

**SANITIZED DECISION -- 05-161 C -- BY R. MICHAEL REED, CHIEF ALJ --  
SUBMITTED for DECISION on MAY 10, 2006 -- ISSUED on JUNE 27, 2006**

**SYNOPSIS**

**CONSUMERS' SALES AND SERVICE TAX -- REQUIRED APPLICATION OF UNIQUE BUT CLEAR STATUTORY "DOUBLE TAXATION" OF BOTH PURCHASES AND SALES OF LIQUOR OR WINE BY THE SAME PERSON** -- W. Va. Code § 11-15-9a [1990] clearly requires restaurants, bars, nightclubs, and similarly situated persons to pay consumers' sales and service tax on purchases of liquor or wine, and to collect and to remit that tax on sales to their customers of the liquor and wine.

**CONSUMERS' SALES AND SERVICE TAX -- OTA LACKS AUTHORITY TO REVIEW CONSTITUTIONALITY OF A STATUTE ON ITS FACE** -- The West Virginia Office of Tax Appeals, being a limited-jurisdiction, executive-branch tribunal, must apply the unique but clear "pyramiding" provisions of W. Va. Code § 11-15-9a [1990] and does not have the authority to determine that this statute, on its face, violates equal protection constitutional principles.

**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 January 31, 2005, the Director of this Division of the Commissioner's Office issued a West Virginia 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 01, 2002 through December 31, 2004, for tax of \$, interest of \$, through February 28, 2005, and no additions to tax, for a total assessed consumers' sales and service tax liability of \$. Written notice of this assessment was served on the Petitioner on February 02, 2005.

Thereafter, by hand delivery on March 29, 2005, 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] and 11-10A-9(a)-(b) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner 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).

The parties attempted in good faith to resolve this matter over an extended time period, but ultimately were unsuccessful. Therefore, the parties eventually submitted this matter for a decision by this tribunal based upon the excellently drafted stipulation of material facts and memoranda of law.

### **FINDINGS OF FACT**

The following statement of material facts is condensed, and slightly re-worded (for purposes of confidentiality and brevity), from the parties' stipulation ("Stip.") regarding the same:

1. The Petitioner has been in business since the year 1994 and during the assessment period operated a restaurant, bar, and nightclub in a certain town within this State. Stip. Nos. 1 & 2.

2. At all relevant times the Petitioner was licensed under applicable laws of this State to sell liquor and wine. Stip. No. 3.

3. During the assessment period the Petitioner made all of its purchases of liquor for its business operations from a certain vendor who was at all relevant times a retail liquor licensee under applicable laws of this State. Stip. Nos. 4 & 5.

4. The Petitioner's liquor-purchase invoices show that the Petitioner was charged and paid the West Virginia 6% consumers' sales and service tax (and the applicable 5% municipal sales tax) on these purchases of liquor. Stip. No. 6.

5. During the assessment period the Petitioner purchased most of its wine for its business operations from a certain vendor who was at all relevant times a licensed wine distributor under applicable laws of this State. Stip. Nos. 7 & 8.

6. The wine-purchase invoices from this wine distributor indicate that the Petitioner was charged and paid 5% as (actually, towards) the "state" sales tax on these purchases of wine. Stip. No. 9.

7. During the assessment period the Petitioner also purchased some wine or wine coolers from another licensed vendor located in this State, and the Petitioner was charged and paid the 6% West Virginia sales tax (and the applicable 5% municipal sales tax) on these purchases of wine and wine coolers. Stip. No. 10.

8. During the assessment period the Petitioner, upon the advice of an independent certified public accountant, did not collect (or remit) any West Virginia consumers' sales and service tax on its sales to its customers of liquor or wine (or wine coolers). Stip. Nos. 11, 12, 13, & 14.

9. During the entire assessment period the Petitioner, in each of its timely filed monthly West Virginia consumers' sales and service tax returns prepared by the independent certified public accountant, reported its income from liquor and wine (and wine cooler) sales, but listed the same as exempt from that tax, under "all other legal exemptions." Stip. Nos. 13 & 14.

10. Prior to issuing the tax assessment in this matter, the Respondent did not communicate directly to the Petitioner the Respondent's position that the West Virginia consumers' sales and service tax statutes and legislative regulations, W. Va. Code St. R. §§ 110-15-91.1 and 91.2 (July 15, 1993), clearly require that restaurants, bars or nightclubs that pay West Virginia consumers' sales and service tax on their purchases of liquor or wine must also collect and remit that same tax on their sales to their customers of liquor or wine. Stip. Nos. 17 & 18.

