

**REDACTED DECISION – DOCKET # 08-171 RC – BY ROBERT W. KIEFER, JR., ALJ
– SUBMITTED FOR DECISION on JANUARY 1, 2009 – ISSUED on JUNE 30, 2009.**

SYNOPSIS

CONSUMERS SALES AND SERVICE TAX – BURDEN OF PROOF – On a claim for refund, the burden of proof is on the taxpayer to show that he is legally entitled to the refund sought by him and to show that he actually paid the amount of the tax for which he seeks the refund.

FINAL DECISION

On May 7, 2008, the Petitioner filed a claim for refund of consumers sales and service tax in the amount of \$_____ for a purchase made on April 29, 2008. By letter dated July 10, 2008, 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”), denied the claim.

Thereafter, by mail postmarked July 17, 2008, received in the offices of the West Virginia Office of Tax Appeals on July 18, 2008, the Petitioner timely filed a petition for refund. W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9 [2005].

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 a licensed veterinarian in the State of West Virginia and member of a Veterinary Clinic.
2. As it pertains to this matter, on April 29, 2008, the Petitioner purchased a product known as “Heartgard Plus” from the Veterinary Clinic and consumed the drug in the treatment of his pet.

3. Heartgard Plus is a veterinary legend drug (as defined in 21 C.F.R. 201.105) that was prescribed by the Petitioner for his pet in his capacity as a licensed veterinarian.

4. After being instructed by an employee of the West Virginia State Tax Commissioner's office on March 13, 2008 to charge clients consumers sales tax on all items (prescription and non-prescription) that were dispensed for "at home use," the Veterinary Clinic invoiced Petitioner consumers sales tax in the amount of \$____ on his purchase of Heartgard Plus.

5. The Petitioner is required to pay for medicines.

6. The total charge as shown on the invoice was \$____ for the medication and \$____ sales tax, for a total balance due of \$____. (See Joint Exhibit No. 1, p 2.)

7. The Petitioner paid \$____ on the account, as shown on a document entitled "Payment On Account, client i.d.: _____," dated 5/6/2008, reprinted on 5/7/2008. (See Joint Exhibit No. 1, p 2 & Petitioner's Exhibit No. 5.)

8. The office manager for the subject veterinarian business and, as such, oversees bookkeeping, reconciliations of accounts, and the books and records of the company.

9. The office manager can make adjustments to the Petitioner's account for items, including products and services, for which he is not required to pay.

10. Any adjustment labeled "Adjustment by ____" is an adjustment done by the wife of the Petitioner.

11. On April 29, 2008, the Veterinary Clinic applied an account credit of \$____, consisting of \$____ as a credit against the amount shown due for Invoice # 229465 and \$____ for a portion of the amount shown due for Invoice # 229466. (See Joint Exhibit No. 1, p. 2 & Petitioner's Exhibit No. 5.)

12. Thereafter, on May 14, 2008, the Veterinary Clinic remitted \$_____ to the West Virginia State Tax Department as its monthly submission of consumer sales and service tax. (See Petitioner's Exhibits Nos. 3 and 4.)

13. The Petitioner's witnesses testified that the monthly submission of consumers sales and service tax included the \$_____ consumers sales and service tax shown on Invoice # 229466.

14. The adjustment to Invoice # 229466, in the amount of \$_____, which was a portion of the \$_____ adjustment referred to in Finding of Fact Number 11 above, was the consumers sales and service tax shown on that invoice.

DISCUSSION

The Petitioner filed his claim for refund on two separate grounds. *See* Joint Exhibit No. 1. The first ground cited was "legislative rule 110-15-99.1 (W. Va. Code St. R. § 110-15-99.1) W. Va. Code St. R. § 110-15-99.1 is the legislative rule governing the exception for professional services, which is provided by W. Va. Code § 11-15-8. The second ground stated was that the sale should be exempt because the item purchased was a prescription drug.

The Petitioner's claim for refund was denied by the State Tax Commissioner on the grounds that the Petitioner had not purchased a "prescription drug." The medication purchased by the Petitioner was not considered a "drug" because it was not "Intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in humans." W. Va. Code § 11-15B-2(14)(B) [2006] (now W. Va. Code § 11-15B-2(16)(B) [2008]). *See* Joint Exhibit No. 2. The refund claim denial did not address the Petitioner's claim respecting a professional services exemption. The Petitioner was advised that if he wished to contest the Tax Commissioner's determination he should file a petition for refund with this Office.

