REDACTED DECISION – DK#'S 13-205 CU-C, 13-219 CU-C, 13-220 CU, 13-221 CU, 13-483 NFN-C, 13-484 CU-C, 13-485 NFN-C, 13-486 CU-C

BY: HEATHER G. HARLAN, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON FEBRUARY 3, 2016
ISSUED ON AUGUST 1, 2016

SYNOPSIS

TAXATION; ASSESSMENTS GENERALLY; ASSESSMENTS OF PERSONAL PROPERTY

As a general rule, West Virginia imposes the consumers' sales and services tax upon all sales of tangible personal property and services in the State of West Virginia. *See* W. Va. Code §§ 11-15-1 and 11-15-3. To this end, "it is presumed that all sales and services are subject to the tax until the contrary is clearly established." West Virginia Code § 11-15-6(b). 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. West Virginia Code § 11-1-2.

TAXATION; WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT; BURDEN OF PROOF

Petitioners have not only the burden of proof (persuasion) in this matter, to wit: West Virginia Code § 11-10A-10(e), ("[e]xcept as otherwise provided by this code or legislative rules, the taxpayer or Petitioner has the burden of proof"), they also bear the burden of going forward with the evidence, stated specifically as the "burden of providing that the sale or service was exempt from tax." W. Va. Code § 11-15-6(a).

OFFICE OF TAX APPEALS; CONCLUSION OF LAW

Mindful of the burden imposed by the presumption of taxability in West Virginia Code §11-15-1, the Legislature codified the West Virginia Constitution's mandate of equal and uniform taxation, pursuant to Article X, Section 1. *See* West Virginia Code §11-15-1. Thus, as Petitioners aptly noted, Article 10 of the West Virginia Constitution, commonly known as the "equal and uniform provision, is both a grant of power to the Legislature to tax, and a limitation on that power.

OFFICE OF TAX APPEALS; CONCLUSION OF LAW

That the West Virginia Supreme Court of Appeals employs such a substance over form approach when analyzing tax statutes can hardly be disputed. *See, e.g.*, Syl. Pt. 6, *CB&T Operations v. Tax Commissioner*, 211 W. Va. 198, 564 S.E.3d 408 (2002) ("[i]n **tax** matters, it is the **substance**, not the **form** of a transaction that determines **tax** liability.") (emphasis in original).

This Tribunal finds that the opinions of Kentucky, Indiana, and Ohio courts are persuasive and inform this Court's analysis of, particularly in the absence of either any controlling or contradicting case law.

OFFICE OF TAX APPEALS; CONCLUSION OF LAW

That the Raffle Tickets were sold illegally is of no moment. Further, the unenforceability of an illegal contract does not inform this Tribunal's analysis. Likewise, Respondent's reliance upon *Wisconsin Dep't of Revenue v. The Milwaukee Brewers Baseball Club*, 111 Wis. 2d 571,

581-582, 331 N.W.2d 383, 388 (1983), is misplaced.

OFFICE OF TAX APPEALS; CONCLUSION OF LAW

Every jurisdiction that has addressed the issue of whether raffle or lottery tickets are intangible personal property excepted from sales tax have ruled affirmatively. Indeed, the Respondent's own publication, entitled, "*Publication TSD-300, Sales and Use Tax Exemptions",* specifically exempts intangible personal property from sales and use tax. The arguments posed by Respondent in his briefs are unavailing. Petitioner has met his burden.

FINAL BIFURCATED DECISION

Combined Sales and Use Tax and Consumer Sales and Service Tax assessments (collectively referred to herein as, the "Assessments") were issued against the following petitioners

herein: (referred to collectively herein, as the "Petitioners"). The Assessments were issued against the Petitioners, respectively, primarily based upon their alleged failure to collect and remit consumers sales and service tax on the proceeds from the sale of those certain raffle tickets (the "Raffle Tickets"), where each Petitioner was prosecuted for conducting gambling without a license.

