SANITIZED DECISION -- 04-329 C -- BY ROBERT W. KIEFER, JR., ALJ --
SUBMITTED for DECISION on DECEMBER 5, 2006 -- ISSUED on JUNE 5, 2006

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- EXEMPTION FOR CHARGES RELATED TO CONTINUING EDUCATION PROGRAMS -- An association or organization that is exempt from paying federal income tax under the provisions of § 501(c)(3) or (c)(6) of the Internal Revenue Code is exempt under the provisions of W. Va. Code § 11-15-9(42) for charges for continuing education seminars, workshops, conventions, lectures or courses put on or sponsored by the association or organization, including charges for related course materials prepared by the association or organization or by the speaker or speakers for use during the continuing education seminar, workshop, convention, lecture or course, only for charges made to members of the association or organization.

CONSUMERS' SALES AND SERVICE TAX -- EXEMPTION FOR ISOLATED SALES -- A taxpayer is not exempt from collecting consumers' sales and service tax under the provisions of W. Va. Code § 11-15-9(a)(7), for isolated transactions, where the transactions subject to tax are engaged in by the taxpayer in the normal and ordinary course of its business. W. Va. Code St. R. § 110-15-2.39 (July 15, 1993).

CONSUMERS' SALES AND SERVICE TAX -- 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 a taxpayer to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

CONSUMERS' SALES AND SERVICE TAX -- BURDEN OF PROOF -- In attempting to prove that the State Tax Commissioner improperly used an audit sampling method in arriving at his assessment, the taxpayer failed to carry its burden of showing that the Tax Commissioner should not have used a sampling method, because it failed to show that its records were not so detailed, complex or voluminous that the Tax Commissioner should have audited all of its detailed records.

CONSUMERS' SALES AND SERVICE TAX -- BURDEN OF PROOF -- In attempting to prove that the State Tax Commissioner improperly used an audit sampling method in arriving at his assessment, the taxpayer failed to carry its burden of showing that the Tax Commissioner's sampling method has resulted in an unreasonably excessive assessment of tax against it.

FINAL DECISION

A tax examiner with the Field Auditing Division ("the Division") of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") conducted an audit

of the books and records of the Petitioner. Thereafter, on April 8, 2004, the Director of this Division issued a consumers' sales and service tax assessment against the Petitioner. The assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of April 1, 1999, through January 31, 2004, for tax in the amount of $ and interest in the amount of $, computed through March 31, 2004, for a total assessed tax liability of $. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked May 17, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b)[2002].

After consultation and negotiation between the Petitioner and counsel for the State Tax Commissioner, the Tax Commissioner agreed to delete certain items from the assessment. Accordingly, the Commissioner (by the Division) issued a revised consumers' sales and service tax assessment against the Petitioner. The revised assessment was for tax in the amount of $ and interest in the amount of $, computed through April 30, 2005, for a total assessed tax liability of $.

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. The Petitioner is a West Virginia nonprofit corporation located in West Virginia, is a trade association qualified as exempt from federal income tax under Internal Revenue Code § 501(c)(6), and is engaged in the activity of educating its members, who include certain classes of members described below. Tr., 10:1-6.

2. As part of carrying out its income tax exempt purposes, the Petitioner conducts seminars, prepares and distributes periodic publications, and engages in lobbying efforts on behalf of its members as an industry.

3. Petitioner has three (3) classes of membership in its organization:

(a) Active membership, which includes owners of local industry companies and other directly related companies. Tr., 29:1-3.

(b) "National" membership, which includes national companies of the local industry companies. Tr., 16:12-13, 29:4; and

(c) Associate membership, which includes businesses that support the active membership companies. Tr., 29:5-8.

4. One of the activities of Petitioner is its trade show (the "Trade Show"). Tr., 10:14-22; Petitioner's Exhibit No. 1 (The Trade Expo Programs, Registration and Booth Contracts, 1999-2003).

5. The Trade Show is an annual one-day event lasting six hours, the purpose of which is to educate active members. Tr., 10:16-18, 14:8-15.

6. At the Trade Show, Petitioner's members have exhibits to display their newest products and services. Tr., 10:19-20.

7. The purpose of the Trade Show is to assist Petitioner's members in methods of marketing their new services. Tr., 10:15-17, 15:20-21, 16:1-9.

