City of Elkins

Finance Committee Meeting

December 11, 2023
1:00 PM
401 Davis Avenue
Council Chamber, 2nd Floor

Charter Authority of the Finance Committee: Recommend an annual budget to Council. Supervise budget management and make reports to Council. Review and propose to Council municipal debt instruments and grants. Make fiscal forecasts and report same to Council.

AGENDA

1. **Call to order and roll call**
2. **Public comment**
3. **Minutes**
   a. Proposed minutes for the meeting of November 13, 2023.
4. **Reports**
5. **New business**
   a. Budget revisions
   b. Tax refund request from Altice
   c. Sanitation Department garage: new round of public bidding.
   d. City hall security improvements
   e. Creation of new position in the Treasurer's Department
   f. Leasing of two Vehicles for Operations and City Hall
6. **Announcements**
7. **Adjournment**

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 11, 2023
Section:	Minutes
Category:	Action Item
Agenda Item Name:	Proposed minutes for the meeting of November 13, 2023.
Recommended By:	City Clerk
Summary:	Proposed minutes for the committee's meeting of November 13, 2023.
Fiscal Impact:	n/a
Recommendation:	Consider for approval.
Attachments:	1. finance committee - 2023_11_13 - minutes_proposed

FINANCE COMMITTEE
REGULAR MEETING
MINUTES

401 Davis Avenue
City Hall, Council Chambers
November 13, 2023
1:00 p.m.

Present were Committee Members: M. Hinchman, C. Lowther, and R. Chenoweth.

Also present were: Jerry Marco (mayor), Mike Kesecker (operations manager), Gerry Roberts (city attorney), Tracy Judy (treasurer), Steve Himes (fire chief), Travis Bennett (police chief), and Sutton Stokes (city clerk).

MINUTES

Lowther **MOVED APPROVAL OF THE MINUTES OF THE MEETING OF OCTOBER 9, 2023.** The motion carried.

NEW BUSINESS

Lowther **MOVED RECOMMENDING COUNCIL APPROVAL OF A PROPOSED REVISION TO THE FY 2024 FIRE DEPARTMENT FUND, ASSIGNING THAT FUND'S FY 2023 CARRYOVER.** The motion carried.

Lowther **MOVED RECOMMENDING COUNCIL APPROVAL OF A PROPOSED REVISION TO THE FY 2024 SANITATION DEPARTMENT FUND, FUNDING ADDITIONAL RENT FOR THAT DEPARTMENT'S GARAGE, PURCHASE OF A NEW SANITATION TRUCK, AND VARIOUS PERSONNEL EXPENSES.** The motion carried.

Lowther **MOVED RECOMMENDING COUNCIL APPROVAL OF FY 2024 STATE BUDGET REVISION #3 CONCERNING FEDERAL AND STATE GRANTS.** The motion carried.

Roberts explained that an eminent domain action taken during the 2016 construction of the water plant is not yet resolved. A final agreement has not been reached, but the approximate amount needed will be about $5,000. No action was taken.

The committee directed that a funding request from Randolph County Emergency Medical Services be routed through the same process as all other requests to provide funding to outside/partner organizations.

Kesecker and Lowther provided updates about efforts to fund an expanded city recycling program. No action was taken.

The meeting adjourned at 1:29 p.m.

The foregoing minutes were approved at the meeting of ___________, 2023.

_____________________________ _________________________________
Name & Title Signature

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 11, 2023
Section:	New business
Category:	Action Item
Agenda Item Name:	Budget revisions
Recommended By:	Treasurer
Summary:	Standing item. There will not necessarily be budget revisions at every meeting.
Fiscal Impact:	TBD
Recommendation:	Consider if presented
Attachments:	None

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 11, 2023
Section:	New business
Category:	Action Item
Agenda Item Name:	Tax refund request from Altice
Recommended By:	City Attorney
Summary:	The City has received a request from Altice on behalf of Optimum (taxpayer) for a refund of B&O taxes paid to the City for all quarterly periods after June 30,2020 which total the amount of $22,690.74. This amount is claimed as refundable due to the expiration of a federal law allowing the collection of such taxes. The money will return to Optimum's customers, who paid the tax on their bill, not Optimum The city attorney will present and explain further.
Fiscal Impact:	Loss of $22,690.74 in already collected B&O revenue.
Recommendation:	Consider for recommendation of approval to council
Attachments:	1. Altice Memo 2. Altice Request 3. ITFA