The Petitioner then filed his petition for refund. The petition for refund was somewhat confusing because the form used by the Petitioner stated that he was requesting a refund solely because the medication was prescribed in the course of the provision of a professional service.¹ However, the Petitioner attached substantial documentation to its petition which could be read to indicate that he was also asserting the exemption for “prescription drugs,” which is set forth in W. Va. Code § 11-15-9(11). The State Tax Commissioner denied the allegations contained in the petition for reassessment.

At the commencement of the hearing in this matter, the parties represented to the undersigned that they were in agreement that the exemption for “prescription drugs” was not applicable. The State Tax Commissioner also conceded that the sales of the medication for the Petitioner’s pet in this matter was exempt from consumers sales and service tax because it was sold to the Petitioner in the course of the provision of a professional service, which is exempt under W. Va. Code § 11-15-8. However, the State Tax Commissioner asserted that the Petitioner had not actually paid consumers sales and service tax on the sale in the amount of \$____. Accordingly, the only issue presented in this matter is whether the Petitioner has actually paid the consumers sales and service tax for which he seeks a refund.

On April 29, 2008, the Veterinary Clinic sold to the Petitioner one unit of Heartgard Plus 26-50 lbs., containing 6 doses. *See* Petitioner’s Exhibit No. 3, p. 17. The purchase price for the medication was \$____. The Veterinary Clinic invoiced the Petitioner the purchase price of \$____, plus six percent (6%) consumers sales and service tax in the amount of \$____. The total amount of the invoice was \$____. The transaction was memorialized in Invoice # 229466.

¹ Professional services are exempt under the provisions of W. Va. Code § 11-15-8.

On April 29, 2008, the Veterinary Clinic made an adjustment to Invoice # 229465 and # 229466. The adjustment totaled \$____. Of that amount, \$____ was applied to Invoice # 229465. The remaining \$____ was applied to Invoice # 229466.

On May 6, 2008, the Petitioner made a cash payment to the Veterinary Clinic in the amount of \$____. *See* Petitioner's Exhibit No. 5 & Petitioner's Exhibit No. 6, p. 2 (identified as "Page 5 of 26). As a result of the payment of \$____, Invoice # 229466 was "closed." *See* Petitioner's Exhibit No. 1, p. 5 (identified as "Page 5 of 26"); Petitioner's Exhibit No. 5 & Petitioner's Exhibit No. 6, pp. 1 & 2)²

This evidence leads to the conclusion that the \$____ credit to Invoice # 229466 was for the consumers sales and service tax itemized thereon. It makes no sense to conclude that the Petitioner paid \$____ for the medication which was invoiced at \$____ and that the Veterinary Clinic credited him with \$____ against the medication, while he paid \$____ in consumers sales and service tax. If, in fact, the Veterinary Clinic had credited the Petitioner with \$____ against the medication, then the Petitioner would have then paid \$____ (6% of \$____) in consumers sales and service tax. The evidence in the record can only lead to the conclusion that the Petitioner was credited the \$____ in consumers sales and service tax. Having been credited with the consumers sales and service tax, he did not remit the same to the Veterinary Clinic.

In this matter, the Petitioner has the burden of proving that he is entitled to the refund that he claims. W. Va. Code § 11-10A-10(e). The documentary evidence and the inferences to be drawn therefrom³ clearly demonstrate that the Petitioner did not remit the consumers sales and

² The testimony presented at the hearing is that the Petitioner's wife was the individual who authorized the invoice to be "closed." The "____" in the third line of the itemized transactions in Petitioner's Exhibit No. 5 are the initials of the Petitioner's wife.

³ It is not impossible that the \$____ credit against Invoice # 229466 could have been against a portion of the purchase price of the medication. However, as set forth above, this is highly improbable.

service tax to the Veterinary Clinic. The \$_____ consumers sales and service tax was a part of the adjustment. Because of the adjustment, the Petitioner did not actually pay any consumers sales and service tax.⁴

⁴ Any consideration of whether or not the Veterinary Clinic may have paid the \$_____ to the State Tax Department is not germane to this matter. The issue is whether or not the Petitioner is entitled to a refund. Since the Petitioner did not remit the consumers sales and service tax to the Veterinary Clinic, what the Veterinary Clinic may have subsequently done is irrelevant. Thus, the evidence showing that the Veterinary Clinic collected consumers sales and service tax from other customers and that it remitted the same to the State Tax Department is of no consequence to the issue decided herein.

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 he is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002].

2. The evidence in the record shows proves that the Petitioner did not remit the consumers sales and service tax which he claims should be refunded to him.

3. The Petitioner in this matter has failed to carry carried its burden of showing that he is entitled to the refund requested.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of consumers sales and service tax in the amount of \$____, for a purchase made on April 29, 2008, is hereby **DENIED**.