

**SANITIZED DEC. 03-623 RU – BY GEORGE V. PIPER -- SUBMITTED FOR
DECISION ON 06/16//04 – ISSUED 07/19/04**

SYNOPSIS

PURCHASERS' USE TAX -- SALE AND INSTALLATION OF CONVEYER SYSTEMS NOT CAPITAL IMPROVEMENTS -- Criteria to constitute a capital improvement, pursuant to 110 C.S.R. 15 § 107.3.3 (May 1, 1992), is not met when conveyor systems: (a) do not add utility to the building or structure; (b) nor become part of the building or structure or real property or become permanently affixed so that their removal would cause material damage to the articles being removed; (c) nor constitute property intended to be permanently installed or to remain for an indefinite period of time.

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. Thereafter, on January 17, 2003, the Director of this Division of the Commissioner's Office issued a purchasers' use tax assessment against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code. The assessment was for the period of, January 1, 2000 through June 30, 2002 for tax, interest, through January 31, 2003, and no additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioner.

FINDINGS OF FACT

1. Petitioner is engaged in the business of selling and installing conveyor systems

which are used by manufacturing facilities to sort items inside the factory walls. Third parties install the systems under the guidance of the Petitioner and said conveyors require no foundation whatsoever, only bolted supports.

2. In this case Petitioner's purchaser, a manufacturing business, on its own, remitted consumers' sales and service tax on the conveyor systems which it purchased from the Petitioner.

3. On February 7, 2003, Petitioner made payment in full of the assessment to avoid further interest charges or other action by the state.

4. On February 13, 2003, Petitioner received a letter from the Field Auditing Division's Director denying the request to waive interest.

5. On March 25, 2003, Petitioner provided documentation received from customer concerning its payment of tax. See Finding of Fact No. 2 above. Petitioner requested refund of tax and interest.

6. On April 28, 2003, Petitioner received a letter from the Division's Director denying the refund request. That letter referenced West Virginia Code § 11-15-9(a)(9), which states that "purchases of building materials, equipment or other tangible personal property by building contractors for installation into a building, facility or structure under construction are subject to the West Virginia consumers' sales and service tax or the West Virginia use tax."

7. Petitioner sent a letter to the Division Director on July 16, 2003, explaining that it was seeking a refund of tax that was paid twice on the same equipment (and that Petitioner was unable to get information from its customer before the assessment was made and paid by Petitioner). Petitioner also enclosed the documentation previously sent. This July 16, 2003 letter was Petitioner's "claim" for refund, timely filed within two (2) years after payment of the tax (on February 13, 2003).

8. Petitioner received no response to the July 16, 2003 letter to the Division Director.

Petitioner started calling in October, 2003, and finally spoke with the Division Director around October 18-20, 2003. He suggested filing a petition for refund with the Office of Tax Appeals. A petition, with a cover letter, was sent on October 21, 2003, wherein Petitioner again stated that the Division Director's letter did not address the circumstances correctly, in that the Petitioner was claiming that the tax had been paid twice. This petition for refund was timely filed within sixty (60) days after the Petitioner received notice of the denial of its claim for refund.

DISCUSSION

The sole issue is whether Petitioner has shown that it is entitled to the refund of purchasers' use tax because the items which it provided to its customer, a manufacturer, did not qualify as a nontaxable contracting sale of a capital improvement, but instead, a taxable sale of tangible personal property, making the Petitioner's purchases of the same items to be exempt from purchasers' use tax as purchases of tangible personal property for resale as such.

The conveyor systems used within the manufacturing facility did not add utility to the building or a structure; or did not become part of the building or structure or real property; or were not permanently affixed so that their removal would cause material damage to the articles being removed; or were not intended to become a permanent installation or to remain for an indefinite period. Accordingly, the same did not constitute capital improvements pursuant to 110 C.S.R. 15, § 107.3.3 (May 1, 1992).

Consequently, Petitioner's purchases were exempt purchases of tangible personal property for resale as such.

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 refund the burden of proof is upon a petitioner-taxpayer, to show that the petitioner-taxpayer is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

The Petitioner-taxpayer in this matter has carried the burden of proof with respect to the issue of whether it had purchased items for resale as tangible personal property, not capital improvements, making the Petitioner's purchases exempt and its payment of the tax improper and refundable. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of purchasers' use tax, for the period of January 1, 2000, through June 30, 2002, is hereby **AUTHORIZED**, plus any statutory interest.

As set forth in W.Va. Code § 11-10A-18 [2002], the West Virginia State Tax Commissioner's Office is to see that the payment of the refund, plus any statutory interest, is issued promptly.