

**REDACTED DECISION – DK#S 12-321 CU, 12-322 C – BY – A.M. “FENWAY”  
POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED DECISION on  
JULY 20, 2011 – ISSUED on SEPTEMBER 23, 2013**

**SYNOPSIS**

**TAXATION**

**SUPERVISION**

**GENERAL DUTIES AND POWERS OF 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**

**PROCEDURE AND ADMINISTRATION**

**COLLECTION OF TAX**

“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**

**PROCEDURE AND ADMINISTRATION**

**ADDITIONS TO TAX**

In the case of failure to file a required return or failure to pay the amount shown as tax, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be additions to the amount required to be shown as tax on such return, not to exceed twenty-five percent in the aggregate for the failure to file and for the failure to pay. *See* W. Va. Code Ann. § 11-10-18(a)(1) & (2) (West 2013).

**OFFICE OF TAX APPEALS**

**CONCLUSION OF LAW**

For approximately six years, the Petitioner in this matter willfully neglected to file consumers sales tax returns and willfully neglected to remit sales taxes it had collected from its customers.

**WEST VIRGINIA SUPREME COURT OF APPEALS**

**CASE LAW**

The word “shall,” in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation. *See e.g. Foster Foundation v. Gainer* 228 W.Va. 99, 110, 717 S.E.2d 883, 894 (2011); Syl. pt. 1, *E.H. v. Matin*, 201 W.Va. 463, 498 S.E.2d 35 (1997)

**OFFICE OF TAX APPEALS**

**CONCLUSION OF LAW**

In the absence of a showing of reasonable cause, the Tax Commissioner has no discretion as to the amount of additions when a Taxpayer fails to pay a required tax or fails to file a required return.

**OFFICE OF TAX APPEALS  
CONCLUSION OF LAW**

West Virginia Code Section 11-10-18(a) does not require the Tax Commissioner to determine the cause of a Taxpayer's failure to file or pay, prior to including additions to taxes due.

**OFFICE OF TAX APPEALS  
CONCLUSION OF LAW**

Upon a Taxpayer's failure to file a return an assessment may be made at any time. *See* W. Va. Code Ann. § 11-10-15(a) (West 2010).

**TAXATION**

**WEST VIRGINIA OFFICE OF TAX APPEALS  
HEARING PROCEDURES**

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).

**OFFICE OF TAX APPEALS  
CONCLUSION OF LAW**

The Petitioner in this matter has failed to meet its burden of showing that any part of the assessments issued against it were erroneous, unlawful, void or otherwise invalid.

**FINAL DECISION**

On July 5, 2012, the Compliance Division of the West Virginia State Tax Commissioner's Office (Tax Commissioner or Respondent) issued a Notice of Assessment against the Petitioner for combined sales and use tax. This assessment was 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 assessment was for the period March 31, 2009, through December 31, 2011, for interest in the amount of \$\_\_\_\_, and additions to tax of \$\_\_\_\_, for a total assessed liability of \$\_\_\_\_. Thereafter, on August 6, 2012, the Compliance Division issued a second assessment, for consumers sales tax. This assessment was for the period March 31, 2007, through June 30, 2008, for interest in the amount of \$\_\_\_\_, and additions to tax in the amount of \$\_\_\_\_, for a total of \$\_\_\_\_. Thereafter, on September 7, 2012, the Petitioner timely

filed with this Tribunal, a petition for reassessment. An evidentiary hearing was held in this matter on March 18, 2013, at the conclusion of which the parties filed legal briefs. The matter became ripe for a decision at the conclusion of the briefing schedule.

### **FINDINGS OF FACT**

1. The Petitioner Corporation operates a hotel in a West Virginia City located in a County of West Virginia.
2. The corporation consists of two officers, President Mr. A and Ms. Z, who, at the time of the evidentiary hearing in this matter believed that she was vice president and perhaps treasurer.
3. Mr. A is an attorney.
4. Ms. Z has various duties, both at Mr. A's law office and at the hotel. Ms. Z is or has been a legal secretary, desk clerk, waitress and bartender.
5. At some point in time, the hotel's manager was Mr. B.
6. During the time he managed the hotel, Mr. B was responsible for remitting West Virginia's sales taxes. As part of these duties, he would calculate the amount due and then obtain a check from Ms. Z, who, at that time, was working in Mr. A's law office.
7. Sometime in 2006, Mr. B left his position as hotel manager.
8. After Mr. B left his employment, Ms. Z took over the management duties of the hotel.<sup>1</sup>
9. Prior to his departure, Ms. Z received no training from Mr. B as to how he managed the hotel.

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<sup>1</sup> Upon questioning from Petitioner's counsel, Ms. Z suggested that another secretary in Mr. A's law firm also helped manage the hotel. Upon questioning from the presiding administrative law judge, Ms. Z suggested that she alone took over the duties. Generally, her testimony suggests that after Mr. B left, the management of the hotel was somewhat chaotic.

