

**SANITIZED DEC. 04-478 X – BY GEORGE V. PIPER – SUBMITTED ON 8/17/04  
FOR DECISION ON DOCUMENTS ONLY – ISSUED 8/31/04**

**SYNOPSIS**

**TOBACCO PRODUCTS EXCISE TAX -- REASONABLE CAUSE NOT SHOWN FOR WAIVER OF ADDITIONS TO TAX --** Failure by the Petitioner to discover that it was not reporting its taxes correctly prior to audit amounts to “willful neglect” and does not constitute reasonable cause for waiver of regular additions to tax. *See* W. Va. Code § 11-10-8(a)(1)-(2) [1986].

**FINAL DECISION**

On June 29, 2004, the Field Auditing Division of the West Virginia State Tax Commissioner’s Office issued a tobacco products excise tax (cigarettes) assessment against the Petitioner. This assessment was for the period of June 1, 2001 through April 30, 2004, for tax, interest, through June 30, 2004, and additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked July 8, 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].

In its petition for reassessment the Petitioner waived its right to a hearing, opting instead for a decision based upon the information contained in its petition for reassessment.

Subsequently, Petitioner decided to apply the total amount of the assessment against the sum of its “cigarette” tax stamp reimbursement (assessment paid in full); however,

Petitioner is still seeking the return of that amount, which represents the interest and additions to tax portions of the assessment.

By telephone the presiding administrative law judge (“ALJ”) requested that the Petitioner and the Tax Commissioner’s counsel submit detailed reasons for and against waiver of the additions to tax.

### **FINDINGS OF FACT**

In its fax of July 30, 2004 Petitioner stated that during May 2003, Petitioner incorrectly misstated its stamp inventory on its cigarette tax return. This fact was discovered during the State of West Virginia tax audit and resulted in an underpayment, which Petitioner is not contesting, and which was offset against a reimbursement that Petitioner received for the return of its stamp inventory.

### **DISCUSSION**

Because interest is not waivable, the only issue remaining is whether the Petitioner has shown reasonable cause for waiver of the regular additions to tax, pursuant to W.Va. Code § 11-10-18(a)(1)-(2) [1986].

Petitioner argues that it was not aware of the amount of tax owed until the audit was conducted and that it is unfair to be assessed additions to tax on a tax balance that it did not even know existed, and for an error that the State had not detected earlier.

Commissioner's counsel countered by arguing that the Petitioner did not timely file its "cigarette" tax returns in the first place, although the Tax Commissioner agreed to waive those late fees. Then, Petitioner was audited and it was discovered that Petitioner was now underreporting the correct amount of tax due.

Commissioner's counsel argued that this repeated noncompliance was not grounds for waiver of the additions to tax.

W.Va. Code § 11-10-8(a)(1)-(2) [1986] provides that regular additions to tax may be waived upon a showing that the failure to file tax returns or to pay taxes when due resulted from reasonable cause and was not due to willful neglect.

The facts in this case are quite clear in that the Petitioner underreported its "cigarette" tax and that said underreporting was not discovered until the audit was performed. Petitioner now seeks to blame the Tax Commissioner for not finding the error sooner, in effect arguing that no error existed until discovered.

Petitioner's argument does not hold water, because its failure to report correctly was due to "willful neglect," and that neglect arose when the noncompliance occurred and not from the date that it was detected. Failure to pay timely also smacks of "willful neglect" and does not constitute reasonable cause.

## CONCLUSIONS OF LAW

1. 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 reasonable cause exists for waiver of the regular additions to tax, W.Va. Code § 11-10-18(a)(1)-(2) [1986].

2. The Petitioner-taxpayer in this matter has failed to show that its actions constitute reasonable cause for waiver of the additions to tax.

## DISPOSITION

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the tobacco products excise tax (cigarettes) assessment issued against the Petitioner for the period of June 1, 2001 through April 30, 2004, for tax, interest and additions to tax, should be and is hereby **AFFIRMED**.

Because Petitioner has previously remitted that amount, no amount of the assessment remains due to the West Virginia State Tax Commissioner's Office.