In these several cases, the Parties previously agreed that there is an important threshold question, namely, whether the sale of the Raffle Tickets (defined herein) at issue here is subject to consumers' sales and service tax. Specifically, the Petitioners assert that the subject raffle tickets

are intangible personal property, as defined under West Virginia Code § 11-5-3, and therefore, not subject to consumers sales and service tax (the preceding paragraph shall herein be collectively referred to "Threshold Question").

During a telephone pre-hearing conference held on October 29, 2015 (the "Telephone Conference"), the Parties requested that Administrative Law Judge George V. Piper ("Judge Piper") bifurcate the appeal so that the Threshold Question could be determined prior to any final hearing. The Parties previously briefed the matters in these cases, apparently, at least in part, because it appears that the previous Chief Administrative Law Judge then determined that a hearing on the matter was unnecessary unless and until the Threshold Question was decided.

At the Telephone Conference, Judge Piper seemingly granted the Parties' request to bifurcate, inasmuch as he directed that the Threshold Issue be briefed by the Parties. On July 11, 2016, Chief Judge Heather G. Harlan conducted a telephonic status conference, wherein she granted the Parties a hearing on the matters, including the Threshold Question.

Nevertheless, the Parties informed this Tribunal that each wishes for the Threshold Question to be decided on the briefs filed alone, without the necessity for a hearing. Notably, Respondent's counsel pointed out that:

> "the use tax and corporate net/business franchise tax assessments are unaffected by the determination of the Threshold Issue. Accordingly, should the Petitioners prevail as to the Threshold Issue, i.e., this Tribunal holds that proceeds from the sale of raffle tickets are excepted from sales tax, an evidentiary hearing will nonetheless need to be held on the use tax and corporate net/business franchise tax assessments."

To reiterate, the Threshold Question, simply stated, is whether the Raffle Tickets are intangible personal property, as defined under West Virginia Code § 11-5-3, and therefore, not subject to consumers sales and service tax. Upon consideration of the Parties' briefs on the Threshold Question, based upon the applicable statutory and case law, including the applicable burden of proof[1], and giving due consideration to the entire record in this proceeding, this Tribunal answers the Threshold Question in the affirmative.

FINDINGS OF FACT[2]

1. The individual Petitioners are each bar owners in Counties in West Virginia, and each of them was prosecuted for conducting gambling without a license.

2. Each of the individual Petitioners paid fines for such prosecution.

3. It is undisputed that the income Petitioners derive from conducting gambling is subject to income tax.

4. Respondent audited each of the Petitioners, assessing each for unpaid consumers' sales and services tax for each raffle ticket the bar owners sold.[3]

[1] As discussed throughout herein, in accordance with West Virginia Code § 11-10A-10(e), the individuals or entities challenging a taxing authority generally has the burden of proof to overcome any such challenge.
[2] The Parties agreed that the essential facts in this matter are not in dispute. Nevertheless, for purposes of completeness and in accordance with the applicable statutory requirements, this Tribunal made those certain "Findings of Fact," as stated herein.

[3] The raffle tickets discussed in numbers four (4) through twelve (12), inclusive, are the Raffle Tickets.

5. Bingo Express is a supply company that sells plastic jars that contain numbered raffle tickets.

6. The plastic jars sold by Bingo Express are used for a particular type of gambling, where, in return for the sum of one dollar ($1.00), the patron receives a raffle ticket.

7. Although some patrons received more than one (1) number for each dollar paid for such raffle ticket, the proceeds of each game is one hundred eighty eight ($188.00).

8. Once all raffle tickets in a jar is sold, the winning numbers are drawn, and two cash prizes are awarded, one for one hundred dollars ($100.00) and one for twenty five dollars ($25.00), with the respective bar owner keeping the balance, or sixty three dollars ($63.00).

9. The Petitioners allege that the subject raffle tickets have no value either before or after the drawing, but rather, each ticket represents a patron's chance at winning a prize.