10. Once Ms. Z took over Mr. B's duties, sales taxes on hotel room rentals ceased to be remitted to the state. This failure to remit continued for approximately six years and was not discovered by the corporation until the West Virginia State Tax Department alerted the Petitioner as to the omissions.

### **DISCUSSION**

There is no dispute among the parties as to what transpired in this matter. In fact, by the time of the hearing in this matter the unremitted taxes had been paid. Nor do the parties argue about what law controls. The Petitioner's main complaint concerns the additions to tax. Specifically, the Petitioner contends that they are not warranted in this case, and that the amount of additions is too high.

The statutory provisions regarding additions to tax are contained in West Virginia Code Section 11-10-18.

*(a) Failure to file tax return or pay tax due. --*

(1) In the case of failure to file a required return of any tax administered under this article on or before the date prescribed for filing such return (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: *Provided*, That this addition to tax shall be imposed only on the net amount of tax due;

(2) In the case of failure to pay the amount shown as tax, on any required return of any tax administered under this article on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return one half of one percent of the amount of such tax if the failure is for not more than one month, with an additional one half of one percent for each additional month or fraction thereof during

which such failure continues, not exceeding twenty-five percent in the aggregate: *Provided*, That the addition to tax shall be imposed only on the net amount of tax due;

W. Va. Code Ann. § 11-10-18(a) (West 2013). The Petitioner has three complaints regarding Section 18. The Petitioner first argues that the “unless it is shown” language puts the burden on the Tax Commissioner to make a showing regarding reasonable cause and willful neglect. The Petitioner states that because Taxpayers would have a difficult time proving the absence of willful neglect it “makes sense . . . to require the tax collector, **as a condition to imposing additions to tax**, to justify the additions . . . .” *See* Brief of Taxpayer at 15 (emphasis added). The Tax Commissioner, for his part, states that it does not matter who makes the showing, and that sometimes it will be the Taxpayer and sometimes the Tax Commissioner. From a practical standpoint, we agree with the Tax Commissioner. Sometimes the Tax Department employees will know the reason for the non-filing or non-payment and sometimes they will not. What this Tribunal rejects is the Petitioner’s suggestion (made without citation to any authority) that the Tax Commissioner must, as a condition precedent to imposing additions, conduct an investigation.

[i]t is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.

Napier v. Bd. of Educ. of County of Mingo, 214 W. Va. 548, 552-53, 591 S.E.2d 106, 110-11 (2003) (internal citations omitted).

The intent of Section 18(a) is to encourage compliance with West Virginia’s tax laws. The Legislature has not given the Tax Commissioner discretion, he or she **shall** add additions to the tax due, when a Taxpayer fails to file or pay. *See e.g.* Foster Foundation v. Gainer 228

W.Va. 99, 110, 717 S.E.2d 883, 894 (2011); Syl. pt. 1, E.H. v. Matin, 201 W.Va. 463, 498 S.E.2d 35 (1997) (It is well established that the word “shall,” in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation). To construe Section 18(a) as the Petitioner suggests would lead to an absurd result. How exactly is the Tax Commissioner supposed to follow the Legislature’s directive to add additions in all cases of non-filing or non-payment, if he or she must first wrest information from non-compliant Taxpayers about the reasons for their non-compliance? Such a suggestion is particularly unfounded, given that the fact that in all cases, the Taxpayer will know the reason for their non-compliance. Obviously, the Legislature intended for the Taxpayer to come to the Tax Commissioner, to present their case for reasonable cause and to try and convince him or her to waive the otherwise mandatory additions.

The Petitioner next argues that there is a two-pronged test in Section 18 and that it has not been met. The Petitioner, while not stating it outright, seems to acknowledge that it did not have reasonable cause for its six year failure to file and pay. However, the Petitioner argues that it never willfully neglected to file and remit sales taxes, rather it was just negligent.

This Tribunal finds the Petitioner’s arguments in this regard to be unpersuasive. The Petitioner is confusing Ms. Z’s actions with its actions. It certainly appears that Ms. Z did not willfully fail to remit the taxes at issue. However, we are not concerned with Ms. Z’s actions because she is not the Taxpayer in this matter. The Taxpayer in this case is the Petitioner, a West Virginia corporation. It is the corporation that willfully neglected to remit consumers sales and use taxes for six years, and converted those monies, held in trust, to its own use. That being said, we are mindful of the fact that Ms. Z is an officer of the corporation, and therefore, under West Virginia law, she had certain legal duties. “An officer, when performing in his or her

official capacity, shall act: . . . (2) With the care that a person in a like position would reasonably exercise under similar circumstances; and (3) In a manner the officer reasonably believes to be in the best interests of the corporation.” W. Va. Code Ann. § 31D-8-842(a) (West 2013).

