

**REDACTED DECISION – DK# 11-325 F – BY – A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED DECISION ON APRIL 16, 2012 – ISSUED ON AUGUST 29, 2012**

**SYNOPSIS**

**TAXATION -- SUPERVISION -- GENERAL DUTIES AND POWERS OF TAX COMMISSIONER --** 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 -- 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 (West 2010)

**TAXATION -- 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 . . .” “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 (West 2010).

**TAXATION -- BUSINESS REGISTRATION TAX --** The Tax Commissioner may cancel, revoke or suspend a business registration certificate at any time during a registration period if the registrant neglected to file a tax return or neglected to pay any tax, when they became due and payable. *See* W. Va. Code Ann. § 11-12-5(b)(1) (West 2010).

**WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW --** The mere fact that, pursuant to West Virginia Code Section 11-12-5(b)(2), the Tax Commissioner may reinstate or reissue a business registration certificate when certain conditions are met, does not limit his or her discretion under West Virginia Code Section 11-12-5(b)(1).

**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 -- BURDEN OF PROOF NOT MET --** The Petitioner has not carried its burden of showing that the Tax Commissioner abused his discretion or was arbitrary or capricious when he issued a Notice of Intent to Revoke Business Registration Certificate to the Petitioner on September 8, 2011.

## **FINAL DECISION**

On September 8, 2011, the Tax Commissioner, pursuant to his authority under West Virginia Code Section 11-12-5(b), issued to the Petitioner, a Notice of Intent to Revoke Business Registration Certificate. The Notice stated, on its face, that it was predicated on the Petitioner's failure to file certain state tax returns and its failure to pay, or pay over certain state taxes. The Petitioner timely filed a petition of appeal and an evidentiary hearing was conducted on March 12, 2012. Thereafter, the parties filed written memorandums of law and the matter became ripe for decision on April 16, 2012.

## **FINDINGS OF FACT**

1. The Petitioner operates a shop in Charleston, West Virginia.
2. Within the last five years, the Petitioner's business began to suffer a downturn.
3. Contemporaneously with this downturn, the Petitioner stopped filing West Virginia sales tax returns and stopped remitting sales tax that had been collected from the shop's customers.
4. No evidence was presented as to the exact date, but at some point the Petitioner entered into a payment plan with the Respondent. Some payments were made on the payment plan; however, in June of 2011, the Respondent sent a payment plan default letter to the Petitioner. *See* State's Ex. 3. This default letter explained that due to the Petitioner's failure to abide by the terms of the payment plan, approximately \$\_\_\_\_\_ was due and owed within ten days.
5. After the June 2011, payment plan default letter, the Petitioner again had periods whereby it failed to remit sales taxes that had been collected.

6. When it received the “Notice of Intent to Revoke Business Registration Certificate” the Petitioner filed all back tax returns and began faithfully remitting collected consumers sales taxes.

7. Upon the “Notice of Intent to Revoke” the Petitioner requested from the Respondent another payment plan or, in the alternative, an offer in compromise. The Respondent denied the request for another payment plan and indicated that before an offer in compromise would be entertained the total amount of back taxes due would have to be remitted.

8. At the time of the evidentiary hearing in this matter, the Petitioner’s unpaid consumers sales tax liability was approximately sixty-three thousand dollars (\$\_\_\_\_\_) plus interest and additions.

9. The Petitioner has attempted to obtain a loan in order to repay the taxes due, but has been unable to do so. The Petitioner has also attempted to sell the business.

## **DISCUSSION**

The facts in this matter are not in dispute. The law of this matter is found in West Virginia Code Section 11-12-5(b) which states:

*(b) Revocation, cancellation or suspension of certificate. --*

(1) The Tax Commissioner may cancel, revoke or suspend a business registration certificate at any time during a registration period if:

(A) The registrant filed an application for a business registration certificate, or an application for renewal thereof, that was false or fraudulent.

(B) The registrant willfully refused or neglected to file a tax return or to report information required by the Tax Commissioner for any tax imposed by or pursuant to this chapter.

(C) The registrant willfully refused or neglected to pay any tax, additions to tax, penalties or interest, or any part thereof, when they became due and payable under this chapter, determined with regard to any authorized extension of time for payment.