10. The Petitioners conclude that this chance at winning a prize meets the definition of intangible personal property and as such, the subject Raffle Tickets are not subject to consumers' sales and service tax.

11. The Respondent first alleges that the subject raffle tickets are illegal, inasmuch as Petitioners did not have a license when such raffle tickets were sold.

12. Respondent goes on to argue that any proceeds derived from the sale of illegal raffle tickets are nevertheless subject to the collection of consumers sales and service tax because those proceeds are neither excepted or exempted by any provision of West Virginia Code § 11-15-1, *et. seq* or § 110-15-1, *et seq.* of the West Virginia Code of State Rules.

DISCUSSION

An analysis of the Threshold Question necessarily begins with the governing statute, which provides that, as a general rule, West Virginia imposes the consumers' sales and services tax upon all sales of tangible personal property and services in the State of West Virginia. *See* W. Va. Code §§ 11-15-1 and 11-15-3. To this end, "it is presumed that all sales and services are subject to the tax until the contrary is clearly established." West Virginia Code § 11-15-6(b). Accordingly, Petitioners have not only the burden of proof (persuasion) in this matter, to wit: West Virginia Code § 11-10A-10(e), ("[e]xcept as otherwise provided by this code or legislative rules, the taxpayer or Petitioner has the burden of proof"), they also bear the burden of going forward with the evidence, stated specifically as the "burden of providing that the sale or service was exempt from tax."). W. Va. Code § 11-15-6(a).

Mindful of the burden imposed by the presumption of taxability in West Virginia Code

§11-15-1, the Legislature codified the West Virginia Constitution's mandate of equal and uniform taxation, pursuant to Article X, Section 1. *See* West Virginia Code §11-15-1.[4] Thus, as Petitioners aptly noted, Article 10 of the West Virginia Constitution[5], commonly known as the

[4] "All personal property belonging to persons residing in this State, whether such property be in or out of the State, and all personal property in the State, though owned by persons residing out of the State, shall be entered in the personal property book, and be subject to equal and uniform taxation . . ." W. Va. Code § 11-15-1 (emphasis added).

[5] The West Virginia Constitution guarantees that, with certain express exceptions, "taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value...." to Article X, Section 1.

"equal and uniform provision, is both a grant of power to the Legislature to tax, and a limitation on that power. Such equal treatment is guaranteed by both the West Virginia Constitution and the United States Constitution.

An analysis of the Threshold Question begins with the language of West Virginia Code §11-15-3. Absent from that statutory provision is a definition of the term "intangible." The Legislature, did, however, define "personal property" as "all fixtures attached to land, if not included in the calculation of such land entered in the proper landbook; all things of value, moveable and tangible, which ae the subjects of ownership; chattels real and personal; all notes, bonds, and accounts receivable, stocks and all other intangible property." §11-5-3 (emphasis supplied). As the parties noted, the West Virginia Supreme Court of Appeals has not directly addressed the issue of whether a raffle ticket constitutes tangible personal property. However, this Tribunal finds persuasive the case cited by the Virginia Attorney General in Opinion Number 11211988, 1988 at 560 (the "AG Opinion").

Utilizing *Black's Law Dictionary* to employ a "plain reading" approach to the statue, the AG Opinion cited a Montana case, which held that "[w]inning a lottery prize clearly derives, not from any real or tangible personal property interest, but from a thing inaction or from intangible personal property. *Sharp v. Department of Revenue of State of Mont;* 945 P.3d 38, 286 Mont. 424 (Mont., 1997). *Id*. Likewise, the decisions of two other border states are instructive. The Supreme Court of Ohio ruled that "[a] lottery ticket is a chance." *United States v. Baker,* 364 F.2d 107, 111 (3rd Cir. 1966). Additionally, in 2012, the Kentucky Supreme Court addressed the issue, noting as follows:

> As the trial court pointed out, a lottery ticket represents a chance to win an unknown amount of money. *See Commonwealth v. Allen*, 404 S.W.2d 464 (Ky. 1966). A chance to win money is intangible and cannot be physically moved at the time that it is purchased. The definition of *goods* does not include intangible property. We also find it is persuasive that the Michigan Court of Appeals has held that lottery tickets do not come within the purview of the UCC. *Downs v. Ky. Lottery Corp. (Ky. App., 2012) (citing Bureau of State Lottery*, 463 N.W.2d 245 (Mich. Ct. App. 1990)).

