

**SANITIZED DEC. 04-082 U – BY ROBERT W. KIEFER, JR. – SUBMITTED FOR
DECISION 07/07/04 – ISSUED 01/07/05**

SYNOPSIS

PURCHASERS' USE TAX – Purchases of items by a contractor that are to be installed in customers' home as part of its contracting business are not subject to the purchasers' use tax pursuant to W. Va. Code § 11-15-9(a)(11), when the purchase and installation are pursuant to a valid prescription issued by doctor or other person who is licensed to issue prescriptions.

PURCHASERS' USE TAX – In order for a contractor to claim an exemption from the purchasers' use tax pursuant to W. Va. Code § 11-15-9(a)(11), the burden of proof is on the contractor to show that the purchase and installation of items is pursuant to a valid prescription issued by a doctor or other person who is licensed to issue prescriptions.

FINAL DECISION

The Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner. Thereafter, on December 15, 2003, the Director of the Division issued a purchasers' use tax assessment against the Petitioner. The 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 July 31, 2003, for tax and interest, computed through December 15, 2003, for a total assessed tax liability. No additions to tax were assessed. Written notice of the assessment was served on the Petitioner.

Thereafter, by hand delivery on February 13, 2004, 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].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. The Petitioner is in the business of selling and installing small elevators, porch lifts, stair lifts and other products of a similar nature, which are for the purpose of transporting people with limited mobility within a building.

2. Installation of the items requires that the equipment installed be attached to buildings in which they are installed.

3. Because the State Tax Commissioner's auditor determined that the items were attached to buildings or structures owned by the Petitioner's customers, or some part thereof, the improvements constituted capital improvements.

4. While the items sold and installed by the Petitioner do not require a prescription issued by a physician or other person licensed to prescribe, some of the items purchased by the Petitioner were installed at its customers' homes or other locations pursuant to prescriptions issued by individuals licensed to issue prescriptions.

5. In some instances, the items purchased and installed by the Petitioner for its customers are required by the customers' medical service providers.¹ However, in many instances, the customers make their determination that they need the items and then contact the Petitioner regarding installation of those items.

6. Upon contact with the Petitioner by the customer, Petitioner will go to the site where the item is to be installed for the purpose of evaluating the site and determining the best method for installing the equipment.

¹ Petitioner's president gave as an example one customer who would not be discharged by the Veterans' Administration hospital until such time as he had a chair lift installed, so that he could go up and down his stairs.

7. Typically, it is at the time that Petitioner goes to the site that he advises the Petitioner's customers that it is to their advantage to obtain a prescription, and it is at that time that the customers will attempt to obtain the prescription.

8. Typically, the prescription is issued subsequent to the Petitioner's initial sales call to the customer.

9. Petitioner testified that, so far as he understands, the purpose of obtaining a prescription is to eliminate the need to collect or pay consumers' sales and service tax. He noted that because installation of the equipment is prescribed, some of his customers will take the cost of installation as a deduction on their federal income tax returns.

8. Health insurance, Medicare and Medicaid will sometimes pay for the equipment when sold and installed pursuant to a prescription. However, more often than not, the customers pay for the equipment themselves.

9. Petitioner further testified that the Petitioner sells and installs approximately one elevator per week and attempts to maintain at least one elevator in stock at all times so as to promptly meet its customers needs.

10. When the Petitioner purchases elevators, it generally purchases two or three at a time.

11. The number of elevators maintained in the Petitioner's stock at any given time is not so great that the purchase of such elevators constitute "bulk" purchases.

12. The Petitioner presented "Petitioner's Exhibit No. 1, which sets forth its computation of exempt purchases.

13. The Petitioner's computes its exempt purchases of equipment that it installed for its customers pursuant to a prescription to be in a certain amount.

14. The Petitioner's computation includes as exempt purchases in a certain amount that were installed for a local school board, which is exempt from payment of the consumers' sales and service tax on its purchases.

16. A review of the individual files that make up Petitioners Exhibit No. 2, discloses that there were no written prescriptions in the files respecting certain sales that were purportedly made pursuant to a prescriptions.

17. It is the finding of this tribunal that the Petitioner has only proven that certain dollar amounts of purchases were installed for its customers pursuant to a prescription.

DISCUSSION

The State Tax Commissioner assessed consumers' sales and service tax against the Petitioner because it purchased equipment that was used and consumed by it in the business of providing contracting services to its customers. The Petitioner contends that the assessment issued by the State Tax Commissioner is incorrect, in part, because the purchases on which the State Tax Commissioner assessed consumers' sales and service tax were made pursuant to prescriptions, which sales are purportedly exempt pursuant to W. Va. Code § 11-15-9(a)(11).

