

**REDACTED DECISION – DOCKET # 04-022 C & 04-025 U – BY ROBERT W. KIEFER, JR., ALJ – SUBMITTED FOR DECISION on AUGUST 4, 2009 – ISSUED on SEPTEMBER 10 2009.**

### **SYNOPSIS**

**CONSUMERS SALES AND SERVICE TAX -- TAXPAYER'S FAILURE TO CARRY BURDEN OF PROOF --** The failure of taxpayer to articulate adequate grounds in its petition for reassessment justifying its claim, combined with its failure to appear at a hearing and to present any evidence respecting its claim, will result in a denial of relief to the taxpayer. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

**PURCHASERS USE TAX -- TAXPAYER'S FAILURE TO CARRY BURDEN OF PROOF --** The failure of taxpayer to articulate adequate grounds in its petition for reassessment justifying its claim, combined with its failure to appear at a hearing and to present any evidence respecting its claim, will result in a denial of relief to the taxpayer. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

### **FINAL DECISION**

On November 13, 2003, the Director of the Auditing Division of the West Virginia State Tax Commissioner's Office ("the Commissioner") issued an assessment for consumers sales and service tax 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 15 of the West Virginia Code. The assessment was for the period January 1, 2000, through June 30, 2003, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, computed through October 31, 2003, and additions to tax in the amount of \$\_\_\_\_\_, for a total assessed tax liability of \$\_\_\_\_\_. Written notice of this assessment was served on the Petitioner.

On the same date, the Director of the Auditing Division also issued an assessment for purchasers use tax 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 October 1, 2000, through June 30, 2003, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, computed through October 31, 2003, and additions to tax in the amount of \$\_\_\_\_\_, for a total assessed tax liability of \$\_\_\_\_\_. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked January 12, 2004, received in the offices of this tribunal, the West Virginia Office of Tax Appeals, on February 4, 2004, the Petitioner timely filed a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9 [2005].

At the time scheduled for convening the evidentiary hearing, there was no appearance on behalf of the Petitioner. The evidentiary hearing was held, however, without an appearance on behalf of the Petitioner, in accordance with the provisions of W. Va. Code § 11-10A-10(a) [2002] and W. Va. Code. St. R. § 121-1-69.1 (Apr. 20, 2003).

### **FINDINGS OF FACT**

1. In its petition for reassessment respecting the consumers sales and service tax assessment, the Petitioner asserted that a substantial portion of its gross receipts were derived from the business of “contracting,” and therefore were not subject to the consumers sales and service tax.

2. With respect to the consumers sales and service tax assessment, the Petitioner also asserted that one of its larger customers had a direct pay permit, for which the Petitioner was entitled to an offset against the assessment.

3. With respect to the consumers sales and service tax assessment, the Petitioner further asserted that with respect to certain sales on which the auditor assessed consumers sales and service tax, the Petitioner either did not receive the full amount that was initially billed or it was not paid at all

4. With respect to the purchasers use tax assessment, the Petitioner asserted that its purchases were used in the business of “contracting,” and therefore were not subject to the purchasers use tax.

5. With respect to the purchasers use tax assessment, the Petitioner also asserted that it was unable to identify numerous vendors on whose purchases the purchasers use tax had been assessed because the vendors were identified as “Various.”

6. With respect to the purchasers use tax assessment, the Petitioner further asserted that it was unable to identify numerous vendors on whose purchases the purchasers use tax had been assessed because the vendors were identified as “Cash.”

7. With respect to the purchasers use tax assessment, the Petitioner further asserted that it had paid consumers sales and service tax on a number of its purchases upon which purchasers use tax had been assessed.

8. The Tax Commissioner served discovery requests on the Petitioner, to which the Petitioner never responded.

9. A prehearing conference was held in which the issues raised by the Petitioner were discussed and at which the parties agreed to request necessary information from each other and to exchange information requested.

10. It does not appear that any further information was ever requested by either party, or that any information was ever supplied by either party to the other subsequent to the prehearing conference.

11. The Petitioner was provided with notice that it was required to appear at the evidentiary hearing and present evidence respecting the reasons it believed that the assessment was erroneous, unlawful, void or otherwise invalid.

12. In the absence of supporting evidence, the grounds articulated by the Petitioner are inadequate to show that the assessments are erroneous, unlawful, void or otherwise invalid.

13. The Petitioner did not appear at the time and place of the hearing and presented no evidence respecting any of its allegations.

### **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 to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. The Petitioner in this matter has failed to carry its burden of proving that any assessment of taxes against it is erroneous, unlawful, void or otherwise invalid.

### **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 January 1, 2000, through June 30, 2003, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, computed through October 31, 2003, and additions to tax in the amount of \$\_\_\_\_\_, for a total assessed tax liability of \$\_\_\_\_\_, should be and is hereby **AFFIRMED**.

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 October 1, 2000, through June 30, 2003, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, computed through October 31, 2003, and additions to tax in the amount of \$\_\_\_\_\_, for a total assessed tax liability of \$\_\_\_\_\_, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on the assessments until the liabilities are fully paid.

**WEST VIRGINIA OFFICE OF TAX APPEALS**

By: \_\_\_\_\_  
Robert W. Kiefer, Jr.  
Administrative Law Judge

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Date Issued