

**REDACTED DECISION – DK#S 11-258 NFN, 11-259 CU**  
**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE**  
**SUBMITTED FOR DECISION ON AUGUST 22, 2012**  
**DECISION ISSUED ON APRIL 23, 2013**

**SYNOPSIS POINTS**

**TAXATION -- PROCEDURE AND ADMINISTRATION --** 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)

**TAXATION -- PROCEDURE AND ADMINISTRATION --** “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010)

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** Article Fifteen of the West Virginia Tax Code imposes a general consumers sales and service tax, for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services, and it is the duty of the vendor to collect the same. *See* W. Va. Code Ann. § 11-15-1 and § 11-15-3 (West 2010)

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

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** “The vendor shall keep records necessary to account for: (1) The vendor's gross proceeds from sales of personal property and services; (2) The vendor's gross proceeds from taxable sales; (3) The vendor's gross proceeds from exempt sales; (4) The amount of taxes collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the tax commissioner . . . .” W. Va. Code Ann. § 11-15-4 (b) (West 2010)

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** “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)

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** “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 (1993)

**TAXATION -- CONSUMERS SALES AND SERVICE TAX --** If, when auditing taxpayer records, said records are, “. . . inadequate to accurately reflect the business operations of

the taxpayer, the auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993)

**WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW --** The Petitioner failed to account for and remit to the Tax Commissioner all of the consumers sales and service taxes collected from its customers.

**WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW --** The records which were provided to the Tax Commissioner were not complete and accurate enough to determine the Petitioner’s liability for consumers sales and use tax purposes. Nor were they adequate to accurately reflect the Petitioner’s business operations.

**WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW --** The Tax Commissioner did not abuse his discretion in conducting a survey of the Petitioner’s operations from its parking lot.

**WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW --** The Tax Commissioner did not use the best information available to ascertain how much each customer spent.

**WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW --** “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 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(a) (West 2010)

**WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF --** 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 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)

**WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW --** The Tax Commissioner’s assessment against the Petitioner for underreported corporate net income was not erroneous, unlawful, void or otherwise invalid.

**WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF --** The Petitioner in this matter has met its burden of showing that the combined sales and use tax assessment issued against it was erroneous, as discussed above.

## **FINAL DECISION**

On May 31, 2011, the Auditing Division of the West Virginia State Tax Commissioner’s Office (the Tax Department or the Respondent) issued two Audit Notice of Assessments, against

the Petitioner., These assessments were issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq*, of the West Virginia Code. The first assessment was for combined sales and use tax for the period of April 1, 2009, through March 31, 2011, 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 \$\_\_\_\_. The second assessment was for corporate income and franchise tax for the period February 1, 2009 to January 31, 2010, for tax in the amount of \$\_\_\_\_, interest in the amount of \$\_\_\_\_ and additions to tax in the amount of \$\_\_\_\_, for a total assessed liability of \$\_\_\_\_. Written notice of these assessments was served on the Petitioner as required by law.

Thereafter, on July 19, 2011, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, two petitions for reassessment. *See* W. Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010). Subsequently, notice of a hearing on the petitions was sent to the Petitioner, and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

### **FINDINGS OF FACT**

1. The Petitioner owns and operates a restaurant in a West Virginia City, in a West Virginia County.
2. In October of 2010, auditors from the West Virginia Tax Department traveled to the office of the Petitioner's accountant in order to conduct an audit of the Petitioner's business. Prior to this visit the auditors provided the accountant with a list of financial documents they wanted to review, particularly documents reflecting the restaurant's sales, such as cash register tapes and/or guest checks.

3. During this October 2010, visit the auditors were provided with some documents, such as, monthly sales summary sheets, tax returns, payroll records, some bank statements, and partial general ledgers that the accountant had compiled. However, the auditors were not provided with any cash register tapes or guest checks. In fact, the accountant advised the auditors that the Petitioner did not keep records such as those; that they were instead thrown away.

4. At the conclusion of this October visit, the auditors requested that the Petitioner begin to keep all of its sales documents, particularly for the month of November 2010. The auditors made arrangements to return to the accountant's office in December of 2010.

