

**REDACTED DECISION – DK# 10-419 CU – BY – GEORGE V. PIPER,
ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION on MARCH 21,
2011 – ISSUED ON SEPTEMBER 16, 2011**

SYNOPSIS

CONSUMERS SALES AND SERVICE TAX – TAXPAYER’S FAILURE TO CARRY BURDEN OF PROOF – The failure of taxpayer to articulate adequate grounds in its petition for reassessment justifying its claim, combined with its failure at a hearing to present any evidence respecting its claim, will result in a denial of relief to the taxpayer. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. § 121-1-63.1 (2003).

COMBINED SALES AND USE TAX – TAXPAYER’S FAILURE TO CARRY BURDEN OF PROOF -- The failure of taxpayer to articulate adequate grounds in its petition for reassessment justifying its claim, combined with its failure at a hearing to present any evidence respecting its claim, will result in a denial of relief to the taxpayer. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 (2003).

FINAL DECISION

On September 7, 2010, the Auditing Division of the West Virginia State Tax Commissioner’s Office (the Commissioner) issued an assessment for consumers sales and service tax 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 January 1, 2007, through June 30, 2008, for

tax in the amount of \$____, interest in the amount of \$____, computed through October 26, 2010, 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 as required by law.

On the same date, the Auditing Division also issued an assessment for combined sales and use tax against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15 and 15A of the West Virginia Code. The assessment was for the period of July 1, 2008, through June 30, 2010, for tax in the amount of \$____, interest in the amount of \$____, computed through October 26, 2010, 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 as required by law.

Thereafter, by mail postmarked October 19, 2010, received in the offices of this Tribunal, the West Virginia Office of Tax Appeals, on October 21, 2010, the Petitioner timely filed a petition for reassessment, pursuant to West Virginia Code Sections 11-10A-8(1) and 11-10A-9 (West 2010).

Subsequently, a notice of hearing of the petition was sent to the parties and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10. A prehearing conference was conducted in front of this Tribunal with all parties being present. At the outset of the proceedings, Respondent's counsel submitted a revised consumers sales and service tax assessment, for tax in the amount of \$____, interest of \$____, and additions to tax of \$____, for a total tax liability of \$____. Respondent's counsel also submitted a revised combined sales and use tax assessment for tax of \$____, interest of \$____, and additions to tax of \$____, for a total tax liability of \$____.

At the hearing, Respondent's counsel moved that the revised assessments be admitted into evidence in lieu of the original tax assessments because the same more correctly reflect the taxable receipts of the business based upon discussions between the parties. The revised assessments were admitted into evidence without objection by Petitioner.

FINDINGS OF FACT

1. In her petition for reassessment, pertaining to both the consumers sales and service tax and combined sales and use tax assessments, the Petitioner asserted that the tax assessments were in error but provided nothing in the way of explanation.

2. In Response to the admission of the revised assessments Petitioner testified that the same were still incorrect; inasmuch as the revised assessments included monthly loans made by her husband to the business, as well as other emoluments which she added to the business from time to time.¹

3. Petitioner also testified that she did not understand that all of her evidence had to be presented at the hearing; however, the notice of hearing sent to Petitioner clearly articulated that when Petitioner appeared at the scheduled hearing she must present all evidence relevant to a determination on the merits of the case.

4. Respondent's witnesses testified the Petitioner never provided, to them, back-up information such as z-tapes, general ledgers, and the like which could be utilized to verify the actual gross receipts derived from the business.

¹ Petitioner's claim that the assessments erroneously included loans and other sums not derived from the business was never brought to the attention of Respondent prior to the evidentiary hearing. During the audit period Petitioner ran all of her business operations through her personal check books.

5. Respondent's witnesses further testified that because Petitioner did not have adequate tax information to audit, they were forced to use her personal bank account statements and added a mark-up.

6. None of the testimony offered by the Respondent's witnesses was rebutted by the Petitioner.

7. Based upon a review of the documentary evidence presented in this matter this Tribunal finds that Petitioner's evidence is neither persuasive nor credible.

DISCUSSION

The issue presented for determination is whether the Petitioner has met the burden of proof showing that the tax assessments issued against her are erroneous, unlawful, void or otherwise invalid. W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

West Virginia imposes a general consumers sales and service tax. *See* W. Va. Code Ann. § 11-15-1 *et seq.* (West 2010). Vendors are required to collect such taxes, “[f]or the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article[.]” W. Va. Code Ann. § 11-15-3(a) (West 2010). “To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established.” W. Va. Code Ann. § 11-15-6(b) (West 2010).

Every person doing business in the State of West Virginia...shall keep complete and accurate records, as are necessary, for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes. *See* W. Va. Code R. § 110-15-14a.1 (1992).

If, when auditing taxpayer records, said records are inadequate to accurately reflect the business operations of the taxpayer, the tax auditor will determine the best information available and will base the audit report on that information. In this case, the only information which the tax auditors believed was reliable was Petitioner's bank statements. *See* W. Va. Code R. § 110-15-14b.4 (1992).

During the course of the hearing both the Petitioner and her representative testified that her personal check books contained items which were not actually derived from the business, such as personal loans made to Petitioner from her husband as well as other emoluments which she added to the business from time to time.

Although Petitioner was afforded an opportunity at the hearing to prove the validity of her claim that the revised assessments contained non-taxable items such as loans she was unable to do so, because entries in Petitioner's personal check book were not adequate to accurately reflect the income actually derived from her business.

Based upon the uncontroverted evidence in the record, it is clear that Petitioner chose not to keep separate books and records for her business; but rather decided to group personal and business finances together which resulted in entries that Petitioner could not explain at the hearing. Accordingly, it is determined that the revised assessments must be upheld in toto.

CONCLUSIONS

Based upon all of the above it is **DETERMINED** that:

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. West Virginia imposes a general consumers sales and service tax. *See* W. Va. Code Ann. § 11-15-1 *et seq.* (West 2010).

3. Vendors are required to collect consumers sales and service taxes “[f]or the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article[.]” W. Va. Code Ann. § 11-15-3(a) (West 2010).

4. “To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established.” W. Va. Code Ann. § 11-15-6(b) (West 2010).

5. Every person doing business in the State of West Virginia...shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes. W. Va. Code R. § 110-15-14a.1 (1992).

6. If when auditing taxpayer records, said records are inadequate to accurately reflect the business operations of the taxpayer the tax auditor will determine the best information available and will base the audit report on that information. W. Va. Code R. § 110-15-14b.4 (1992).

7. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the taxpayer to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

8. The Petitioner, in this matter, has failed to carry her burden of proving that any assessment of taxes against her 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 period of January 1, 2007, through June 30, 2008, for tax in the amount of \$____, interest in the amount of \$____, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____, should be and is hereby **AFFIRMED**, as revised, for tax in the amount of \$____, interest of \$____ and addition to tax of \$____, for a total tax liability of \$____.

It is **ALSO** the Final Decision of the West Virginia Office of Tax Appeals that the combined sales and use tax assessment issued against the Petitioner for the period July 1, 2008, through June 30, 2010, for tax in the amount of \$____, interest in the amount of \$____, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____, should be and is hereby **AFFIRMED**, as revised, for tax of \$____, interest of \$____, and additions to tax of \$____, for a total tax liability of \$____.

Pursuant to the provisions of West Virginia Code Section 11-10-17(a) [2002], interest accrues on the assessments until the liabilities are fully paid.