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

September 5, 2023

City of Elkins
Attn: Jennifer Shreve
401 Davis Ave
Elkins, WV 26241

RE: Suddenlink Communications ("SDL" or "Taxpayer")
Business and Occupation Tax ("B&O")
West Virginia ("WV") Tax Registration No.: 1415100
Refund Period: 7/1/2020 to 12/31/2022

Dear Sir or Madam:

We are respectfully requesting a refund in the amount of $22,690.74 for B&O Taxes reported by the above referenced Taxpayer for the above referenced periods (i.e., all periods after June 30, 2020) paid to the City of Elkins, WV on internet access services. Please note that the reporting entity is Cebridge Acquisition ("Cebridge") (EIN 20-4394384), which is a wholly owned subsidiary of Altice USA, Inc. ("Altice") but doing business as Suddenlink in Elkins, WV.

For a historical background, the Internet Tax Freedom Act of 1998 ("ITFA") provided for a moratorium on the ability of state and local governments to impose taxes on internet access and certain internet transactions (hereinafter referred to as the "Moratorium"). The Moratorium included a grandfather clause (i.e., an exclusion from the Moratorium) permitting states that imposed and enforced taxes on internet access prior to October 1, 1998, to continue imposing such taxes on otherwise protected services (e.g., internet access); however, as of June 30, 2020, all grandfather clauses expired. See ITFA, Public Law 105-277 § 1100 et seq. (Oct. 21, 1998) (as amended by the Trade Facilitation and Trade Enforcement Act of 2015, Public Law 114-125, § 922 (Feb. 24, 2016) (setting up a June 30, 2020 expiration date for all grandfathered taxes)). As of June 30, 2020, the ITFA prohibits all state and local taxes on internet access and other internet transactions. As such, Suddenlink is requesting a refund of B&O taxes paid by Suddenlink to the City of Elkins on internet access services for the period of July 1, 2020 to December 31, 2022 which follows the expiration of the aforementioned grandfather clause.

Altice USA
One Court Square West
Long Island City, NY 11120
alticeusa.com

altice

To assist with this refund request, we are enclosing the original filed returns which included the gross receipts associated with internet access services and the amended returns which remove the gross receipts associated with internet access services for the refund period noted above.

We reserve the right to supplement this material or to respond to any request made by the City of Elkins with any documents deemed necessary by the City Clerk, Controller, or any other Administrator within the City of Elkins.

If you have any questions please contact either David Prebut at david.prebut@alticeusa.com or call 929-260-5230; or Laura La Neve at laura.minhas@alticeusa.com or call 516-803-1683; or Ajay Arora at Ajay.Arora@alticeusa.com or call 347-324-1671.

Thank you for your courtesy.

Sincerely,

David S. Prebut
Altice USA, Inc.

SPILMAN THOMAS & BATTLE, PLLC
ATTORNEYS AT LAW

Dale W. Steager
304.340.1692
e-mail: dsteager@spilmanlaw.com

November 3, 2011

Mr. Michael Kelemen
Director of Government Relations
Suddenlink, Inc.
P. O. Box 1220
Scott Depot, WV 25560

Re: City of Charleston, West Virginia, Business and Occupation Taxes

Dear Mr. Kelemen:

You asked whether Suddenlink's charges for Internet access are subject to the City of Charleston's municipal business and occupation tax. The answer to this question turns on whether the City's municipal business and occupation tax is prohibited by Section 1101(a)(1) of the Internet Tax Freedom Act (hereinafter "Act"), codified as 47 U.S.C. § 151 note, or is permitted under Section 1101 (b) and the grandfather clause found in Section 1104 of the Act.[1] Because the City's business and occupation tax is a privilege tax imposed on businesses doing business in the City, measured by gross income or gross proceeds of sale, depending upon the privilege being exercised, and was imposed and generally enforced for many years prior to enactment of the Internet Tax Freedom Act, we believe the tax is grandfathered under Section 1104 of the Act. Therefore, the tax applies to the gross income of Suddenlink from furnishing services within the City without excluding Internet access charges from the measure of tax.