In that same opinion, the Kentucky Supreme Court cited a Texas decision, whereby the Court of Appeals of Texas ruled that a lottery ticket is intangible personal property. Specifically,

> The Court of Appeals of Texas has held that "the right to participate in the lottery is intangible and is neither a good nor a service . . . We have searched but have not discovered any authority that is contradictory." *Downs v. Ky. Lottery Corp.* (Ky. App., 2012) (*citing Kinnard v. Circle K. Stores, Inc.*, 966 S.W. 2d 613, 617-18 (Texas Ct. App. 1998) (internal quotations omitted)). Interpreting the plain terms of its pertinent statute, the Indiana Supreme Court, in *Maurer v. Indiana Dept. of State Revenue*[6], 607 N.E.2d 985 (In. Tax 1993), held that its relevant statute:
>
> > Provides that a raffle ticket or change represents a potential claim to a prize awarded after a random drawing. The player is indifferent to the ticket; what matters is the prize the ticket may generate. In Indiana, the substance, not the form, of a transaction determines its tax consequences, and the substance of a raffle sale transaction is the purchase of the opportunity to win, not the purchase of the ticket. The sale of a raffle ticket to a raffle player is therefore not a sale of tangible personal property.[7] Other courts [California] have reached the same result, holding a ticket "is the physical evidence of a right of the purchaser or holder to a change to win." *Id.* at 985 (internal citations and quotations omitted).

[6] Upon winning a car in a raffle, the petitioner in this Indiana case had to pay sales tax to obtain the car from the dealer. Consequently, the petitioner made a claim for refund with Indiana's State Tax Department for the sales tax that he paid to obtain the vehicle. Upholding the Indiana Department of Revenue's denial of petitioner's refund claim, the Indiana Supreme Court held that the petitioner's raffle ticket was intangible personal property not subject to sales tax.

[7] As noted in "Petitioners' Supplemental Brief in Support of Motion to Find that the Raffle Tickets That are the Subject of This Appeal Are Intangible Property Not Subject to Sales Tax," at *page 4, par. 2-3)

That the West Virginia Supreme Court of Appeals employs such a substance over form approach when analyzing tax statutes can hardly be disputed. *See, e.g.,* Syl. Pt. 6, *CB&T Operations v. Tax Commissioner*, 211 W. Va. 198, 564 S.E.3d 408 (2002) ("[i]n **tax** matters, it is the **substance**, not the **form** of a transaction that determines **tax** liability.") (emphasis in original)). This Tribunal finds that the opinions of Kentucky, Indiana, and Ohio courts are persuasive and inform this Court's analysis and aid this Tribunal in answering the Threshold Question in the affirmative, particularly in the absence of either any controlling or contradicting case law.

On the other hand, this Tribunal is unpersuaded by the arguments presented by Respondent, the first of which is that the absence of the term "raffle ticket" from § 110-15-2.38 of the West Virginia Code of State Rules, is somehow determinative of its designation as such. To the contrary, the absence of the word "raffle ticket" from the governing regulations could be argued to lend support to Petitioners' position, since it is certainly reasonable to assume that the Respondent would be, and is, cognizant of the constitutional prohibition against taxation of intangible personal property.[8]

Further, in *Green Line Terminal Co. v. Martin, Assessor, et al.,*122 W. Va. 483, 10 S.E.2d 901, 902 (1940), the West Virginia Supreme Court of Appeals held that:

> Under statute classifying property for purposes of taxation and providing that Class 1 shall include all money, notes, bonds, bills, and accounts receivable, stock and any other **intangible** personalty, and that Class 4 shall include all realty and personalty situated within municipalities, exclusive of Classes 1 and 2, the phrase "other **intangible** personal property", under "ejusdem

[8] *See* West Virginia Constitution, Article X, Section 1. As such, specific mention of the term "raffle tickets," would naturally be unnecessary.

