

**SANITIZED DECISION – 06-224 RU – BY ROBERT W. KIEFER, JR., ALJ –
SUBMITTED for DECISION on JUNE 13, 2006 – ISSUED on DECEMBER 13, 2006**

SYNOPSIS

PURCHASERS’ USE TAX – STATUTE OF LIMITATIONS – In order for a taxpayer to be entitled to a refund of purchasers’ use tax paid to the State Tax Commissioner, it must file a claim for refund within three years of the due date of the tax return with respect to the tax due, or within two years of the date on which the tax was paid, whichever is later. W. Va. Code § 11-10-14(l)(1) [2003].

PURCHASERS’ USE TAX – STATUTE OF LIMITATIONS – There being no annual return required by the purchasers’ use tax statute, W. Va. Code § 11-15A-1, *et seq.*, a claim for refund of purchasers’ use tax must be filed within three years of the due date of the quarterly purchasers’ use tax return.

PURCHASERS’ USE TAX – STATUTE OF LIMITATIONS – The Petitioner is not due a refund of the purchasers’ use tax it paid to the State of West Virginia because it did not file its claim for refund within three years of the due date of the tax return with respect to the tax due, or within two years of the date on which the tax was paid. W. Va. Code § 11-10-14(l)(1) [2003].

FINAL DECISION

On March 14, 2006, the Petitioner, filed a claim for refund of purchasers’ use tax in the amount of \$ for the period of June 1, 1994, through July 31, 2002.¹ The Sales Tax Unit of the Internal Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or the “Respondent”), by letter dated March 20, 2006, denied the refund claim. The reason stated for the denial was that the refund claim was not timely filed, that is, it was filed after July, 2005, in violation of W. Va. Code § 11-10-14(l)(1) [2003].

Thereafter, by hand delivery on March 21, 2006, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund. W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9 (a)-(b) [2005].

¹ The denial letter states that the claim for refund was for periods ending not later than June 20, 2002, but the affidavit by which the Petitioner seeks the refund states that the refund is sought through July, 2002.

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. The Petitioner is in the business of dispensing hearing aids to individuals.
2. The Petitioner operated a sole proprietorship doing business in West Virginia; it commenced operations in April, 1994.
3. The sole proprietorship operated until, at the latest, June, 2002.
4. Some time in June, 2002, the sole proprietorship was incorporated.
5. In terms of the functions performed and the services provided, the two businesses were one and the same.
6. At the time that the Petitioner commenced operations, he inquired of the State Tax Commissioner's Office as to what taxes he was required to collect and pay.
7. He testified that he was informed that he was not required to collect consumers' sales and service tax on the product it sold to its customers, but that it was required to pay purchasers' use tax on items purchased by it and used or consumed in the conduct of its business.
8. The Petitioner and his successor operated in this manner for the period between 1994 and 2005.
9. The Petitioner maintains that, since he commenced operations, he has followed the direction of employees of the State Tax Commissioner's Office respecting the collection and payment of consumers' sales and service tax and purchasers' use tax, with respect to both the sole proprietorship and the corporation.
10. In 2005, the Petitioner's successor corporation was the subject of a field audit by the State Tax Commissioner.

11. Some time between December 12, 2005, and December 16, 2005, as a result of the field audit, the Petitioner was advised by the auditing supervisor that it was entitled to a refund of purchasers' use tax.

12. At the same time, the auditing supervisor advised the Petitioner that his successor corporation was required to pay consumers' sales and service tax on the amount of sales it had made to its customers, but for which it failed to collect consumers' sales and service tax, for the three-year period preceding the audit.

13. The auditing supervisor advised the Petitioner that the successor corporation would be required to collect and pay over consumers' sales and service tax on all future sales of hearing aids its customers without a prescription.

14. The successor corporation was not assessed consumers' sales and service tax for sales of their product made to customers without a prescription during the audit period.

15. In response to the information received from the auditor and his supervisor, the Petitioner called the State Tax Commissioner's Office respecting the consumers' sales and service tax and purchasers' use tax consequences on both his and the successor corporation's business. In a conversation with an employee of the State Tax Commissioner, the Petitioner received responses to certain questions, which he memorialized in writing. *See* Petitioner's Exhibit No. 2.

16. The Petitioner maintains that the answers he received from the tax employee conflicted with information he had previously received.

17. The Petitioner maintains that this evidences the conflicting information that he received from the State Tax Commissioner's Office, resulting in his and his successor corporation's failure to properly collect and pay over consumers' sales and service tax.

18 The Petitioner further testified that subsequently he had a meeting with the Deputy State Tax Commissioner, and the General Counsel to the State Tax Commissioner, who together advised him that if he had been provided the information set out in Petitioner's Exhibit No. 2, he had been misinformed, but that they could do nothing for the periods during which the Petitioner operated as a sole proprietorship, or for three years prior to the date the successor corporation filed its claim for refund because of the expiration of the statute of limitations.

