

**SANITIZED DECS. 05-029 C & 05-030 W – BY GEORGE V. PIPER –
SUBMITTED FOR DECISION 4/26/05 – ISSUED 6/14/05**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – BURDEN OF PROOF MET

– Estimated tax figures will be supplanted by actual taxable gross proceeds shown by actual invoices and bank deposits when the same are presented with specificity at hearing.

WITHHOLDING TAX – BURDEN OF PROOF NOT MET

– Estimated tax figures will not be supplanted at hearing when the Petitioner does not offer or otherwise prove that the same are incorrect.

FINAL DECISION

On November 18, 2004, 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 November 18, 2004, the Director of this Division of the Commissioner's Office issued a consumers' sales and service 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 15 of the West Virginia Code. The assessment was for the period of January 1, 2001 through June 30, 2004, for tax, interest, and additions to tax, for a total assessed consumers' sales and service tax liability of \$. Written notice of this assessment was served on the Petitioner.

Also, on November 18, 2004, the Commissioner issued a withholding tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the period of January 1, 2001 through June 30, 2004, for tax, interest, and additions to tax, for a total assessed withholding tax liability of \$. Written notice of this assessment was also served on the Petitioner.

Thereafter, by mail postmarked January 12, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions 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] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. At hearing, Petitioner testified that the tax figures compiled by the tax auditor were based upon records he received from Petitioner's former employee (bookkeeper), who is presently the subject of a lawsuit alleging fraud and misappropriation of funds.

2. Petitioner further testified that the bookkeeper concealed the actual income figures from the tax auditor and that Petitioner's accountant has now compiled the actual receipts and bank statements to properly calculate Petitioner's consumers' sales and service tax liability.

3. Petitioner's counsel stated that their own internal investigation did not show that the withholding tax assessment was clearly erroneous and would not further contest same.

DISCUSSION

The first issue is whether the Petitioner has shown that the consumers' sales and service tax assessment is incorrect and contrary to law, in whole or in part.

At the hearing Petitioner's accountant testified that she had, with some success, balanced actual sales invoices with the business' bank statements and had arrived at a much more accurate tax liability figure, which she urged this tribunal to accept in lieu of the erroneous figures given to Respondent.

The second issue is whether the Petitioner has shown that the withholding tax assessment is incorrect and contrary to law, in whole or in part.

At hearing, Petitioner's counsel stated that their investigation showed that the withholding tax assessment was in error; however, it was not worth the time and trouble to contest same.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

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 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-taxpayer in this matter has carried the burden of proof with respect to its contention that the consumers' sales and service tax assessment was erroneous. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

3. On the other hand, the Petitioner has failed to carry the burden of proof with respect to its contention that the withholding tax assessment was erroneous.

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 1, 2001 through June 30, 2004, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for **revised** tax, interest, on the revised tax, through May 31, 2005, and additions to tax, for a **total revised** consumers' sales and service tax liability of \$.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this modified consumers' sales and service tax assessment until this liability is fully paid.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the withholding tax assessment issued against the Petitioner for the period of January 1, 2001 through June 30, 2004, for tax, interest, and additions to tax, totaling \$, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this withholding tax assessment until this liability is fully paid.