Internet Tax Freedom Act

Section 1101(a) of the Act, as amended,[2] provides that "[n]o State or political subdivision thereof may impose any of the following taxes during the period beginning November 1, 2003,

[1] The Internet Tax Freedom Act was enacted in 1998 as part of the Omnibus Appropriations Act of 1998, Title XI of Pub. L. 105-277. The Act imposed a three-year moratorium on new taxes on Internet access charges and did several other things not relevant here. The Act was amended in 2001 to extend the moratorium, Pub. L. 107-75, § 2 (November 28, 2001). The Act again amended in 2004 and 2007. Pub. L. 108-435, §§ 2-6A (December 3, 2004); and Pub. L. 110-108 (October 31, 2007).

[2] As enacted in 1998, Section 1101(a) read:

> (a) Moratorium. – No State or political subdivision thereof shall impose any of the following taxes during the period beginning on October 1, 1998, and ending 3 years after the date of enactment of this Act –
>
> (1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998; and

and ending November 1, 2014: (1) Taxes on Internet access [and] (2) Multiple or discriminatory taxes[3] on electronic commerce.[4]

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(2) multiple or discriminatory taxes on electronic commerce..

[3] "Multiple tax" is defined in Section 1105(6) as follows:

(6) *Multiple tax*. --

(A) *In general*. -- The term "multiple tax" means any tax that is imposed by one State or political subdivision thereof on the same or essentially the same electronic commerce that is also subject to another tax imposed by another State or political subdivision thereof (whether or not at the same rate or on the same basis), without a credit (for example, a resale exemption certificate) for taxes paid in other jurisdictions.

(B) *Exception*. -- Such term shall not include a sales or use tax imposed by a State and 1 or more political subdivisions thereof on the same electronic commerce or a tax on persons engaged in electronic commerce which also may have been subject to a sales or use tax thereon.

(C) *Sales or use tax*. -- For purposes of subparagraph (B), the term "sales or use tax" means a tax that is imposed on or incident to the sale, purchase, storage, consumption, distribution, or other use of tangible personal property or services as may be defined by laws imposing such tax and which is measured by the amount of the sales price or other charge for such property or service.

"Discriminatory tax" is defined in Section 1105(2) of the Act as follows:

(2) *Discriminatory tax*. -- The term 'discriminatory tax' means --

(A) any tax imposed by a State or political subdivision thereof on electronic commerce that --

(i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;

(ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period;

(iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means;

(iv) establishes a classification of Internet access service providers or online service providers for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means; or

(B) any tax imposed by a State or political subdivision thereof, if --

(i) the sole ability to access a site on a remote seller's out-of-State computer server is considered a factor in determining a remote seller's tax collection obligation; or

(ii) a provider of Internet access service or online services is deemed to be the agent of a remote seller for determining tax collection obligations solely as a result of --

(I) the display of a remote seller's information or content on the out-of-State computer server of a provider of Internet access service or online services; or

"Internet access" is defined in Section 1105(5) of the Act as follows:

> (5) *Internet access*. -- The term "Internet access" –
>
> (A) means a service that enables users to connect to the Internet to access content, information, or other services offered over the Internet;
>
> (B) includes the purchase, use or sale of telecommunications by a provider of a service described in subparagraph (A) to the extent such telecommunications are purchased, used or sold --
> (i) to provide such service; or
> (ii) to otherwise enable users to access content, information or other services offered over the Internet;
>
> (C) includes services that are incidental to the provision of the service described in subparagraph (A) when furnished to users as part of such service, such as a home page, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity;
>
> (D) does not include voice, audio or video programming, or other products and services (except services described in subparagraph (A), (B), (C), or (E)) that utilize Internet protocol or any successor protocol and for which there is a charge, regardless of whether such charge is separately stated or aggregated with the charge for services described in subparagraph (A), (B), (C), or (E); and
>
> (E) includes a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity, that are provided independently or not packaged with Internet access.

(II) the processing of orders through the out-of-State computer server of a provider of Internet access service or online services.

[4] "Electronic commerce" is defined in Section 1105(3) of the Act as follows:
(3) *Electronic commerce*. -- The term "electronic commerce" means any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access.

"Tax on Internet access" is defined in Section 1105(10) of the Act as follows:

(10) *Tax on internet access.* --

(A) *In general.* -- The term 'tax on Internet access' means a tax on Internet access, regardless of whether such tax is imposed on a provider of Internet access or a buyer of Internet access and regardless of the terminology used to describe the tax.

(B) *General exception.* -- The term 'tax on Internet access' does not include a tax levied upon or measured by net income, capital stock, net worth, or property value.

