

**SANITIZED DECISION – 05-512 U & 05-513 C – BY GEORGE V. PIPER, ALJ –  
SUBMITTED for DECISION on JUNE 7, 2006 – ISSUED on OCTOBER 31, 2006**

**SYNOPSIS**

**CONSUMERS’ SALES AND SERVICE TAX – BURDEN OF PROOF NOT MET** – W. Va. Code § 11-10A-10(e) places the burden of proof upon the Petitioner to show that the assessment is incorrect and contrary to law, in whole or in part, and the failure to do so mandates that the assessment be upheld *in toto*, notwithstanding Petitioner’s conjecture that, despite its admittedly poor and incomplete tax records, the assessment could have been more exact.

**PURCHASER’S USE TAX – BURDEN OF PROOF NOT MET** – Failure by Petitioner to conclusively prove the actual dollar amount paid for contract labor, on which it admittedly did not pay any purchaser’s use tax, leaves the trier of fact no alternative but to uphold the assessment in its entirety. W. Va. Code § 11-10A-10(e).

**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 July 25, 2005, 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 March 13, 2001 through December 31, 2004, for tax of \$, interest, through August 31, 2005, of \$, and additions to tax of \$, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner as required by law.

Also, on July 25, 2005, the Commissioner (by the Division) issued a purchaser’s 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 March 13, 2001 through December

31, 2004 for tax of \$, interest, through August 31, 2005, of \$, and additions to tax of \$, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked September 23, 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] and 11-10A-9(a)-(b) [2002].

Subsequently, notice of a hearing on the petitions 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).

### **FINDINGS OF FACT**

1. Petitioner is a limited liability company that formerly operated a bar and exotic dance club establishment in West Virginia during the period of February, 2002 through April, 2006.

2. At hearing, Respondent's tax auditor testified that Petitioner did not have adequate records for him to conduct a full field audit, which then required him to prepare the estimated tax assessments based upon whatever records or information he could find which pertained to Petitioner's business.

3. The only month for which Petitioner had anything close to complete records was the one month of September, 2004; however, the record reflects that even during that month, Petitioner had some missing cash register tapes and that, for the remainder of the thirty-four (34) months that the club was in business, no credible business records were ever maintained by Petitioner.

4. Petitioner's former manager, who testified that Respondent's consumers' sales and service tax estimates were inflated during the audit period, left the employ of Petitioner from either September or October, 2003 until February, 2004 before returning, having no knowledge of what took place during his absence.

5. Petitioner's bank account, which was the ultimate source used by Respondent in estimating the consumers' sales and service tax assessment, may have contained revenues deposited from a real estate business also owned by a ninety-nine (99) percent owner of the Petitioner.

6. Respondent's tax auditor gave Petitioner credit for any and all consumers' sales and service tax remittances prior to estimating the additional amount of consumers' sales and service tax owed by Petitioner for the audit period.

7. Petitioner admits making contract labor payments to bouncers, doormen, etc. on which it did not remit any purchaser's use tax.

8. Petitioner's bank account figures were ultimately used by the tax auditor in preparing both estimated assessments.

## **DISCUSSION**

The only issue to be decided is whether the Petitioner has carried its burden of proof showing that the assessments are incorrect and contrary to law in whole or in part.

West Virginia Code § 11-10-5a authorizes the inspection or auditing of the taxpayer's books and records to ascertain the correctness of any tax return or assessment. The most direct method of ascertaining the accuracy of any tax return is a review of the actual sales.

“If records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.” W. Va. Code St. R. § 110-15-14b.4.

As the trier of fact, we do not doubt that the estimated consumers' sales and service tax assessment issued by Respondent is probably inflated; however, Petitioner's evidence is plainly not credible enough to justify supplanting Respondent's figures.

First, Petitioner argues that its estimate is more believable because it is based upon one (1) month of actual revenues, being the month of September, 2004, but that estimate was compiled from records not maintained by Petitioner's accountant, but rather found by Petitioner's former manager, after the audit, in an office in Virginia, “in the back behind some things.” (TR. p. 47). That month also had some missing cash register entries and the former club manager could not explain during cross-examination all of the cash register entries which he had compiled, saying, “but I'm not an expert on the register” (TR. p. 46), and, “I don't have anything really to compare it to as a full month. I was asked to prepare anything I could that would be a full month. Like I said, I've been gone for a long time. I went to a location where there were some records, but not full records, cause like I said, the corporation didn't run well.” (TR. p. 46).

In a nutshell, Petitioner's argument is that, although it did not maintain adequate records to show what was the taxable income from the business for consumers' sales and service tax purposes, it has pieced together one (1) month out of thirty-five (35) months and based upon one witnesses' testimony, the information for that one month should supplant what Respondent found, notwithstanding the fact that Respondent used Petitioner's bank account which, although not exact, was the closest thing available in order to determine the club's gross revenue figures for the audit period.

Previously, in the case of *Howard Brothers, Inc. v. State Tax Commissioner*, OTA Docket Nos. 03-689 C and 03-690 U (OTA's decision issued on October 12, 2004 and affirmed on appeal for failure to post appeal bond), we were presented with a similar argument in that that petitioner who kept no real records, argued that his tax estimates were more correct than those arrived at by the Tax Commissioner.

We held that that petitioner, never having proved its case, could not prevail by merely arguing that the tax auditor could have done a somewhat better job when presented with petitioner's lack of business records which it never rehabilitated at the hearing.

Accordingly, it is determined in this case that Petitioner's repeated failure to prove what the correct amount of tax should be never shifts the burden of proof to the Respondent to prove that any tax assessment should have been more exact, because to do so would make a mockery of the burden of proof requirement.

As to the purchaser's use tax assessment, we find a similar situation in that Petitioner's witness admitted under oath that he remitted absolutely no purchaser's use tax concerning all of the contract labor that he hired for the club; admitted that he was not there for almost six months between September or October, 2003 through February, 2004; and admitted that the club was managed poorly and kept poor records; however, he testified that, in his opinion, the estimated assessment is incorrect.

To again allow such a naked assertion to supplant the estimate arrived at by Respondent, using Petitioner's bank account records, although probably not precisely accurate, would again improperly shift the burden of proof, which we will not condone.

## **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 W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof as to either assessment. *See* W. Va. Code St. R. § 121-1-69.2 (Apr. 20, 2003).

### **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 March 13, 2001 through December 31, 2004 for tax of \$, interest of \$, and additions to tax of \$, **totaling \$**, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this 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 purchaser's use tax assessment issued against the Petitioner for the period of March 12, 2001 through December 31, 2004 for tax of \$, interest of \$, and additions to tax of \$, **totaling \$**, should be and is hereby **AFFIRMED**.

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