

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – PROFESSIONAL SERVICES EXCEPTION PROVEN – Licensed radiological technologist -- who both sides agree is a professional for consumers' sales and service purposes pursuant to Chapter 30 of the West Virginia Code -- does not forfeit that exception simply because he is also a licensed vascular imaging technologist who now employs a safer and more sophisticated sonographic imaging procedure which no longer utilizes iodized radiation.

PURCHASERS' USE TAX – SAMPLING UPHELD – Failure or refusal of the Petitioner to provide full records to the tax auditor at the time of audit or thereafter for examination authorizes the Tax Commissioner to employ a sampling method of auditing for the entire period, as provided by C.S.R. § 110-15-14.5.3.2.

FINAL DECISION

The Field Auditing Division issued a consumers' sales and service tax assessment against the Petitioner. This assessment was for the period of January 1, 1997 through December 31, 2001, for tax and interest, through December 31, 2001.

Written notice of this assessment was served on the Petitioner.

Also, the Commissioner issued a purchasers' use tax assessment against the Petitioner for the period of October 1, 1997 through June 30, 2002, for tax and interest through October 31, 2002.

Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked December 6, 2002, the Petitioner timely filed petitions for reassessment.

FINDINGS OF FACT

1. Petitioner is a registered radiologic technologist, as well as a registered vascular technologist. He is a member of several professional organizations,

including the American Registry of Radiologic Technologists (ARRT) and the American Registry of Diagnostic Medical Sonographers (ARDMS). Petitioner received his education at the St. Mary's School of Radiologic Technology in West Virginia, a state approved radiological technology school. Prior to working in his profession, he passed a comprehensive test which, among other things, tested the principles of instrumentation and positioning of patients. The Petitioner performs cardiovascular ultrasounds and imaging of arteries, veins and the heart, and then interprets those images for the hospital or referring physician.

2. To maintain his license in order to continue practicing, Petitioner must have continuing medical education of ten (10) hours per year. Petitioner is qualified to be reimbursed by Medicare and Medicaid, because he is a licensed radiologic technologist and a member of both the ARRT and ARDMS. At the hearing, Petitioner provided copies of his license by the Board of Examiners of Radiologic Technologist for the State of West Virginia, his registry in the American Registry of Radiologic Technologists and American Registry of Diagnostic Medical Sonographers, as well as his membership in the Society of Vascular Technology.

3. West Virginia Code § 30-23-1 et. seq. recognize a radiologic technologist as a profession in the State of West Virginia; however, no mention is made therein of sonographic imaging. Most of the services that were the subject of this audit were provided under a contract with a West Virginia hospital dated April 1, 1998 and described as a "Professional Service Agreement." Petitioner maintains professional liability insurance with an insurance company in the amount of \$1,000,000.00 per incident or occurrence, and \$3,000,000.00 in the aggregate.

DISCUSSION

The sole issue for determination concerning the consumers' sales and service tax assessment is whether the services provided by the Petitioner, (i.e. cardiovascular imaging services) are professional services as contemplated by West Virginia Code § 11-15-8 and therefore excepted from the collection of consumers sales and service tax.

Neither side disputes that the field of radiologic technology is a recognized profession in West Virginia, under West Virginia Code § 30-23-1 et. seq. However, the issue that is presented relates to the fact that the Petitioner is actually working as a vascular imaging technologist, a specialty which is not found in chapter 30 of the W. Va. Code.

On redirect examination Petitioner testified as follows:

Q. Now, in your course of work as a vascular technologist, imaging technologist, what do you do exactly?

A. I perform cardiovascular ultrasounds or imaging. I have patients where I image various structures of the body. Further?

Q. Yes.

A. I actually image arteries, veins, the heart, anything associated with cardiovascular ultrasound.

Q. And do you then read those images?

A. I interpret what I do. I leave a preliminary report with the physician and also the hospital or the referring physician.

Q. And do you make recommendations to physicians as to whether a patient should be hospitalized or not?

A. Yes, I do.

Q. Do physicians take your advice?

A. Yes, they do.

Q. Has there ever been a physician who didn't take your advice?

A. No, sir.

Q. Do you have to be supervised by a physician in order to make these vascular images and to read them?

A. I do not.

Q. Do you bill Medicare independently for your services?

A. Yes, I do.

Q. And what kind of qualification do you have to have to bill Medicare?

A. They require a physician doing the test to be on the site or someone with my credentials as being a registered vascular technologist.

Q. So your credentials then are required by Medicare for reimbursement?

A. Yes, sir.

Q. When did you first come to be registered as a radiologic technologist?

A. I believe August of 1984.

On recross examination, the following occurred:

Q. A person to perform as a radiological technologist under the code section, that job is applying ionizing radiation or assist in the application of ionizing radiation to human beings for diagnostic or therapeutic purposes, which you've testified you don't do.

