

### **SYNOPSIS**

**SEVERANCE TAX AND PURCHASERS' USE TAX – BURDEN OF PROOF** -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the taxpayer bears the burden of proving that the assessment issued by the State Tax Commissioner is incorrect. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

**SEVERANCE TAX AND PURCHASERS' USE TAX – CONSTRUCTIVE NOTICE OF PROCEDURAL RULES** -- A taxpayer, and any representative acting on its behalf, have the duty to know the contents of the procedural rules promulgated by the West Virginia Office of Tax Appeals, 121 C.S.R. 1, § 1, *et seq.* (Apr. 20, 2003), and to comply with said rules when practicing before this Office.

**SEVERANCE TAX AND PURCHASERS' USE TAX -- EFFECT OF FAILURE TO FILE MOTION FOR CONTINUANCE** -- The failure of the taxpayer to appear at a hearing without first filing with this Office a motion for a continuance, as required by 121 C.S.R. 1, § 57.2 (Apr. 20, 2003), and without said motion being granted by the presiding administrative law judge shall be deemed a waiver by the taxpayer of its statutory right to present testimony or documentary evidence in support of its petition for reassessment.

**SEVERANCE TAX AND PURCHASERS' USE TAX – BURDEN OF PROOF NOT CARRIED** -- By failing to appear at a hearing and present testimony or documentary evidence in support of its petition for reassessment, the taxpayer failed to satisfy its burden of proving that the assessment issued against it was incorrect or invalid. W. Va. Code §§ 11-10A-10(d) & (e) and 121 C.S.R. 1, § 64.1.1 & 63.1 (Apr. 20, 2003).

### **FINAL DECISION**

The Director of the Field Auditing Division issued a severance tax assessment against the Petitioner. The assessment was for the year period of January 1, 1999, through December 31, 2001, for tax and interest, computed through September 30, 2002. Written notice of this assessment was served on the Petitioner.

Also, on September 25, 2002, the Commissioner issued a use tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code, for the year period of January 1, 1999, through December 31, 2001, for tax and interest,

computed through September 30, 2002. Written notice of this assessment was also served on the Petitioner.

Thereafter, by mail postmarked October 30, 2002, received on November 1, 2002, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, two petitions for reassessment, one contesting the severance tax assessment and one contesting the use tax assessment.

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

There was no appearance on behalf of the Petitioner when the hearing was convened. The hearing was held without an appearance on behalf of the Petitioner or the Commissioner, in accordance with the provisions of W. Va. Code § 11-10A-10(a) [2002] and 121 C.S.R. 1, § 69.1 (Apr. 20, 2003).

### **FINDINGS OF FACT**

1. As a result of his review of the Petitioner's books and records, the Tax Commissioner's auditor made several estimates in arriving at the assessment issued against the Petitioner.

#### **THE AUDITOR'S ESTIMATES FOR SEVERANCE TAX PURPOSES**

2. For purposes of the severance tax, the auditor estimated the value of timber severed based on the amounts received from customers for logs and lumber sold, or for logs and lumber used for several purposes.

3. As a result of reviewing the Petitioner's invoices, the auditor determined that the Petitioner sold logs to various customers. He estimated the value of the timber severed and sold as logs by taking the amount received from the sale of logs and multiplying it by 50 percent.

Stated differently, he estimated the value of the severed timber at one-half of the value of the logs sold. He then multiplied that amount by 3.22%, the rate of tax on timber severed, arriving at the tax, which he rounded.

4. Based on his review of the Petitioner's invoices, the auditor also determined that the Petitioner sold lumber to various customers. He estimated the value of the timber severed and sold as lumber by taking the amount received from the sale of lumber and multiplying it by 25 percent. Stated differently, he estimated the value of the severed timber at one-quarter of the value of the logs sold. He then multiplied that amount by the severance tax rate, 3.22%, arriving at a tax amount, which he rounded.