West Virginia Code § 11-15-8 provides, in relevant part, "(a) The provisions of this article shall not apply to contracting services. However, purchases by a contractor of tangible personal property or taxable services for use or consumption in the providing of a contracting service shall be taxable . . . , except as otherwise provided in this article."

W. Va. Code § 11-15-2(c) defines "contracting," in relevant part, as follows:

(c) "Contracting":

(1) *In general* -- "Contracting" means and includes the furnishing of work, or both materials and work, for another (by a sole contractor, general contractor,

prime contractor, subcontractor or construction manager) in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for removal or demolition of a building or structure, or any part thereof, or for the alteration, improvement or development of real property. . . .

* * *

(3) *Special rules* -- For purposes of this definition:

(A) The term "structure" includes, but is not limited to, everything built up or composed of parts joined together in some definite manner and attached or affixed to real property or which adds utility to real property or any part thereof or which adds utility to a particular parcel of property and is intended to remain there for an indefinite period of time;

(B) The term "alteration" means, and is limited to, alterations which are capital improvements to a building or structure or to real property;

(C) The term "repair" means, and is limited to, repairs which are capital improvements to a building or structure or to real property;

(D) The term "decoration" means, and is limited to, decorations which are capital improvements to a building or structure or to real property;

(E) The term "improvement" means, and is limited to, improvements which are capital improvements to a building or structure or to real property;

(F) The term "capital improvement" means improvements that are affixed to or attached to and become a part of a building or structure or the real property or which add utility to real property, or any part thereof, and that last or are intended to be relatively permanent. As used herein, "relatively permanent" means lasting at least a year in duration without the necessity for regularly scheduled recurring service to maintain the capital improvement. "Regular recurring service" means regularly scheduled service intervals of less than one year;

(G) Contracting does not include the furnishing of work, or both materials and work, in the nature of hookup, connection, installation or other services if the service is incidental to the retail sale of tangible personal property from the service provider's inventory: Provided, That the hookup, connection or installation of the foregoing is incidental to the sale of the same and performed by the seller thereof or performed in accordance with arrangements made by the seller thereof. Examples of transactions that are excluded from the definition of contracting pursuant to this subdivision include, but are not limited to, the sale of wall-to-wall carpeting and the installation of wall-to-wall carpeting, the sale, hookup and connection of mobile homes, window air conditioning units, dishwashers,

clothing washing machines or dryers, other household appliances, drapery rods, window shades, venetian blinds, canvas awnings, free-standing industrial or commercial equipment and other similar items of tangible personal property. Repairs made to the foregoing are within the definition of contracting if the repairs involve permanently affixing to or improving real property or something attached thereto which extends the life of the real property or something affixed thereto or allows or intends to allow the real property or thing permanently attached thereto to remain in service for a year or longer;

The Petitioner's customers are individuals who suffer from reduced mobility, as the result of age, illness, injury, debilitation, or other like causes. Generally, the customers contact the Petitioner when they wish to have certain equipment installed in their homes for the purpose of increasing or enhancing their mobility. The Petitioner purchases the equipment and installs it in its customers' homes. The evidence in the record is that the Petitioner engages in the business of providing equipment and installing it in the homes of its customers as part of a single contract. There is no evidence in the record to show that it sells equipment separate and apart from its installation, or that installation is incidental to the sale of the equipment. The Petitioner is engaged in the furnishing of materials and work, for another in fulfillment of a contract for the alteration or improvement an existing building or structure, or a part thereof. This is the statutory definition of "contracting." W. Va. Code § 11-15-2(c)(1). Since the Petitioner is engaged in the business of contracting, all of its purchases are subject to the consumers' sales and service tax, unless otherwise exempt. W. Va. Code § 11-15-8. Absent evidence that the purchases were exempt, the State Tax Commissioner properly assessed consumers' sales and service tax on the Petitioner's purchases of equipment that were installed in its customers' homes.

