REDACTED DECISION -- 04-784 U -- BY ROBERT W. KIEFER, JR., ALJ -- SUBMITTED for DECISION on OCTOBER 31, 2006 -- ISSUED on MARCH 17, 2008

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- RELATIONSHIP BETWEEN "UNIT OWNERS' ASSOCIATION" AND "UNIT OWNERS -- A "unit owners' association," organized pursuant to the provisions of W. Va. Code § 36B-3-101, as last amended, and its unit owners, who have a statutorily created ownership interest in the "common elements" of their "common interest community," W. Va. Code §§ 36B-1-105 & 36B-2-118(f), each as last amended, operate as a single entity, and should be treated as a single entity for purposes of the consumers' sales and service tax.

CONSUMERS' SALES AND SERVICE TAX -- ASSESSMENTS FOR "COMMON EXPENSES" BY "UNIT OWNERS' ASSOCIATION" ARE NOT SALES -- The transfer of funds to a "unit owners' association" by its unit owner members in the common interest community pursuant to an assessment for the payment of the common interest community's "common expenses," W. Va. Code § 36B-2-107(a) and §§ 36B-3-102 & -115(b), each as last amended, does not constitute a sale of tangible personal property and the provision of certain selected services for purposes of the West Virginia consumers' sales and service tax. W. Va. Code § 11-15-3 [1989, 2003].

CONSUMERS' SALES AND SERVICE TAX -- ASSESSMENTS FOR "COMMON EXPENSES" BY "UNIT OWNERS' ASSOCIATION" -- A "unit owners' association" is not required to collect consumers' sales and service tax on the amount it assesses its unit owner members in the common interest community for the payment of the common interest community's "common expenses." W. Va. Code § 36B-2-107(a) and §§ 36B-3-102 & -115(b), each as last amended.

CONSUMERS' SALES AND SERVICE TAX -- PURCHASES BY "UNIT OWNERS' ASSOCIATION" -- A "unit owners' association" is required to pay consumers' sales and service tax on all of its purchases for use and consumption in its ordinary, every day operations, including the repair, maintenance and upkeep of all "common elements," unless its

purchases are otherwise exempt from the payment of consumers' sales and service tax by some other provision of the law.

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 December 13, 2004, the then 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 January 1, 2001, through September 30, 2004, for tax in the amount of $______, and interest in the amount of $______, computed through December 31, 2004, for a total assessed liability of $______. Written notice of this assessment was served on the Petitioner on December 14, 2004.

Also, on December 13, 2004, the Commissioner (by the "Division") issued a purchasers' use tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code, for the period of January 1, 2000, through December 31, 2004, for tax in the amount of $______, and interest in the amount of $______, computed through December 31, 2004, for a total assessed liability of $______. Written notice of this assessment was served on the Petitioner on December 14, 2004.

Thereafter, by mail postmarked December 27, 2004, received on December 30, 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] & 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petitions 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 corporation organized to establish, maintain, operate, manage and improve a unit owners' association (often referred to as a "homeowners' association") for landowners within the Petitioner's Development, which is located in West Virginia. (Petitioner's Exhibit No. 1.)

2. This corporation was created pursuant to the provisions of Uniform Common Interest Ownership Act, Chapter 36B of the West Virginia Code, as amended, and the provisions of a declaration of protective covenants, conditions and restrictions of the Petitioner. (Petitioner's Exhibit No. 1.)