A. We don't, but that's what they require.

Q. Who is "they?"

A. The insurance, Medicare, Medicaid.

Q. Well, how about third-party private pays?

A. They want it – we cannot get third-party pay until Medicaid or Medicare approves us.

Q. Now, the educational requirement, to be a radiological technologist requires 18 months of education, correct?

A. Yes, sir.

Q. And where did you get your education at?

A. Saint Mary's X-ray School, School of Radiologic Technology in Huntington, West Virginia.

Q. And that was an 18-month program. Did you receive a certificate, as Associate degree or a Bachelor's degree?

A. A certificate.

Q. And that's the minimum requirement that you have to have to get the licensure, including passing of the test.

A. That's correct.

Q. To be a registered vascular technologist, I believe you said that you're required 40 hours of work in the field over periods of time?

A. Yes, sir. I think at least two years, plus you have to have an allied health degree, I believe.

Q. An allied health degree like a –

A. Nursing.

Q. Bachelor's degree in biology?

A. No. Most – I'm not speaking for the ARDMS, but most of them are nurses or radiologic technologists.

Q. So your 18-month degree plus your time in the field is a sufficient educational or experience requirement so that you can become a registered vascular technician, including passing the test.

A. That's correct.

Q. I believe you testified that you have a continuing professional educational requirement.

A. Yes, sir.

Q. Is that required by the board of the radiological technologists?

- A. Yes, sir.
Q. When did they start requiring a continuing professional education requirement?
A. Which?
Q. The West Virginia board that has –
A. It looks like it was enacted in 1975, I believe. I'm not sure when it was enacted. You can't have that license without the AART license, and the AART license – you can't get a West Virginia license without passing the AART test, and AART requires us to have ten hours per year. And if I lost that license, I would also lose my state license.

Commissioner's counsel argues that, while the Petitioner is a licensed radiologic technologist, he is not actually providing radiologic services through the use of ionized radiation. Petitioner responds that he performs cardiovascular imaging simply because it is a safer procedure. In effect what Petitioner is saying is that when the relevant statute was written less sophisticated methods of care were used and that medical advances such as sonographical technology should not now make what should be a professional service a nonprofessional one.

Commissioner's counsel correctly sets forth the law on this subject which is; professional services are those services recognized as professional at common law, or explicitly by statute or administrative regulation, as well as those other services determined to be professional by the State Tax Commissioner using the four-part criteria set forth by the legislative regulation, C.S.R. § 110-15-8.1.1. The Commissioner's interpretation in this case is, however, just too narrow.

The Petitioner is a licensed radiologic technologist and vascular technologist having received his education at St. Mary's School. He is clearly a professional under Chapter 30 of the West Virginia Code, and his profession has established standards and a continuing education requirement to maintain same.

For the Commissioner to exclude him from the professional exception because technology has found a safer way to conduct these examinations violates clear legislative intent, given the fact that he remains a professional in every sense of the word.

Accordingly, it is **DETERMINED** that the Petitioner is a professional for consumers' sales and service tax purposes and was not required to collect said tax.

The sole issue for decision regarding the purchasers' use tax assessment is whether the Petitioner has shown that the assessment is incorrect and contrary to law, in whole or in part, as required by W. Va. Code § 11-10A-10(e), in that the tax auditor should not have employed a five (5)-month sampling in making her determination.

Petitioner's counsel bases his argument on the fact that the equipment lease did not occur until August, 2001 and should have been annualized rather than applied during the whole of the audit period, thereby making the assessment invalid.

This argument, although meritorious in that respect, fails when one considers that Petitioner never produced more than five (5) months of invoices for the tax auditor or this tribunal to review and has admitted that some of those purchases could have occurred outside the audit period.

C.S.R. § 110-15-14.5.3.2 clearly allows the Tax Commissioner to employ a sample period when adequate records are not provided by the taxpayer.

In this instance the purchasers' use tax assessment covered a period of fifty-seven (57) months and Petitioner only provided records for five (5) months. This

failure to properly supply tax records as required by law mandates the use of a sample period, the validity of which per se has never been challenged by Petitioner.

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 of proof is upon the petitioner-taxpayer, to show that the assessments are 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 carried the burden of proof with respect to the issue of the professional exception for consumers' sales and service tax purposes.

3. On the other hand, the Petitioner has failed to carry the burden of proof with respect to the issue of the sampling method employed by the tax auditor.

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 year period of January 1, 1997, through December 31, 2001, should be and is hereby **VACATED** and the Petitioner owes no further consumers' sales and service tax for the period in question.

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 October 1, 1997, through June 30, 2002, for tax and interest, updated through September 30, 2003, should be and is hereby **AFFIRMED**.