

**SYNOPSIS**

**CONSUMERS' SALES AND SERVICE TAX -- DATA PROCESSING EXEMPTION NOT APPLICABLE** -- Setting up web sites, hosting fee arrangements, and advertising services are not exempt under W. Va. Code § 11-15-9(a)(22) as being the sale of electronic data processing services, because the same constitute data generation services, instead.

**CONSUMERS' SALES AND SERVICE TAX -- INTERNET WEB SITE ADVERTISING IS NOT EXEMPT AS OUTDOOR ADVERTISING** -- W. Va. Code § 11-15-9(a)(12), which exempts outdoor advertising such as billboards, sales of radio and television time, and the preprinting of advertising circulars, does not extend to web site advertisements.

**CONSUMERS' SALES AND SERVICE TAX – INTERNET TAX FREEDOM ACT NOT APPLICABLE** – Computer services provided to customers prior to any electronic transmission of items over the internet are not exempt under the Federal Internet Tax Freedom Act.

**FINAL DECISION**

The Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner.

The Director of the Division of the Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner.

This assessment was for the period of January 1, 1999 through December 31, 2001, for tax and interest, through February 28, 2002.

Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked April 10, 2002, the Petitioner timely filed a petition for reassessment.

During the course of the hearing, Commissioner's counsel agreed that the following items should be deleted from the assessment: (1) transposition errors on pp. 13 and 68 of the audit working papers should be changed to reflect a much smaller

amount instead of the two larger amounts, respectively; (2) reported commissions totaling one large amount was actually salaries paid to employees; (3) bad debts totaling one amount, except for invoice to Company 1; (4) unpaid invoices totaling another amount; (5) invoice to Company 2; and (6) the Company 3 invoice.

Petitioner's representative agreed during the hearing that actual commissions, which it received from subscribers, were indeed subject to consumers' sales and service tax.

### **FINDINGS OF FACT**

1. Petitioner is engaged in the business of providing certain internet-related services, which include internet web site development, web hosting (processing and storing of customer information for use on a customer's web site and making same accessible to internet users, etc.
2. Petitioner collected no consumers' sales and service tax at all during the audit period.

### **DISCUSSION**

The first issue presented for determination is whether Petitioner is correct in arguing that its revenues derived from setting up web sites, hosting fees, and the like are exempt under W. Va. Code § 11-15-9(a)(22) as being the sale of electronic data processing services.

Said provision defines data processing services as "(1) the processing of another's data, including all processes incident to processing of data such as keypunching, key stroke verification, rearranging or sorting of previously documented data for the purpose of data entry or automatic processing and changing the medium on which data is sorted."

Petitioner argues that by converting any clients' raw data into information available to its clients' customers amounts to processing of another's data. In addition,

he says that the transforming of this written data into internet-available data means that Petitioner is also changing the medium on which the data is stored.

Notwithstanding Petitioner's arguments to the contrary, this Tribunal finds that the physical setting up of web sites and web hosting operations, including that of electronic mail, are not the sale of electronic data processing services but merely the providing of data generation services. See RGIS Inventory Specialists v. Palmer, 209 W. Va. 152, 544 S.E.2d 79 (2001).

The second issue presented is whether so-called domain fees (development work) are not taxable, because the same were purchased for resale.

At hearing Commissioner correctly argued that the above was actually consulting fees charged to clients for which no consumers' sales and service tax was charged.

Accordingly, it is also **DETERMINED** that the same were properly subject to consumers' sales and service tax, because an hourly charge was billed for consulting work and no tax was collected or re-sale exemption certificate obtained.

The third issue presented for decision is whether so-called banner advertising, which consists of preparing an advertising logo for a web page is exempt under both the aforementioned data processing exemption as well as the exemption for advertising per se.

For the same reasons as set forth in the first issue decided herein, it is clear that this type of activity is purely a data generation service provided by the Petitioner in conjunction with web page development and is neither processing of data, such as key stroking or the changing the medium on which data is sorted. Additionally, W. Va.

Code § 11-15-9(a)(12) exempts outdoor advertising such as billboards, sales of radio and television time, and the preprinting of advertising circular; however, there is absolutely no mention of internet web site advertisements being tax exempt.

The final issue presented is whether the “Internet Tax Freedom Act” (ITFA) exempts Petitioner’s activities.

Because this Tribunal has determined that Petitioner’s taxable services are merely computer services provided to customers prior to any transmission of items over the internet, we find no violation of the ITFA; the later would be implicated if the Commissioner were seeking to tax dial-up fees and the like.

The issues presented in this matter involve the following important rules of administrative agency authority and statutory construction. Initially, it is important at all times to recognize and to give more than just “lip service” to two general points: (1) rather than utilizing a so-called “de novo” scope of review, deference is to be given to the expertise of the administrative agency, even with respect to an “issue of law,” when that issue of law is one within the peculiar expertise of the administrative agency; and (2) any applicable legislative regulation does not merely reflect the administrative agency’s position but, instead, has been legislatively reviewed and approved, has exactly the same force and effect as a statute, and is, therefore, subject to the usual, deferential rules of statutory construction, see Feathers v. West Virginia Board of Medicine, 211 W. Va. 96, 102, 562 S.E.2d 488, 494 (2002).

The following specific points flow from these general points. “[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the reviewing [tribunal] is whether the agency’s answer is based on a permissible construction of the

statute.” Syllabus point 4, in relevant part, Appalachian Power Co. v. State Tax Department, 195 W. Va. 573, 466 S.E.2d 424 (1995) (emphasis added). Similarly, “the Tax Commissioner [or the West Virginia Office of Tax Appeals] need not write a rule [or an administrative decision] that serves the statute in the best or most logical manner; he [, or she, or the Office of Tax Appeals] need only write a rule [or a decision] that flows rationaly from the statute.” Id., 195 W. Va. at 588, 466 S.E.2d at \_\_\_ (emphasis added). Thus, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syllabus point 3, Shawnee Bank, Inc. v. Paige, 200 W. Va. 20, 488 S.E.2d 20 (1997) (internal citation omitted) (emphasis added). Finally, “courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary.” Appalachian Power, 195 W. Va. at 589, 466 S.E.2d at \_\_\_ (quoting Frymier-Halloran v. Paige, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

### **CONCLUSION(S) OF LAW**

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. See W. Va. Code § 11-10A-10(e).
2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the issues raised.

## DISPOSITION

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the period of January 1, 1999 through December 31, 2001, should be and is hereby **MODIFIED** in accordance with the above Conclusion(s) of Law for tax, interest, on the revised tax, updated through July 31, 2003, for a total revised liability.