

**SANITIZED DECISION – 05-574 U & 05-575 C – BY GEORGE V. PIPER, ALJ –
SUBMITTED for DECISION on JUNE 7, 2006 – ISSUED on NOVEMBER 3, 2006**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX AND PURCHASERS' USE 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, given the records which were made available, Respondent could have made a more precise assessment.

CONSUMERS' SALES AND SERVICE TAX AND PURCHASERS' USE TAX – ESTIMATED TAX FIGURES UPHELD – Failure by Petitioner to conclusively prove the actual dollar amount of “door income” subject to consumers' sales and service taxes or the actual dollar amount of contract labor hired by the club for which purchasers' use tax was not remitted, leaves the trier of fact no alternative but to affirm both tax estimates.

CONSUMERS' SALES AND SERVICE TAX AND PURCHASERS' USE TAX - CLAIMED INVALIDITY OF TAX AMNESTY PROGRAM -- West Virginia Office of Tax Appeals being a limited-jurisdiction, executive branch, does not sit as a court of equity and, therefore, does not have the statutory authority to invalidate the penalty set forth by the West Virginia Legislature to be imposed upon those who failed to participate in the Tax Amnesty Program. See W. Va. Code § 11-10D-1 et seq.

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 August 30, 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 October 1, 2000 through January 31, 2005, for tax of \$, interest, through September 30, 2005, of \$, and additions to tax of \$, plus a ten (10) percent penalty for failure to participate in the Tax Amnesty Program, for a

total assessed liability of \$. Written notice of this assessment was served on the Petitioner as required by law.

Also, on August 30, 2005, 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 October 1, 2000 through March 31, 2005 for tax of \$, interest, through September 30, 2005, of \$, and additions to tax of \$, plus a ten (10) percent penalty for failure to participate in the Tax Amnesty Program, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked October 28, 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) [2005].

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 corporation that formerly operated a bar in West Virginia, during the period of October, 2000 through April, 2005.

2. For consumers' sales and service tax purposes, the assessment for under-reported "door" income for the period of January, 2002 through January, 2005 was calculated by averaging the actual door income for October, 2000 to December, 2001 and estimating same for the period of January 1, 2002 through 2005, for which no records were available.

3. Petitioner failed to file consumers' sales and service tax returns for October, November and December of 2000 and for all months of 2001. Returns were filed for January, 2002 through January, 2005; however, door income was not included in those returns.

4. Petitioner's former bookkeeper testified that Respondent's consumers' sales and service tax and purchasers' use tax estimates were incorrect during the audit period. He had left the employ of Petitioner from July, 2002 until August, 2003 because of illness. He admitted that no taxes were remitted to Respondent during his absence.

5. Petitioner's counsel stated for the record that he cannot prove what the actual consumers' sales and service tax and purchasers' use tax amounts should be because all of the club's records are tied up in court in a civil suit.

6. Concerning the purchasers' use tax assessment, Petitioner provided purchase invoices, cancelled checks, bank statements and purchase ledgers to the tax auditor for the years 2001, 2002 and 2003, which were later used to prorate contract labor income for 2000, 2004 and 2005.

7. Respondent's tax auditor testified that he estimated the remainder of both tax audits because Petitioner's former bookkeeper and he got into a verbal argument which involved name calling, which he said terminated their working relationship.

8. At the conclusion of the administrative hearing, the presiding administrative law judge gave Petitioner a period of thirty (30) days during which to obtain copies of its business records which were said to be part of a civil suit and then to meet with Respondent's tax auditor for the purpose of reaching an accord, if possible, as to the correct amount of taxes owed; however, Petitioner never availed itself of this opportunity.

DISCUSSION

The only issue to be decided is whether the Petitioner has carried its burden of proof by 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 (July 15, 1993).

As the trier of fact, we allow any Petitioner a wide berth in contesting all or any portion of estimated assessments issued by Respondent; however, Petitioner must have credible and compelling evidence proving what tax amounts, if any, are actually owed.

In this case, Petitioner has produced nothing to supplant Respondent's figures except to argue that they are incorrect and that it could prove what, if anything, was owed if its records were available, although they are not because they are part of a civil suit.