5. As planned, the auditors returned to the accountant's office in December. During this visit, they were provided with a few months of what were purported to be cash register tapes. A close review of these tapes showed that they were not "Z'd out" or totaled for each day. As a result, the auditors were unable to rely on these tapes to provide an accurate picture of the Petitioner's business operations. Additionally, the auditors were not provided with any of the records they had requested for November of 2010.

6. Between the time of the auditors' first and second visits to the accountant, two Tax Department employees undertook surveillance of the Petitioner's establishment. Over the course of three days in November 2010, these employees sat outside the restaurant and counted the customers who entered and exited.

7. The auditors returned to the accountant's office a final time in May of 2011 and again were not provided with any sales documents for the month of November 2010.

8. After the final visit to the accountant's office, the auditors were of the opinion that the Petitioner's books and records were inadequate to accurately reflect its business operations.

9. To complete the audit, the auditors were forced to rely upon the surveillance to ascertain the average number of customers the restaurant served each day. The auditors observed the restaurant on three days and observed the following customer counts:

Monday	11/15/2010	62	5:30pm - 9pm
Tuesday	11/16/2010	108	11am - 4pm
Tuesday	11/16/2010	35	4pm - 5:30pm
Friday	11/19/2010	135	11am - 4pm
Friday	11/19/2010	<u>169</u>	4pm - 10:30pm
		509	
Average number of daily customers		254.5	

10. The auditors added these numbers up and divided by two, the Monday/Tuesday numbers representing a weekday and the Friday numbers representing a weekend count. This calculation resulted in an average daily customer count of two hundred fifty-four point five. They then took that number and multiplied it by the average check amount for each customer. They arrived at the average check amount by adding the four different buffet prices<sup>1</sup> and dividing by four. The average check amount that the auditors arrived at was \$9.07. They next added \$1.59 to each average check for beverage purchases, for a total average check of \$10.66. Then the auditors multiplied the information they had gathered to arrive at a calculated amount of daily, monthly and yearly sales. The auditors then took these extrapolated sales amounts and calculated the Petitioner's unremitted sales taxes and issued the assessments in the amounts listed above. Finally, they calculated the Petitioner's underreported corporate net income, based

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<sup>1</sup> Monday through Saturday adult lunch buffet (\$6.79), Monday through Thursday adult dinner buffet (\$9.49), Friday-Saturday adult dinner buffet (\$10.49) and all day Sunday adult buffet (\$9.49).

upon the restaurant's additional attributed sales and issued an assessment for unremitted corporate income and franchise taxes.

11. After the Petitioner filed its Petition for Reassessment with the Office of Tax Appeals, the auditors met with Petitioner's counsel and reviewed guest checks that were purportedly from the month of November 2010. Once again, the auditors came away with the opinion that these records did not accurately reflect the business operations of the Petitioner. Specifically, they found that these guest checks, when totaled up, did not match the daily sales summaries, which the auditors had previously been given.

12. In April of 2012, again after the filing of the Petition for Reassessment, Petitioner's, counsel arranged for a survey to be conducted inside the restaurant. A retired accounting professor observed the restaurant's operations for the better part of three days, including the amount of customers served, total sales and average amount spent. This information was included in an August 22, 2012, report prepared by the Petitioner's expert, Mr. A, a certified public accountant. This report was introduced at the evidentiary hearing and Mr. A testified regarding its contents.

## **DISCUSSION**

The West Virginia Code provides that “[f]or the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected 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). “‘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(26) (West 2010)

Likewise, the Code provides that “The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible 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). Section 4 also lays out the record keeping requirements for vendors tasked with collecting sales tax.

(b) The vendor shall keep records necessary to account for: (1) The vendor's gross proceeds from sales of personal property and services; (2) The vendor's gross proceeds from taxable sales; (3) The vendor's gross proceeds from exempt sales; (4) The amount of taxes collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the tax commissioner . . . .

Id.

Section 14a of Title 110, Series 15 of the West Virginia Code of State Rules also lays out the record keeping requirements of business people in the state, “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 consumers sales and use tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993). Further, “if records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993).