11. The Respondent has not issued or published any type of written notice to the public in general (such as "Taxpayer Service Division" publications) setting forth the Respondent's position that the West Virginia consumers' sales and service tax statutes and legislative regulations clearly require that restaurants, bars or nightclubs that pay West Virginia consumers' sales and service tax on their purchases of liquor or wine must also collect and remit that same tax on their sales to their customers of liquor or wine. Stip. Nos. 15 & 16.

## **DISCUSSION**

The first issue is whether the Petitioner is liable under statutory law for the West Virginia consumers' sales and service tax on both its purchases and sales of liquor and wine (and wine products).

W. Va. Code § 11-15-9a [1990] provides in relevant part:

The exemptions provided in this article . . . for sales of tangible personal property for the purpose of resale in the form of tangible personal property [ ] shall not apply to persons or organizations licensed under authority of article seven, chapter sixty of this code, for the purchase of liquor or wines for resale either from the alcohol beverage control commissioner or from retail liquor licensees licensed under authority of article three-a, chapter sixty of this code.

*See also* W. Va. Code St. R. § 110-15-91.2 (July 15, 1993) (this legislatively reviewed and approved regulation specifically for “restaurants and bars,” provides, in pertinent part, that “[p]urchases for resale exempt from the sales and service tax do not include purchases of alcoholic liquors [and] wines”).

The Respondent contends that this statute clearly requires the Petitioner (and all other similarly situated persons) to pay consumers’ sales and service tax on its purchases of liquor or wines, without being entitled to claim that these purchases are tax-exempt as purchases for resale -- which resales are, necessarily, also subject to the tax, or the purchase for resale exemption would not otherwise be applicable and have to be excepted by this statute.\*

On the other hand, the Petitioner contends that this statute merely provides, in effect, that the tax is more easily accounted for and, therefore, should be paid only at the “wholesale” level by bars (and the like), and is not also to be collected by bars from (and remitted on behalf of) the ultimate consumers. The Petitioner contends that upholding the tax on both the purchases and sales of liquor and wines by bars would result in impermissible “pyramiding” of the tax or “double taxation,” contrary to the usual “anti-pyramiding” scheme of the consumers’ sales and service tax statutes. *See, e.g.*, W. Va. Code § 11-15-10 [1943] (“It is the intent of this article that the tax levied hereunder shall be passed on to and be paid [only] by the ultimate consumer.”).

While the Respondent’s contentions appear to have some merit, the Respondent’s

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\*A vendor shall collect the consumers’ sales and service tax from a purchaser (and remit the same to the State Tax Commissioner) on all sales of tangible personal property (or on furnishing all taxable services), unless the vendor clearly establishes that the transaction is not subject to the tax. W. Va. Code §§ 11-15-3 [1989, 2003] and 11-15-6(b) [2003] (formerly § 11-15-6 [1987]). The burden of proof usually is upon a vendor to show that a sale or service was exempt (or excepted) from the tax, W. Va. Code § 11-15-6(a) [2003] (formerly § 11-15-6 [1987]). If a vendor fails to collect the tax on a taxable transaction, the

view of W. Va. Code § 11-15-9a [1990] is, technically, correct. This statute, while unique in its “pyramiding” effect, clearly requires this result. This executive-branch tribunal may not, of course, address the wisdom of the Legislature in enacting this statute.

The second issue is whether this tribunal may determine whether this statute, on its face, offends equal protection constitutional principles. This limited-jurisdiction, executive-branch tribunal does not have the authority to make that determination.

### **CONCLUSIONS OF LAW**

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

1. W. Va. Code § 11-15-9a [1990] clearly requires restaurants, bars, nightclubs, and similarly situated persons to pay consumers’ sales and service tax on purchases of liquor or wine, and to collect and to remit that tax on sales to their customers of the liquor and wine.

2. The West Virginia Office of Tax Appeals, being a limited-jurisdiction, executive-branch tribunal, must apply the unique but clear “pyramiding” provisions of W. Va. Code § 11-15-9a [1990] and does not have the authority to determine that this statute, on its face, violates equal protection constitutional principles.

### **DISPOSITION**

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vendor usually is personally liable for the tax, W. Va. Code § 11-15-4a [1955, 2003] (the vendor is jointly and severally liable along with the purchaser, W. Va. Code § 11-15-4b [1989, 2003]).

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the West Virginia consumers' sales and service tax assessment issued against the Petitioner for the period of January 01, 2002 through December 31, 2004, for tax of \$, interest of \$, and no additions to tax, **totaling \$**, must be and is hereby **AFFIRMED** by this limited-jurisdiction, executive-branch tribunal

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