3. Without limiting the generality of the foregoing, this corporation has the power to do the following:

> (1) To establish thereupon and to administer and enforce, existing and new covenants, conditions, restrictions, reservations, servitudes, easements, licenses, liens or assessments for the support and benefit of the corporation and the welfare or betterment of the properties and entities governed thereby:
>
> (2) To manage, regulate and control the common use and enjoyment of the lands comprising Petitioner's Development in accordance with the aforesaid Declaration;
>
> (3) To control, manage, regulate, restrict, build, maintain, improve and repair those roadways, cul-de-sacs, greenbelt areas and other lands actually located within Petitioner's Development as defined in the Declaration;
>
> (4) To establish By-laws simultaneously herewith which shall govern the administration and management of this homeowners' corporation;
>
> (5) To impose annual and special assessments upon members (which assessments may be collected in such amounts and at such intervals as the Executive Board of this corporation, or its managing agent, may impose in accordance with the Declaration, Bylaws and the aforesaid Act);

(6) To enter into contracts for the management of this Association, which may include all provisions and powers which may be delegated to a managing agent under the provisions of the Declaration, and to enter into such other contracts and agreements as may be permitted under the Declaration and the Act;

(7) To buy, sell, acquire, lease and dispose of real and personal property and equipment to carry out the purposes and needs of this corporation;

(8) To borrow and expend money, and to execute such contracts, agreements, promissory notes and other negotiable instruments as may be necessary to carry out this purpose;

(9) To pledge real and/or personal property of the corporation as collateral;

(10) To give such other security, including deeds of trust, as may be necessary to effect financing, and enter into such other financial arrangements as may, from time to time, be necessary to carry out the objects and purposes of the corporation;

(11) To maintain, repair and improve any real or personal property owned by the corporation;

(12) To have employees of the corporation to carry out its objects and purposes;

(13) To act as a tax-exempt, non-profit entity under the laws of the State of West Virginia and the Internal Revenue Code of the United States;

(14) To provide social activities and events for the enjoyment and benefit of its members;

(15) To utilize such legal process as may be necessary to effect the object and purposes of this corporation and to collect such sums and assessments as may be due it from time to time;

(16) To collect and receive contributions and revenue monies from members and other legal sources;

(17) To open banking accounts, including checking accounts, savings accounts and such other forms of deposit as the Executive Board, or its managing agent, may from time to time deem appropriate;

(18) To construct, install, extend, operate, maintain, repair and replace utilities, systems, services, or other facilities on such property as may be appropriate for the welfare or betterment of Petitioner's Development and the members hereof;

(19) To obtain and hold such licenses and franchises as may be necessary pertaining to the objects and purposes of this corporation;

(20) To do all things permitted under the provisions of the corporation laws of the State of West Virginia pertaining to non-profit entities and to do all things permitted by an owners' association by the aforesaid Act;

(21) To operate under the declarant control of the Petitioner's Corporation during the periods and in the manner permitted in the Declaration and the By-Laws. (Petitioner's Exhibit No. 1.)

4. The Petitioner Corporation is a community consisting of approximately 90 individual homes, each on a very small tract of land that is deeded in fee simple to the purchaser of each unit. The homes were built primarily in the 1980s and are very similar in appearance. All are from the same manufacturer and lot owners were not permitted to deviate from that design. (Transcript, p. 17.)

5. The homes are all pedestal homes, designed so that the foundation is much smaller than the rest of the unit. Approximately half of the unit is cantilevered out beyond the footprint of the foundation. (Transcript, p. 18.)

6. Practically all of the homes are vacation resort homes. Very seldom does anyone live in one for an extended period, and then only for relatively short period of time. (Transcript, p. 17.)

7. The size of each lot is approximately 50' x 50'. (Transcript, p. 18; Petitioner's Exhibit No. 3.)

8. The homes are approximately 900 $ft.^2$ in size. (Transcript, p. 38.)

9. Approximately 55 of the 90 homes are available to be rented by third parties. (Transcript, p. 39.)

10. Although they appear identical from the outside, there are three different sizes of homes: luxury units, large units, and small units. Different units rent for different rates. (Transcript, p. 40.)

11. All of the homes are painted gray or a similar color. All have cedar shingles or a man-made product that resembles cedar shingles. (Transcript, p. 21.)