5. The auditor also determined that the Petitioner built four homes during the audit period. He estimated that the value of each home built. Thus, the total estimated value of the homes built during the audit period. He estimated the value of the materials going into the homes at 50% of the value of the homes. He then estimated that the value of the lumber incorporated into the homes was 90% of the estimated value of the materials. For each year of the audit period, he estimated that the value of the lumber used in the homes was 1/3 of the total estimated value of the lumber. Then, using the same methodology used to estimate the value of timber severed and sold as lumber, he estimated the value of the timber severed and used as lumber in new homes was 25 percent of the estimated value of the lumber. For each year of the audit period, he estimated the value of the timber severed, processed into lumber, and used in new homes per year. He then multiplied that amount by the severance tax rate, 3.22%, arriving at an annual tax, which he rounded.

6. The auditor also determined that the Petitioner remodeled two homes during the audit period. The auditor estimated the value of the lumber used in remodeling the homes. He took

the total estimated value of the lumber used in remodeling homes during the audit period and estimated that the value of the lumber for each year of the audit period was 1/3 of the total estimated total value of the lumber. Consistent with his methodology for valuing timber severed and processed into lumber, he estimated the value of the timber severed and ultimately used in remodeling homes. He then multiplied that amount by the severance tax rate, 3.22%, arriving at an annual tax, which he rounded.

7. The auditor determined that the Petitioner used lumber for its “personal use,” during the audit period.<sup>1</sup> He estimated the value of that lumber used for “personal use” during the audit period. He estimated that for each year of the audit period the value of the timber severed and processed into lumber that was put to “personal use” was 25% of the value of the lumber. He then multiplied that amount by the severance tax rate, 3.22%, arriving at the tax, which he rounded.

8. The auditor determined that the Petitioner purchased logs that it either resold or sawed. For these purchases, the Petitioner was given a credit against estimated values for the timber severed, since these amounts were included in the sales upon which the determination of the value of severed timber was based.

#### THE AUDITOR’S ESTIMATES FOR PURCHASERS’ USE TAX PURPOSES

9. To arrive at the value of lumber used by the Petitioner in the construction of new homes, the auditor used the same methodology he used in estimating the value of the lumber for severance tax purposes, except that he did not reduce value of the lumber by 75% to arrive at the value of timber severed. Thus, he valued the lumber used by the Petitioner in the building of

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<sup>1</sup> The Petitioner is a corporation. It can only be assumed that the lumber was furnished to one of the principals of the Petitioner for his or her personal use.

new homes per year. He then multiplied that amount by 6%, the purchasers' use tax rate to arrive at a use tax per year.

10. To arrive at the value of lumber used by the Petitioner in the remodeling of homes, the auditor used the same methodology he used in estimating the value of the lumber for severance tax purposes, except he did not reduce the value of the lumber by 75% to arrive at the value of timber severed. Thus, he valued the lumber used by the Petitioner in the building of new homes per year. He then multiplied that amount by 6%, the purchasers' use tax rate to arrive at a use tax per year.

11. To arrive at the value of lumber for personal use, the auditor used the same methodology he used in estimating the value of the lumber for severance tax purposes, except he did not reduce the value of the lumber by 75% to arrive at the value of timber severed. Thus, he valued the lumber for personal use per year. He then multiplied that amount by 6%, the purchasers' use tax rate to arrive at a use tax per year.

## FACTS RELATED TO PROCEDURE

12. Prior to the hearing in this matter, over the course of several days, the undersigned made numerous attempts to contact the Petitioner's representative, a public accountant, by telephone, in order to schedule the hearing in a manner that was convenient to the representative.

13. The undersigned was unable to speak to the Petitioner's representative and never received return phone calls from the representative about scheduling the hearing in this matter at time convenient for the representative.<sup>2</sup> The undersigned was never able to speak to the Petitioner's representative about this matter.