The Petitioner contends that certain of its purchases of equipment are exempt by reason of the provisions of W. Va. Code § 11-15-9(11), which provides an exemption for "Sales of

drugs dispensed upon prescription and sales of insulin to consumers for medical purposes.”² This Office is of the opinion that the Legislature, in enacting W. Va. Code § 11-15-9(a)(11), did not intend to exempt sales of prescription “drugs,” including appliances, to persons or entities other than the patient for whom the prescription was written. However, the Supreme Court ruled otherwise in *Syncor International Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001). While this Office is of the opinion that this is not what the Legislature intended, it is bound by the *Syncor* decision. Thus, it must be determined whether or not the facts presented by this matter are sufficiently similar to those presented by *Syncor*, so as to justify application of the legal principles articulated in the *Syncor* decision to this matter.

In *Syncor*, the taxpayer purchased radiopharmaceuticals, which were administered to its patients. The radiopharmaceuticals were prepared in accordance with prescriptions issued to the individual patients. The taxpayer then purchased the radiopharmaceuticals pursuant to the individual prescriptions issued to its patients. The sales to the taxpayer were held to be exempt because they were pursuant to prescriptions issued to individual patients.

The situation presented by this matter is sufficiently similar to the *Syncor* case to warrant application of that decision herein. The Petitioner’s customers, who are the users of the equipment, receive prescriptions for the equipment. The Petitioner then purchases the equipment pursuant to its customers’ prescriptions. Again, while this tribunal does not believe this is what the Legislature intended, this similarity in the two transactions justifies application of the *Syncor* rule to the Petitioner.

As testified to by the Petitioner’s president and its representative at the hearing, its customers are advised to obtain the individual prescriptions from their physicians, although a prescription is not required to purchase the equipment. Upon presentation of the prescription by

² The term “drugs” is defined to include appliances. W. Va. Code § 11-15-2(f) [2001].

the customer to the Petitioner, the Petitioner then purchases the item from one of its suppliers. He further testified that the reason for prescription was to eliminate the need for the payment of consumers' sales and service tax.³ He also testified that some of the Petitioner's customers were able to deduct the cost of Petitioner's services on their personal income tax returns because they are pursuant to a prescription.

This Office is troubled by the fact that the principal for the Petitioner advises its customers to obtain a prescription for the equipment to be installed. It is also troubling that the primary reason for obtaining a prescription relates to the consumers' sales and service tax exemption, and not to traditional medical reasons. While this Office has some concern with the fact that the Petitioner is able to structure the transactions so that they are made pursuant to prescriptions, nothing in the statute that mandates that the item purchased *require* a prescription. All that is required for application of the exemption is that the items be purchased pursuant to prescriptions. Thus, the exemption applies regardless of whether a prescription is required for the purchase of the item, or if it merely optional and provides some advantage to the customer. It is also immaterial whether the advantage is for tax purposes, or other reasons. This is a classic example of tax avoidance, not tax evasion.

As set forth in Petitioner's Exhibit No. 1, the Petitioner identifies purchases that it contends were made pursuant to prescriptions issued to its customers.⁴ Thus, it contends that those purchases are exempt.

³ It appears that Petitioner's President's advice to the Petitioner's customers is based on the erroneous understanding that the customers would be required to pay consumers' sales and service tax on the installation of the equipment absent a prescription. This is clearly not the case. The Petitioner's services are exempt. It is the Petitioner's purchases that are subject to the purchasers' use tax.

⁴ Actually, the evidence shows that several of the identified purchases were installed for customers in other states. Thus, these purchases are exempt, although not for the reason stated by the Petitioner.

However, a review of the individual files shows that not all of the purchases identified by the Petitioner were made pursuant to prescriptions.⁵ Totaling the invoices that the Petitioner proved were made pursuant to prescriptions and to customers located in other states, the Petitioner had exempt purchases in a certain amount. This results in a reduction to the amount of tax assessed.

The Petitioner also claims that two purchases are exempt because it installed the equipment purchased in the course of providing contracting services to the local county school board. It is true that purchases made by the school board would be exempt by reason of its status as a government agency, regardless of the nature of the goods or services purchased. However, purchases by the Petitioner which are used and consumed in the provision of contracting services are subject to purchasers' use tax, regardless of whether or not the person or entity to whom the contracting services are provided is required to pay consumers' sales and service tax. Therefore, the purchases of equipment that were installed in buildings owned by the school board are not exempt, as claimed by the 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 to show that the assessment against it is incorrect. *See* W. Va. Code § 11-10A-10(e) [2002].

⁵ There were no prescriptions in the following customers' files: Customer 1, Customer 2, Customer 3, Customer 4, Customer 5, Customer 6 and Customer 7. This is not to say that these customers were not issued prescriptions, but only that the Petitioner failed to satisfy its burden of proving that these particular customers had prescriptions. There was also an invoice identified as a trailer repair that was claimed as exempt, but which was not shown to be exempt.