12. The Petitioner Corporation has a lodge. The lodge has a living area with a fireplace, and offices for the staff and for the operations and rental business. Downstairs, the lodge has a private room exclusively for the use of the owners, with a kitchen and a television. There is a balcony on the rear of the lodge looking towards the ski areas. (Transcript, p. 23.)

13. The Petitioner Corporation has a heated pool, open from Memorial Day to Labor Day, which is available for use by owners and tenants. (Transcript, p. 23.)

14. The Petitioner Corporation has a miniature golf course available for use by owners and tenants. (Transcript, p. 24.)

15. The Petitioner Corporation has two tennis courts, which are HAR-TRU surfaced and fenced, for the use of owners and tenants. (Transcript, p. 24.)

16. The Petitioner Corporation has a children's playground, equipped with swings, sandbox and see-saws, for use by owners and tenants. (Transcript, p. 24.)

17. The Petitioner Corporation has two ponds, one of which is stocked with fish so that children may fish, and which is available to both owners and tenants. The other is a holding pond for the sewage system. (Transcript, at 24.)

18. Houses have been built on approximately 91 or 92 of the 103 available lots. (Transcript, p. 25.)

19. The Petitioner Corporation expedites the rental of homes to tenants. (Transcript, p. 26.)

20. To expedite home rental, the Petitioner Corporation advertises their availability. The Petitioner Corporation produces a brochure, maintains a website and purchases signage in various locations. (Transcript, p. 26.)

21. The Petitioner Corporation provides cleaning services to homes that are rented. (Transcript, p. 26.)

22. The Petitioner Corporation provides very little entertainment or activities for its homeowners or tenants. (Transcript, p. 27.)

23. The Petitioner Corporation occasionally sponsors a New Year's Eve party, although it has not done so in the last few years. The Petitioner Corporation provides a "get together" after board meetings. During the summer, the Petitioner Corporation may organize a covered dish dinner. (Transcript, p. 27.)

24. A tenant renting a home from the Petitioner Corporation has the right to use the swimming pool, the miniature golf course, the children's playground and the fishing pond. A tenant does not have the right to use the private homeowners' lounge in the lodge. (Transcript, p. 27.)

25. The Petitioner Corporation periodically paints the pedestals of the homes at no charge to homeowners. (Transcript, p. 66.)

26. The Petitioner Corporation mows all commonly-owned property. It also mows the private lots, including under the houses, which requires minimal additional effort on the part of its employees. (Transcript, p. 28.)

27. At most 7.5% of the total acreage mowed by the homeowners association belongs to private individuals; it only requires about two passes for the mower to completely mow an individual lot, and only seventy two of the ninety-plus houses have yards that require mowing. Only about 1% of the employee's time is expended mowing individual lots. (Transcript, pp. 56-57, 63-65; Petitioner's Exhibit No. 7.)

28. The Petitioner Corporation trims all trees on the commonly-owned property and all private lots. (Transcript, p. 28.)

29. The Petitioner Corporation maintains the roads by keeping the ditches and culverts clean and by replacing gravel on the roads. (Transcript, p. 28.)

30. The Petitioner Corporation maintains the swimming pool, lodge building, and maintenance garage. (Transcript, p. 28.)

31. When it snows, the Petitioner Corporation plows all of the roads in the development. As an incident to this, some or all of the land owners benefit from clearing of the mouths of their parking areas. (Transcript, p. 28.)

32. When the homeowners association plows the roads for snow, it is impossible to avoid clearing parking areas for individual houses if the parking area is parallel to the road. See Petitioner's Exhibit No. 9.

33. Even if the parking pad is perpendicular to the road, it is very short. Part of it may be on association property and the remainder may be on private property. In any event, only a single pass is required to clear the parking area. See Petitioner's Exhibit No. 10.

34. All of the services described in paragraphs 21, 25, 26, 27, 28, 29, 30, 31, 32 and 33 are rendered by employees of the Petitioner Corporation. (Transcript, p. 29.)

