

**REDACTED DECISION – DK#’s 11-165 CUR & 11-166 UR – BY – GEORGE V. PIPER,
ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION on JULY 18, 2011,
ISSUED ON DECEMBER 21, 2011**

SYNOPSIS

COMBINED SALES AND USE TAX AND PURCHASERS USE TAX – BURDEN OF PROOF – A necessary component of satisfying a Petitioner’s burden of proof requires that the Petitioner maintain complete and accurate books and records that are sufficient to show the amount of tax that it properly should have paid on all taxable services and purchases. *See* W. Va. Code R. § 110-15-14.a (1993).

COMBINED SALES AND USE TAX AND PURCHASERS USE TAX – ISSUANCE OF ASSESSMENTS BASED ON ESTIMATES AFTER INVESTIGATION BY STATE TAX COMMISSIONER – Where the Petitioner’s books and records are incomplete or otherwise deficient, so as to prevent the State Tax Commissioner from arriving at a definite determination of the amount of tax that remains due and owing to the State, the State Tax Commissioner may investigate and determine or estimate the amount of tax due based on such information as is available to him. *See* W. Va. Code Ann. § 11-10-7(a) (West 2010); W. Va. Code R. §§110-15-14.a and 14.b (1993).

COMBINED SALES AND USE TAX AND PURCHASERS USE TAX – ISSUANCE OF ASSESSMENTS BASED ON ESTIMATES AFTER INVESTIGATION BY STATE TAX COMMISSIONER – After conducting an audit or other investigation of the Petitioner’s books and records, the Tax Commissioner determines that the Petitioner’s books and records are inadequate or insufficient so that a competent audit for the period in question is not otherwise possible, the tax auditor will determine the best information available and will base the audit report on that information. *See* W. Va. Code Ann. § 11-10-7(a) (West 2010); W. Va. Code R. §110-15-14.b (1993).

COMBINED SALES AND USE TAX AND PURCHASERS USE TAX – BURDEN OF PROOF NOT MET – The burden of proof is on the Petitioner to show that the assessment is incorrect and contrary to law, in whole or in part, and its failure to do so mandates that the assessment be upheld, either *in toto* or with respect to those issues for which it has not satisfied its burden of proof. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

COMBINED SALES AND USE TAX AND PURCHASERS USE TAX – BURDEN OF PROOF NOT MET – Where the State Tax Commissioner has made an investigation and issued an assessment based on an estimated determination of the amount of tax actually due and owing, which assessment is based in whole or in part on estimates or calculations deemed reasonable by the Commissioner, West Virginia Code Section 11-10A-10(e) places upon the

Petitioner the burden of proving each and every element in the assessment to be incorrect and contrary to law, and its failure to do so mandates that the assessment be upheld *in toto*.

COMBINED SALES AND USE TAX AND PURCHARERS USE TAX – BURDEN OF PROOF NOT MET - The Petitioner in the matter has failed to carry its burden of showing that the assessments are erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

A tax examiner with the Field Auditing Division (the Division) of the West Virginia State Tax Commissioner's Office (the Commissioner) conducted an audit of the books and records of the Petitioner. Thereafter, on April 19, 2011, the Director of this Division issued a purchasers use tax assessment against the 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, 2007, through June 30, 2008, tax in the amount of \$____, interest in the amount of \$____, computed through May 31, 2011, and no additions to tax, for a total assessed tax liability of \$____. Written notice of this assessment was served on the Petitioner as required by law.

Also on April 19, 2011, the Director of the Division issued a combined sales and use tax assessment against the Petitioner 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 February 28, 2011, for tax in the amount of \$____, interest in the amount of \$____, computed through May 31, 2011, and no additions to tax for a total assessed tax liability of \$____. Written notice of the assessment was served on the Petitioner as required by law.

Thereafter by mail postmarked May 4, 2011, and received on May 6, 2011, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. § 11-10A-8(1) (West 2010).¹

FINDINGS OF FACT

1. The Petitioner operates a country club in West Virginia.
2. During the audit period, the Petitioner purchased tangible personal property and taxable services, which were used or consumed in the operation of the country club and the golf course.
3. Petitioner failed to file a purchasers use tax return for December 2007 and for tax year 2008.
4. At the outset of the audit, Respondent's tax auditors were informed that Petitioner's CPA had advised that Petitioner should not hand over all of the computerized QuickBooks reports to Respondent for its review. Rather, specific records were to be supplied or otherwise provided when requested by the tax auditors.
5. In order to properly complete the audit, the Respondent and the Petitioner agreed to use the sample period of October 1, 2009 through September 30, 2010, which would then be projected back using a monthly average.
6. During the conduct of the sample period, the tax auditors personally reviewed every invoice pertaining to that fiscal year.
7. Prior to the time of the evidentiary hearing, respondent agreed to review the tax assessments again based upon Petitioner's contention that the sample period was not representative of the three-year audit period. Respondent compared Petitioner's income from its

¹ Because Petitioner claimed that it had overpaid combined sales and use tax and purchasers use tax for the periods in question, the petition for reassessment was docketed as a petition for refund.

federal tax returns to its total deduction on those same returns; however, Respondent would not agree to revise either assessment.