(C) *Specific exception.* --

(i) *Specified taxes.*—Effective November 1, 2007, the term 'tax on Internet access' also does not include a State tax expressly levied on commercial activity, modified gross receipts, taxable margin, or gross income of the business, by a State law specifically using one of the foregoing terms, that --

(I) was enacted after June 20, 2005, and before November 1, 2007 (or, in the case of a State business and occupation tax, was enacted after January 1, 1932, and before January 1, 1936);

(II) replaced, in whole or in part, a modified value-added tax or a tax levied upon or measured by net income, capital stock, or net worth (or, is a State business and occupation tax that was enacted after January 1, 1932 and before January 1, 1936);

(III) is imposed on a broad range of business activity; and

(IV) is not discriminatory in its application to providers of communication services, Internet access, or telecommunications.

(ii) *Modifications.*—Nothing in this subparagraph shall be construed as a limitation on a State's ability to make modifications to a tax covered by clause (i) of this subparagraph after November 1, 2007, as long as the modifications do not substantially narrow the range of business activities on which the tax is imposed or otherwise disqualify the tax under clause (i).

(iii) *No inference.* -- No inference of legislative construction shall be drawn from this subparagraph regarding the application of subparagraph (A) or (B) to any tax described in clause (i) for periods prior to November 1, 2007.

Section 1101(b) of the Act, which preserves State and local taxing authority, reads:

(b) *Preservation of State and Local Taxing Authority.* – Except as provided in this section, nothing in this title shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or superseding of, and State or local law pertaining to taxation that is otherwise permissible under the Constitution of the United States or other federal law and in effect on the date of enactment of this Act [October 21, 1998].

Section 1104 of the Act grandfathered State and local taxes on Internet access services that were imposed and enforced prior to October 1, 1998. That Section reads:

(a) *Pre-October 1998 Taxes.* --

(1) *In general.* -- Section 1101 (a) does not apply to a tax on Internet access that was generally imposed and actually enforced prior to October 1, 1998, if, before that date --

(A) the tax was authorized by statute; and

(B) either --

(i) a provider of Internet access services had a reasonable opportunity to know, by virtue of a rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; or

(ii) a State or political subdivision thereof generally collected such tax on charges for Internet access.

(2) *Termination.*—

(A) *In general.* -- Except as provided in subparagraph (B), this subsection shall not apply after November 1, 2014.

(B) *State telecommunications service tax.* --

(i) *Date for termination.* -- This subsection shall not apply after November 1, 2006, with respect to a State telecommunications service tax described in clause (ii).

(ii) *Description of tax.* -- A State telecommunications service tax referred to in subclause (i) is a State tax—

(I) enacted by State law on or after October 1, 1991, and imposing a tax on telecommunications service; and

(II) applied to Internet access through administrative code or regulation issued on or after December 1, 2002.

(3) *Exception.* -- Paragraphs (1) and (2) shall not apply to any State that has, more than 24 months prior to the date of enactment of this paragraph [Oct. 31, 2007], enacted legislation to repeal the State's taxes on Internet access or issued a rule or other proclamation made by the appropriate agency of the State that such State agency has decided to no longer apply such tax to Internet access.

(b) *Pre-November 2003 Taxes.* --

(1) *In general.*—Section 1101 (a) does not apply to a tax on Internet access that was generally imposed and actually enforced as of November 1, 2003, if, as of that date, the tax was authorized by statute and --

(A) a provider of Internet access services had a reasonable opportunity to know by virtue of a public rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; and

(B) a State or political subdivision thereof generally collected such tax on charges for Internet access.

(2) *Termination.* -- This subsection shall not apply after November 1, 2005.

(c) *Application of Definition.* --

(1) *In general.*—Effective as of November 1, 2003 --

(A) for purposes of subsection (a), the term "Internet access" shall have the meaning given such term by section 1104(5) of this Act, as enacted on October 21, 1998;[5] and

(B) for purposes of subsection (b), the term "Internet access" shall have the meaning given such term by section 1104(5) of this Act as enacted on October 21, 1998, and amended by section 2(c) of the Internet Tax Nondiscrimination Act (Public Law 108–435).