35. None of the services described in paragraphs 21, 25, 26, 27, 28, 29, 30, 31, 32 and 33 are rendered by independent contractors or other vendors who are not the Petitioner Corporation's employees. (Transcript, p. 29.)

36. Some time prior to the year 2000, the Petitioner Corporation may have contracted for its snowplowing services. (Transcript, p. 30.)

37. The Petitioner Corporation quit contracting out the snowplowing, at the latest, in 2002. (Transcript, p. 41.)

38. When the Petitioner Corporation began plowing snow with its own employees, it had to procure additional equipment. (Transcript, p. 41.)

39. The Petitioner Corporation currently charges its property owners $174 per month. (Transcript, p. 30.) Of that amount, $10 is for the capital and reserve expenditures; the remaining $164 is an assessment for common expenses. (Transcript, p. 54.)

40. The amount of the individual assessment for common expenses is determined through the budgeting process, which consists of estimating the costs of maintenance, less anticipated income, then dividing that amount by the number of homeowners. (Transcript, p. 30.)

41. The Petitioner Corporation collects and remits West Virginia consumers' sales and service tax on all weekly rental fees. (Transcript, p. 38.)

42. The Petitioner Corporation collects rent from tenants, retains a commission, deducts for cleaning expenses and remits the balance to the unit owner. (Transcript, p. 40.)

43. Rental commissions retained by the Petitioner Corporation constitute income which, when used to pay common expenses, can reduce the amount of the assessment paid by all homeowners. (Transcript, pp. 40-41.)

44. The Petitioner Corporation may contract out capital improvement works. For instance, the Petitioner Corporation contracted out construction of a super septic system. It also contracted out repairs to the swimming pool when a wall collapsed. (Transcript, p. 42.)

45. If a house is damaged, the owner is ultimately responsible for repairs. The owner may choose to have the repair work done by the Petitioner Corporation's employees or by outside

contractors. In either event, the owner is responsible for payment of repair costs. (Transcript, p. 42.)

46. Owners of unimproved lots at the Petitioner Corporation began paying the assessment for common expenses on November 1, 2006. (Transcript, p. 43.)

47. The Petitioner Corporation files its income tax return consistent with § 277 of the Internal Revenue Code. It first allocates its income between homeowner fee income and all other income. It then allocates its expenses between homeowner fee expenses and expenses related to other activities. Finally, the Petitioner Corporation nets its homeowner fee expenses against its homeowner fee income. If its homeowner fee expenses exceed its homeowner fee income, the difference can be carried forward to the next year as a loss against homeowner fee income. (Transcript, p. 46.)

48. The Petitioner Corporation pays consumers' sales and service tax on all of its purchases, except items purchased for resale which consist primarily of souvenirs sold at the lodge. The Petitioner Corporation collects and remits consumers' sales and service tax on items it sells at the lodge. (Transcript, p. 50.)

49. If employees of the Petitioner Corporation purchase materials such as lumber, the Petitioner Corporation pays consumers' sales and service tax at the point-of-sale. (Transcript, p. 50.)

50. When the Petitioner Corporation performs maintenance on homeowners' units, it pays consumers' sales and service tax when it purchases the materials for the repairs. When it bills the homeowners for repairs, it charges consumers' sales and service tax on the entire amount invoiced. (Transcript, p. 51; 65.)

51. The 2007 budget for the Petitioner Corporation is reflective of budgets that have been adopted by the Petitioner Corporation in preceding years. (Transcript, p. 52; Petitioner's Exhibit No. 6.)

52. Expenditures by the Petitioner Corporation, as reflected in its budget, which are not subject to West Virginia consumers' sales and service tax, include insurance, employee salaries, accounting fees, legal fees, licenses and permits, payroll packages, property tax, utilities, water system maintenance, postage and telephone. (Transcript, p. 53.)

53. In the 2007 budget, these exempt expenditures total about $_______. (Transcript, p. 53.)

54. Association expenses that are not subject to sales tax constitute 75% of the total income of the Association. (Transcript, p. 54.)