8. Businesses that are not members of Petitioner, but that are engaged in the industries in which Petitioner represents, also participate in the Trade Show. Tr., 23:17-20.

9. Petitioner typically charges non-member trade show participants $ more for a booth at the Trade Show because there are additional administrative efforts involved in setting up non-

members for the Trade Show and because the Petitioner wishes to provide an incentive for non-members to become members. Tr., 17:6-14; Petitioner's Exhibit No. 4 (Invoices from various booth rentals from 1999-2004).

10. For an 8'x 10' booth in 1999 and 2000, Petitioner charged $ per booth for members and more $ per booth for non-members. Tr., 19:17-22; Petitioner's Exhibit No. 4.

11. In both 1999 and 2000, Petitioner charged $ to a member for a 10' x 10' booth and more $ to a non-member. Tr. 19:22-23; Petitioner's Exhibit No. 4.

12. In 2001, Petitioner charged $ to members and more $ to non-members for an 8' x 10' booth and $ to members and more $ to non-members for a 10' x 10' booth. Tr., 19:24, 20:1-2, Petitioner's Exhibit No. 4.

13. In 2002 and 2003, 10' x 10' was the only booth size, and Petitioner charged $ for members and more $ for non-members. Tr., 20:2-5; Petitioner's Exhibit No. 4.

14. Approximately thirty (30) non-members rented booths from Petitioner in 2003. Petitioner's Executive Director testified that this was a typical number of non-member lessees for each year of the audit period. Roughly two-thirds of the booths at the trade show are rented to members. Tr., 18:1-8.

15. The reduction from the original assessment is a result of deleting the tax on trade show booths rented to members of Petitioner's organization. The revised assessment only imposes tax on booths rented to non-members of Petitioner's organization. State's Exhibit No. 1.

16. During the audit period, the Trade Show was held at a Resort (the "Facility") in West Virginia. Petitioner's Exhibit No. 1.

17. The Facility provides the meeting space, meals and transportation from the meeting space to the exhibit space for the trade show. Tr., 12:21-22, 13:1-2; Petitioner's Exhibit No. 2 (Invoice and agreement with the Resort, 2002 Trade Expo.).

18. Petitioner paid consumers' sales and service tax for all services provided by the facility to Petitioner for the Trade Show. Tr., 13:3-23, 14:1-5; Petitioner's Exhibit No. 2.

19. Petitioner also contracts with an organization, which sets up booths for the Trade Show. Tr., 15:1-2, Petitioner's Exhibit No. 3. (Invoice from Hollins Exhibits).

20. The organization provides Petitioner's vendors with the pipe, drapes, tables and chairs, aisle carpets and other items utilized to set up the booths at the Trade Show. Tr., 15:2-5.

21. Petitioner paid West Virginia consumers' sales and service tax on items purchased from the organization. Tr., 15:5-6; Petitioner's Exhibit No. 3.

22. Executive Director of Petitioner, is Chairman of the West Virginia Society of Association Executives (the "Society"), an organization comprised of association executives throughout the State that meets on a monthly basis. Tr., 20:21-24, 21:1-6.

23. Members of the Society, such as the Petitioner, have trade shows to promote their educational mission. Tr., 21:9-13.

24. The Executive Director testified that upon polling members of the Society, none indicated that they charged sales tax on the rental of booths at their trade shows. Tr., 21:14-23, 22:17-21.

DISCUSSION

The Petitioner's first contention is that the charges to nonmembers for booths at its annual meeting are exempt pursuant to the provisions of W. Va. Code § 11-15-9(a)(42), which provides an exemption for:

