

**REDACTED DECISION—09-022 C, 09-023 U—BY ROBERT W. KIEFER, JR.—ALJ—
SUBMITTED FOR DECISION on OCTOBER 28, 2009—ISSUED on APRIL 20, 2010**

SYNOPSIS

PURCHASERS USE TAX – A purchasers use tax assessment must be affirmed where the petitioner has conceded the validity thereof.

CONSUMERS SALES AND SERVICE TAX – SERVICES SOURCED OUT OF STATE FOR PURPOSES OF W. VA. CODE § 11-15B-15(a)(1) – The petitioner has satisfied its burden of proving that its service of destroying records occurs at its business location outside of West Virginia and must be sourced at that location for purposes of W. Va. Code § 11-15B-15(a)(1).

CONSUMERS SALES AND SERVICE TAX – SERVICES SOURCED IN STATE FOR PURPOSES OF W. VA. CODE § 11-15B-15(a)(1) – The petitioner has conceded that its service of picking up documents and records in West Virginia constitutes a service that first occurs in West Virginia and must be sourced to West Virginia for purposes of W. Va. Code § 11-15B-15(a)(2).

FINAL DECISION

The Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the petitioner. Thereafter, on November 17, 2008, the director of this division issued a consumers sales and service tax assessment against the petitioner. The 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 January 1, 2003, through June 30, 2008, for tax and

interest, computed through December 29, 2008. According to the petition for reassessment, written notice of this assessment was served on the petitioner on November 26, 2008.

Also, on November 17, 2008, 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 January 1, 2003, through June 30, 2008, for tax and interest. According to the petition for reassessment, written notice of this assessment was also served on the petitioner on November 26, 2008.

Thereafter, by mail postmarked January 20, 2009, received on January 22, 2009, the petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. 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]. At the hearing, the petitioner conceded the validity of the purchasers use tax assessment.

FINDINGS OF FACT

1. The petitioner began business in 1997 for the purpose of shredding and destroying records for an out of state business.
2. The petitioner is in the business of shredding or otherwise destroying and disposing of documents and other records for a fee.
3. The petitioner will go to its customer's place of business, collect the records to be destroyed, transport them back to its place of business outside of West Virginia and destroy the records.
4. The records are almost always destroyed the same day they are collected from the customer, the exception being when the truck does not get back until late in the afternoon.

5. If the records are not destroyed the same day, they are stored in the secure facility overnight and destroyed the next day.

6. Sometimes the petitioner's customers will transport their own documents and records to the petitioner's location outside of West Virginia.

7. In that circumstance, the total cost is less because the customer bears the cost of transportation.

8. The petitioner can shred and destroy a customer's records at the customer's site.

9. However, it is cheaper to have the records destroyed at the petitioner's location outside of West Virginia.

10. When the records are destroyed, their destruction is filmed and the customer is presented with a notarized certificate of destruction.

11. The customer does not normally get a copy of the videotape showing the destruction of the records.

12. The petitioner retains destruction records for 90 days, after which they destroyed. The customer is charged if it requests a permanent copy.

13. None of the petitioner's West Virginia customers requests a permanent record of destruction.

14. As disclosed by the audit work papers, the petitioner's West Virginia customers include debt collectors, hospitals and other medical providers, a bank, a law firm and a clothing manufacturer and retailer.

15. The West Virginia customer for whom the petitioner performs the substantial majority of its work is a hospital in West Virginia.

16. Prior to the audit period, when the petitioner first began destroying records for the hospital, the hospital transported the records to the petitioner's location outside of West Virginia.

17. After the hospital became comfortable with the petitioner's methods, it began allowing the petitioner to transport records to the petitioner's location outside of West Virginia.

18. The petitioner's general manager, Mr. A, testified that the petitioner charges a fee each week to pick up or collect records from the hospital and transport them outside of West Virginia.

19. If the hospital requests an additional pick up during a week, there is an additional charge.

20. Containers are placed throughout the hospital for the collection of records to be destroyed.

21. Currently, the petitioner's employees collect the records from the containers placed in the hospital, transport them in the petitioner's vehicles to the petitioner's location outside of West Virginia and destroy them under video surveillance on the same day they are collected.

22. This fee for destroying records is greater than the charge for transporting the records, and is based upon the number of containers and weight of the records to be destroyed.

23. The petitioner's certified public accountant, Mr. B, testified that he is a customer of the petitioner.

24. He testified that he has two bins that he uses to dispose of records. One is maintained by the local refuse company, the other is maintained by the petitioner.

25. The service offered by the local refuse company, which consists of hauling the records to the local landfill, is substantially cheaper than the service offered by the petitioner.

26. Mr. B testified that the difference in cost demonstrates that the petitioner's services primarily involve the secure and confidential destruction of the records, not merely the picking them up and transporting them to a disposal site.

27. This state does not charge a sales tax on services.

28. On the advice of Mr. B, the petitioner did not collect consumers sales and service tax since he was of the opinion that the services occurred in that state.

