

**SANITIZED DECISION – 06-219 C, 06-220 C, 06-221 C, 06-222 C & 06-223 C – BY
GEORGE V. PIPER, ALJ – SUBMITTED for DECISION on SEPTEMBER 19, 2006 –
ISSUED on OCTOBER 6, 2006**

SYNOPSIS

CONSUMERS’ SALES AND SERVICE TAX – PETITIONER’S FAILURE TO CARRY BURDEN OF PROOF – Petitioner’s failure to present evidence at hearing proving that he was engaged in business other than that of making retail sales subject to the collection of consumers’ sales and service tax mandates that all assessments be upheld *in toto*. See W.Va. Code § 11-10A-10(e) [2002]; W. Va. Code St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

FINAL DECISION

On January 15, 2006, the Accounts Monitoring Unit of the Internal Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) 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 April 1, 2001 through December 31, 2001, for tax of \$, interest, through January 15, 2006, of \$, and additions to tax of \$ for a total assessed tax liability of \$. Written notice of this assessment was served on the Petitioner as required by law.

Also, on January 15, 2006, the Commissioner (by the Division) issued a consumers’ sales and service tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code, for the year 2002, for tax of \$, interest, through January 15, 2006, 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 January 15, 2006, the Commissioner (by the Division) issued a consumers’ sales and service tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10

and 15 of the West Virginia Code, for the year 2003, for tax of \$, interest, through January 15, 2006, 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 January 15, 2006, the Commissioner (by the Division) issued a consumers' sales and service tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code, for the year 2004, for tax of \$, interest, through January 15, 2006, 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 January 15, 2006, the Commissioner (by the Division) issued a consumers' sales and service tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code, for the period January 1, 2005 through September 30, 2005, for tax of \$, interest, through January 15, 2006, 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 March 16, 2006, 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 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 conclusion of the administrative hearing, the presiding administrative law judge instructed Petitioner that he would have a period of ten (10) days in which to submit to this tribunal copies of his allegedly filed West Virginia personal income tax returns for the tax years 2001, 2002, 2003, 2004 and 2005, which Petitioner had previously testified were prepared and filed by a certain commercial tax return preparer on a timely basis for each of those years. Respondent's counsel had

previously noted for the record that Respondent had no record of Petitioner having ever filed a West Virginia personal income tax return for any year.

On September 27, 2006, Petitioner submitted in person original federal and State personal income tax returns for the tax years 2002, 2003, 2004 and 2005 (2001 was not submitted), which all reflected that the commercial tax return preparer had prepared same on September 19, 2006, and that the returns were signed by Petitioner and his wife on September 22, 2006. There was absolutely no evidence indicating that the recently prepared federal income tax returns had been filed with the Internal Revenue Service.

FINDINGS OF FACT

1. On April 1, 2002, Petitioner filed with the West Virginia Office of Business Registration a completed registration listing its business activity as that of making retail sales subject to the collection of consumers' sales and service tax.

2. At the evidentiary hearing in this matter, Petitioner testified that he later amended said business registration to reflect the fact that he was now selling at wholesale; however, no such amended registrations are permissible under state law and no such a registration was ever received by Respondent.

3. Petitioner admitted that he never filed consumers' sales and service tax returns or collected or remitted any consumers' sales and service tax to the State of West Virginia.

4. Petitioner also admitted that he never sought or received exemption certificates from his alleged wholesaler-customers, which would have indicated that he had sold meat products to others for the purpose of resale.

5. Petitioner submitted into evidence several contracts which purported to show that Petitioner sold meat products to independent contractors; however, no evidence was produced showing that these individuals gave resale exemption certificates to Petitioner or that they collected and remitted consumers' sales and service tax to the State of West Virginia on the resale of any meat products.

6. In response to Petitioner's attorney's inquiry as to why Petitioner was audited, Respondent's attorney produced for the record a December 14, 2005 newspaper article from the Charleston Daily Mail indicating that Petitioner was sued by the West Virginia Attorney General's Office, alleging that Petitioner sold poor quality meat door-to-door and did not abide by consumer protection laws.

