

**SANITIZED DECS. – 02-539 SV & 02-540 W – BY – ROBERT W. KIEFER, JR. –
ISSUED – 10/28/03**

SYNOPSIS

WITHHOLDING TAX AND SEVERANCE TAX -- The burden of proof on a taxpayer, to overcome the presumption that an estimated assessment is correct, may be satisfied by filing returns that are accepted by the State Tax Commissioner.

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. Thereafter, on July 18, 2002, the Assistant Director of the Division issued an estimated assessment for withholding tax against the Petitioner. The assessment was for the period of January 1, 2000, through December 31, 2001, for tax, interest, computed through June 15, 2002, and additions to tax, for a total assessed tax liability.

On July 18, 2002, the Assistant Director of the Division also issued an estimated severance tax assessment against the Petitioner, pursuant to the provisions of Chapter 11, Articles 10 and 13A of the West Virginia Code, for the year period of January 1, 1999, through December 31, 2001, for tax, interest, computed through June 15, 2002, and additions to tax, for a total assessed tax liability.

Thereafter, the Petitioner filed petitions for reassessment with the Office of Hearings and Appeals of the Commissioner's Office. The petition for reassessment was received on August 20, 2002, and was timely filed. This matter was transferred to the docket of this tribunal, the West Virginia Office of Tax Appeals, effective January 1, 2003, pursuant to the provisions of W. Va. Code § 11-10-9(b).

Subsequently, pursuant to a notice of a hearing sent to the parties, a hearing was held on August 6, 2003, in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. The Petitioner does not dispute that he withheld taxes from one or more of his employees for the period that is the subject of the assessment, and that the amount actually withheld is owed to the State.

2. The Petitioner does not dispute that he owes severance tax for the privilege of engaging in his business activity within the State of West Virginia.

3. The Petitioner only disputes the amount of the tax he withheld from his employees and the amount of the severance tax he owes for the period of the assessment.

4. After the assessment was issued, the Petitioner submitted withholding tax returns to the Commissioner for the tax year 2000.

5. After the assessment was issued, the Petitioner also submitted severance tax returns to the Commissioner for the years 1999, 2000 and 2001.

6. The withholding and severance tax returns submitted by the Petitioner to the Commissioner were accepted by the Commissioner.

7. While the Petitioner did not appear at the hearing in this matter, said returns were submitted by the Commissioner at the hearing to establish the Petitioner's actual liability with respect to both the taxes and the tax periods that were the subject of the assessments.

8. No withholding tax return was submitted at the hearing by or on behalf of the Petitioner for tax year 1999.

9. The withholding tax return submitted by the Petitioner for tax year 2000, and entered into evidence at the administrative hearing, demonstrates that the Petitioner withheld a small amount for that year. State's Exhibit No. 4.

10. The severance tax return submitted by the Petitioner for tax year 1999, and entered into evidence at the administrative hearing, demonstrates that the Petitioner owed a larger amount in severance tax for that year. After giving the Petitioner a credit in estimated payments made for that year, the Petitioner had a remaining balance due and owing. State's Exhibit No. 8.

11. The severance tax return submitted by the Petitioner for tax year 2000, and entered into evidence at the administrative hearing, demonstrates that the Petitioner owed severance tax for that year. State's Exhibit No. 8.

12. The severance tax return submitted by the Petitioner for tax year 2001, and entered into evidence at the administrative hearing, demonstrates that the Petitioner owed severance tax for that year. State's Exhibit No. 8.

DISCUSSION

As found above, the only issue in this action is the amount of tax actually owed by the Petitioner. The Petitioner submitted returns to the Commissioner showing the amount he actually owed with respect to one of the two years that were the subject of the withholding tax assessment, and with respect to all three years that were the subject of the severance tax assessment. The Commissioner submitted said returns on behalf of the Petitioner at the administrative hearing. The amounts show as owed on the returns filed by the Petitioner will be established as the Petitioner's liability with respect to the taxes owed for those particular years.

CONCLUSIONS OF LAW

1. At a hearing on a petition for reassessment, the burden of proof is on the Petitioner to prove that the assessment issued against it is erroneous, either in whole or in part. See W. Va. Code § 11-10A-10(e) [2002]; 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. With respect to his withholding tax liability for 1999, the Petitioner submitted no evidence to overcome the presumption that the assessment of withholding tax is correct and to satisfy his burden of proving that it is incorrect.