14. The undersigned scheduled the hearing in this matter for the date and time set out above.

15. The week before the scheduled hearing, under cover letter dated September 8, 2003, the Petitioner's representative "overnighted" certain materials addressed to this office. The salutation on the cover letter addressed to the paralegal read, "[paralegal's name]," an apparent reference to the paralegal with the Legal Division of the State Tax Commissioner's Office. Reading the cover letter leads to the conclusion that this information was sent as part of an attempt to informally resolve this matter with the State Tax Commissioner.

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<sup>2</sup> The undersigned spoke to the Petitioner's brother, another accountant in the firm representing the Petitioner, about another petition for reassessment pending before this tribunal. The undersigned explained that the Petitioner's representative and his brother were being given the opportunity to schedule their respective hearings at times that were convenient for the both of them. At no time did the Petitioner's representative or his brother ever call the undersigned to express a preference for times for their hearings. In fact, the undersigned made several subsequent phone calls over the course of several days in an attempt to speak to the Petitioner's representative or his brother. In each instance, the representative was either in conference with a client, at lunch, or otherwise unavailable. Finally, on the third Friday preceding the week for which the hearing was to be scheduled, the undersigned placed a call to the Petitioner's representative in an attempt to schedule the hearing, and was advised that neither the Petitioner's representative nor his brother was available and that one of them would return the call. Having received no return phone call late in the day, the undersigned again called the Petitioner's representative and was advised that both the Petitioner's representative and his brother had both left the office for the weekend. Consequently, the undersigned scheduled the hearing without any input on the part of the Petitioner's representative.

16. The materials were received in this Office on September 9, 2003, where they were directed to the docket clerk, who was on vacation that week. Because the docket clerk was on vacation, the documents were not forwarded to the undersigned Administrative Law Judge until the week following the hearing.

17. On September 18, 2003, the hearing was held in Wheeling, West Virginia. As noted above, neither the Petitioner nor its representative appeared at the hearing.

18. Upon returning from Wheeling, where multiple hearings were conducted between September 16 and September 19, 2003, the undersigned was presented with the materials sent by the Petitioner. After giving them the most cursory of reviews, the undersigned forwarded them to counsel for the Tax Commissioner under cover letter dated September 23, 2003.

19. Counsel for the Tax Commissioner reviewed said materials and, by letter dated September 25, 2003, advised the undersigned that he did not believe these materials constituted evidence that the assessment was incorrect and that they were otherwise adequate to overcome the presumption that the assessment was correct. He characterized it as merely an attempt on the part of the Petitioner to substitute its estimates for those of the Tax Commissioner.

20. By letter dated September 30, 2003, the Petitioner's representative responded to the September 25, 2003 letter of counsel for the Tax Commissioner. The Petitioner's representative maintains that counsel for the Tax Commissioner was incorrect in asserting that the Petitioner is merely attempting to substitute its estimates for those of the Tax Commissioner. He maintains that some of the information establishes the value of lumber used in the construction of new homes.

21. The Petitioner's representative also attempts to explain why no one appeared on behalf of the Petitioner at the hearing. He states that he sent information to the paralegal and that

he indicated that “we did not see the need to attend the hearing as we had no new information to provide.” He also stated that “it was indicated to [them] that by doing this a hearing was not necessary.” He stated that because he never heard anything to the contrary, he assumed that the Tax Commissioner’s representatives were of the opinion that the information provided was adequate, and that there was no reason for the Petitioner or its representative to attend the hearing.

22. In his letter of September 8, 2003, the Petitioner’s representative stated that the information provided with the letter was the same information that would be presented at an evidentiary hearing.

PETITIONER’S ESTIMATES AS SET OUT IN THE DOCUMENTS PRESENTED BY IT TO THE STATE TAX COMMISSIONER

23. The Petitioner contends that the Tax Commissioner overvalued the timber severed by it, which is subject to the severance tax, and that she also overvalued the lumber used by the Petitioner during the audit period that is subject to the purchasers’ use tax.