DISCUSSION

The issue in this matter is whether the Petitioner has presented evidence that is sufficient to satisfy its burden of proving that one or both of the assessments are incorrect. Because the Petitioner had refused to allow Respondent to see the electronic QuickBooks for the three-year period, which would have shown all the pertinent invoices, Respondent had to resort to issuing the assessments based on a methodology that was deemed reasonable. West Virginia Code Section 11-10-7(a) provides:

(a) General – If the tax commissioner believes that any tax administered under this article 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 erroneous², he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.

W. Va. Code Ann. § 11-10-7(a) (West 2010).

In this matter, the Respondent and the Petitioner agreed that a reasonable alternative was to audit a sample period, which would then be projected back to the prior two years using a monthly average. Only after that was done, did Petitioner question the sample period, which it had previously agreed to use.

The assessments, including the estimates upon which they are based, are presumed to be correct and the Petitioner has the burden of proving that the estimates are incorrect. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003). It is

² Petitioner's refusal to allow Respondent to audit all of its records by using QuickBooks reports coupled with its failure to file all required tax returns allows the Tax Commissioner to investigate and determine or estimate tax liability and issue an assessment. *See* W. Va. Code R. § 110-15-14.b.4 (1993) (if records are inadequate to accurately reflect the business operation of the taxpayer, the auditor will determine the best information available and will base the audit report on that information).

incumbent on the Petitioner to show that the methodology used by the State Tax Commissioner to estimate the amount of combined sales and use tax and purchasers use tax that the Petitioner paid is incorrect.

At the hearing, Petitioner's representative admitted that it had failed to pay use tax on certain purchases during the audit periods; and acknowledged that it had failed to file a purchaser's use tax return for December 2007 or for tax year 2008.

The Petitioner then undertook to show that the methodology used by the State Tax Commissioner was incorrect by simply theorizing that its taxable deductions for the sample period were probably higher than what was reflected on the federal return because golf carts and other items were purchased right before the end of the fiscal year, which was sampled. In response, Respondent replied that the deductions for the fiscal year October 1, 2009, through September 30, 2010, were significantly lower than the other years, which actually benefitted the Petitioner.

The West Virginia Code and the Rules of Practice and Procedure before the West Virginia Office of Tax Appeals place the burden of proof on the Petitioner. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003). In the context of the issues presented by this matter, the Petitioner cannot refuse to provide the Tax Commissioner with complete information, agree to base the audit on limited information, and then complain that the audit results are lacking. The Petitioner refused, based upon the advice of its CPA, to turn the entire electronic QuickBooks over to Respondent, which would have determined the exact amount of tax unpaid. It chose, instead to opt for the sampling period, which the parties had agreed to use. Having done so, it cannot now attack the methodology that

it wanted to use. Conjecture and supposition after the fact cannot supplant the audit, which was properly conducted³.

CONCLUSIONS OF LAW

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. 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 the assessment issued against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

3. A necessary component of satisfying a Petitioner's burden of proof requires that the Petitioner maintain complete and accurate books and records that are sufficient to show the amount of tax that it properly should have paid on all taxable services and purchases. *See* W. Va. Code R. § 110-15-14a (1993).

4. Where the Petitioner's books and records are incomplete or otherwise deficient, so as to prevent the State Tax Commissioner from arriving at a definite determination of the amount of tax that remains due and owing to the State, the State Tax Commissioner may investigate and determine or estimate the amount of tax due based on such information as is available to him. *See* W. Va. Code Ann. § 11-10-7(a) (West 2010); W. Va. Code R. §§ 110-15-14.a and 14.b (1993).

5. After conducting an audit or other investigation of the Petitioner's books and records, the Tax Commissioner determines that the Petitioner's books and records are inadequate

³ At the conclusion of the hearing, Mr. A stated that, if he had known that following the CPA's advice would have resulted in having to pay \$3,000 dollars more, he would have disagreed with the CPA.

or insufficient so that a competent audit for the period in question is not otherwise possible, the tax auditor will determine the best information available and will base the audit report on that information. *See* W. Va. Code Ann. § 11-10-7(a) (West 2010); W.Va. Code R. § 110-15-14.b (1993).

6. The burden of proof is on the Petitioner to show that the assessment is incorrect and contrary to law, in whole or in part, and its failure to do so mandates that the assessment be upheld, either *in toto* or with respect to those issues for which it has not satisfied its burden of proof. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

7. Where the State Tax Commissioner has made an investigation and issued an assessment based on an estimated determination of the amount of tax actually due and owing, which assessment is based in whole or in part on estimates or calculations deemed reasonable by the Commissioner, West Virginia Code Section 11-10A-10(e) places upon the Petitioner the burden of proving each and every element in the assessment to be incorrect and contrary to law, and its failure to do so mandates that the assessment be upheld *in toto*.

8. The Petitioner in this matter has failed to carry its burden of showing that the assessments are 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 period of January 1, 2007, through June 30, 2008, for tax in the amount of \$____, interest in the amount of \$____, computed through May 31, 2011, and no additions to tax, totaling \$____, should be and is hereby **AFFIRMED**.

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 February 28, 2011, for tax in the amount of \$____, interest in the amount of \$____, computed through May 31, 2011, and no additions to tax, totaling \$____, should be and is hereby **AFFIRMED.**

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