> (42) . . . [C]harges to a member by a membership association or organization which is exempt from paying federal income taxes under Section 501(c)(3) or (c)(6) of the Internal Revenue Code of 1986, as amended, for membership in the association or organization, including charges to members for newsletters prepared by the association or organization for distribution primarily to its members, *charges to members for continuing education seminars, workshops, conventions, lectures or courses put on or sponsored by the association or organization, including charges for related course materials prepared by the association or organization or by the speaker or speakers for use during the continuing education seminar, workshop, convention, lecture or course*, but not including any separate charge or separately stated charge for meals, lodging, entertainment or transportation taxable under this article: Provided, That the association or organization pays the tax imposed by this article on its purchases of meals, lodging, entertainment or transportation taxable under this article for which a separate or separately stated charge is not made. A membership association or organization which is exempt from paying federal income taxes under Section 501(c)(3) or (c)(6) of the Internal Revenue Code of 1986, as amended, may elect to pay the tax imposed under this article on the purchases for which a separate charge or separately stated charge could apply and not charge its members the tax imposed by this article or the association or organization may avail itself of the exemption set forth in subdivision (9) of this subsection relating to purchases of tangible personal property for resale and then collect the tax imposed by this article on those items from its member; . . . . (Emphasis added.)

The Petitioner contends that it should be exempt on the rental of booth space to both members and nonmembers because the providing of exhibit space "is an essential incident to the educational function of the Trade Show." Petitioners Brief, p. 8. Providing exhibit space to nonmembers is an important, if not essential, incident to the educational function of the Trade Show. However, the statute does not provide an exemption for such activity when provided to nonmembers. Instead, it provides an exemption for "charges *to members* for continuing education seminars, workshops, conventions, lectures or courses put on or sponsored by the association or organization, . . ." (Emphasis added.) The express statutory language provides an exemption only for charges to members.[1] Therefore, any amount charged for exhibit space to

[1] In fact, the other portions of the statute also speak only to charges to members. The overriding purpose of this exemption is clear. An exemption is permitted only for charges to members of the organization.

nonmembers is not exempt. The Petitioner was required to charge and collect consumers' sales and service tax on said charges.

The second reason offered by the Petitioner for its failure to charge and collect consumers' sales and service tax on providing exhibit space to nonmembers at its annual Trade Show is that the provision of such space is an isolated transaction. W. Va. Code § 11-15-9(a)(7) provides an exemption for:

> An isolated transaction in which any taxable service or any tangible personal property is sold, transferred, offered for sale or delivered by the owner of the property or by his or her representative for the owner's account, the sale, transfer, offer for sale or delivery not being made in the ordinary course of repeated and successive transactions of like character by the owner or on his or her account by the representative: . . . . The tax commissioner may propose a legislative rule for promulgation pursuant to article three [§§ 29A-3-1 et seq.], chapter twenty-nine-a of this code which he or she considers necessary for the efficient administration of this exemption; . . . .

Pursuant to this statutory authorization, the Tax Commissioner proposed a legislative rule that was approved by the Legislature. The Tax Commissioner now cites this legislative rule in support of his contention that the Petitioner's provision of booths to nonmembers is not an isolated transaction.

> Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. . . . The court must first ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the legislature is clear, that is the end of the matter, and the agency's construction can only be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage.

Syl. pt. 3, *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

A reading of the statute demonstrates that the Legislature did not directly speak to the precise legal issue presented by this matter. The precise legal issue to be answered is whether it

is an isolated transaction when a taxpayer provides exhibition space to nonmembers in the ordinary course of its business, albeit once a year.

It is apparent that W. Va. Code § 11-15-9(a)(7) contains ambiguity. Nowhere in the consumers' sales and service tax statute is there an express definition of "isolated transaction." It speaks in terms of "an isolated transaction" in which there is a "sale, transfer, offer for sale or delivery not being made in the ordinary course of repeated or successive transactions of like character by the owner . . . ." This description of "an isolated transaction" by the Legislature is hardly a model of clarity. The term "not being made in the ordinary course of repeated or successive transactions of like character by the owner" is one that does not lend itself to a substantial degree of clarity or exactitude. To the extent that this language attempts to define or delineate what constitutes an "isolated transaction," it is ambiguous. What constitutes the "ordinary course of repeated or successive transactions of like character" can reasonably be subject to differing interpretations by different individuals. It raises a legal issue, specifically, what is the "ordinary course of repeated and successive transactions of like character." It can also be subject to differing applications, depending upon the nature of different taxpayers and their businesses.

Beyond inserting the ambiguous language in the statute, as described above, the Legislature was deliberately silent on this issue. Not only did it determine that it would not further address this issue, it evidently recognized the ambiguity because it expressly authorized the State Tax Commissioner to address the issue by proposing a legislative rule. In proposing the rule, the State Tax Commissioner was authorized to give substantial, if not primary, consideration to efficient administration of the exemption. It assigned to the Commissioner the task of clarifying and resolving the ambiguity.

