

**SYNOPSIS**

**PURCHASERS' USE TAX -- MOTOR VEHICLE DEALER -- BODY SHOP'S OR SERVICE DEPARTMENT'S MISCELLANEOUS, "CONSUMABLE" MATERIALS OR "SHOP" SUPPLIES -- NOT SHOWN TO HAVE BEEN PHYSICALLY TRANSFERRED TO CUSTOMERS -- TAXABLE PURCHASES FOR USE IN BUSINESS, NOT TAX-EXEMPT PURCHASES FOR RESALE --** The West Virginia Office of Tax Appeals will affirm the challenged portion of a purchasers' use tax assessment related to the purchases by a motor vehicle dealer of miscellaneous, "consumable" materials or "shop" supplies used or consumed in its body shop or service department, such as disposable cloths, sandpaper, masking tape, cleaning fluids, welding gases, etc., when the dealer shows only that it -- improperly -- collected (and remitted) consumers' sales and service tax from customers on the alleged sales of these materials and supplies to customers, but fails to show that these materials or supplies were physically transferred indefinitely to the customers; in these circumstances the dealer's purchases of these "consumable" materials and supplies are subject to the purchasers' use tax, because the dealer is the user or consumer, and the dealer has failed to show that the items were resold, within the meaning of the exemption from the consumers' sales and service tax / purchasers' use tax provided by W. Va. Code § 11-15-9(a)(9) [2001] and W. Va. Code § 11-15A-3(a)(2) [1987], see 110 C.S.R. 15, § 9.3.4.3.c. (1992). The Petitioner's customers who paid the consumers' sales and service tax on these transactions would be entitled to a refund if they timely and properly file claims for refund of that tax.

**FINAL DECISION**

A tax examiner with 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 this Division of the Commissioner's Office issued a purchasers' use tax assessment against the Petitioner. The assessment was for the period of August 01, 2000 through December 31, 2002, for tax, interest, through April 30, 2003, and no additions to tax, for a total assessed tax liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked April 23, 2003, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment.

## **FINDINGS OF FACT**

1. The Petitioner-taxpayer, a motor vehicle dealer located in this State, purchased, among other things, for use in its business, various materials and supplies, identified by the Petitioner as “body shop materials,” “shop supplies,” “wax and grease remover,” or the like. These materials or supplies included such “consumable” items as disposable cloths, sandpaper, masking tape, cleaning fluids, welding gases, etc.

2. On a computational basis not described on the record, the Petitioner charged each of its body shop customers for, among other things, “paint materials,” as a means of recouping at least some of the costs of the consumable body shop materials used by the Petitioner in performing vehicle painting or body shop work. This charge included consumers’ sales and service tax, and the Petitioner remitted to the State Tax Commissioner the payments by the Petitioner’s customers of that tax on these so-called “paint materials” transactions.

## **DISCUSSION**

The only issue raised is whether the Petitioner’s purchases of consumable body shop materials and the like are exempt from the purchasers’ use tax as purchases for resale, because the Petitioner subsequently charges its customers for “paint materials,” as described above in Finding of Fact no. 2, including charging its customers the consumers’ sales and service tax on those alleged “sales” of such body shop materials.

The purchasers' use tax is complementary to the consumers' sales and service tax, and applies to most purchases of tangible personal property (and most services) for use in this State. On the other hand, purchases of tangible personal property for "resale" as such is exempt, because the intent is for the ultimate user to pay the tax. See, e.g., W. Va. Code § 11-15-9(a)(9) [2001] (sale or purchase for resale exemption from consumers' sales and service tax) and W. Va. Code § 11-15A-3(a)(2) [1987] (same exemption for purchasers' use tax); see also 110 C.S.R. 15, § 9.3.4 (1992) (legislative regulation on sales or purchases for resale, for purposes of consumers' sales and service tax and purchasers' use tax).

Subdivision 9.3.4 of the sales and use tax legislative regulations (1992) make the following relevant points (emphasis added):

9.3.4.1. The exemption allowed by this Section permits [most] vendors of tangible personal property . . . to purchase tangible personal property for the purpose of resale in the form of tangible personal property without paying the consumers sales and service tax or the use tax. However, when such vendors purchase tangible personal property or services for use or consumption in their business of selling tangible personal property, they must pay the consumers sales and service tax or the use tax on such purchases.

9.3.4.2. For providers of taxable services and sellers of tangible personal property subject to the consumers sales and service tax or use tax, property purchased is presumed to be purchased for resale if the final consumer or end user of the property sold will obtain possession of the property upon consummation of the final sale of the property or service sold.

. . . .

9.3.4.3.b. Example: Property not sold for resale to such service providers would include: sales of dry cleaning fluid . . . to persons in the business of dry cleaning[.]

9.3.4.3.c. Sales of carpet shampoo to persons in the carpet cleaning business would not constitute sales for resale because, although the shampoo is applied to the customer's carpet in the cleaning process, it is

extracted from the carpet, allowed to evaporate or otherwise effectively used up in the process rather than being the subject of a transfer of possession.

Thus, to be a sale (or purchase) for resale of tangible personal property, two elements usually must be present: (1) the transfer of possession of the property indefinitely to the ultimate user and (2) an expressed, identifiable sales price charged to that user.

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] court is whether the agency’s answer is based on a permissible construction of the statute.” Syllabus point 4, in 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 rationally from the statute.” *Id.*, 195 W. Va. at 588, 466 S.E.2d at 439 (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 440 (*quoting Frymier-Halloran v. Paige*, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

### **CONCLUSIONS OF LAW**

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

1. The West Virginia Office of Tax Appeals will affirm the challenged portion of a purchasers’ use tax assessment related to the purchases by a motor vehicle dealer of miscellaneous, “consumable” materials or “shop” supplies used or consumed in its body shop or service department, such as disposable cloths, sandpaper, masking tape, cleaning fluids, welding gases, etc., when the dealer shows only that it -- improperly -- collected (and remitted) consumers’ sales and service tax from customers on the alleged sales of these materials and supplies to customers, but fails to show that these materials or supplies were physically transferred indefinitely to the customers; in these circumstances the dealer’s

purchases of these “consumable” materials and supplies are subject to the purchasers’ use tax, because the dealer is the user or consumer, and the dealer has failed to show that the items were resold, within the meaning of the exemption from the consumers’ sales and service tax / purchasers’ use tax provided by W. Va. Code § 11-15-9(a)(9) [2001] and W. Va. Code § 11-15A-3(a)(2) [1987], see 110 C.S.R. 15, § 9.3.4.3.c. (1992). The Petitioner’s customers who paid the consumers’ sales and service tax on these transactions would be entitled to refund if they timely and properly file claims for refund of that tax.

2. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a 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) [2002].

3. In light of conclusion of law no. 1, the Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the issue of whether the items in question were resold to customers, as opposed to being used ultimately by the Petitioner-taxpayer in its business.

### **DISPOSITION**

**WHEREFORE**, it is 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 August 01, 2000 through December 31, 2002, for tax and interest, **updated** through July 31, 2003, should be and is hereby **AFFIRMED**.