PETITIONER’S SEVERANCE TAX ESTIMATES

24. With respect to the four homes built by Petitioner during the audit period, the Petitioner presents two separate contentions. For one house, the Petitioner presented the Tax Commissioner with a written contract, executed by the purchasers showing that they paid the Petitioner to construct the house. Using the same methodology as used by the auditor, based on the purchase price, instead of the auditor’s estimated value, the Petitioner values the lumber used in the house.<sup>3</sup>

25. With respect to the other houses, the Petitioner presented documents purporting to show the lumber used in constructing those homes and the value of said lumber. The Petitioner

estimated the value based on the type of lumber and number of pieces purportedly used. It estimated the value of lumber used in the three houses.

26. According to the Petitioner, the total value of the lumber used in building new homes during the audit period was estimated. For each year of the audit period, it estimated the value of the lumber used in the houses built. It then used the auditor's estimate, that the value of the timber severed is 25% of the estimated value of the lumber, making the estimated value of the timber severed for each year of the audit period. Applying the tax rate for severing timber results in severance tax for each year of the audit period.

27. With respect to the lumber used in the remodeling of homes and for "personal use," the Petitioner made the following statement in the materials submitted to the Tax Commissioner:

#### REMODELED HOMES AND PERSONAL USE LUMBER VALUE

It is our opinion that based on how greatly the new homes valuation was overestimated, that it would be and is very responsible, to estimate the remodeling work and personal use at 50 % [sic] of what the auditor originally estimated. As you can see, the new home type work that is done was extremely over estimated [sic] and their remodel work certainly would not exceed this.

28. Consistent with this contention, the Petitioner maintains that the severance tax on timber processed into lumber and used in remodeling homes should be, per year, one-half of the tax computed by the auditor. *See* ¶ 6, *supra*.

29. Also consistent with this contention, the Petitioner maintains that the severance tax on timber processed into lumber and put to "personal use" should be, per year, one-half of the tax computed by the auditor. *See* ¶ 7, *supra*.

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<sup>3</sup> The Petitioner erroneously used the amount as the value of the house. This error affected the amounts computed by the Petitioner. The Petitioner computed the lumber used in the house differently.

30. The Petitioner did not dispute the auditor's estimates respecting timber severed and sold as logs, timber severed, processed and sold as lumber, or the amount credited for timber that the Petitioner purchased for resale or to be sawed.

PETITIONER'S PURCHASERS' USE TAX ESTIMATES

31. For purposes of the purchasers' use tax, the Petitioner took its estimated value of the lumber used in the new houses, and applied the 6% purchasers' use tax rate to that value. Because of the Petitioner's error in the base figure, the purchase price of a house it constructed, the Petitioner's computation is incorrect. *See* f.n. 3, *supra*. Had the Petitioner used the correct figures, it would have valued the lumber used in the new houses for each year of the assessment. Consequently, the Petitioner would have arrived at purchasers' use tax per year, or a certain total for the entire period.

32. In arriving at the value of lumber used by the Petitioner in the remodeling of homes, the Petitioner takes the position that the value of the lumber should be one-half of the value used by the auditor. The auditor valued the lumber used by the Petitioner in the building of new homes per year. Thus the Petitioner would value the lumber used in remodeling homes per year. At that value, the purchasers' use tax on lumber used in remodeling homes would be for each year of the audit period.

33. In arriving at the value of lumber used by the Petitioner for "personal use," the Petitioner takes the position that the value of the lumber should be one-half of the value used by auditor. The auditor valued the lumber used by the Petitioner for "personal use" per year. Thus the Petitioner would value the lumber used for "personal use" per year. At that value, the purchasers' use tax on lumber used for "personal use" for each year of the audit period.