7. Prior to the evidentiary hearing in this matter, Respondent's counsel had informed Petitioner that a hearing might not be necessary if Petitioner prepared and filed consumers' sales and service tax returns for the audit period which reflected Petitioner's gross receipts from the conduct of his business.

8. Although an exhaustive search was undertaken by Respondent to find the consumers' sales and service tax returns, which Petitioner claimed he filed, none were ever found, and neither the Petitioner nor his attorney had kept copies to prove that any such returns had indeed been already filed.

DISCUSSION

The only issue is whether Petitioner has shown that the assessment is erroneous and contrary to law, in whole or in part.

To meet that burden in this case, Petitioner was required to prove that it did not make retail sales subject to consumers' sales and service tax, because he sold to others who made such retail sales subject to the collection of consumers' sales and service tax.

At the hearing, Petitioner testified that he had signed agreements with independent contractors to resell meat and that these same independent contractors paid him either at the time that they took possession of the meat products or at the end of the day's business.

To prove this point, Petitioner placed into evidence copies of these contracts, which bore the names of the individual(s) involved and what each would pay for the meat and what that contractor would pay a driver if a driver was needed. Each contract contained a copy of the individual's drivers' license, social security card and a business registration certificate in the name of the alleged independent contractor.

In response to an inquiry by the presiding administrative law judge as to why one of the "independent contractors" also signed as the driver, Petitioner testified that in that case the driver was working for another independent contractor.

Notwithstanding the documentary evidence presented at hearing, this tribunal finds that Petitioner's "evidence" is pure subterfuge designed to distract the true nature of Petitioner's business, which was and is that of retail sales of meat products subject to the collection of consumers' sales and service tax.

Evidence of same is, first, that of Petitioner's business registration certificate signed April 2, 2001, which states that the business activity is retail and that of selling meat products door to door. Although Petitioner testified that he later changed the business to wholesale, no credible evidence, such as a new business registration certificate (no amendments are permissible) showing same was ever filed with Respondent.

Secondly, Petitioner never really operated as a wholesaler in that he has no exemption certificates purporting to show that the “independent contractors” purchased meat from him for the purpose of resale and no proof that any of these individuals collected consumers' sales and service tax from their customers.

In addition, the Petitioner testified that the actual income received from his business could be shown in the West Virginia income tax returns, which he and his wife had filed for the years 2001 through 2005, and which his accountant could supply to this tribunal. However, when Petitioner presented this evidence in person, it consisted of newly prepared federal income tax returns which were dated a day after the hearing, in clear contravention of Petitioner’s testimony.

Petitioner’s perjured testimony concerning his prior tax filings and all of the other evidence leaves this tribunal no recourse but to find the obvious, which is that Petitioner made retail sales of meat door-to-door which were all subject to the collection of consumers' sales and service tax; however, Petitioner never collected or remitted any such tax as required by law.

This tribunal also finds that, because Petitioner never timely filed any type of tax returns with the federal government and/or the Respondent reflecting the gross income derived from the business, nothing exists to credibly refute the amounts used by Respondent in preparing all five (5) of the estimated assessments relied upon by Respondent, and, therefore, the same are upheld *in toto*.

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 with respect to his contention that he was not engaged in the retail sale of products subject to collection of consumers' sales and service tax. *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 April 1, 2001 through December 31, 2001, for tax of \$, interest of \$, and additions to tax of \$, **totaling \$**, should be and is hereby **AFFIRMED**.

It is **ALSO** 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 year 2002, for tax of \$, interest of \$, and additions to tax of \$, **totaling \$**, should be and is hereby **AFFIRMED**.

It is **ALSO** 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 year 2003, for tax of \$, interest of \$, and additions to tax of \$, **totaling \$**, should be and is hereby **AFFIRMED**.

It is **ALSO** 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 year 2004, for tax of \$, interest of \$, and additions to tax of \$, **totaling \$**, should be and is hereby **AFFIRMED**.

It is **ALSO** 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 January 1, 2005 through September 30, 2005, 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 these consumers' sales and service tax assessments until this liability is fully paid.