55. Of the monthly assessment for common expenses of $164, all but approximately $25 dollars is spent on maintaining water and sewer distribution at Petitioner Corporation. Of the remaining $25.00 per month, approximately $10 is attributable to maintenance and repair of the swimming pool. (Transcript, pp. 54-55.)

56. By letter dated April 10, 1990 and addressed to a certain certified public accountant (name omitted), Mr. "A," the then Director of the Legal "Division" of the Respondent, advised as follows:

> Re: **ASSESSMENTS FOR COMMON EXPENSES PURSUANT TO WEST VIRGINIA CODE § 36B-3-115 BY A COMMON INTEREST OWNERSHIP ASSOCIATION ARE NOT SUBJECT TO WEST VIRGINIA CONSUMER SALES AND SERVICE TAX**
> Legal Log No. 90-115
>
> Dear Mr. _____:
>
> This letter is in response to your letter of November 16, 1989 in which you request an opinion regarding whether common interest ownership assessments are subject to West

> Virginia Consumers [sic] Sales and Service Tax. We presume that the "common interest ownership assessments" to which you refer are "assessments for common expenses" made pursuant to W. Va. Code § 36B-3-115 by a "unit owners association" which is required for the management of a "common interest community." See W. Va. Code §§ 36B-1-103(7) and 36B-3-101.
>
> The West Virginia Consumers [sic] Sales and Service Tax is imposed on the sale of tangible personal property and the provision of certain selected services. W. Va. Code § 11-15-3. "Sale", "sales" or "selling" are defined in W. Va. Code § 11-15-2 (d) as including "any transfer of the possession or ownership of tangible personal property for consideration, . . . when the transfer is made in the ordinary course of the transferor's business." "Service" or "selected service" is defined in W. Va. Code § 11-13-2(i) as including "all non-professional activities engaged in for other persons for consideration."
>
> The purchase of goods or services are [sic] made by the "unit owners association" which pays sales tax on such purchases. Such taxable purchases are "transfers of possession" to, or "non-professional activities engaged in" for, the "unit owners association." The "assessments for common expenses" are simply a means to assure that each unit bears its proportionate share of common expenses without any subsequent "transfer of possession" to, or "activity engaged in" on behalf of, the individual units being so assessed. As a result, such "assessments for common expenses" cannot be classified as "sales" within the meaning of the West Virginia Consumers [sic] Sales and Service Tax. Therefore, it is our opinion that "assessments for common expenses" made pursuant to W. Va. Code § 36B-3-115 do not constitute sales of tangible personal property or the provision of a taxable service, subject to consumer [sic] sale[s] and service tax.

(Petitioner's Exhibit No. 8.)

57. By letter dated August 20, 1997, and addressed to a Mr. "B," the then Managing Attorney of the Technical "Section" of the Respondent's Legal "Division," the person who was the Treasurer of the Petitioner Corporation Owners' Association, Inc. made the following request:

> Dear Mr. "B":
>
> Enclosed is a copy of my letter dated January 2, 1997 and a response from Ms. "C" dated March 19, 1997. In discussion yesterday with Ms. "D", she suggested that I send the above items to you requesting a more definitive answer.

Basically we are a Homeowners' Association which collects monthly assessments from our unit owners to pay the cost of maintenance (grass cutting, snow removal, painting, road maintenance, etc.) for the common elements and to a lesser extent the individual units. We are required by certain covenants running with the land to pay these assessments. The payment of same is <u>not</u> voluntary.

Since sales taxes are paid on invoices for services performed for the Association it would seem to be double taxation if the Association was required to collect taxes on the collection of assessments to pay these shared expenses. Due to the frequency to which homeowner or unit owner associations occur in today's society (I am associated with these entities in Maryland, West Virginia and Arizona) and the lack of specific reference in West Virginia statute and regulation, I hereby request your assistance.