Finally,

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 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(a) (West 2010)

Here, the Tax Commissioner attempted to audit the Petitioner's books and discovered that it had not kept adequate records to account for its proceeds from the sales of personal property, namely food and drink in its restaurant. The Tax Commissioner discovered that the Petitioner's records were not at all adequate to accurately reflect the Petitioner's business operations. As a result, the Tax Commissioner undertook an investigation and issued assessments for what he believed was underreported sales in the restaurant and the accompanying unremitted sales tax that had been collected from the restaurant's customers. It is clear from the testimony and evidence in this matter that the Petitioner was underreporting its food and drink sales and that its records were not adequate to accurately reflect its business operations. The Petitioner argued at hearing that it did, in fact, keep records adequate to reflect its business operations. To bolster this argument it called Mr. A, a certified public accountant. Mr. A testified at length that the Petitioner did keep adequate records and that he had reviewed monthly summaries and bank statements. However, when asked point blank if he had seen records of the type to adequately account for the restaurant's gross sales, such as cash register tapes or sequential guest checks he had to admit that he had not.

ATTORNEY WAGGONER: *My question is very simple, so please listen carefully. Did you have possession of all of the records from the taxpayer for the audit period?*

MR. A: *No.*

ATTORNEY WAGGONER: *So you never even saw the records for May of 2009?*

MR. A: *No, sir.*

ATTORNEY WAGGONER: *Or any of the other 22 months of the audit period, except for January and February?*

MR. A: *That is correct.*

See Transcript at 27. This Tribunal finds Mr. A's testimony regarding the adequacy of the Petitioner's record keeping to be unpersuasive and that the Petitioner's records were inadequate to accurately reflect its business operations, as those terms are used in Section 110-15-14b.4 of the West Virginia Code of State Rules.

Therefore, the only remaining question for this Tribunal is, did the Petitioner meet its burden of showing that the Tax Commissioner did not use the best information available in preparing the audit report? Specifically, information regarding how many customers the restaurant served each day and how much each customer spent? The Petitioner argued that there were numerous problems with the Tax Commissioner's answers to both of these questions.

Regarding how many customers the restaurant served each day, the Petitioner argues that the Tax Department employees who sat in the parking lot would have done better if they had observed the restaurant's operations from inside. As a result, the Petitioner wants this Tribunal to use the customer counts observed by the retired C.P.A. in April of 2012. During the evidentiary hearing, when Mr. A was asked how, sitting inside would generate a more accurate number of customers served; he was unable to articulate a reasonable answer.

*JUDGE POLLACK: Just to be clear, your only complaint with the raw numbers of customers is that it would have been better if they told the taxpayer and did it in the lobby; correct? And let me just add one thing. And not having heard the auditor's testimony, we're presuming that maybe there was a problem with people using the bathroom or deciding not to eat; correct?*

*MR. A: Right. I mean, what they did was merely a guess.*

*JUDGE POLLACK: However, assuming under West Virginia law neither a competent detailed audit nor a sample and projection audit is possible because of inadequacy of records, do you have any authority to give me today to say that sitting in a parking lot counting the amount of customers going in and out is not the best information available?*

MR. A: *It was just common sense.*

JUDGE POLLACK: *So if it is common sense, then what information should the auditors have used instead of sitting in the parking lot?*

MR. A: *They should have gone in the store and get the receipts just like we did and tabulated. Again, I mean, this is full of errors and mistakes.*

*See* Transcript at 42. The problem with Mr. A's argument in this regard is that he is confusing the information his observer obtained regarding how much each customer spent, with the actual amount of customers entering the restaurant on any given day. All of the Petitioner's witnesses, along with Petitioner's counsel expressed displeasure with the fact that the Tax Department employees surreptitiously sat in the parking lot and counted customers. All suggested that somehow the numbers of customers observed by the Tax Department employees had been inflated. However, no witness could explain how exactly this would have happened, save for a halfhearted argument that not all people who enter the restaurant eat. This Tribunal finds that argument to be unpersuasive, because common sense dictates that, while it may happen once in a great while, most people do not go to a restaurant to **not** eat. The Petitioner's witnesses and counsel also suggested that because the customer counts observed by the Petitioner's counter were lower than those observed by the Tax Department employees, this Tribunal should use the Petitioner's numbers. The problem with this argument is that it confuses "best information" with different information. The mere fact that the retired C.P.A. hired by Mr. A counted one hundred seventy-four customers on April 27, 2012, does not mean that the restaurant did not serve the three hundred and four people observed by the Tax Department employees on Friday November 19, 2010. The one hundred seventy-four count is not "better" than the three hundred and four count, it is merely different. The truth is, what the Tax Department employees did is not, with all