The weakness of Petitioner's case begins on page 32 of the hearing transcript when Petitioner's witness, Bookkeeper and myself had this exchange:

Judge : Let me get something straight. The period that the state says the taxes were paid, you don't know how the taxes were paid, but where the state says taxes weren't paid, you think they were paid.

Petitioner Bookkeeper: Yes, that's correct.

....

Petitioner's Bookkeeper: Well, when, again, when I was sick, somebody else took over the books and it was my understanding that the taxes

through that period were not paid. After I came back, I made a genuine effort to pay the taxes and they were paid with the exception of maybe one or two months when we didn't have the cash to pay them and the last couple of months of operation.

Petitioner's Bookkeeper testimony is even more damaging to Petitioner when you consider that while he was employed there as bookkeeper prior to his illness, certain consumers' sales and service tax returns were never filed by Petitioner; that upon his return, consumers' sales and service taxes were not paid when Petitioner did not have the cash to pay same, and not at all for the last couple of months that the business was operated.

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 somewhat similar argument, because that petitioner, who kept inadequate records for the whole of the audit period, 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 the petitioner never rehabilitated at the hearing. In that case, petitioner wanted its estimates to supplant those arrived at by Respondent, and we said no. In this case, Petitioner does not even know what is owed, and has not provided the tax records to prove its case, although it was given sufficient opportunity to do so, and, thus, the outcome must be the same.

Accordingly, it is determined that Petitioner's repeated failure to prove what the correct amount of tax should be concerning the door income never shifts the burden of proof to the Respondent to prove that a tax assessment should have been more exact. To do so would make

a mockery of the burden of proof requirement, especially given the fact that no door income was reported on those consumers' sales and service tax returns which Petitioner did file.

As to the purchasers' use tax assessment, we find that, although Petitioner argued that the assessment was incorrect, Petitioner never proved that purchasers' use tax was paid on all or any portion of the contract labor that it hired for the club, although it again was given sufficient time after the administrative hearing to prove its case.

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

During the course of the administrative hearing, Petitioner's counsel mentioned that a completed audit could have been performed if the tax auditor had merely ignored the bookkeeper's verbal conduct which was personally directed at him.

Although we need not get into the specifics of the matter or decide if the audit should or could have been completed, it is clear that the tax auditor questioned the veracity of a certain document provided by the bookkeeper, that the bookkeeper became offended and used vulgarity which the tax auditor testified ended their working relationship which then resulted in a certain portion of the audit period being estimated.

To rectify the issue presented by Petitioner's counsel, this tribunal gave Petitioner a period of thirty (30) days after the hearing in which to obtain a copy of its business records, which Petitioner's counsel said are now part of the court record in a civil suit, so that Petitioner and Respondent could meet and see if agreement could be reached on what, if anything, is owed for any of the estimated tax periods for which Petitioner says that it does have records.

Petitioner did not, for whatever reason, obtain a copy of the club's business records within the allotted time and, therefore, this tribunal has no alternative but to uphold both assessments *in toto*.

It should be noted that Petitioner raised in its briefs the argument that this tribunal should now find the statute and regulations promulgated by the West Virginia Legislature purporting to authorize the imposition of a ten (10) percent penalty for the failure of Petitioner to participate in the Tax Amnesty Program to be contradictory, overly broad and, therefore, unenforceable.

As we have stated before on numerous occasions, this tribunal being a limited-jurisdiction, executive-branch tribunal, does not have the statutory authority to sit essentially as a court of "equity," and, so, we apply the law as written and will not deviate from that obligation under any circumstances.

Accordingly, it is finally determined that we have no jurisdiction to question the validity of Respondent's Tax Amnesty Program and, therefore, the ten (10) percent additional penalty in this case must be and is affirmed.

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).

3. The Petitioner-taxpayer in this matter has failed to carry the burden of proof regarding its argument that this tribunal has the statutory authority to invalidate the provisions of the Tax Amnesty Program.

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 October 1, 2000 through January 31, 2005, for tax of \$, interest of \$, and additions to tax of \$, plus a ten (10) percent penalty for failure to participate in the Tax Amnesty Program, **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 purchasers' use tax assessment issued against the Petitioner for the period of October 1, 2000 through March 31, 2005, for tax of \$, interest of \$, and additions to tax of \$, plus a ten (10) percent penalty for failure to participate in the Tax Amnesty Program, **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.