(2) *Exceptions*. -- Paragraph (1) shall not apply until June 30, 2008, to a tax on Internet access that is –

(A) generally imposed and actually enforced on telecommunications service purchased, used, or sold by a provider of Internet access, but only if the appropriate administrative agency of a State or political subdivision thereof issued a public ruling prior to July 1, 2007, that applied such tax to such service in a manner that is inconsistent with paragraph (1); or

(B) the subject of litigation instituted in a judicial court of competent jurisdiction prior to July 1, 2007, in which a State or political subdivision is seeking to enforce, in a manner that is inconsistent with paragraph (1), such tax on telecommunications service purchased, used, or sold by a provider of Internet access.

(3) *No inference*. -- No inference of legislative construction shall be drawn from this subsection or the amendments to section 1105 (5) made by the Internet Tax Freedom Act Amendments Act of 2007 [Pub. L. 110–108] for any period prior to June 30, 2008, with respect to any tax subject to the exceptions described in subparagraphs (A) and (B) of paragraph (2).

The State business and occupation tax in effect prior to July 1, 1987, was enacted in 1935. *See* 1935 Acts of Legislature, chapter 86.[6] *See also* the discussion of State business and occupation taxes, *infra*.

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[5] Section 1104(5) of the Internet Tax Freedom Act enacted on October 21, 1998 defined "Internet access" as follows:

> (5) Internet Access. -- The term "Internet Access" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to users. Such term does not include telecommunication services.

[6] Variations of the tax were enacted prior to that. See 1921 Acts of Legislature, chapter 110; 1925 Acts of Legislature, extraordinary session, chapter 1; and 1933 Acts of Legislature extraordinary session, chapter 33.

The City will likely argue that cable television companies have been subject to municipal business and occupation taxes since at least 1981, if not before that, when the issue of taxability, under the State's business and occupation tax, was resolved by the Court's decision in *Capitol Cablevision Corp. v. Hardesty*, 168 W. Va. 631, 285 S.E.2d 412 (1981); and that gross income from service activity is taxable regardless of the type of the service activity unless an exemption applies or the State did not delegate to municipalities the authority to tax a particular business, such as railroads, pipelines, motor carriers, and telephone and telegraph companies.

As new services became available in the marketplace, gross income from furnishing the new services automatically became subject to the State's business and occupation tax as in effect prior to July 1, 1987. By analogy, when a retailer of tangible personal property sells goods that only recently came on the market, gross proceeds from sales of those goods were automatically subject to the State's business and occupation tax, without any action by the State.

Municipal business and occupation taxes apply in like manner. The City will likely argue that, in this context, the municipal taxation of cable television companies on their charges for providing Internet access falls under the grandfather rule of the Internet Tax Freedom Act, as enacted in 1998, and that Suddenlink's charges for Internet access are subject to the City's municipal business and occupation tax.

Additionally, State and municipal business and occupation taxes are privilege taxes imposed on the business for the privilege of doing business within the taxing jurisdiction. Business activities were divided into broad classifications, e.g., privilege of producing natural resources, privilege of making retail sales of tangible personal property, etc. The tax was imposed on the privilege of doing business and was not on the particular good or service that is sold or furnished.

Charleston's B & O Tax

You also asked when the City of Charleston began imposing its business and occupation tax on service business or callings not otherwise specifically taxed.

All municipalities in West Virginia have been authorized since 1949 to impose a municipal business and occupation tax similar to the State business and occupation tax in effect prior to July 1, 1987. It appears that prior to 1949, a municipality could impose a business and occupation tax if the tax was authorized in the charter for that municipality enacted by the West Virginia Legislature.

We believe that the City's business and occupation tax has been imposed generally, and specifically on service business or callings not otherwise specifically taxed, since the City first began imposing a business and occupation tax similar to that imposed by the State of West Virginia (prior to July 1, 1987), either pursuant to authority found in the charter granted to the City of Charleston by the West Virginia Legislature or pursuant to the general authority grant to municipalities in 1949.

1. Current City Code

The business and occupation tax of the City of Charleston, West Virginia, is presently codified in Article II, Chapter 110 of the Charleston City Code of 2000, as amended.[7] The service classification of the tax, which applies to any service business or calling not otherwise specifically taxed, is codified in Section 110-58. (Otherwise specifically taxed service businesses include contracting, banking, certain public utilities and rental businesses.) Section 110-58 reads:

> **§ 110-58. Service business or calling not otherwise specifically taxed.**
>
> (a) Upon every person engaging or continuing within the city in any service business or calling not otherwise specifically taxed under this article, there is hereby levied, and shall be collected, a tax equal to one percent of the gross income of any such business.
>
> (b) Gross income or gross proceeds of sales derived from services within West Virginia which is not taxed or taxable by any other municipality are included in the measure of the city business and occupation tax if the services are either directed from a Charleston location or the taxpayer's principal West Virginia office is located in the city. Without limiting the generality of the foregoing, when a taxpayer has only one (1) office location and this office is located within the municipal limits of the city and its activities elsewhere in West Virginia are neither taxed nor taxable by another municipality, the gross income or gross proceeds from those activities are taxable by the city.

