

REDACTED DECISION – DOCKET #S 09-039 C & 09-072 C – BY ROBERT W. KIEFER, JR., ALJ – SUBMITTED FOR DECISION on AUGUST 4, 2009 – ISSUED on FEBRUARY 4, 2010.

SYNOPSIS

CONSUMERS SALES AND SERVICE TAX – WAIVER OF INTEREST -- Interest on any underpayment of tax is mandated by W. Va. Code § 11-10-17, and in the absence of some statutory provision allowing the waiver of interest and establishing a standard for such waiver, may not be waived.

CONSUMERS SALES AND SERVICE TAX – ASSESSMENT OF ADDITIONS TO TAX -- Additions to tax are mandated when a taxpayer is required to file a tax return or pay the tax shown due on a return, but fails to do so. W. Va. Code § 11-10-18(a)(1) & (2).

CONSUMERS SALES AND SERVICE TAX – WAIVER OF ADDITIONS TO TAX -- Additions to tax may be waived where there is a showing that the taxpayer's failure to file a return or pay the tax shown due on a return was due to reasonable cause and not due to willful neglect. W. Va. Code § 11-10-18(a)(1) & (2).

CONSUMERS SALES AND SERVICE TAX – WAIVER OF ADDITIONS TO TAX -- The failure of a taxpayer to remit consumers sales and service tax collected from its customers and held in trust for the State because it was undergoing financial hardship and needed the funds to sustain its business does not constitute reasonable cause for the waiver of additions to tax.

FINAL DECISION

On December 5, 2008, 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 July 1, 2006, through October 31, 2006, for interest in the amount of \$____, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____. Written notice of this assessment was served on the Petitioner on December 10, 2008.

Thereafter, by facsimile electronic transmission received on February 7, 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].

Also, on January 5, 2009, 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 of November 1, 2006, through November 20, 2006, for interest in the amount of \$____, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____. Written notice of this assessment was served on the Petitioner on January 9, 2009.

Thereafter, by facsimile electronic transmission received on March 6, 2009, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a second 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].

FINDINGS OF FACT

1. The Petitioner, a corporation, operates a business in a city in West Virginia.
2. The Petitioner collected consumers sales and service tax from its customers on certain of its sales.
3. For the periods that are the subject of these assessments, the Petitioner did not file consumers sales and service tax returns or remit the consumers sales and service tax collected in a timely manner.
4. As admitted by its President and Chief Executive Officer, in the interim the Petitioner used the consumers sales and service tax it collected to help fund the operation of its business.

5. The reason given by the Petitioner for its use of the consumers sales and service tax is that it was undergoing financial hardship due to the current economic recession and that it needed the funds to operate.

6. The Petitioner has submitted its corporation income tax returns, Federal Forms 1020, and a financial statement to show that it is undergoing financial hardship. *See* Petitioner's Exhibit No. 1.

7. The Petitioner filed consumers sales and service tax returns and remitted the amount of the consumers sales and service tax shown due on said returns on or about August 18, 2008, between 19 and 24 months late, depending on the month.

8. The amounts assessed as interest and additions to tax are based on the amounts shown due on the consumers sales and service tax returns filed by the Petitioner.

9. The Petitioner does not assert that the amounts assessed are erroneous, only that they should be waived.

10. The Petitioner believes there is reasonable cause for the waiver of additions to tax and that the failure to remit the tax was not due to willful neglect.

DISCUSSION

The assessments in this matter consist solely of interest and additions to tax. The Petitioner contends that the interest and additions to tax should be waived and the assessments abated, because it has suffered from a downturn in business, resulting in financial hardship. It maintains that upholding the assessment will cause further hardship.

West Virginia Code § 11-10-17 provides for the assessment of interest on any underpayment of tax. This section does not provide for any waiver of interest. In the absence of a statutory provision that allows for the waiver of interest and establishing some standard by

which this Office can determine whether or not interest should be waived, it cannot be done.

Consequently, the Petitioner's request for waiver of interest cannot be granted.

West Virginia Code § 11-10-18 provides, in relevant part:

(a) Failure to file tax return or pay tax due.

(1) In the case of failure to file a required return of any tax administered under this article on or before the date prescribed for filing such return (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for more than one month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: Provided, That this addition to tax shall be imposed only on the net amount of tax due;

(2) In the case of failure to pay the amount shown as tax, on any required return of any tax administered under this article on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return one half of one percent of the amount of such tax if the failure is for not more than one month, with an additional one half of one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: Provided, That the addition to tax shall be imposed only on the net amount of tax due;

(3) In the case of failure to pay any amount in respect to any tax required to be shown on a return specified in paragraph (1) which is not so shown within fifteen days of the date of notice and demand therefore, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand one half of one percent of the amount of each tax if the failure is for not more than one month, with an additional one half of one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: Provided, That this addition to tax shall be imposed only on the net amount of tax due.

The statute provides that additions to tax may be waived if it can be shown that the Petitioner's failure to pay the consumers sales and service tax collected from its customers was due to reasonable cause and not due to willful neglect. The Petitioner contends that it has been suffering from financial hardship due to the recession. It contends that both the federal and state

governments have an express policy of helping small businesses, of which the Petitioner is one. It maintains that affirming the assessment of additions to tax will cause it further hardship and that the waiver of additions to tax will further the governmental policy of aiding small businesses by helping it survive the recession.

Like similarly situated businesses in the State of West Virginia, the Petitioner acts as an agent of the State in collecting consumers sales and service tax from its customers. It collects the consumers sales and service tax from its customers as an agent of the State and holds it in trust for the State of West Virginia until it remits the same to the State. W. Va. Code § 11-15-4. The State requires remission of the tax on a periodic basis.

The Petitioner did not remit the tax in a timely manner. Instead, it took the money that it was holding in trust for the State and used it to operate its business. Petitioner expressly testified that it did so. *See also* Petitioner's Exhibit No. 3, ¶ 5. The Petitioner contends that it was justified in doing so because of its hardship. However, it offers no explanation for why its use of the State's money that it is holding in trust to operate its business constitutes reasonable cause for its failure to remit the trust fund money to the State. The Petitioner has not shown that its failure to pay the tax was due to reasonable cause. In the absence of some showing that the failure to remit the tax was due to reasonable cause and not due to willful neglect, the additions to tax may not be waived.

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. Interest on any underpayment of tax is mandated by W. Va. Code § 11-10-17, and in the absence of some statutory provision allowing the waiver of interest and establishing a standard for such waiver, may not be waived.

3. Additions to tax are mandated when a taxpayer is required to file a tax return or pay the tax shown due on a return, but fails to do so. W. Va. Code § 11-10-18(a)(1) & (2).

4. Additions to tax may be waived where there is a showing that the taxpayer's failure to file a return or pay the tax shown due on a return was due to reasonable cause and not due to willful neglect. W. Va. Code § 11-10-18(a)(1) & (2).

5. The failure of a taxpayer to remit consumers sales and service tax collected from its customers and held in trust for the State because it was undergoing financial hardship and needed the funds to sustain its business does not constitute reasonable cause for the waiver of additions to tax.

6. The Petitioner in this matter has failed to carry its burden of proving that any assessment of taxes against it is erroneous, unlawful, void or otherwise invalid.

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 for the period of July 1, 2006, through October 31, 2006, for interest in the amount of \$____, and additions to tax in the amount 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 for the period of November 1, 2006, through November 20, 2006, for interest in the amount

of \$____, and additions to tax in the amount of \$____, totaling \$____, should be and is hereby

AFFIRMED.