

**REDACTED DECISION – DOCKET # 09-218 RC – BY GEORGE V. PIPER, ALJ –  
SUBMITTED FOR DECISION on JULY 21, 2009 – ISSUED on JANUARY 15, 2010.**

**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 it is legally entitled to the refund sought by it and to show that it actually paid the amount of the tax for which it seeks the refund.

**FINAL DECISION**

On March 6, 2009, the petitioner, filed a claim for refund of consumers sales and service tax in the amount of \$\_\_\_\_ for the period January 1, 2007 through December 31, 2008. By letter dated March 31, 2009, the Sales Tax Unit of the Internal Auditing Division of the West Virginia State Tax Commissioner's Office denied the claim stating that a contractor making capital improvements must generally pay sales or use tax on purchases used or consumed in making capital improvements.

Thereafter, by mail postmarked June 17, 2009, the Petitioner timely filed with this tribunal a petition for refund in the amount of \$\_\_\_\_. W. Va. Code §§ 11-10A-8(2) [2007] and 11-10A-9 [2005].

Subsequently, notice of a hearing on the petition was sent to the parties 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 limited liability company, is engaged in the business of landscaping including the planting of trees, shrubs, flowers, etc., as well as some spot painting and small repairs when necessary.

2. The petitioner's requested refund in the amount of \$\_\_\_\_\_ pertains solely to purchases which it made in relation to the spot painting and repair side of the business. No part of the refund involves purchases used in the landscaping side of the business.

3. At the hearing, the respondent's counsel agreed that the petitioner is entitled to the refund of \$\_\_\_\_\_ based upon the petitioner's submitted tax receipts from retail vendors reflecting the amount of consumers sales and service tax paid by the petitioner in relation to the spot painting and repair side of its business.

### **DISCUSSION**

The only issue to be determined is whether the petitioner has met the burden of proving that it is entitled to the refund amount that he claims. W.Va. Code § 11-10A-10(e). The petitioner's tax receipts and testimony clearly demonstrated that the petitioner did pay consumers sales and service tax in the amount of \$\_\_\_\_\_ on purchases of tangible personal property which were then used in the spot painting and small repair side of the petitioner's business.

W.Va. Code § 11-15-9(a)(9) exempts sales of tangible personal property to a person for the purpose of resale in the form of tangible personal property which means that petitioner was not required to pay consumers sales and service tax to retail vendors on purchases of paint and small repair items which he in turn resold to customers.

Because petitioner collected consumers sales and service tax from customers with respect to spot painting and small repairs it is determined that the petitioner is entitled to the refund because its purchases for resale were exempt from tax at the time of purchase.

Accordingly, it is determined that the petitioner is entitled to the refund in the amount of \$\_\_\_\_\_.

### **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 evidence in the record proves that the petitioner did pay the consumers sales and service tax on resale items which it claims should be refunded.
3. The petitioner in this matter has carried its burden of showing that it 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 the period January 1, 2007 through December 31, 2008 is hereby **GRANTED**.