

**SANITIZED DECISION NOS. 05-101 C & 05-180 U -- BY GEORGE V. PIPER --  
SUBMITTED FOR DECISION 09/01/05 -- FINAL DECISION ON MERITS ISSUED  
09/09/05**

**SYNOPSIS**

**CONSUMERS' SALES AND SERVICE TAX – SALES AND INSTALLATION OF DOUBLE-WIDE AND SINGLE-WIDE MOBILE HOMES – BURDEN OF PROOF NOT MET** – Petitioner's testimony at hearing failed to rehabilitate internal documents which purport to show separate charges for the same activity, when said documents reflect a pattern of misleading and erroneous entries.

**FINAL DECISION**

A tax examiner with the Field Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) conducted an audit of the books and records of the Petitioner. Thereafter, on December 9, 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 September 30, 2004, for tax of \$, interest through December 31, 2004 of \$, and no additions to tax, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner on December 13, 2004.

Also, on December 9, 2004, the Commissioner (by the Division) issued a purchasers' use tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code, for the period of January 1, 2001 through September 30, 2004, for tax of \$, interest, through December 31, 2004, of \$, and no additions to tax, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner on December 13, 2004.

Thereafter, by mail postmarked February 14, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions for reassessment. [The sixtieth day after service of the assessments was Friday, February 11, 2005, a legal holiday (specifically Lincoln's birthday celebration).] *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

At the hearing, Petitioner's counsel stated that the Petitioner had agreed to the purchasers' use tax assessment in full and that payment would be forthcoming, if not already remitted.

## **FINDINGS OF FACT**

1. Petitioner is engaged in the business of selling and installing doublewide and singlewide mobile homes, including site preparation; blocking; drilling piers; installing rebars, footers, skirting packages, and utilities; as well as other set-up activities.

2. Each customer signs a sales contract (first invoice), which sets forth the base price of each mobile home, with a separate charge for land improvements, if necessary.

3. Petitioner does not, however, show its customers a second invoice (internal use) which breaks down in detail all of the charges which make up the total price of the purchased home, to-wit: delivery and roll on; rough set home on piers; finish home; seam carpet; install anchors, tie downs, and blocks, provision of an extended service contract on new homes; set up allowances for homes placed in West Virginia; footers in West Virginia; skirting packages; utility hookups; etc.

4. On several of the internal use invoices Petitioner made a charge for “Footers in West Virginia,” as well as a separate charge for, “Set-up Allowance for Homes Placed in West Virginia.”

5. At the evidentiary hearing the Petitioner testified that the \$ charge for footers in West Virginia was not really for footers, but, in actuality, the footer charge came under the heading of “set-up allowance for homes placed in West Virginia,” which carried an estimated price tag of \$ for doublewide mobile homes, and \$ for singlewide mobile homes.

6. Petitioner testified that he could not account for each and every item displayed on the internal use invoice (because of concededly poor record keeping); however, only the estimated \$ set-up allowance (footers) was deducted from the sales contract amount prior to the imposition of consumers’ sales and service tax.

Note: Upon cross-examination, Petitioner admitted that on some occasions roll off and other charges, which were subject to consumers’ sales and service tax, were mistakenly deducted as capital improvements from the face amount of the sales contracts, in addition to the \$ set-up allowance.

7. The Tax Commissioner’s counsel informed this tribunal at the outset of the hearing that because the sales invoices to the customers were for a fixed amount, without

further delineation of each charge which made up the sales price, the consumers' sales and service tax rate should have been three (3) percent rather than six (6) percent and that the assessment should be reduced accordingly.

## **DISCUSSION**

The sole issue presented for determination is whether the Petitioner has "clearly established," *see* W. Va. Code § 11-15-6 [1987, 2003], that the \$ charge for "Set-up Allowance for Homes Placed in West Virginia" is, in actuality, the charge for the construction of footers, although certain of the same "internal invoices" reflected a separate but lesser charge for "footers in West Virginia."

An example of the above can be illustrated in the sales contract (first invoice) to Customer "A" contained in Petitioner's Exhibit #1. On its face, the sales price for the doublewide is listed as \$ plus \$ in land improvements with sales tax and fees for a total cash purchase price of \$.

With regard to this transaction, Petitioner generated a second (internal) invoice, never shown to this customer, which delineated each and every charge which comprised the total price, including a \$ charge for footers and a separate \$ charge designated as set-up allowance for homes placed in West Virginia.

Petitioner's counsel argues that the terminology on the internal invoice is wrong because the set-up allowance is really the footer charge and the \$ charge for footers is for something else. (The record reflects consumers' sales and service tax was sometimes collected on the \$ footer charges and sometimes not).

This tribunal now believes that the abysmal condition of Petitioner's internal record keeping is most assuredly the source of the problem. More important, though, is the fact that Petitioner is now attempting to use such mistakes to its own advantage by claiming additional capital improvements, which are not subject to consumers' sales and service tax.

This tribunal is not convinced and finds: (1) That on each and every invoice which sets forth both a charge for footers and a separate charge for set-up allowance, none of the \$ set-up allowance will be considered tax exempt; instead, the separate footer charge is controlling; (2) that on each internal invoice which does not reflect a separate charge for footers in West Virginia, Petitioner will be allowed to take the full \$ charge for footers; however, the exemption for same as a capital improvement will not extend to roll on and delivery charges, which Petitioner had mistakenly taken on the sales contracts; (3) That as to singlewide mobile homes, again the footer charge is that specified on the internal invoice and not the \$ set-up allowance unless the internal invoice specifies no specific charge for footers in West Virginia; (4) That if applicable, no charges for footers will be allowed regarding those mobile homes concerning which Petitioner constructed a basement because footers were never used; and (5) That the recomputed amount of taxable income will be assessed tax at the three (3) percent rate rather than the six (6) percent rate used in the audit.

### **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 the 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 not carried the burden of proof with respect to its contention that the designation of set-up allowances for homes placed in West Virginia is really the charge for footers in West Virginia, when those same invoices reflect a separate charge for footers in West Virginia.

3. On the other hand, the Petitioner's charges for set-up allowances will be accepted as the footer charge only when the invoice in question reflects no separate footer charge, but the same does not encompass delivery, roll on, or other charges subject to consumers' sales and service tax.

#### **DIRECTIVES RESPECTING COMPUTATION OF THE AMOUNT OF TAX 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 the consumers' sales and service tax due and owing consistent with the opinions set forth above;

3. Within 30 days of service of this Final Decision on the Legal Issues, the parties shall meet in an attempt to reach an agreement with respect to the computation of tax due in accordance with the above-stated Division;

4. If the parties are unable to agree upon an amount of tax due, then in accordance with the provisions of 121 C.S.R. 1, § 73.2.1, and within 45 days of service of this Decision, either party may submit a computation of the amount of tax that it believes is due, and serve its computation on the West Virginia Office of Tax Appeals and on the other party;

5. If only one party submits a computation of the amount of tax 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;

6. If both parties submit a computation of the amount of tax 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 the 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;

7. If, after the submission of computations of the amount of tax 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.

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

---

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 of January 1, 2001 through September 30, 2004, for tax of \$, interest of \$, and additions to tax of \$-0-, **totaling \$**, should be and is hereby **AFFIRMED**.

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