The situation presented in this matter is very similar to the situation presented by *Appalachian Power*. In *Appalachian Power*, the statute provided a tax on the generation of electricity. The tax was measured by the "net generation available for sale." The State Tax Commissioner promulgated a legislative rule providing that "net generation available for sale . . . shall not be reduced by company use, line loss or any other use, loss or deduction, except station use, ..." *Id*. at 580, 466 S.E.2d at 431. The taxpayers, who were subject to the tax, maintained that the statutory language was clear and unambiguous, and that "net generation available for sale" could not include amounts which were consumed by company use or lost through "line loss." *Id*. at 581, 466 S.E.2d at 432. The Supreme Court determined that the language "net generation available for sale" was ambiguous. The failure of the Legislature to define the words or to enumerate factors that the Tax Commissioner must consider evidences the Legislature's intent to delegate a determination of their meaning to the Tax Commissioner. *Id*. at 590, 466 S.E.2d at 441. The Supreme Court determined that even though it might not have interpreted the statute in the same manner as the Tax Commissioner, the legislative rule promulgated by the Tax Commissioner was a reasonable interpretation thereof. *Id*. at 591, 466 S.E.2d at 442. Therefore, the Commissioner's interpretation was entitled to deference and the rule was required to be applied.

The statute under consideration in this action is similar to that presented in *Appalachian Power*, in that the statutory language is not defined and there little in the way of factors set out in the statute to guide the Tax Commissioner in its administration. The statute exempts "an isolated transaction" and the only guidance provided is that "the sale, transfer, offer for sale or delivery [is] not being made in the ordinary course of repeated and successive transactions of like character by the owner or on his or her account . . . ." As more fully set forth above, this

language is problematic because what constitutes the "ordinary course of repeated and successive transactions of like character" is not a term that is unequivocally clear and unambiguous.

It is evident that the Legislature did not clearly and unambiguously answer the precise legal question presented in this matter. It did not define the term. The only standard it articulated was a general one, "efficient administration," and that was to be considered in proposing the legislative rule. The plain language of the statute does not answer the question of whether or not the provision of services in the normal and ordinary course of business, albeit once a year, is an isolated transaction.

Pursuant to the legislative authorization to propose a legislative rule, the State Tax Commissioner promulgated W. Va. Code St. R. § 110-15-2.39, which defines an "isolated transaction" as follows:

> "Isolated transaction" means a transaction or event in which tangible personal property or a taxable service is sold, transferred, offered for sale or delivered by the owner thereof or by his representative. In order to qualify as an isolated transaction, the seller may not be in the business of selling the type of tangible personal property or rendering the service which is the subject of the transaction. The isolated transaction may be in the form of a single transaction, or a series of individual transactions which would be an event. An example of a single transaction would be the sale of a boat. An example of a series of transactions comprising an event would be a yard sale. An event may not be longer than forty-eight (48) hours in duration. A person qualifying for the exemption shall have the isolated transaction exemption available for up to a total of four (4) "isolated transactions" (whether they be "transactions" or "events," as herein described,) in any twelve (12) month period. The fifth (5th) transaction or event and any transaction or event thereafter in any such twelve (12) month period is taxable. Any purported "event" having a duration longer than forty-eight (48) hours shall be treated as two (2) or more successive "events." If the number of total aggregate events is greater than four (4) for any twelve (12) month period, any purported event beyond four (4) is a taxable activity.

The structure of the legislative rule demonstrates that the Tax Commissioner identified two situations in which there might be some question as to whether or not a transaction is isolated. One is where a taxpayer engages in sales transactions in the ordinary course of its

business, but the number of transactions is such that it not readily apparent that each such transaction is one of a series of repeated and successive transactions. The other is where a taxpayer is not engaged in such sales as part of its ordinary course of business, but it engages in enough transactions that they might be considered repeated and successive.[2] The legislative rule addresses these two principal ambiguities in the exemption.