2. Purchases of equipment that is to be installed in the homes of individuals in the course of the provision of contracting services are ordinarily subject to purchasers' use tax by the contractor.

3. Petitioner's purchases of equipment that is to be installed in its customers' homes pursuant to prescriptions issued by individuals who are licensed to issue such prescription are exempt from purchasers' use tax pursuant to the provisions of W. Va. Code § 11-15-9(a)(11).

4. As more fully set forth above, the Petitioner in this matter has carried its burden of proving that certain of its purchases are exempt from the payment of purchasers' use tax, because those purchases were pursuant to a valid prescription issued to the customers for whom the services were performed.

5. As more fully set forth above, the Petitioner in this matter has not carried its burden of proof with respect to certain of its purchases which it claims are exempt, because there is no evidence to show that these purchases were made pursuant to a valid prescription issued to those customers.

6. Petitioner's purchases which were used in the provision of contracting services to the local county board are not exempt from the purchasers' use tax simply because items purchased by the county board are exempt from the tax.

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 year period of January 1, 2000, through July 31, 2003, for tax and interest, computed through December 15, 2003, for a total assessed tax liability, should be **MODIFIED** in accordance with

the above Conclusions of Law for **revised** tax, with tax due for 2000, tax due for 2001, tax due for 2002, and tax due for January 1, 2003 through July 31, 2003.

**DIRECTIVES RESPECTING COMPUTATION
OF THE AMOUNT OF INTEREST DUE**

1. In accordance with 121 C.S.R. 1, § 73.1.1, the above shall constitute a statement of the opinion of the West Virginia Office of Tax Appeals determining the issues in the above-captioned matter.

2. The West Virginia Office of Tax Appeals is withholding entry of its decision for the purpose of requiring the parties to submit computations of interest due and owing consistent with the opinions set forth above.

3. The parties shall make every attempt to reach an agreement with respect to the amount of interest due and owing on the tax found due in accordance with the above-stated opinion of the West Virginia Office of Tax Appeals.

4. If the parties are able to reach an agreement with the respect to the amount of interest due and owing, then within 45 days of service of this decision, and in accordance with 121 C.S.R. 1, § 73.1.2, the parties shall file an agreed upon computation of interest due.

5. Within 15 days of service of this opinion, the parties are to confer for the purpose of making a preliminary attempt to identify the amounts or computations upon which the parties agree and those upon which they disagree.

6. Within 30 days of service of this opinion, the parties shall meet in an attempt to reach an agreement with respect to the computation of interest due in accordance with the above-stated opinion.

7. If, after meeting in an attempt to reach an agreement with respect to the above-stated computations, the parties are unable to agree upon an amount of interest due, then in accordance with the provisions of 121 C.S.R. 1, § 73.2.1, and within 45 days of service of this opinion, either party may submit a computation of the amount of interest that it believes is due, and serve its computation on the West Virginia Office of Tax Appeals and on the other party.

8. If only one party submits a computation of the amount of interest it believes is due, the Office of Tax Appeals shall proceed in accordance with the provisions of 121 C.S.R. 1, § 73.2.2.

9. If both parties submit a computation of the amount of interest they believe is due, either in accordance with the provisions of 121 C.S.R. 1, § 73.2.1 (where both parties file their computations simultaneously) or 121 C.S.R. 1, § 73.2.2 (where one party files its computation and other party files its computation in response), the Office of Tax Appeals shall proceed in accordance with the provisions of 121 C.S.R. 1, § 73.2.3.

10. Any computation submitted by the parties pursuant to 121 C.S.R. 1, § 73.2, shall contain such information as shall be sufficient to permit the West Virginia Office of Tax Appeals to understand how such computation of interest was arrived at by said party.

11. If, after the submission of computations of the amount of interest due by both parties, either party believes that an evidentiary hearing is necessary, within 10 days of receipt of the opposing party's computation, it shall submit a request for an evidentiary hearing, clearly and succinctly setting forth the grounds upon which its request is based, and describing the nature of any evidence that it intends to introduce.

12. Upon receipt of an agreed upon computation of interest due, pursuant to 121 C.S.R. 1, § 73.1.2, or upon resolution of any dispute in the computations of interest due submitted by the

parties, pursuant to 121 C.S.R. 1, §§ 73.2.1 & 2, the West Virginia Office of Tax Appeals will enter a final order respecting the amount of interest due.