

**BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS  
REDACTED DECISION –09-110 U—BY ROBERT W. KIEFER, JR., ALJ—  
SUBMITTED FOR DECISION on OCTOBER 28, 2009—ISSUED on APRIL 27, 2010**

**SYNOPSIS**

**PURCHASERS USE TAX – BURDEN OF PROOF** – In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is on 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).

**PURCHASERS USE TAX – PURCHASES FOR USE IN CONTRACTING BUSINESS** – Petitioner was required to pay purchasers use tax on purchases made prior to July 1, 2007, for use in its contracting business in West Virginia, consisting of fabrication and erection of metal tanks in West Virginia.

**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 February 3, 2009, the Director of this Division issued a purchasers use tax assessment against petitioner. The assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code. The assessment was for the period of January 1, 2006, through June 30, 2008, for tax and interest. According to the petition for reassessment, written notice of this assessment was served on Petitioner on February 10, 2009.

Thereafter, by mail postmarked April 13, 2009, received in the offices of the West Virginia Office of Tax Appeals on April 15, 2009, 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 petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

After filing a petition for reassessment the petitioner remitted full payment of the assessment, under protest, to stop the running of interest on the assessment. Accordingly, the petition for reassessment has been converted to a petition for refund, under the provisions of W. Va. Code § 11-10-8(c) [2002].

#### **FINDINGS OF FACT**

1. During the periods in question, petitioner was engaged in business in West Virginia as a subcontractor for a company, fabricating and erecting metal industrial tanks for an electric company at two different power plants. *See* Petitioner's Exhibit Nos. 1 & 2.

2. Petitioner presented Petitioner's Exhibit No. 1, which relates to fabrication and erection of the tanks at one of the power plants.

3. Pages 6 & 7, Petitioner's Exhibit No. 1 show the items that petitioner was to fabricate and erect at the the other power plant, specifically thirteen (13) metal tanks which were to be used for various purposes.

4. Petitioner's Exhibit No. 1 contains drawings of the tanks that petitioner was required to construct at one of the plants.

5. Pages 6 & 7, Petitioner's Exhibit No. 1 shows the estimated number of pounds of steel required for the tanks to be constructed at one of the power plants.

6. Page 8, Petitioner's Exhibit No. 1 shows that petitioner purchased 2,604,580 pounds of steel for use in constructing the tanks at one of the power plants.

7. Petitioner paid \$.4395 per pound of steel used in the construction of the tanks at one of the power plants.

8. At \$.4395 per pound, the cost of the steel purchased by petitioner, as shown on Page 8, Petitioner's Exhibit No. 1.

9. Petitioner's Exhibit No. 2 contains the documents relevant to the work performed by petitioner at the power plant.

10. Pages 1-7, Petitioner's Exhibit No. 2 shows the items that petitioner was to fabricate and erect at this particular power plant, specifically nine (9) metal tanks which were to be used for various purposes.

11. Page 11, Petitioner's Exhibit No. 2 shows the amount of steel that petitioner purchased and which was necessary for fabrication and erection of the tanks.

12. Petitioner paid \$.4395 per pound of steel used in fabricating and erecting the tanks at another power plant.

13. Page 11, Petitioner's Exhibit No. 2 shows that petitioner purchased 1,670,804 pounds of steel for use in fabricating and erecting the tanks at the power plant.

14. At \$.4395 per pound, the cost to petitioner of purchasing the steel as shown on Page 11 of Petitioner's Exhibit No. 2.

15. Petitioner's Exhibit No. 2 contains drawings of the tanks that petitioner was required to fabricate and erect at the power plant.

16. The Petitioner concedes that it should have paid purchasers use tax with respect to its purchases for a job, which occurred in April through June of 2007.

17. Petitioner accepted in good faith a “Special Contractors Exempt Purchases Certificate,” CST-286 from a corporation respecting a power plant job, which stated the corporation should be responsible for payment of any purchasers use tax because it either unintentionally misled petitioner or provided the exemption certificate without full knowledge of the ramifications of doing so.