> generis" rule, refers to **intangibles** evidencing indebtedness, which are "**chattels** personal", and does not include "**chattels** real", and leasehold within a municipality must therefore be assessed and taxed under Class 4 rather than Class 1. Code 1931, 11–8–5, as amended and re–enacted by Acts 1933, 2d Ex.Sess., c. 67, § 5; Const. art. 10, § 1, as amended in 1932 . . . A leasehold, which is "**intangible** personalty," or a "**chattel** real", constitutes an interest in land and is immobile, as distinguished from other "**intangible** personalty" such as evidences of debt, which are "**chattels** personal." *Id. (emphasis in original).*

Given the Court's language above, it is also reasonable to assume that raffle tickets could be construed as an intangible that evidences indebtedness of Petitioners, inasmuch as inherent with the expectation that the purchaser has of winning, is his right to demand payment from Petitioners should that event occur.

Respondent's contention that raffle tickets cannot be deemed intangible personal property because Petitioners illegal sold the Raffle Tickets is likewise without merit. In *Greer v. Dept. of Treasury*, 145 Mich. App. 248, 377 N.W.2d 836 (1985), a dealer in marijuana challenged a sales tax assessment of some $50,000 on the ground that only legal sales were taxable. *Hellerstein, Walter, State Taxation, Third Edition, Part V, Sales and Use Taxes, Chapter 12, Introduction to Sales and Use Taxes, Section Nine, Illegal Sales (citing Greer 3*77 N.W.2d 836, at 837 (1985)).

In *Greer,* the statute levied a tax on "all persons engaged in the business of making sales at retail." *Id.* The statute defined the term "business" as "an activity engaged in by a person or caused to be engaged in...with the object of gain, benefit or advantage." *Id. (internal citations omitted).* The taxpayer contended that "the sale of marijuana is not a 'sale at retail' within the meaning of the statute because the legislature only intended the Act to apply to legal sales transactions." *Id.* The court disagreed:

> Petitioner's argument has long ago been rejected. In *Youngblood v. Sexton*..., Justice Cooley stated:
>
> "Indeed, in this state, liquors have always been taxable as property; and so have been the implements by means of which forbidden games of chance have been carried on. Yet, when the keeper of billiard tables is compelled to pay a tax, it can be no defense to him, either in law or in morals, that he is compelled to do so from the profits of an illegal business. To refuse to receive the tax under such circumstances, would tend to encourage the business, instead of restraining it; and would not only be unwise because of exempting one man from his fair share of taxation, but also because it would tend to defeat the state policy which forbids games of chance and hazard."
>
> Similar principles have been applied to federal income taxation of illegal activities. See *Lewis v. United States*....
>
> The term "business" is defined in the Act as "an activity engaged in by a person or caused to be engaged in by that person with the object of gain, benefit, or advantage, either direct or indirect.". The Act makes no distinction between legal and illegal activities. It would be unreasonable to assume that the Legislature intended to impose a sales tax on those who comply with the law, while exempting those who disobey it. *Id.*

That the Raffle Tickets were sold illegally is of no consequence. Further, the unenforceability of an illegal contract does not inform this Tribunal's analysis. Likewise, Respondent's reliance upon *Wisconsin Dep't of Revenue v. The Milwaukee Brewers Baseball Club*, 111 Wis. 2d 571, 581-582, 331 N.W.2d 383, 388 (1983), is misplaced.