3. With respect to all other years forming the basis of both assessments, the Petitioner has satisfied his burden of proving that the assessment against him was erroneous, in part, and has submitted evidence that tends to prove the true and actual amounts of his tax liability with respect to both the withholding and severance tax assessments.

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

1. Because the Petitioner submitted no evidence to overcome the presumption that the assessment of withholding tax is correct and to satisfy his burden of proving that it is incorrect, his withholding tax liability for 1999 remains at the amount established by the assessment.

2. Based on the returns submitted by and on behalf of the Petitioner, respecting his withholding tax liability due and owing for 2000, it is determined his liability for that period.

3. Based on the returns submitted by and on behalf of the Petitioner, respecting his severance tax liability, determined his liability for 1999, 2000, and 2001.

4. Interest is imposed by statute and may not be waived.

5. There is no evidence in the record showing that there was reasonable cause for waiver of the additions to tax and that the failure of the taxpayer to file his returns and pay the tax was not due to willful neglect.

**DIRECTIVES RESPECTING COMPUTATION
OF THE AMOUNT OF TAX DUE**

1. In accordance with 121 C.S.R. 1, § 73.1.1, the above shall constitute a statement of the opinion of the West Virginia Office of Tax Appeals determining the issues in the above-captioned matter.

2. The West Virginia Office of Tax Appeals is withholding entry of its decision for the purpose of requiring the parties to submit computations of interest and additions to tax due and owing consistent with the opinions set forth above.

3. The parties shall make every attempt to reach an agreement with respect to the amount of interest and additions to tax due and owing on the tax found due in accordance with the above-stated opinion of the West Virginia Office of Tax Appeals.

4. If the parties are able to reach an agreement with the respect to the amount of interest and additions to tax due and owing, then within 45 days of service of this decision, and in accordance with 121 C.S.R. 1, § 73.1.2, the parties shall file an agreed upon computation of interest and additions to tax due.

5. Within 15 days of service of this opinion, the parties are to confer for the purpose of making a preliminary attempt to identify the amounts or computations upon which the parties agree and those upon which they disagree.

6. Within 30 days of service of this opinion, the parties shall meet in an attempt to reach an agreement with respect to the computation of interest and additions to tax due in accordance with the above-stated opinion.

7. If, after meeting in an attempt to reach an agreement with respect to the above-stated computations, the parties are unable to agree upon an amount of interest and additions to tax due, then in accordance with the provisions of 121 C.S.R. 1, § 73.2.1, and within 45 days of service of

this opinion, either party may submit a computation of the amount of interest and additions to tax that it believes is due, and serve its computation on the West Virginia Office of Tax Appeals and on the other party.

8. If only one party submits a computation of the amount of interest and additions to tax it believes is due, the Office of Tax Appeals shall proceed in accordance with the provisions of 121 C.S.R. 1, § 73.2.2.

9. If both parties submit a computation of the amount of interest and additions to tax they believe is due, either in accordance with the provisions of 121 C.S.R. 1, § 73.2.1 (where both parties file their computations simultaneously) or 121 C.S.R. 1, § 73.2.2 (where one party files its computation and other party files its computation in response), the Office of Tax Appeals shall proceed in accordance with the provisions of 121 C.S.R. 1, § 73.2.3.

10. Any computation submitted by the parties pursuant to 121 C.S.R. 1, § 73.2, shall contain such information as shall be sufficient to permit the West Virginia Office of Tax Appeals to understand how such computation of interest and additions to tax was arrived at by said party.

11. If, after the submission of computations of the amount of interest and additions to tax due by both parties, either party believes that an evidentiary hearing is necessary, within 10 days of receipt of the opposing party's computation, it shall submit a request for an evidentiary hearing, clearly and succinctly setting forth the grounds upon which its request is based, and describing the nature of any evidence that it intends to introduce.

Upon receipt of an agreed upon computation of interest and additions to tax due, pursuant to 121 C.S.R. 1, § 73.1.2, or upon resolution of any dispute in the computations of interest and additions to tax due submitted by the parties, pursuant to 121 C.S.R. 1, §§ 73.2.1 & 2, the West Virginia Office of Tax Appeals will enter its the computation of interest and additions to tax due.