

REDACTED DECISION – DK# 11-105 U – BY – A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION on JULY 18, 2011, ISSUED ON DECEMBER 16, 2011

FINAL DECISION

SYNOPSIS POINTS

WEST VIRGINIA OFFICE OF TAX APPEALS – 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 or penalty 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).

CONSUMERS SALES AND SERVICE TAX – “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.” W. Va. Code Ann. § 11-15-3(a) (West 2010).

CONSUMERS SALES AND SERVICE TAX – “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (West 2010).

CONSUMERS SALES AND SERVICE TAX – “Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993).

CONSUMERS SALES AND SERVICE TAX – “If the tax commissioner believes that any tax . . . has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.” W. Va. Code Ann. § 11-10-7 (West 2010).

CONSUMERS SALES AND SERVICE TAX – The Commissioner may add interest and additions to tax where applicable. *See* W. Va. Code Ann. §§ 11-10-17, and 11-10-18, (West 2010).

CONSUMERS SALES AND SERVICE TAX – It is well settled that exemptions from taxation are strictly construed against the person making the claim for exemption. *See* Syllabus

Point 4, Shawnee Bank, Inc. v. Paige, 200 W.Va. 20, 488 S.E.2d 20 (1997); Davis Memorial Hosp. v. W. Va. Tax Comm'r., 222 W. Va. 677, 671 S.E.2d 682 (2008).

CONSUMERS SALES AND SERVICE TAX – “Sales of livestock, poultry or other farm products in their original state by the producer . . .” are exempt from consumers sales and service tax. W. Va. Code Ann. § 11-15-9(a)(32) (West 2010).

CONSUMERS SALES AND SERVICE TAX – Farm products are “products grown on a farm, generally for consumption, and includes, but is not necessarily limited to, apples, cherries, strawberries, natural honey and corn . . .” W. Va. Code R. § 110-15-2.32 (1993).

CONSUMERS SALES AND SERVICE TAX – The consumers sales and service tax regulations define livestock, and it is clear that dogs are not included in the meaning of that term for purposes of that article. *See* W. Va. Code R. § 110-15-2.42 (1993).

CONSUMERS SALES AND SERVICE TAX – West Virginia Code Section 11-15A-2(d) imposes a use tax on every person using tangible personal property in this state, and the Petitioner’s purchase of supplies for use in his kennel business are subject to the same. W. Va. Code Ann. § 11-15A-2(d) (West 2010).

FINDINGS OF FACT

1. Petitioner owns and operates a business located in West Virginia.
2. Petitioner’s business consists of raising and selling dogs, as well as a few head of cattle.
3. In or around April 2009, Petitioner, along with his friend, Ms. A, met with a Mr. Donald Dunn, who worked for the West Virginia State Tax Department (hereinafter Respondent). Mr. Dunn was reportedly a taxpayer representative employed by the West Virginia State Tax Department.
4. Petitioner met with Mr. Dunn for the purpose of setting up his business registration and filling out any necessary paperwork related to the taxation of the business. While there, Petitioner decided upon a name for his business and completed the requisite paperwork for obtaining his business registration certificate.

5. Petitioner and Mr. Dunn had some discussions about the taxability of Petitioner's business activities. Petitioner left that meeting with a document entitled Certificate of Exemption for agricultural activities.

6. Petitioner's business was audited by Respondent sometime prior to February 2011. The auditor concluded that Petitioner's cattle business was exempt from taxation because it qualified as an agricultural activity.

7. The auditor noted, however, that Petitioner was not charging sales tax on the sale of dogs and was not paying use tax on the purchase of certain supplies, such as dog food, vaccines, dog feeders, and medications for the kennel portion of his business. Petitioner had gifted some of his dogs, and those were excluded from the audit.

8. The auditor concluded that the kennel portion of Petitioner's business did not qualify for an agricultural exemption, and on February 8, 2011, Petitioner was issued a combined sales and use tax assessment, in the amount of \$____, plus \$____ in interest, for a total assessed amount of \$____, covering tax periods April 1, 2009 through December 31, 2010.