## DISCUSSION

By filing a petition for reassessment or a petition for refund, a taxpayer's representative holds himself or herself out as having a minimum level of expertise in the entire hearings process before the West Virginia Office of Tax Appeals ("WVOTA"). Any person practicing before WVOTA represents to his client, to the other party, and to WVOTA: (1) That he is familiar with the structural relationships that exist among WVOTA, the State Tax Commissioner and his client; (2) That he is aware of and understands the Procedural Rules promulgated by WVOTA, 121 C.S.R. 1, § 1, *et seq.* [Apr. 20, 2003]; (3) that he is able to represent his client before WVOTA, consistent with W. Va. Code § 11-10A-1, *et seq.* and 121 C.S.R. 1, § 1, *et seq.* (Apr. 20, 2003), and, more specifically, that his representation of his client will not violate W. Va. Code § 11-10A-15, 121 C.S.R. 1, § 17 (Apr. 20, 2003) and "The Definition of the Practice of Law," promulgated by the West Virginia Supreme Court of Appeals, by Order entered June 27, 1961; and (4) That he has knowledge respecting the substantive issues involved the petition for reassessment or petition for refund that is the subject of the petition in which he is representing the taxpayer. Inherent in this representation is that he is familiar with the structural relationships that exist among WVOTA, the State Tax Commissioner and his client, and that he knows which public entity (WVOTA or the State Tax Commissioner) employs the individuals with whom he is dealing at any given time or, if he is unsure, that he will make the necessary inquiry to inform himself of that information.

In his letter of September 30, the Petitioner's representative articulates the reasons that neither he nor his client appeared at the hearing in this matter. The letter demonstrates either a lack of understanding of the structural relationship among WVOTA, the State Tax Commissioner and the taxpayer, or a lack of knowledge as to who employs the paralegal. He

also demonstrates either a lack of awareness of the existence of the Procedural Rules promulgated by WVOTA, 121 C.S.R. 1, § 1, *et seq.* (Apr. 20, 2003), or a lack of understanding of what is required under the rules.

A primary requirement of the procedural rules (a requirement inherent in all judicial and quasi-judicial proceedings) is that the parties must appear at the scheduled evidentiary hearing and present all evidence in support of a petition for reassessment or refund, unless the hearing has been continued. *See* 121 C.S.R. 1, §§ 57.2, 57.3.1, 62.5 (Apr. 20, 2003). In the present action, the Petitioner's representative did not make a proper motion to continue the hearing. He certainly did not file a written motion requesting a continuance, as required by 121 C.S.R. 1, § 57.2. At no time did the Petitioner or its representative contact the undersigned Administrative Law Judge to request a continuance based on the existence of exceptional conditions. *See* 121 C.S.R. 1, §§ 57.3.1, 57.3.8 (Apr. 20, 2003). At the hearing, counsel for the Tax Commissioner did not indicate that he was aware that the Petitioner did not intend to appear at the hearing. Either the Petitioner's representative was not familiar with the requirements for requesting a continuance of a hearing as required by the procedural rules or, if he was familiar with those requirements, he simply did not comply with them.

The Petitioner's representative asserts that he did not attend the hearing because: (1) As he informed the paralegal in his letter of September 8, 2003, based on the information submitted, he and his client "did not see the need to attend the hearing," and (2) They anticipated being called by the paralegal if she believed the information they submitted was insufficient and that a hearing would be necessary. This tends to demonstrate that the Petitioner's representative's either did not understand the relationship between WVOTA and the State Tax Commissioner, or that he did not understand that the paralegal is an employee of the State Tax Commissioner.

WVOTA and the State Tax Commissioner are separate statutory entities. The State Tax Commissioner performs all functions respecting administration of taxes, including the issuance of assessments and all litigation related to defending assessments or defending against taxpayers' petitions for refund. On the other hand, WVOTA performs the quasi-judicial function of hearing evidence respecting petitions for reassessment and petitions for refund, and determining whether or not assessments issued by the State Tax Commissioner and challenged by taxpayers are valid, and whether or not petitions for refund filed by taxpayers are valid. In the exercise of this function, it is WVOTA that schedules hearings and determines whether or not to grant requests to continue hearings. Determining whether or not a hearing should be continued is not a function that is exercised by the State Tax Commissioner.

