not include a reference to the DCED’s rulemaking relating to exemption certificates.

We recommend the final-form regulation include a reference to the DCED’s rulemaking. Doing so would enable persons seeking to file for a sales and use tax exemption pursuant to Subsection 54 and this regulation to know where to find the applicable exemption certificate form.