With respect to what constitutes the "ordinary course" of repeated transactions "of like character," the Tax Commissioner determined that a taxpayer engaged in the business of selling the type of tangible personal property or rendering the service that is the subject of the transaction does not satisfy the statutory standard, because it is engaged in "the ordinary course repeated and successive sales of such goods or services." As such, its sales are not "isolated transactions" because they are repeated and successive in the ordinary course of its business. This is so, regardless of how few transactions occur in any given period. In this context, the Tax Commissioner has established a clear, bright-line rule that a taxpayer who is engaged in a selling tangible personal property or providing a service in the ordinary course of business does not engage in isolated transactions with respect to the sales of those products or provision of those services. In this situation, it is the character of the seller, not the number of transactions, that governs whether or not the transactions are considered isolated.

With respect to a seller who is not engaged in selling tangible personal property or providing a service in the ordinary course of business, the Tax Commissioner promulgated a rule providing that the first four such transactions in a twelve-month period are to be considered isolated transactions. The fifth and all subsequent transactions within a twelve-month period are

[2] A taxpayer that is engaged in sales in the ordinary course of its business, and who engages in a large number of transactions, such as a major retailer, a restaurant or an automobile service facility, clearly does not engage in isolated transactions. At the other end of the spectrum, a person who does not engage in sales transaction in the

to be considered taxable. Where a person is not engaged in such sales in the ordinary course of his or her business, the Commissioner has established a different, clear, bright-line rule. In this situation, it is the number of transactions that determines what constitutes an isolated transaction.

Applying the clear, bright-line rule established by the Tax Commissioner in the legislative rule to the Petitioner's situation, it is clear that renting booths at its annual Trade Show is not an isolated transaction. The Petitioner is engaged in this activity in the normal, ordinary course of its business. Therefore, its sales are not isolated transactions.

> If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va. Code, 29A-4-2 (1982).

Syl. pt. 4, *Appalachian Power Co. v. State Tax Dep't*, (emphasis added). As discussed above, having determined that the statute is silent or ambiguous with respect to the precise legal issue that is required to be decided, it must be determined whether or not the State Tax Commissioner's interpretation is based on a permissible construction of the statute.

This tribunal is of the opinion that the legislative rule promulgated by the State Tax Commissioner is clearly based on a permissible construction of the statute. The Tax Commissioner's rule provides that a taxpayer who engages in such transactions in the normal and ordinary course of its business is not engaged in isolated transactions, no matter how limited the number of such transactions. It does not strain credulity to hold that a taxpayer engaged in a business engages in "the ordinary course of repeated and successive transaction of like character." In fact, one would expect that repeated and successive transactions are the reason for

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ordinary course of its business and who may sell items once or twice a year, can readily be considered to have

such taxpayer's existence. The Legislature approved this interpretation as consistent with its legislative intent. The transactions in which the Petitioner engages are repeated and successive, although they occur only once per year. In accordance with the legislative rule, they are not isolated transactions.

Having determined that the legislative rule promulgated by the State Tax Commissioner provides a reasonable interpretation of the statute, this Office is of the opinion that it must be given the full force and effect of a statute.

> Once a disputed regulation is legislatively approved, it has the force of a statute itself. . . . Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or it is arbitrary or capricious. *See* W. Va. Code, 29A-4-2 (1982).

Id. at 585, 466 S.E.2d at 436. The legislative rule, having been legislatively approved and having the full force and effect of a statute, is entitled to controlling weight. This Office is without any authority to disregard the rule. Consequently, it must be held that the Petitioner's transactions in question were not isolated transactions.

The Petitioner's third contention concerns that fact that the State Tax Commissioner used a sample period in arriving at the Petitioner's tax liability for the entire audit period. The Petitioner raises two basic contentions in challenging the Commissioner's sampling. It first contends that the legislative rules permit the State Tax Commissioner to use a sample only when the taxpayer's records are so detailed, complex or voluminous, that to base an audit on the taxpayer's entire records would be impractical or unreasonable. The Petitioner's second contention is that the sample used by the Tax Commissioner skewed the results against the

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engaged in isolated transactions.

Petitioner in an unreasonable manner, resulting in an assessment that is in excess of what the Petitioner should actually owe.