due respect, “rocket science”, nor was it guess work, as the Petitioner suggests. They sat outside the restaurant, with a clear view of the door, and made hash marks on paper representing each person that entered. Absent some showing of animosity towards this Petitioner, or some evidence that the numbers counted were deliberately inflated, this Tribunal finds the number of customers served, as reflected in State’s Exhibits 1 & 2 to be reliable and credible.

The Petitioner next complains about the Tax Commissioner’s calculations regarding the average check amount. These complaints are spelled out on page 3 of Mr. A’s August 22, 2012, report as follows:

1. Not everyone entering the restaurant ate.
2. Not everyone eating ordered the buffet.
3. Not everyone eating ordered a drink.
4. If students show their student ID, they receive a discount of 15 %.
5. Seniors get a discount of 15 %.
6. On Tuesdays, there is a buy-one, get a second 1/2 –off special.
7. If any other restaurant in town is offering a special, they will match the offer.
8. Student population varies throughout the year: relatively consistent during two regular semesters; much lower between semesters and during holiday breaks; and relatively consistent during the summer but lower than during regular semesters. (Management estimates that students represent 60 % to 70% of their customer base.)

Regarding Mr. A’s list of “complaints”, the first one, (the fact that not everyone entering the restaurant ate a meal) was discussed above. The same argument would apply to complaint number two, that not everyone orders a buffet. While that may be true, common sense dictates that the amount of people going to a buffet restaurant and not eating the buffet is going to be minimal. Complaints four through seven deal with discounts, such as those for seniors and students. Except for Mr. A’s report, the Petitioner presented no evidence regarding these discounts, despite the fact that the restaurant’s menu was made a part of the record. *See* State’s

Exhibit 1. The menu contains no mention of any discounts. Additionally, the testimony of one of the Tax Commissioner's witnesses effectively rebutted complaints four through seven.

*MS HOCKENSMITH: My daughter's been a customer there since August of 2010. She does not receive a 15 percent discount as a student, and she has asked in the past. My husband did not get a 15 percent senior discount. It's not advertised, it's not on their menu, and there's nothing showing up when you're standing at the register that says seniors get a discount. Tuesdays buy one get one half off. Never ever in my 20 plus years as an adult have I ever been to a buffet that offers buy one get one half off. It's not on their menu. I can't say I've ever been there on a Tuesday. Even their records for November 16th that I reviewed in your office do not notate that it's a buy one get one half off. Never heard that they offered to match other restaurants' deals. And as the student population changes, their sales tax remittance stays fairly the same. So they're still reporting approximately the same amount of sales, even though the students aren't in town.*

See Transcript p. 141.

Complaint number three above, concerns the fact that the auditors calculated the average check amount to include every customer purchasing a soft drink of some kind. This dovetails with the Petitioner's complaints regarding how the auditors calculated the average check in general as testified to by Mr. A:

*MR. A: . . . Additionally, they took the average buffet price. They have a price for Monday through Saturday for the lunch buffet, they have a Monday through Thursday adult dinner buffet, they have a Friday and Saturday adult dinner buffet, and they have a Sunday adult all day buffet. Now, the first one I gave you, the Monday through Saturday, that's six days with a different price. Monday through Thursday, four days. Friday and Saturday, two days. And Sunday, one day. They gave these equal weights in their averaging. A competent, prudent auditor would have weighted it. However, they took the simple average without weighing, and on that basis came up with an average price. . . .*

Transcript p. 15.

