

**SANITIZED DEC. – 03-480 C – BY – R. MICHAEL REED – SUBMITTED FOR
DECISION (AFTER POST- HEARING EVIDENTIARY FILINGS) – 02/02/04 –
ISSUED – 02/10/04**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- AUDIT SAMPLE'S TAXABLE PERCENTAGE CALCULATION NOT SHOWN TO BE CLEARLY UNREASONABLE -- The Petitioner's-taxpayer's evidentiary submissions (direct pay permits and tax exemption certificates) at and shortly after the evidentiary hearing did not show that the taxable percentage calculation utilized in the audit sample was so flawed and unrepresentative that it must be disregarded totally, in favor of a detailed (exhaustive) audit method.

CONSUMERS' SALES AND SERVICE TAX -- APPROPRIATE DELETIONS FROM AUDIT SAMPLE -- On the other hand, as conceded by counsel for the Commissioner at and shortly after the evidentiary hearing, the Petitioner has carried the burden of proof with respect to the factual issue of whether the sales to a couple of the significant customers should be deleted (as nontaxable) from the audit sample.

FINAL DECISION

On June 09, 2003, the Director of the Field Auditing Division of the Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner. The assessment was for the period of January 01, 2000 through December 31, 2002, for tax, interest, through June 30, 2003, and no additions to tax. Written notice of this assessment was served on the Petitioner on June 10, 2003.

Thereafter, by mail postmarked August 05, 2003, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. See W. Va. Code § 11-10A-8(1) [2002].

FINDINGS OF FACT

1. Due to the very large number of sales transactions, the tax auditor performed a sample and projection audit method, rather than a detailed

(exhaustive) audit method. The tax auditor randomly chose for the audit sample period the last six months of the middle year of the three-year audit period.

2. Based upon the audit sample, the tax auditor calculated the percentage of sales transactions that were taxable for the sample period, that is, the percentage of all sales transactions for which the Petitioner-taxpayer did not produce applicable direct pay permit numbers or tax exemption certificates at the time of the audit and for which no consumers' sales and service tax had been collected and remitted. In addition to the direct pay permit numbers and exemption certificates that the taxpayer produced at the time of the audit, the tax auditor also considered as nontaxable those sales transactions in the sample period for which the tax auditor confirmed with the Commissioner's main office that applicable direct pay permits were of record.

3. The Tax auditor then projected the taxable percentage from the sample period to the remainder of the audit period, and applied that same taxable percentage to the actual gross proceeds of sales for each of the years in the audit period as reported by the Petitioner-taxpayer for West Virginia corporate net income tax purposes.

4. At the evidentiary hearing the Petitioner-taxpayer eventually opined, without supporting evidence, that the taxable percentage utilized in the audit sample period seemed clearly too high.

5. Based upon tax exemption certificates that the taxpayer produced at and (as allowed) shortly after the evidentiary hearing, the Commissioner conceded

that the sales to a couple of significant customers should be deleted from the taxable percentage calculation.*

DISCUSSION

The first issue is a mixed issue of fact and law: whether the Petitioner-taxpayer has shown that the audit sample method was clearly unreasonable, in that the taxable percentage calculation utilized in that method was grossly excessive and not representative of the entire audit period.

W. Va. Code § 11-10-7(a) [1986] authorizes the State Tax Commissioner to “investigate and determine or estimate the tax liability and make an assessment therefor.” (emphasis added) As an adjunct to the Commissioner’s general authority to estimate a tax liability, the legislatively reviewed and approved regulations for consumers’ sales and service tax and use tax purposes, for example, explicitly authorize a sample and projection method of performing an audit of a taxpayer’s books and records, in certain circumstances, in lieu of a detailed (exhaustive) audit method:

14b.2. The Tax Commissioner may use a detailed auditing procedure or a sample and projection auditing method to determine tax liability.

14b.3. A sample and projection auditing method is appropriate if:

14b.3.1. the taxpayer’s records are so detailed, complex, or voluminous that an audit of all detailed records would be impractical or unreasonable;

*This tribunal will not delete from the audit sample the sales to one customer because the tax exemption certificate for this customer -- which tax exemption certificate was submitted by the Petitioner-taxpayer after the evidentiary hearing -- was dated after the audit period, specifically, January, 2004. The tax exemption certificates are, of course, to be submitted to the vendor-taxpayer at the time of the purchase.

14b.3.2. the taxpayer's records are inadequate or insufficient, so that a competent audit for the period in question is not otherwise possible; or

14b.3.3. the cost of an audit of all detailed records to the taxpayer or the State will be unreasonable in relation to the benefits derived, and sampling procedures will produce a reasonable result.

110 C.S.R. 15, §§ 14b.2 – 14.3.3 (May 1, 1992) (emphasis added).

A related but separate issue is the second issue, a purely factual issue: whether the Petitioner-taxpayer has shown that the sales to a couple of the admittedly significant customers should be deleted (as nontaxable) from the taxable percentage calculation utilized in the audit sample.

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 assessment is incorrect and contrary to law, in whole or in part. See W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioner's-taxpayer's evidentiary submissions (direct pay permits and tax exemption certificates) at and after the evidentiary hearing did not show that the taxable percentage calculation utilized in the audit sample was so flawed and unrepresentative that it must be disregarded totally, in favor of a detailed (exhaustive) audit method.

3. On the other hand, as conceded by counsel for the Commissioner at and after the evidentiary hearing, the Petitioner has carried the burden of proof

with respect to the factual issue of whether the sales to a couple of the significant customers should be deleted (as nontaxable) from the audit sample.

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 01, 2000 through December 31, 2002, for tax, interest, and no additions to tax, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for **revised** tax, interest, on the revised tax, updated through February 29, 2004, and no additions to tax, for a **total revised** liability.