18. The exemption certificate accepted by petitioner reflected a change in the law effective July 1, 2007.

19. The exemption certificate with respect to a power plant job was for any purchases made after July 1, 2007.

20. The law changed effective July 1, 2007, whereby a contractor is not required to collect consumers sales and service tax or pay purchasers use tax on purchases that are provided in a job where the ultimate consumer would be exempt. W. Va. Code § 11-15-8d.

21. The State Tax Commissioner did not assess tax for periods after June 30, 2007, when the change in the law was effective.

## **DISCUSSION**

The issue in this matter is whether petitioner is required to pay purchasers use tax on its purchases that were used and consumed in the fabrication and erection of the metal tanks for the power plant and the work it performed for a corporation.

W. Va. Code § 11-15-8a, enacted in 1989, provides, in relevant part:

(a) The provisions of this article shall not apply to contracting services. However, purchases by a contractor of tangible personal property or taxable services for use or consumption in the providing of a contracting service shall be taxable beginning the first day of March, one thousand nine hundred eighty-nine, except as otherwise provided in this article.

This section provides that contractors are not required to collect consumers sales and service tax from those for whom it performs a contracting activity. However, it requires that contractors pay purchasers use tax on their purchases for use in their contracting businesses.

W. Va. Code § 11-15-9(b)(2), as enacted in 1990 and as amended in 1997, provides, in relevant part:

(a) Persons who perform "contracting" as defined in section two [§ 11-15-2] of this article, . . . may not assert any exemption to which the purchaser of such contracting services . . . is entitled. Any statutory exemption to which a taxpayer may be entitled shall be invalid unless the tangible personal property or taxable service is actually purchased by such taxpayer and is directly invoiced to and paid by such taxpayer. . . .

(b) Transition rule. – [E]ffective July 1, 2007, this section shall not apply to purchases of services, machinery, supplies or materials, except gasoline and special fuel, to be directly used or consumed in the construction, alteration, repair or improvement of a new or existing building or structure by a person performing "contracting", as defined in section two of this article, if the purchaser of the "contracting" services would be entitled to claim the refundable exemption under subdivision (2), subsection (b), section nine of this article had it purchased the services, machinery, supplies or materials. . . .

Thus, prior to July 1, 2007, contractors could not assert exemptions with respect to their purchases that could be asserted by their customers with respect to their purchases. In order for such exemptions to be asserted, the customers would have to purchase the services or property themselves and be directly invoiced and pay for the property and services. After the 2007 amendment, which was effective July 1, 2007, contractors could assert exemptions that their customers could assert with respect to their purchases.

As applicable to the present situation, W. Va. Code § 11-15-8a requires petitioner to pay purchasers use tax on its purchases prior to July 1, 2007. The State Tax Commissioner assessed purchasers use tax on petitioner's purchases prior to July 1, 2007. Thus, the assessment is legally valid. The State Tax Commissioner, recognizing the power company is exempt pursuant to the provisions of W. Va. Code § 11-15-9(b)(2), as a generator, producer or seller of electric

power, and that petitioner was entitled to assert this exemption after July 1, 2007, did not assess purchasers use tax on its purchases after June 30, 2007.

Petitioner initially presented evidence respecting its purchases, which appeared to be geared towards showing that its purchases were less than the amounts computed by the State Tax Commissioner. Subsequently, however, it agreed that the figures assessed by the State Tax Commissioner are correct. Accordingly, the assessment must be affirmed.

### **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 on 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. Petitioner was required to pay purchasers use tax on purchases made prior to July 1, 2007, for use in its contracting business in West Virginia, consisting of fabrication and erection of metal tanks in West Virginia.

3. In this matter petitioner 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 purchasers use tax assessment issued against the Petitioner for the year period of January 1, 2006, through June 30, 2008, for tax and interest computed through March 15, 2009, the tax liability should be and is hereby **AFFIRMED**.