The paralegal is an employee of the State Tax Commissioner, not WVOTA. As such, she has no authority to speak for WVOTA, including authority to grant a taxpayer's request to continue a hearing. This tribunal finds it highly unlikely that she would make such a representation. If the Petitioner's representative understood the paralegal to say that she would determine whether or not the scheduled hearing would be continued, he likely misunderstood what the paralegal said. Of greater concern, it would constitute an understanding on his part that is absolutely contrary to the respective duties of WVOTA and the State Tax Commissioner established by the Code and the procedural rules. The Petitioner's representative should have understood that the paralegal was not an employee of WVOTA,<sup>4</sup> that she had no authority to grant a continuance and that, under the procedural rules, he had a duty to file a written motion for continuance directed to WVOTA.

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<sup>4</sup> If the Petitioner's representative was not certain that the paralegal was not employed by WVOTA, he should have made the necessary inquiry to ensure that he was aware of that fact.

The Petitioner's representative further contributed to his own misunderstanding by failing to return the phone calls of the undersigned administrative law judge. Had he returned the phone calls and broached the issue of a continuance, the undersigned would have explained the requirements for a continuance and directed Petitioner's representative's attention to the procedural rules respecting the filing for motions for continuance. Instead, the Petitioner's representative disregarded several requests that he return the undersigned's phone calls.

Because the Petitioner failed to attend the hearing without first properly obtaining a continuance thereof, it must be deemed to have waived participation in the hearing.

There are several consequences of the Petitioner's failure to appear in person at the hearing. First, the Petitioner is required to present any evidence it intends to present at the evidentiary hearing. 121 C.S.R. 1, § 62.5 (Apr. 20, 2003). Second, the documents that the Petitioner presented to the Tax Commissioner, which it now asks WVOTA to consider as evidence, were not presented pursuant to the sworn testimony of witnesses, as required by W. Va. Code § 11-10A-10(d) and 121 C.S.R. 1, § 64 (Apr. 20, 2003). Third, the rules provide that *ex parte* affidavits, statements in briefs and unadmitted allegations in pleadings do not constitute evidence. 121 C.S.R. 1, § 64.2 (Apr. 20, 2003).<sup>5</sup> These documents, the contents of which the Petitioner asks this Office to accept as true, have been neither authenticated nor has a proper foundation been laid for their admission into the record. If this Office were to give them the credence that the Petitioner requests, these documents would, in effect, constitute the sworn testimony of the author thereof, who has not been identified, and who the Tax Commissioner has not had the opportunity to cross-examine. These documents are not proper evidence for the consideration of WVOTA.

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<sup>5</sup> The materials submitted by the Petitioner in this action do not rise to the level of an *ex parte* affidavit or statements in a brief.

Even if this tribunal were to accept the documents submitted by the Petitioner, the benefit to the Petitioner would be limited. The one document that, standing alone, aids the Petitioner's case is the contract to build a house for a certain couple. The contract provides that the house is to be constructed at a certain total cost. This is less than the amount that the auditor estimated as the value of the house. Thus, using the auditor's methodology, the value of the timber would be substantially reduced.

The other documents that might be of some benefit to the Petitioner would be the handwritten documents that purport to show the lumber that the Petitioner used in constructing the other new homes. Those documents indicate that the amount of lumber used in those new homes was substantially less than the value of the lumber estimated by the Tax Commissioner's auditor. If the Petitioner had presented sworn testimony to prove that which is shown in those documents, it might have benefited. However, the documents, standing alone, do not constitute proof of the matters asserted therein.