There are only two possibilities in this case, either Ms. Z was acting in her official capacity as an officer, or she was not. We believe, given the fact that at various times she was a bartender, waitress, desk clerk, and legal secretary; that she was an officer in name only. However, the “capacity” under which Ms. Z was acting is not determinative to the question of whether the Taxpayer corporation was willfully negligent. Under either scenario, the corporation cannot use the inexperience of a bartender/waitress/secretary as an excuse for its failure to perform its legal duties. The question becomes, where were the other officers or directors during the six years of non-compliance? The record in this matter clearly establishes that when Mr. B left, Ms. Z was thrown into his position with no training. Additionally, there was no evidence presented showing that during the six years at issue anyone from the corporation ever inquired as to how things were going. There are numerous things the corporation could have done to ensure that West Virginia taxes were properly remitted, starting with something as simple as having another person within the corporation check on how Ms. Z was doing. Moreover, this Tribunal finds determinative (and somewhat odd) that the corporation never, in six years, had a third party, such as an accountant, review all of its tax filings.<sup>2</sup> That six-year lack of inquiry and inattention is willful neglect, as the term is used in West Virginia Code Section 11-10-18. To be clear, the reason the situation described above is willful neglect and not mere negligence is because of the amount of time involved. Negligence would be no one checking on Ms. Z for a

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<sup>2</sup> There was testimony that the corporation used an accounting firm, but that they did not prepare the sales tax returns.

few months because of other pressing corporate business or some emergency. Not checking for six years evidences a deliberate desire for ignorance as to the corporation's affairs.

The Petitioner's final argument concerning Section 18 involves the amount of additions. The Petitioner states that "a simple reading of the Section 18 might suggest that additions are limited to 25% of the tax unremitted . . ." *See* Brief of Taxpayer at 18. The Petitioner is incorrect in this regard. As stated above, the Legislature has directed the Tax Commissioner to include additions to tax both when a Taxpayer fails to file returns and when a Taxpayer fails to pay the proper amount of tax due. Section 18 does not give the Tax Commissioner discretion as to the amount of these additions, unless the Taxpayer makes the showing discussed above.

Finally, the Petitioner argues that in failure to file cases, such as this, the Tax Department traditionally only goes back five years when it issues the assessment. It is important to note that the Petitioner is not arguing that West Virginia law prevents the Tax Commissioner from going back more than five years. Presumably, the Petitioner does not make that argument because West Virginia law is clear on this point. *See* W. Va. Code Ann. § 11-10-15(a) (West 2010) (in cases where no return is filed an assessment can be made at any time). Not only is West Virginia law clear in this regard, this Tribunal doubts that the Legislature or the West Virginia Supreme Court of Appeals would look kindly upon a Tax Commissioner who allowed a Taxpayer to keep, as a windfall, any collected but unremitted trust taxes, just because they were collected more than five years prior to the issuance of an assessment.

### **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. In the case of failure to file a required return or failure to pay the amount shown as tax, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be additions to the amount required to be shown as tax on such return, not to exceed twenty-five percent in the aggregate for the failure to file and for the failure to pay. *See* W. Va. Code Ann. § 11-10-18(a)(1)&(2) (West 2013).

4. For approximately six years, the Petitioner in this matter willfully neglected to file consumers sales tax returns and willfully neglected to remit sales taxes it had collected from its customers.

5. The word “shall,” in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation. *See e.g. Foster Foundation v. Gainer* 228 W.Va. 99, 110, 717 S.E.2d 883, 894 (2011); Syl. pt. 1, *E.H. v. Matin*, 201 W.Va. 463, 498 S.E.2d 35 (1997).

6. In the absence of a showing of reasonable cause, the Tax Commissioner has no discretion as to the amount of additions when a Taxpayer fails to pay a required tax or fails to file a required return.

7. West Virginia Code Section 11-10-18(a) does not require the Tax Commissioner to determine the cause of a Taxpayer’s failure to file or pay, prior to including additions to taxes due.

8. Upon a Taxpayer’s failure to file a return, an assessment may be made at any time. *See* W. Va. Code Ann. § 11-10-15(a) (West 2010).

9. 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).

10. The Petitioner in this matter has failed to meet its burden of showing that any part of the assessments issued against it were erroneous, unlawful, void or otherwise invalid.

**DISPOSITION**

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the combined sales and use tax assessment issued on July 5, 2012, for the period March 31, 2009, through December 31, 2011, for interest in the amount of \$\_\_\_\_, and additions to tax of \$\_\_\_\_, for a total assessed liability of \$\_\_\_\_ and the sales tax assessment, issued on August 6, 2012, for the period March 31, 2007, through June 30, 2008, for interest in the amount of \$\_\_\_\_, and additions to tax in the amount of \$\_\_\_\_, for a total of \$\_\_\_\_ are hereby **AFFIRMED**.

Interest continues to accrue on the unpaid tax until this liability is fully paid pursuant to the West Virginia Code Section 11-10-17(a).

**WEST VIRGINIA OFFICE OF TAX APPEALS**

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

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Date Entered