In summary, every jurisdiction that has addressed the issue of whether raffle or lottery tickets are intangible personal property excepted from sales tax have ruled affirmatively. Indeed, the Respondent's own publication, entitled, "*Publication TSD-300, Sales and Use Tax Exemptions",* specifically exempts intangible personal property from sales and use tax. The

arguments posed by Respondent in his briefs are unavailing. Petitioner has met his burden.

Based upon the applicable statute, governing regulations, applicable case law and the entire record in this matter, this Tribunal hereby finds that, in this circumstance, the Raffle Tickets are, in fact, intangible personal property exempt from sales and use tax.

CONCLUSIONS OF LAW

1. As a general rule, West Virginia imposes the consumers' sales and services tax upon all sales of tangible personal property and services in the State of West Virginia. *See* W. Va. Code §§ 11-15-1 and 11-15-3. To this end, "it is presumed that all sales and services are subject to the tax until the contrary is clearly established." West Virginia Code § 11-15-6(b). 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. West Virginia Code § 11-1-2.

2. Petitioners have not only the burden of proof (persuasion) in this matter, to wit: West Virginia Code § 11-10A-10(e), ("[e]xcept as otherwise provided by this code or legislative rules, the taxpayer or Petitioner has the burden of proof"), they also bear the burden of going forward with the evidence, stated specifically as the "burden of providing that the sale or service was exempt from tax."). W. Va. Code § 11-15-6(a).

3. The Legislature codified the West Virginia Constitution's mandate of equal and uniform taxation, pursuant to Article X, Section 1. *See* West Virginia Code §11-15-1. Thus, as Petitioners aptly noted, Article 10 of the West Virginia Constitution, commonly known as the "equal and uniform provision, is both a grant of power to the Legislature to tax, and a limitation on that power. Such equal treatment is guaranteed by both the West Virginia Constitution and the United States Constitution.

4. That the West Virginia Supreme Court of Appeals employs such a substance over form approach when analyzing tax statutes can hardly be disputed. *See, e.g.*, Syl. Pt. 6, *CB&T Operations v. Tax Commissioner*, 211 W. Va. 198, 564 S.E.3d 408 (2002) ("[i]n **tax** matters, it is the **substance**, not the **form** of a transaction that determines **tax** liability.") (emphasis in original). This Tribunal finds that the opinions of Kentucky, Indiana, and Ohio courts are persuasive and inform this Court's analysis of, particularly in the absence of either any controlling or contradicting case law.

5. That the Raffle Tickets were sold illegally is of no moment. Further, the unenforceability

of an illegal contract does not inform this Tribunal's analysis. Likewise, Respondent's reliance upon *Wisconsin Dep't of Revenue v. The Milwaukee Brewers Baseball Club*, 111 Wis. 2d 571, 581-582, 331 N.W.2d 383, 388 (1983), is misplaced.

6. Every jurisdiction that has addressed the issue of whether raffle or lottery tickets are intangible personal property excepted from sales tax have ruled affirmatively. Indeed, the Respondent's own publication, entitled, "*Publication TSD-300, Sales and Use Tax Exemptions",* specifically exempts intangible personal property from sales and use tax. The arguments posed by Respondent in his briefs are unavailing. Petitioner has met his burden.

DISPOSITION

WHEREFORE, insofar as the Assessments against Petitioners pertain to the Threshold Question, they should be, and hereby are **VACATED**. Further, this Tribunal shall retain jurisdiction of this matter until it has heard from the Parties about the proposed reductions in the total of each Petitioner's assessments as a result of this Decision. Such reductions, along with any and all other matters necessary to decide, settle, or otherwise dispose of any and all matters pertaining in and to the assessments for each of the Petitioners, shall be presented to this Tribunal in the form of proposed calculations. This Tribunal will discuss such calculations, along with any

such other matters, at a status conference, which this Tribunal will hold with the Parties as soon as is immediately practicable. **It is so ORDERED.**

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Heather G. Harlan, Chief Administrative Law Judge

_____
Date Entered