As stated in finding of fact number ten above, the auditors took the lunch buffet price and the three dinner buffet prices, added them up and divided by four, to arrive at an average check amount of \$9.07. The auditors then added \$1.59 to the average check amount to reflect the purchase of a soft drink. However, even Ms. Hockensmith testified that the auditors could have weighted the buffet prices differently, to account for lunch and dinner customers.

JUDGE POLLACK: *And then our average meal price of \$10.66. You said something about weighted averages when Mr. Lane was cross examining you. And you'd said our time in New York was limited. Explain what that meant.*

MS. HOCKENSMITH: *Our time in New York was limited. When we went back in May we were given one day. And we weren't conducting one audit, we actually had multiple audits in progress.*

JUDGE POLLACK: *I don't mean to interrupt you.*

MS. HOCKENSMITH: *Okay.*

JUDGE POLLACK: *But what does that have to do with ---*

MS. HOCKENSMITH: *So instead of taking ---*

JUDGE POLLACK: *--- this \$10.66?*

MS. HOCKENSMITH: *Instead of taking the buffet out and multiplying it by the six days, \$6.79 in six days, and then the dinner buffet, \$9.49 ---*

JUDGE POLLACK: *Right.*

MS. HOCKENSMITH: *--- at four days, and then the Saturday and Sunday buffet because it's ---*

JUDGE POLLACK: *Right.*

MS. HOCKENSMITH: *--- all day where the dinner is twice. So you'd multiply that by two --- and then you've got the Sunday adult --- instead of multiplying it out and then adding it together and then dividing it by the total number of different meals for different days, which is more of a weighted average.*

JUDGE POLLACK: *Right.*

MS. HOCKENSMITH: *Because our time was limited, we used the simplest method possible.*

JUDGE POLLACK: *But couldn't you have done the weighted average back in West Virginia? What does it have to do with your time in New York?*

MS. HOCKENSMITH: *We were trying to finish the audit and give him the results while we were there, because he was only giving us one day.*

JUDGE POLLACK: *Why were you trying to do that? Wouldn't you get a better number if you went back to West Virginia?*

MS. HOCKENSMITH: *It may have been ---. I think when you do a weighted average I think it changes the assessment like one percent. We calculated that after the fact, after the petition was filed and it was questioned as to why we didn't use a weighted average. We then calculated it that way. At the time we didn't think to do a weighted average. We were just in such a time crunch while we were there to give him the results. He made no objections to the audit findings. He just acted like it was just a walk in the park, just another day at the office.*

See Transcript p. 167-168. Through her testimony, Ms. Hockensmith also acknowledged that adding a beverage to every average check probably did not generate the most accurate number available to the Tax Commissioner.

JUDGE POLLACK: *Okay. And the soda. Obviously, everybody doesn't get a soda; correct?*

MS. HOCKENSMITH: *I don't believe everybody gets a soda.*

JUDGE POLLACK: *So ---.*

MS. HOCKENSMITH: *Some of them actually get hot tea, I can see.*

JUDGE POLLACK: *Let me ask you this. Here's my question. Mr. A has a soda percentage of --- I don't recall what it was, maybe 40 ---.*

MS. HOCKENSMITH: *Forty-three (43) percent.*

JUDGE POLLACK: *Somewhere in the 40s; correct? You have 100 percent. Under 14b.4 your mandate is to use the best information available; correct?*

MS. HOCKENSMITH: *Yes.*

JUDGE POLLACK: *How hard would it be to go to a restaurant industry website, trade publication, et cetera, to find out the percentage of people that order soda nationwide?*

MS. HOCKENSMITH: *I don't know. I've never looked it up.*

JUDGE POLLACK: *But would you agree that there's probably better information available to the Tax Commissioner than 100 percent?*

MS. HOCKENSMITH: *Potentially. But we were --- again, we had asked for these records multiple times so that we could have detailed and seen how many soda sales they were reporting, and we weren't provided with that information*

See Transcript p. 169.