Thanking you in advance, I am

Very truly yours,

Treasurer

(Petitioner's Exhibit No. 5.)

58. By letter dated January 8, 1999, Mr. "B," the aforestated Managing Attorney with the Respondent, wrote to the Petitioner Corporation Owners' Association, Inc. in the care of the Treasurer, providing the following guidance:

RE: SALES/USE TAX - THE MANDATORY DUES PAID BY MEMBERS TO A HOMEOWNERS [SIC] ASSOCIATION ARE NOT SUBJECT TO SALES TAX, PROVIDED THE ASSOCIATION PAYS THE APPLICABLE SALES TAX ON ITS PURCHASES.
Legal Log # 97-207

This is in response to your letter dated August 2, 1997 concerning the Petitioner Corporation Owner's [sic] Association, Inc. (the Association). In that letter you requested an advisory opinion concerning the taxability of the dues collected from the members of the Association. Your letter states that the unit owners must pay the monthly assessments (dues) to the Association. This is not a voluntary exercise. These dues are required in certain covenants running with the land. The dues are then used by the Association to purchase maintenance related services for the Association (grass cutting, snow removal, painting, road maintenance, etc.). Sales tax is paid by the Association on the purchase of these services.

First, the State Tax Commission would like to apologize for the protracted delay in responding. At the time we received your original letter, issues directly related to your

letter were being litigated. We felt it would not be prudent to attempt to answer your request until that litigation was resolved. Thankfully, that litigation was recently resolved, and an adequate answer not inconsistent with the litigation can be given.

As a general rule, West Virginia imposes Sales Tax on all sales of tangible personal property and services in the State. W. Va. Code §§ 11-15-1 and 11-15-3. The purchaser is required to pay the appropriate Sales Tax and the vendor is required to collect the Sales Tax. W. Va. Code § 11-15-4. If the vendor fails to collect the Sales Tax, then the vendor becomes personally liable for the outstanding tax. All sales are presumed to be taxable until the contrary is clearly established. W. Va. Code § 11-15-6.

The dues paid by the unit owners/members of the Association are required to be paid. The members are not directly "purchasing" anything of value with these monthly dues. The Association is the entity that purchases the services outlined above and, therefore, it is our opinion that the Association is the ultimate consumer in the instant situation. Therefore, the Association (not the members) is responsible for paying the Sales Tax on those transactions. The members are merely making mandatory payments to the Association. As such, the dues collected from the members, as outlined above, are not subject to Sales Tax. However, it is important to note that the Association *must* pay the required amount of Sales Tax on those services purchased with the monies collected from the members.

This letter is based on the facts furnished us and the application of current West Virginia tax statutes and regulations. Should there be a modification of the facts presented or a change in pertinent tax statutes or regulations, this letter may no longer be valid.

(Petitioner's Exhibit No. 5.)

59. In August, 1999, the Respondent issued publication TSD-316, titled "Rental of Private Condominiums and Other Types of Lodging." (Joint Exhibit 1.)

60. The consumers' sales and service tax assessment reflects the Petitioner's failure to collect and remit the consumers' sales and service tax on the amount of the dues paid by its members for the above mentioned time periods.

61. The Petitioner presented no evidence respecting the purchasers' use tax assessment.

DISCUSSION

The issue presented by this matter is whether the Petitioner, is required to collect consumers' sales and service tax from unit owners on the amounts it collects from the unit owners as homeowners' association fees.

The Petitioner is a corporation that was incorporated as a unit owners' association pursuant to the provisions of W. Va. Code § 36B-3-101, as last amended. In accordance with the provisions of said section, as a unit owners' association its membership consists exclusively of all unit owners.

"'Planned community' means a common interest community that is not a condominium or a cooperative." W. Va. Code § 36B-1-103(23), as last amended. Without fully setting forth the definitions of "condominium" and "cooperative," the Petitioner does not satisfy either of those definitions.[1] Thus, by definition it is a "planned community."