29. Prior to the audit, the petitioner did not collect consumers sales and service tax from its West Virginia customers.

30. After the audit, the petitioner began collecting consumers sales and service tax from its West Virginia customers.

31. The petitioner believes that this is not a taxable event in four (4) other states outside of West Virginia.

32. The petitioner concedes that if it destroys records at a customer's location in West Virginia, it is subject to the West Virginia consumers sales and service tax.

DISCUSSION

The first issue is whether the petitioner is liable for West Virginia consumers sales and service tax on the service of destroying and disposing of documents and other records which it picks up from its customers in West Virginia and transports to another state, where the records are shredded and then disposed of. The petitioner contends that it is not liable to collect tax on the service, because the service occurs outside of West Virginia. The respondent contends that the provisions of W. Va. Code § 11-15B-15(a)(2) require that the transaction be sourced to the State of West Virginia. Upon a review of the relevant statute, this Office is of the opinion that subsection (a)(2) is not applicable, and that the applicable subsection requires the transaction be sourced to the state performing the service.

W. Va. Code § 11-15B-14 (a) provides, in relevant part, "For purposes of Subsection (a), section fifteen of this article, the terms "receive" and "receipt" mean . . . (2) Making first use of services; W. Va. Code § 11-15B-15(a) provides, in relevant part:

[T]he retail sale . . . of a product shall be sourced as follows:

(1) When the product [service] is received by the purchaser at a business location of the seller, the sale is sourced to that business location;

(2) When the product [service] is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser or the purchaser's designated donee occurs,

W. Va. Code § 11-15B-15(f) defines "product" as including "service." Thus, for purposes of 11-15B-15(a), "product" refers to the service provided by the petitioner.

In the present matter, the petitioner's customers contract with the petitioner for the service of the destruction of documents and other records. This is the "product" provided by the petitioner. This occurs at the petitioner's place of business outside of West Virginia.

Subsection (a)(1) provides that when the product (service) is received by the purchaser at the business location of the seller, the sale is sourced to the business location of the seller. In the present action, the service occurs when the petitioner destroys the documents at its location in Ohio. Thus, according to subsection (a)(1), that is the location to which the service is sourced.

The respondent contends that subsection (a)(2) applies in this situation. Subsection (a)(2) provides that where the product is not received by the purchaser at a business location of the seller, then it is sourced to the location where receipt by the purchaser occurs. At first blush, the respondent's contention, that receipt of the product occurs when the petitioner takes possession of the customers' records, appears valid. However, receipt is defined as first use of the product, in this case a service. The respondent's argument ignores the fact that in this case the documents or other records of the customer are not the product. The product is the service provided by the petitioner. First use of the service, the destruction of records, occurs at the petitioner's location outside of West Virginia, and must be sourced to that location.

The respondent's error in this regard is that he considers the documents to be shredded as the product. Thus, according to him, when the documents are received by the petitioner at its customers' locations, that is the location at which the transactions must be sourced. However, as explained above, his characterization of the transaction is incorrect.

With respect to the charges for picking up of the documents and records, the petitioner concedes that those charges are subject to consumers sales and service tax. The audit work papers do not disclose the amounts the petitioner charged its customers for picking up the documents and other records to be destroyed. Thus, as it indicated it would do at the hearing, it will be necessary for the petitioner to provide evidence respecting the amount it charged for picking up the records to be destroyed. Thus, the petitioner must provide the contract showing how its charges for picking up documents. It is further required to provide invoices or other documentation showing the amounts it actually charged for picking up documents for transportation to its location for destruction.

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 reassessment, the burden of proof is upon the petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).
2. The petitioner has conceded the validity of the purchasers use tax assessment.
3. The petitioner has satisfied its burden of proving that its service of destroying records occurs at its business location outside of West Virginia and must be sourced at that location for purposes of W. Va. Code § 11-15B-15(a)(1).

4. The petitioner has conceded that its service of picking up documents and records in West Virginia constitutes a service that first occurs in West Virginia and must be sourced at that location for purposes of W. Va. Code § 11-15B-15(a)(2).

DISPOSITION

WHEREFORE, it is 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 January 1, 2003, through June 30, 2008, for tax and interest, 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, 2003, through June 30, 2008, for tax and interest, should be and is hereby **MODIFIED** to exclude consumers sales and service tax on the services of destroying documents and records at it business outside of West Virginia.

Within thirty (30) days of receipt of this decision, the petitioner shall provide to this Office and counsel for the respondent its contracts with its customers showing how it charges for picking up documents and other records from the customers, and shall further provide all invoices showing the amounts that the petitioner actually invoiced its customers for said services. Within twenty (20) days thereafter, each party shall provide to this Office, and to each other, a computation of the amount of consumers sales and service tax due with respect to said services, plus a computation of interest due thereon, and within ten (10) days after that, each party is entitled to comment with respect to the computation of the other party.