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[7] In 2000, the City's business and occupation tax was recodified and moved from chapter 6, article III of the Charleston City Code of 1975, to chapter 110, article II of the Code of 2000, and Section 6-115 (of the 1975 Code) was recodified as Section 110-58 (of the 2000 Code). In 2002, §§ 110-31 -- 110-34, 110-51 -- 110-63, 110-111 -- 110-115, and 110-141 -- 110-149 of the business and occupation tax were repealed in their entirety, and replacement sections were enacted.

(Bill No. 6799, § 6-115, 1-22-2002)

The 2002 amendment was to Subsection 110-58(b).

"Service business or calling" is defined in Section 110-31 of the Charleston City Code of 2000, as amended, and means:

> all activities engaged in by a person for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible property, but not including the services rendered by an employee to his employer. The term shall include, but not be limited to:
>
> (1) Persons engaged in manufacturing, compounding or preparing for sale, profit or commercial use articles, substances or commodities which are owned by another or others;
>
> (2) Persons engaged as independent contractors in producing natural resource products which are owned by another or others, as personal property, immediately after the same are severed, extracted, reduced to possession and produced; and
>
> (3) The repetitive carrying of accounts, in the regular course and conduct of business, and extension of credit in connection with the sale of any tangible personal property or service, except as to persons taxed pursuant to the provisions of section 110-60.[8]

2. Prior City Code

Prior to 2000, Charleston's business and occupation tax was codified in chapter 6, article III, of the Charleston City Code, as adopted in 1975.

The term "service business or calling" was defined in Section 6-107 of the Code of 1975 and reads:

> **Service business or calling.** All activities engaged in by a person for other persons for a consideration, which involve the rendering of a service

[8] Section 110-60 of the Charleston Code of 2000, as amended, taxes banks and other financial businesses.

as distinguished from the sale of tangible property, but not including the services rendered by an employee to his employer. The term shall include, but not be limited to:

(1) Persons engaged in manufacturing, compounding or preparing for sale, profit or commercial use articles, substances or commodities which are owned by another or others;

(2) Persons engaged as independent contractors in producing natural resource products which are owned by another or others, as personal property, immediately after the same are severed, extracted, reduced to possession and produced; and

(3) The repetitive carrying of accounts, in the regular course and conduct of business, and extension of credit in connection with the sale of any tangible personal property or service, except as to persons taxed pursuant to the provisions of section 6-117.[9]

The service classification was found in Section 6-115, which reads:

Sec. 6-115. Service business or calling not otherwise specifically taxed.

Upon every person engaging or continuing within the city in any service business or calling not otherwise specifically taxed under this article, there is hereby levied, and shall be collected, a tax equal to one percent of the gross income of any such business.

For purposes of this section, gross income shall not include income from services rendered to persons outside the city which is taxed by any other municipality of this state pursuant to section 8-13-5 of the Code of West Virginia.

(Ord. No. 1232, 4-18-72, § 9; Ord. No. 1300, § 11-20-72, § 9; Ord. No. 2405, 3-27-79; Ord. No. 4369, 11-21-88.

[9] Section 6-117 of the Charleston Code of 1975 taxed banks and other financial businesses.

It appears that the 1988 amendment either added the second paragraph to Section 6-115 or amended the language of that paragraph to reflect an amendment to W. Va. Code § 8-13-5 enacted by the West Virginia Legislature in 1985.