"'Common elements' means: . . . (2) in a planned community, any real estate within a planned community owned or leased by the association, other than a unit." W. Va. Code § 36B-1-103(3), as last amended. The real estate that is not part of one of the units constitutes a common element. In this matter, the units are the individual houses and the real estate on which they are located. The Petitioner Corporation owns legal title to the remaining real estate in the development, including that on which the lodge, pool, miniature golf course, tennis courts, playground, garage, the two ponds and the roads are situated. This real estate owned by the association and the facilities located thereon constitute the common elements of Petitioner Corporation.

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[1] Petitioner Corporation is not a "condominium" because an undivided interest in the common elements is not vested in the unit owners. It is not a "cooperative" because all real estate is not owned by the association. The unit owners own the real estate on which their respective units are located, while the association is vested with legal title to the remaining real estate.

West Virginia Code § 36B-1-105, as last amended, provides, in relevant part:

> (b) In a condominium or planned community:
>
> (1) If there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.
>
> (2) If there is any unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no development rights.

This section makes it clear that each unit owner owns his or her unit. Each unit consists of the individual building or condominium and real estate that make up the unit, along with its proportionate share of the common elements. This property, considered together, constitutes a separate parcel of real property and is assessed as such. Thus, a unit owner has legal title to his or her physical unit and, in addition thereto, a proportionate ownership interest in the common elements.

W. Va. Code § 36B-2-118(f), as last amended, provides, in relevant part:

> (f) In a condominium or planned community, if the real estate constituting the common interest community is not to be sold following termination, title to the common elements, . . . , vests in the unit owners upon termination as tenants in common in proportion to their respective interests as provided in subsection (j)[.]

This section further evidences that the unit owners have, at the very least, a proportionate ownership interest in the common elements. This equitable ownership interest vests no later than the termination of the planned community.

The foregoing Code provisions are part of the "Uniform Common Ownership Interest Act." They must be given due consideration in the determination of this matter, because they provide the authority by which entities such as the Petitioner are created and operated. It is clear that when these provisions are considered together, as they must, unit owners are members of the

association that has legal title to the common elements. The unit owners also have an ownership interest in the common elements that is separately recognized by statute. In consideration of the foregoing, it is clear that the unit owners are also owners of the common elements.

"'Common expenses' means expenditures made by, or financial liabilities of, the association, together with any allocation to reserves." W. Va. Code § 36B-2-107(a), as last amended, provides, "The declaration must allocate to each unit: . . . (iii) In a planned community, a fraction or percentage of the common expenses of the association[.]" W. Va. Code § 36B-3-102, as last amended, permits a unit owners' association to "(3) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners." W. Va. Code § 36B-3-115(b), as last amended, provides, "Except for assessments under subsections (c), (d) and (e), all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration[.]" The exceptions do not apply here.

Pursuant to these provisions relating to common expenses, unit owners' associations are required to assess their members, the unit owners, for common expenses. Common expenses are all expenditures or financial liabilities of the association, including (if not consisting primarily of) expenditures related to common elements. The common elements include, if they don't primarily consist of, the real property owned by the association, including the buildings and structures located thereon. Thus, the association is responsible for assessing its unit owners for expenditures necessary to run the association, as well as the upkeep and maintenance of the association property or the common elements.

Giving full consideration to the ownership and management structure of common interest communities, with their associated unit owners' associations as established by the Legislature in

the "Uniform Common Ownership Interest Act," it is apparent that the unit owners' association and the individual unit owners, for all intents and purposes, operate as a single entity. A unit owners' association is merely a mechanism that permits the unit owners to act collectively with respect to some activities, and requires them to act collectively with respect to others. They have a shared ownership interest in "common elements" and act in concert to repair, maintain and otherwise keep up the common elements. Collective action involves overall management and decision making by the owners, but consists primarily around the upkeep of common property – the "common elements" – in which every unit owner has an ownership interest.

