

**SANITIZED DECISION -- 05-141 DR -- BY ROBERT W. KIEFER, JR., ALJ --
SUBMITTED for DECISION on DECEMBER 5, 2005 -- ISSUED on JUNE 5, 2006**

CONSUMERS' SALES AND SERVICE TAX -- DECLARATORY RULING -- On petition of any interested person, an agency may issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it.

CONSUMERS' SALES AND SERVICE TAX -- DECLARATORY RULING -- A declaratory ruling sought pursuant to W. Va. Code § 29A-4-1, with respect to the applicability of the consumers' sales and service tax to any person, property or state of facts, must be rendered by the State Tax Commissioner, because the consumers' sales and service tax is administered and enforced by the State Tax Commissioner.

FINAL DECISION

This matter is before the West Virginia Office of Tax Appeals on a petition for a declaratory ruling filed by the Petitioner. The Petitioner is an association whose members are property owners within a development located in this State. The Petitioner seeks a ruling respecting whether or not it has the duty to collect consumers' sales and service tax from individual property owners in the development on the amounts it assesses against them. The amounts assessed and collected by the Petitioner are used to improve, maintain and repair common property within the development.

On November 6, 2003, the State Tax Commissioner assessed consumers' sales and service tax on the amount of the assessments the Petitioner collected from its property owners. Upon receiving the consumers' sales and service tax assessment issued by the State Tax Commissioner, the Petitioner filed a petition for reassessment. After some preliminary proceedings before this tribunal, the State Tax Commissioner withdrew the assessment by motion to remove filed January 12, 2005.

In response to the withdrawal of the assessment, the Petitioner filed a petition for declaratory ruling with this tribunal, seeking a ruling that the amount that the Petitioner assesses

and collects from members is not subject to consumers' sales and service tax. After preliminary proceedings, this matter proceeded to an evidentiary hearing on May 24, 2005. Subsequently, the parties filed briefs in which they set forth their legal positions.

DISCUSSION

Having reviewed the administrative declaratory ruling statute set out in the Administrative Procedures Act, W. Va. Code § 29A-1-1, *et seq.*, this Office is of the opinion that it is without any authority to issue a declaratory ruling respecting tax statutes enforced by the State Tax Commissioner. Any preliminary ruling to the contrary was in error.

West Virginia Code § 29A-4-1 provides, in relevant part:

§ 29A-4-1 Declaratory rulings by agencies.

On petition of any interested person, an agency may issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it. [Emphasis added.] A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court, but it shall not be binding on any other person. Such ruling is subject to review before the court and in the manner hereinafter provided for the review of orders or decisions in contested cases. Each agency may prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition.

The express language of the statute makes it apparent that this Office does not have the authority to issue a declaratory ruling under this statute. An agency is without authority to issue a declaratory ruling unless it has some authority or capacity to enforce the statute or rule which is the subject of the petition for declaratory ruling. Since it is the Tax Commissioner that is tasked with enforcing the consumers' sales and service tax statute, it is the Tax Commissioner, not this Office, that that must issue a declaratory ruling under this statute.¹

¹ Since the statute expressly says that the agency "may" issue a declaratory ruling, this Office is of the opinion that the Tax Commissioner is not required to issue such a ruling upon being petitioned to do so.

This conclusion is bolstered by the second sentence of the statute, which states that a declaratory ruling may be binding between the agency that is tasked with enforcing the statute and the petitioner, but only if it is issued after argument and if it is expressly stated to be binding. Even if both of those conditions were met, a ruling that is binding between the Petitioner and this Office would have little practical effect. What the Petitioner really seeks is a ruling that is binding between it and the State Tax Commissioner. Under the statute, this Office does not have the authority to issue a declaratory ruling that binds the State Tax Commissioner.² Therefore, this petition must be dismissed.

CONCLUSIONS OF LAW

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

1. On petition of any interested person, an agency may issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it. W. Va. Code § 29A-4-1, *et seq.*
2. A declaratory ruling sought pursuant to W. Va. Code § 29A-4-1, with respect to the applicability of the consumers' sales and service tax to any person, property or state of facts, must be rendered by the State Tax Commissioner, because the consumers' sales and service tax is administered and enforced by the State Tax Commissioner

DISPOSITION

² In addition, West Virginia Code § 11-10-10a permits the State Tax Commissioner to acquiesce or to not acquiesce to a decision of this Office. Thus, if the Tax Commissioner were to not acquiesce to a declaratory ruling issued by this Office, it would be of no practical force and effect. The Tax Commissioner could opt not to acquiesce to a declaratory ruling issued by this tribunal and thereafter issue an assessment for a specified period of time, and make the same legal arguments that he made in the hearing on the declaratory ruling. In effect, the Tax Commissioner could circumvent the declaratory ruling process. Under the statute, it appears that he would have every right to do so.

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for a declaratory ruling is hereby **DISMISSED**.