19. The Petitioner maintains that the General Counsel to the State Tax Commissioner advised him that the successor corporation was not required to collect consumers' sales and service tax after the date of the decision of the Supreme Court of West Virginia in *Syncor Int'l Corp v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001).

20. The Petitioner further testified that the Deputy Tax Commissioner and General Counsel to the State Tax Commissioner advised him that after the *Syncor* decision, the State Tax Commissioner could no longer collect purchasers' use tax from the successor corporation, or taxpayers in similar positions.

21. There is no evidence in the record to show when the Petitioner, the sole proprietorship, filed any purchasers' use tax returns for periods from the time he commenced operations in 1994, and ceased operating as a sole proprietorship in June, 2002.

22. Since the Petitioner ceased operating as a sole proprietorship in June, 2002, at the latest, the latest due date of its purchasers' use tax return would have been July 15, 2002.

23. The Petitioner recalls that he filed its claim for refund on or about January 31, 2006.

DISCUSSION

The issue in this matter is whether the Petitioner filed its claim for refund within the limitations period established by W. Va. Code § 11-10-14(l)(1) [2003], which provides:

(l) Limitation on claims for refund or credit.

(1) General rule.

Whenever a taxpayer claims to be entitled to a refund or credit of any tax (or fee), additions to tax, penalties or interest imposed by this article, or any article of this chapter, or of this code, administered under this article, paid into the treasury of this state, the taxpayer shall, except as provided in subsection (d) of this section, file a claim for refund, or credit, within three years after the due date of the return in respect of which the tax (or fee) was imposed, determined by including any authorized extension of time for filing the return, or within two years from the date the tax, (or fee), was paid, whichever of the periods expires the later, or if no return was filed by the taxpayer, within two years from the time the tax (or fee) was paid, and not thereafter.

This section required the Petitioner to file its claim for refund either within three years of the due date of the applicable purchasers' use tax return, or within two years of the date that the purchasers' use tax was paid.

For the second quarter of 2002, the final quarter during which the Petitioner, conducted business as a sole proprietorship, the due date of the purchasers' use tax was July 15, 2002. There is no evidence to show that the Petitioner paid its purchasers' use tax for that quarter, or for any other quarter, subsequent to July 15, 2002. Using this date as the benchmark, the claim for refund for the second quarter of 2002 was required to be filed by July 15, 2005. Since, at the earliest, it was filed on or about January 31, 2006, it was not timely filed.

All purchasers' use tax returns for quarters ending prior to the second quarter of 2002 were required to be filed prior to the return for the second quarter of 2002. Using this as a benchmark, the purchasers' use tax returns were required to be filed on or before April 15, 2002. The claims for refund were required to be filed on or before April 15, 2005. Since the claim for

refund was filed no earlier than January 31, 2006, it was not timely filed for periods from the time the Petitioner commenced operations in 1994, until the first quarter of 2002.

There is no evidence in the record to show that the Petitioner paid purchasers' use tax any later than the due date of any return respecting the period for which the return was required to be filed. Since there is no evidence to show that the tax was paid at a later date than the due date of the return, the Petitioner cannot satisfy its burden of showing that it timely filed its claims for refund with respect to those periods.

The Petitioner argues that it was misinformed by employees of the State Tax Commissioner respecting the manner in which it should have been collecting and reporting the consumers' sales and service tax and the purchasers' use tax. It further maintains that this purportedly erroneous information resulted in an overpayment for the periods in question.

Regardless of whether or not information imparted by employees of the State Tax Commissioner was erroneous, as alleged, and regardless of whether or not such information, if erroneous, resulted in the overpayment of purchasers' use tax by the Petitioner, the Petitioner is not entitled to a refund. In order for the Petitioner to be entitled to a refund, it is required to comply with the provisions of the Tax Procedures Act, W. Va. Code § 11-10-1, *et seq.* This includes complying with the statute of limitations for filing a claim for refund, W. Va. Code § 11-10-14(l)(1) [2003]. The provision of erroneous information by employees of the State Tax Commissioner does not absolve the Petitioner of its duty to protect its refund claim by complying with the procedural requirements of the Code. *See Bradley v. Williams*, 195 W. Va. 180, 465 S.E.2d 180 (1995).

CONCLUSIONS OF LAW

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

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the Petitioner to show that it is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002].

2. The Petitioner did not comply with the provisions of W. Va. Code § 11-10-14(l)(1) [2003], because it did not file its claim for refund within the time periods prescribed by the statute for the filing of such claims.

3. The Petitioner has failed to carry its burden of showing that it is entitled to a refund.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of purchasers' use tax, in the amount of \$ of tax, for the period of June 1, 1994 through July 31, 2002, is hereby **DENIED**.