3. State B & O Tax

The State business and occupation tax in effect prior to July 1, 1987, was imposed for the privilege of engaging in certain enumerated business activities. One such privilege was engaging in any service business or calling not otherwise specifically taxed. "Service business or calling" was defined in W. Va. Code § 11-13-1 (definitions) as follows:

> "Service business or calling" shall include all activities engaged in by a person for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible property, but shall not include the services rendered by an employee to his employer. This term shall include, but not be limited to:
>
> (a) Persons engaged in manufacturing, compounding or preparing for sale, profit or commercial use articles, substances or commodities which are owned by another or others;
>
> (b) Persons engaged as independent contractors in producing natural resource products which are owned by another or others, as personal property, immediately after the same are severed, extracted, reduced to possession and produced; and
>
> (c) The repetitive carrying of accounts, in the regular course and conduct of business, and extension of credit in connection with the sale of any tangible personal property or service, except as to persons taxed pursuant to the provisions of section two-k of this article.[10]

This definition was last amended in 1972.

Service businesses or callings not otherwise specifically taxed were taxed under W. Va. Code § 11-13-2h, which reads:

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[10] W. Va. Code § 11-13-2k taxed banks and other financial businesses.

> **§ 11-13-2h. Service business or calling not otherwise specifically taxed.**
>
> Upon every person engaging or continuing within this State in any service business or calling not otherwise specifically taxed under this law, there is hereby levied and shall be collected, a tax equal to one and fifteen one-hundredths percent of the gross income of any such business.

The language of Section 11-13-2h had been in the West Virginia Code since at least 1935. The amendments to Section 11-13-2h in 1959 and 1971 were to the rate of tax. (Section 11-13-2h was repealed by the Legislature in 1989.)

Summary

In summary, the City of Charleston has imposed and generally enforced its business and occupation tax on all businesses doing business in the City[11] that were subject to the State business and occupation tax prior to July 1, 1987, including, but not limited to, service businesses or callings not otherwise specifically taxed, since at least 1975, which was 23 years prior to enactment by Congress of the Internet Tax Freedom Act, which was effective October 21, 1998. Consequently, including charges for Internet access in the gross income subject to tax under Section 110-58 of the Charleston City Code is not prohibited by the Internet Tax Freedom Act because the tax is grandfathered under Section 1104 of the Internet Tax Freedom Act, as amended.[12]

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[11] Businesses not subject to the City's business and occupation tax include, and are limited to, those businesses the City is prohibited from taxing by State law, W. Va. Code § 8-13-5. Those businesses include businesses that were exempt from the State business and occupation tax under W. Va. Code § 11-13-3 (such as insurance companies, nonprofit cemeteries, certain fraternal societies, organizations and associations, and corporations, associations and societies organized exclusively for religious or charitable purposes), and those businesses that prior to July 1, 1987, were subject to the annual tax on incomes of certain carriers, such as telephone and telegraph companies, motor carriers, railroads, barge lines and pipelines.

[12] Prior to amendment of the Internet Tax Freedom Act, the City's business and occupation tax was grandfathered under language in Section 1101(a) of the Act, for state and local taxes imposed and generally enforced prior to October 1, 1998.

After you have had an opportunity to read this letter, we will be happy to discuss it with you and answer any questions you may have.

Very truly yours,

Dale W Steager

Dale W. Steager

DWS/ljr

cc: Michael Zarrilli

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CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 11, 2023
Section:	New business
Category:	Presentation
Agenda Item Name:	Sanitation Department garage: new round of public bidding.
Recommended By:	Operations Manager
Summary:	Initial bids to construct a new Sanitation Garage were higher than anticipated and cost prohibitibe. A second round of bidding based on updated specifications is now proposed. The Operations Manager will present more information.
Fiscal Impact:	TBD.
Recommendation:	For discussion
Attachments:	None

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 11, 2023
Section:	New business
Category:	Action Item
Agenda Item Name:	City hall security improvements
Recommended By:	Operations Manager
Summary:	Operations Manager will report on plans to increase security at city hall.
Fiscal Impact:	TBD
Recommendation:	For discussion
Attachments:	None

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 11, 2023
Section:	New business
Category:	Action Item
Agenda Item Name:	Creation of new position in the Treasurer's Department
Recommended By:	City Treasurer
Summary:	The City Treasurer will present information about her department's need for a new position not previously included in this year's budget.
Fiscal Impact:	New full time hire, cost TBD.
Recommendation:	Consider for approval
Attachments:	None

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 11, 2023
Section:	New business
Category:	Action Item
Agenda Item Name:	Leasing of two Vehicles for Operations and City Hall
Recommended By:	Operations Manager
Summary:	The Operations Manager will present information about the opportunity to lease two new vehicles for City Hall, including a pool vehicle.
Fiscal Impact:	TBD
Recommendation:	Consider for approval
Attachments:	None