The documents provided by the Petitioner respecting the value of the lumber used in the remodeling of homes and for "personal" use are insufficient to show that the assessment is incorrect with respect to those issues. Sworn testimony to the same effect would be equally insufficient. Counsel for the State Tax Commissioner correctly characterizes this information as an attempt by the Petitioner to substitute its own estimate for that of the State Tax Commissioner.

The Tax Commissioner's assessment is based on estimates. This is permitted by W. Va. Code § 11-10-7, which provides, in relevant part:

(a) *General.* – If the tax commissioner believes that any tax administered under this article has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient to otherwise erroneous, he may

proceed to investigate and determine or estimate the tax liability and make an assessment therefor.

Clearly, the Tax Commissioner has the statutory authority to issue an assessment that is based on her best estimates respecting the amount of tax that the taxpayer owes.

The burden of proving that the assessment is incorrect is on the taxpayer. W. Va. Code § 11-10A-10(e) provides, “Except as otherwise provided by this code or legislative rules, the taxpayer or petitioner has the burden of proof.” The legislative rules do not alter the burden of proof. 121 C.S.R. 1, § 63.1 provides, “The burden of proof shall be upon the petitioner, except as otherwise provided by statute or legislative rule.” Thus, it is the petitioner who has the burden of proving that the Tax Commissioner’s estimates are incorrect.

Looking at the information submitted by the Petitioner respecting the value of lumber used in remodeling of homes and for “personal use,” its estimates are certainly no more valid than those of the Tax Commissioner. However, they are not imbued with any statutory imprimatur, as are the estimates of the Tax Commissioner. They do not have any evidentiary basis, either.<sup>6</sup> The Petitioner’s estimates were not properly presented at the hearing in this matter. Even if they had been properly presented, they would not have been sufficient to overcome the statutory presumption, because they were based on estimates related to other activities.

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<sup>6</sup> The Petitioner’s estimates respecting lumber used in new homes are based on evidence respecting the lumber actually used in building the new homes. It is proper in that respect. It is improper, because it was not properly presented at the hearing.

The Petitioner’s estimates respecting lumber used in remodeling homes and for “personal” use are based on the estimates of the value of lumber used in the building of new homes. This is not an adequate evidentiary foundation. If the estimates were based on the value of the lumber actually used in the remodeling of homes, or the lumber actually used for “personal” use, and if the evidence were properly presented, then the Petitioner’s evidence might be due some consideration. However, basing the estimates on the amount of lumber for another purpose, in the context of the present action, is not adequate to overcome the statutory presumption in the context of this action.

## CONCLUSIONS 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 is on the Petitioner to show that the assessment issued by the State Tax Commissioner is incorrect. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioner, and any representative acting on its behalf, have the duty to know the contents of the procedural rules promulgated by the West Virginia Office of Tax Appeals, 121 C.S.R. 1, § 1, *et seq.* (Apr. 20, 2003), and to comply with said rules when practicing before this Office.

3. In failing to appear at a hearing without first filing with this Office a motion for a continuance and without said motion being granted, as required by 121 C.S.R. 1, § 57.2 (Apr. 20, 2003), the Petitioner waived its right to present testimony or documentary evidence in support of its petition for reassessment.

4. In failing to present testimony or documentary evidence in support of its petition for reassessment, the Petitioner failed to satisfy its burden of proving that the assessment in this action is incorrect or invalid. W. Va. Code §§ 10-10A-10(d) & (e) and 121 C.S.R. 1, § 64.1.1 & 63.1 (Apr. 20, 2003).

## DISPOSITION

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the severance tax assessment issued against the Petitioner for the period of January 1, 1999, through December 31, 2001, for tax and interest, updated through December 20,

2003, should be and is hereby **AFFIRMED**. Interest on the severance tax assessment continues to accrue daily.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers' use tax assessment issued against the Petitioner for the period of January 1, 1999, through December 31, 2001, for tax and interest, updated through December 20, 2003, should also be and is hereby **AFFIRMED**. Interest on the purchasers' use tax assessment continues to accrue daily.