PROCEDURAL HISTORY

Upon receipt of the assessment at issue, Petitioner made a timely appeal to the West Virginia Office of Tax Appeals, where the matter was assigned to Administrative Law Judge, Christopher B. Amos. An evidentiary hearing was conducted in Clarksburg, West Virginia. Petitioner appeared in person, and by his representative, an Enrolled Agent. Respondent appeared by Mr. Mike V. Marlow, Staff Attorney. Present also for the Respondent was Ms. Evelyn Furbee, Audit Supervisor. Following the evidentiary hearing the record was closed and the matter became mature for decision.

ISSUES AND BURDEN OF PROOF

The question presented in this case is whether the Petitioner is responsible for combined sales and use tax, as assessed. 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 or penalty 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).

DISCUSSION

West Virginia Code Section 11-15-3(a) makes clear that “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.”¹ W. Va. Code Ann. §11-15-3(a) (West 2010). Further, West Virginia Code Section 11-15-4 states that “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. §11-15-4 (West 2010)

According to West Virginia Code of State Rules Section 110-15-4.1, “Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993). Also, “If the tax commissioner believes that any tax has been insufficiently

¹ Vendor means “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(z) (West 2010). The amount of consumers sales and service tax is “six cents on the dollar of sales or services, excluding gasoline and special fuels, which remain taxable at the rate of five cents on the dollar of sales.” W. Va. Code Ann. § 11-15-3(b) (West 2010).

returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.” W. Va. Code Ann. § 11-10-7 (West 2010). The Commissioner may add interest and additions to tax where applicable. *See* W.Va. Code Ann. §§ 11-10-17. and 11-10-18 (West 2010).

Finally, sales tax need not be charged and collected if a business activity qualifies for an exemption under West Virginia Code Section 11-15-9, or its accompanying regulations. *See* W. Va. Code Ann. § 11-15-9 (West 2010). However, it is well settled that exemptions from taxation are strictly construed against the person making the claim for exemption. *See* Syllabus Point 4, Shawnee Bank, Inc. v. Paige, 200 W. Va. 20, 488 S.E.2d 20 (1997); Davis Memorial Hosp. v. W. Va. Tax Comm’r., 222 W. Va. 677, 671 S.E.2d 682 (2008).

Petitioner testified that he and Ms. A visited Mr. Dunn at the Tax Department, and that Mr. Dunn represented that both the cattle and kennel portions of his business were exempt from taxation because they qualified as agricultural activities. Petitioner testified that Mr. Dunn instructed him and Ms. A on how to fill out the exemption certificate that was apparently given to them by Mr. Dunn.² Petitioner testified that he relied upon these purported representations and that this is why he never charged any tax on the sale of dogs or paid any tax on the purchase of supplies for his kennel business. It should be pointed out that Mr. Dunn was not present to testify. The representations of Mr. Dunn as relayed by Petitioner and Ms. A are notably hearsay.

² The legal effect of this form is questionable for the reason that it was not signed or dated.

While admissible in administrative proceedings, hearsay must be assigned less probative weight, for the simple fact that it amounts to unconfirmed statements by another purported speaker.³ The Petitioner and Ms. A provided credible testimony as to their understanding of what Mr. Dunn reportedly represented to them. It is possible that Mr. Dunn did indeed represent to Petitioner that both his cattle and kennel activities would qualify for an agricultural exemption. There exists a possibility, however, that Mr. Dunn could have represented to Petitioner that the cattle portion of his business would qualify for an agricultural exemption, but that the kennel business would not, and Petitioner may have misunderstood Mr. Dunn's representations. It is impossible to know for certain because Mr. Dunn did not testify, and such is the danger of hearsay testimony.

While it is true that Petitioner introduced an exemption certificate, purportedly given to him by Mr. Dunn, the undersigned cannot conclude that the evidence supports a finding that it was issued to cover both the cattle and the kennel portions of Petitioner's business. Petitioner testified that Mr. Dunn expressly told him to include the word "kennel" in his business name, so that the exemption would cover both his farming and his kennel activities. However, absent Mr. Dunn's testimony, there is some degree of doubt as to whether the exemption certificate was ever intended to cover both activities.⁴

The Respondent argues that an agricultural exemption could never apply to kennels because, in order to qualify for that exemption, one must be producing food products for

³ "The office of tax appeals is not bound by the rules of evidence as applied in civil cases in the circuit courts of this state. The office of tax appeals may admit and give probative effect to evidence of a type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs." W. Va. Code Ann. § 11-10A-10(c) (West 2010).