(D) The registrant neglected to pay over to the Tax Commissioner on or before its due date, determined with regard to any authorized extension of time for payment, any tax imposed by this chapter which the registrant collects from any person and holds in trust for this state.

W. Va. Code Ann. § 11-12-5(b)(1) (West 2010). As stated above, it is undisputed that the Petitioner has neglected to file tax returns and has neglected to pay over, on or before their due date, taxes which the Petitioner has collected from persons and held in trust for the state. Section 5(b)(1) gives the Tax Commissioner discretion to revoke the business registration certificate of Taxpayers similarly situated to the Petitioner here. Therefore, the only question to be answered is, has the Tax Commissioner abused his discretion or acted in an arbitrary or capricious manner? The Petitioner, while not saying so directly, suggests that he has.

The Petitioner argues that revoking the license of a Taxpayer that is currently remitting sales taxes and that is willing to enter into another payment plan, thwarts the “spirit” of Section 5. The Petitioner relies specifically on Subsection (b)(2), which allows the Tax Commissioner to issue a new business registration certificate to a Taxpayer who “has entered into a payment plan approved by the Tax Commissioner by which liability for all delinquent fees, taxes, interest, additions to tax and penalties will be paid in due course and without significant delay.” *Id.*, at 5(b)(2). According to the Petitioner, Section 5(b)(2) evidences a Legislative intent to not have the Tax Commissioner shut down businesses who are “attempting to rectify their obligations”. *See* Petitioner’s Brief at p. 2.

The Petitioner's reliance on Section 5(b)(2) is misplaced for a variety of reasons, most obviously because Subsection (b)(2) is referencing Taxpayer's who are already suspended or revoked. Sections 5(b)(2) and 5(b)(1), do not address or inform each other. (b)(1) deals with the Tax Commissioner's discretion as to when to suspend or revoke and (b)(2) deals with the Tax Commissioner's discretion as to when to reinstate or lift a suspension. Additionally, the Petitioner fails to cite or discuss the last sentence of Section 5(b)(2) which states, "Failure of any registrant to comply with a payment plan pursuant to this provision shall be grounds for immediate suspension or revocation of the registrant's business registration certificate." Id. If the Tax Commissioner can **immediately** revoke a Taxpayer who fails to comply with a second chance, it seems a stretch to suggest that he or she cannot revoke, after proper notice and an opportunity to be heard, the certificate of a Taxpayer who has defaulted on a payment plan and after default, again failed to remit taxes due. West Virginia Code Section 11-12-5 gives the Tax Commissioner discretion as to when to suspend or revoke a business registration certificate. Here, the Tax Commissioner has exercised that discretion in a reasonable prudent manner. At the time the Tax Commissioner issued his "Notice of Intent to Revoke," the Petitioner had not only defaulted on its payment plan, but it was not filing sales tax returns and remitting current sales tax collected. The Tax Commissioner was faced with a Taxpayer whom he knew was still in business and collecting trust taxes, but not remitting the same. For the Petitioner to suggest that the Tax Commissioner, under the circumstances laid out above, has abused the discretion given him under West Virginia Code Section 11-12-5 is without merit.

## 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. “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 (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. . . .” “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 (West 2010).

4. The Tax Commissioner may cancel, revoke or suspend a business registration certificate at any time during a registration period if the registrant neglected to file a tax return or neglected to pay any tax, when they became due and payable. *See* W. Va. Code Ann. § 11-12-5(b)(1) (West 2010).

5. The mere fact that pursuant to West Virginia Code Section 11-12-5(b)(2), the Tax Commissioner may reinstate or reissue a business registration certificate when certain conditions are met, does not limit his or her discretion under West Virginia Code Section 11-12-5(b)(1).

6. 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).

7. The Petitioner has not carried its burden of showing that the Tax Commissioner abused his discretion or was arbitrary or capricious when he issued a Notice of Intent to Revoke Business Registration Certificate to the Petitioner on September 8, 2011.

#### **DISPOSITION**

Based upon the foregoing, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the Tax Commissioner's issuance of a Notice of Intent to Revoke Business Registration Certificate to the Petitioner on September 8, 2011, is hereby **AFFIRMED**.

#### **WEST VIRGINIA OFFICE OF TAX APPEALS**

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

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Date Entered