With respect to the auditing of a taxpayer's books and records, W. Va. Code St. R. § 110-15-14 (July 15, 1993) provides, in relevant part:

> 14b.3. A sample and projection auditing method is appropriate if:
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> 14b.3.1. the taxpayer's records are so detailed, complex, or voluminous that an audit of all detailed records would be impractical or unreasonable;
>
> 14b.3.2. the taxpayer's records are inadequate or insufficient, so that a competent audit for the period in question is not otherwise possible; or
>
> 14b.3.3. the cost of an audit of all detailed records to the taxpayer or the State will be unreasonable in relation to the benefits derived, and sampling procedures will produce a reasonable result.

The Tax Commissioner responds by asserting that the Petitioner failed to raise this issue in its petition for reassessment or at the time of the prehearing conference. The Tax Commissioner is correct. For that reason, this Office cannot hold for the Petitioner on this contention.

There is a valid reason for this Office to disregard this contention. While the Tax Commissioner is not entitled to due process of law, fundamental concepts of fairness dictate that the Tax Commissioner is entitled to notice of the issues that are to be joined in a hearing of this nature. Otherwise, taxpayers could routinely engage in trial by ambush, putting the Tax Commissioner at an unfair disadvantage in nearly every instance.

Another important reason for requiring the Petitioner to put the Tax Commissioner on notice is that disputes regarding audit issues are often resolved or narrowed when discussed by the parties prior to the hearing. The parties could agree on one set of numbers, and merely

contest the legal issues involved. They could agree on two sets of numbers and contest the legal issues, leaving it to this Office to decide those issues and, ultimately, the correct set of numbers.

The Petitioner maintains that its records are not so detailed, complex or voluminous that an audit of all of its records would have been impractical or unreasonable. The issue of whether or not a taxpayer's records are so detailed, complex or voluminous that an audit of all of its records is impractical or unreasonable is a judgment call, which is within the sound discretion of the Tax Commissioner. Unless clearly arbitrary, if the Tax Commissioner determines that a taxpayer's records are such that he must audit them using a sampling method, this Office has no authority to interfere with that decision by requiring the Tax Commissioner to audit all of the taxpayer's books and records or by requiring the Tax Commissioner to use some other sampling method preferred by the taxpayer.

Instead, a taxpayer must present evidence sufficient to show that the Tax Commissioner's sampling method has produced an unreasonable result. For example, a taxpayer may show that the Tax Commissioner's sample periods are so unrepresentative as to yield an unreasonable result.[3] Alternatively, the taxpayer may show that an audit of all of its books and records would have yielded a different result. In essence, the taxpayer may audit itself and present that evidence at the hearing. The burden is on the taxpayer to show that the Tax Commissioner's audit is incorrect.

The Petitioner has not presented evidence sufficient to satisfy its burden of proving that the Tax Commissioner's sampling method produced an unreasonable result. In order to satisfy such a burden, the Petitioner would need to show the results that would have been produced by a

[3] This Office will likely modify an assessment based on an audit sample only when the taxpayer makes unusual purchases. The fact that a taxpayer made more usual purchases during the sample period chosen by the Tax Commissioner will not be grounds for modification of an assessment, unless it is shown that the number of purchases is so unusual as to be unreasonable.

complete and thorough audit of its books and records, and then would have to show that it would have produced a different result. In essence, it would have to conduct a complete audit of its books and records to show that the Tax Commissioner's audit sampling approach was unreasonable. It has not done so.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. The Petitioner is exempt under the provisions of W. Va. Code § 11-15-9(42) for charges for continuing education seminars, workshops, conventions, lectures or courses put on or sponsored by the association or organization, including charges for related course materials prepared by the association or organization or by the speaker or speakers for use during the continuing education seminar, workshop, convention, lecture or course, only when the charges are made to members of the association or organization.

2. The Petitioner's rental of booths at its annual Trade Show are not exempt pursuant to the provisions of W. Va. Code § 11-15-9(a)(7), as isolated transactions, where the Petitioner engages in such rentals in the normal and ordinary course of its business.

3. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioners to show that any assessment of tax against him is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

4. The Petitioner in this matter has failed to carry its burden of showing that the Tax Commissioner's sampling method has resulted in an unreasonably excessive assessment of tax against it.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the period of April 1, 1999, through January 31, 2004, for tax in the amount of $ and interest in the amount of $, computed through April 30, 2005, for a total assessed tax liability of $, should be and is hereby **AFFIRMED**.