⁴ Petitioner also raised an argument that the audit mistakenly included some of his father's business, as his father's name is similar to his own. However, the audit records introduced into evidence does not seem to have included anything but Petitioner's business activities.

consumption; such as cattle, chickens, eggs, milk, vegetables, etc., and that dogs do not qualify as such. West Virginia Code Section 11-15-9(a)(31) provides that “Sales of livestock, poultry or other farm products in their original state by the producer . . .” are exempt from consumers sales and service tax. W. Va. Code Ann. § 11-15-9(a)(31) (West 2010). Obviously dogs are not poultry, so the question becomes whether they are considered “livestock” or “other farm products” for purposes of this Code section. West Virginia Code of State Rules Section 110-15-2.32 defines farm products as “products grown on a farm, generally for consumption, and includes, but is not necessarily limited to, apples, cherries, strawberries, natural honey and corn . . .” W. Va. Code R. § 110-15-2.32 (1993). Additionally, the consumers sales and service tax regulations define livestock, and it is clear from that definition that dogs are not included in the meaning of that term for purposes of that article.⁵ Respondent is correct that Petitioner’s kennel business is not selling livestock, poultry or other farm products, and as such, it does not qualify for an exemption from consumers sales and use tax.

Turning now to the use tax portion of the assessment, West Virginia Code Section 11-15A-2(d) imposes a use tax on every person using tangible personal property in this state. *See* W. Va. Code Ann. §11-15A-2(d) (West 2010). The Petitioner has pointed this Tribunal to no exemption that would apply to his purchases of supplies for use in his kennel business, nor is this Tribunal aware of such an exemption.

As such, the Petitioner did not meet his burden of proof and establish that the combined sales and use tax assessment at issue in this case was erroneous, unlawful, void or otherwise

⁵ “Livestock means farm animals raised for profit but does not include . . . dogs[.]” W. Va. Code R. § 110-15-2.42 (1993).

invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

CONCLUSIONS OF LAW

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 or penalty 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).

2. “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.” W. Va. Code Ann. § 11-15-3(a) (West 2010).

3. “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (West 2010).

4. “Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993).

5. “If the tax commissioner believes that any tax . . . has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he

may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.” W. Va. Code Ann. § 11-10-7 (West 2010).

6. The Commissioner may add interest and additions to tax where applicable. *See* W.Va. Code Ann. §§ 11-10-17, and 11-10-18 (West 2010).

7. It is well settled that exemptions from taxation are strictly construed against the person making the claim for exemption. *See* Syllabus Point 4, Shawnee Bank, Inc. v. Paige, 200 W. Va. 20, 488 S.E.2d 20 (1997), Davis Memorial Hosp. v. W. Va. Tax Comm’r., 222 W. Va. 677, 671 S.E.2d 682 (2008).

8. “Sales of livestock, poultry or other farm products in their original state by the producer . . .” are exempt from consumers sales and service tax. W. Va. Code Ann. § 11-15-9(a)(31) (West 2010).

9. Farm products are “products grown on a farm, generally for consumption, and includes, but is not necessarily limited to, apples, cherries, strawberries, natural honey and corn . . .” W. Va. Code R. § 110-15-2.32 (1993).

10. The consumers sales and service tax regulations define livestock, and it is clear that dogs are not included in the meaning of that term for purposes of that article. *See* W. Va. Code R. § 110-15-2.42 (1993).

11. Petitioner’s kennel business does not qualify for an exemption from consumers sales and use tax.

12. West Virginia Code Section 11-15A-2(d) imposes a use tax on every person using tangible personal property in this state, and the Petitioner’s purchase of supplies for use in his kennel business are subject to the same. *See* W. Va. Code Ann. § 11-15A-2(d) (West 2010).

13. The Petitioner did not meet his burden of proof and establish that the assessment of combined sales and use tax at issue in this case was 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).

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the combined sales and use tax assessment issued against Petitioner, in the amount of \$____, plus \$____ in interest, for a total assessed amount of \$____, covering tax periods April 1, 2009, through December 31, 2010, should be and hereby is **AFFIRMED**.

Pursuant to West Virginia Law, interest accrues on the assessments until the liabilities are fully paid. *See* W. Va. Code Ann. § 11-10-17(a) (West 2010).