In summation, the Petitioner did not keep “complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumers sales and use tax purposes”, as those terms are used in West Virginia Code of State Rules Section 110-15-14a.1. As a result, the Tax Commissioner was forced to use the best information available to him to ascertain the Petitioner’s actual sales and accompanying unremitted sales taxes. By conducting surveillance and using the restaurant’s menu, the Tax Commissioner used the best information available to him to arrive at the amount of customers served in a day and how much they spent. However, the Petitioner is correct in its argument that the Tax Commissioner erred by giving equal weight to lunch and dinner prices when arriving at an average check amount, and to assume every customer purchases a beverage. The Petitioner’s

other “complaints” regarding the Tax Commissioner’s calculations are unpersuasive. The Petitioner presented no evidence regarding discounts for seniors, students or discounts of any other type; nor does the Petitioner’s menu reflect the existence of such discounts. The Petitioner also presented no evidence to prove its contention that sixty to seventy percent of its business comes from students, or that its business slows down substantially when college classes are not in session.

Our final area of discussion concerns the Tax Commissioner’s assessment for the Petitioner’s underreported corporate net income. West Virginia Code Section 11-10-7(a), *supra*, allows the Tax Commissioner to investigate and determine taxpayer’s unpaid liabilities. That is precisely what he has done here. As part of his investigation he discovered that the Petitioner was underreporting its sales of food and drink. Those sales logically created increased income to the corporation; income that was not reported on the Petitioner’s federal or state income tax returns. As a result, the Tax Commissioner adjusted the Petitioner’s corporate net income accordingly. The Petitioner presented no evidence that this assessment was incorrect or erroneous; in fact, the Petitioner presented no argument regarding this assessment at all.

### **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. “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010)

3. Article Fifteen of the West Virginia Tax Code imposes a general consumers sales and service tax, for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services, and it is the duty of the vendor to collect the same. *See* W. Va. Code Ann. § 11-15-1 and § 11-15-3 (West 2010)

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

5. “The vendor shall keep records necessary to account for: (1) The vendor's gross proceeds from sales of personal property and services; (2) The vendor's gross proceeds from taxable sales; (3) The vendor's gross proceeds from exempt sales; (4) The amount of taxes collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the tax commissioner . . . .” W. Va. Code Ann. § 11-15-4 (b) (West 2010)

6. “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)

7. “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 (1993)

8. If, when auditing taxpayer records, said records are, “. . . inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993)

9. The Petitioner failed to account for and remit to the Tax Commissioner all of the consumers sales and service taxes collected from its customers

10. The records which were provided to the Tax Commissioner were not complete and accurate enough to determine the Petitioner's liability for consumer sales and use tax purposes. Nor were they adequate to accurately reflect the Petitioner's business operations.

11. The Tax Commissioner did not abuse his discretion in conducting a survey of the Petitioner's operations from its parking lot.

12. The Tax Commissioner did not use the best information available to ascertain how much each customer spent.

13. "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 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(a) (West 2010)

14. 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 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)

15. The Tax Commissioner's assessment against the Petitioner for underreported corporate net income was not erroneous, unlawful, void or otherwise invalid.

16. The Petitioner in this matter has met its burden of showing that the combined sales and use tax assessment issued against it was erroneous, as discussed above.

**FINAL DECISION**

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the two assessments issued against the Petitioner on May 31, 2011, are hereby **MODIFIED** in a manner consistent with this decision and now reflect, as of April 30, 2013 the amounts due as follows:

1) The combined sales and use tax assessment for the period April 1, 2009, through March 31, 2011 for tax of \$\_\_\_\_, interest of \$\_\_\_\_, and additions to tax of \$\_\_\_\_for a total liability of \$\_\_\_\_\_.

2) The corporate income and franchise tax assessment for the period February 1, 2009, through January 31, 2010 for tax of \$\_\_\_\_, interest of \$\_\_\_\_, and additions to tax of \$\_\_\_\_for a total liability of \$\_\_\_\_\_.

These two modified assessments reflect a total liability due of \$\_\_\_\_\_.

Interest continues to accrue on this unpaid tax until this liability is fully paid. *See* W. Va. Code Ann. § 11-10-17(a) (2010)

**WEST VIRGINIA OFFICE OF TAX APPEALS**

By: \_\_\_\_\_  
A. M. "Fenway" Pollack  
Chief Administrative Law Judge

\_\_\_\_\_  
Date Entered