Thus, the unit owners, acting collectively through the unit owners' association, are responsible for assessing themselves the amounts necessary to run the association on a day-to-day basis and to make the necessary periodic expenditures to keep up and maintain the property owned by the association. The association has legal title to the association property but, by statute, the unit owners have an ownership interest in the common elements. In assessing the unit owners for the costs of the common expenses of the association, they are, in effect, assessing themselves for the maintenance and upkeep of their own property. The unit owners' association is merely a vehicle for the unit owners to act collectively to protect their common property. Another way to look at this statutory scheme is to say that the statute simply provides the unit owners an efficient mechanism for pooling their funds, so that those funds may be expended for the unit owners' own common, collective purposes.[2]

The April 10, 1990 letter issued by Mr. "A," the then Director of the Respondent's Legal "Division," and the January 8, 1999 letter issued by Mr. "B," the then Managing Attorney with

[2] While 26 U.S.C. § 277 recognizes the true nature of the relationship between unit owners and unit owners' associations, and treats them in the same manner for purposes of the federal income tax, it does not constitute binding precedent, either factually or as a legal principle, and is not controlling.

the Respondent's Technical "Section," both seem to recognize that this is the nature of these types of transactions, although neither mentions the "Uniform Common Ownership Interest Act" by name. Clearly Mr. "A" was aware of the act, because he discussed "unit owners' associations" by name and cited to Chapter 36B. Mr. "A" first cites the statutes which define the transactions on which consumers' sales and service tax is imposed. He then goes on to state:

> The purchase of goods or services are [sic] made by the "unit owners association" which pays sales tax on such purchases. Such taxable purchases are "transfers of possession" to, or "non-professional activities engaged in" for, the "unit owners association." The "assessments for common expenses" are simply a means to assure that each unit bears its proportionate share of common expenses without any subsequent "transfer of possession" to, or "activity engaged in" on behalf of, the individual units being so assessed. As a result, such "assessments for common expenses" cannot be classified as "sales" within the meaning of the West Virginia Consumers [sic] Sales and Service Tax. Therefore, it is our opinion that "assessments for common expenses" made pursuant to W. Va. Code § 36B-3-115 do not constitute sales of tangible personal property or the provision of a taxable service, subject to consumer [sic] sale[s] and service tax.

Mr. "B's" letter refers to the same statutes as those cited by Mr. "A." Mr. "B's" letter states:

> The dues paid by the unit owners/members of the Association are required to be paid. The members are not directly "purchasing" anything of value with these monthly dues. The Association is the entity that purchases the services outlined above and, therefore, it is our opinion that the Association is the ultimate consumer in the instant situation. Therefore, the Association (not the members) is responsible for paying the Sales Tax on those transactions. The members are merely making mandatory payments to the Association. As such, the dues collected from the members, as outlined above, are not subject to Sales Tax. However, it is important to note that the Association *must* pay the required amount of Sales Tax on those services purchased with the monies collected from the members. (Emphasis in original.)

A mere seven months after issuance of Mr. "B"'s letter, the State Tax Commissioner altered his prior ruling respecting the treatment of unit owners' association dues. He did so by means of a document designated "TSD-316."[3]

It is not entirely clear the status to which a TSD is entitled under the law. In order to determine the degree of deference or weight to be accorded a TSD, if any, this Office must first determine exactly what a TSD is.

West Virginia Code § 29A-1-2(i) provides, in relevant part, the definition of "rule:"

> (i) "Rule" includes every regulation, standard or statement of policy or interpretation of general application and future effect, . . . , affecting private rights, privileges or interests, . . . , adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it . . . . Every rule shall be classified as "legislative rule," "interpretive rule" or "procedural rule," all as defined in this section, and shall be effective only as provided in this chapter[.]

Since TSD-316 appears to be a standard or statement of policy or interpretation of general application and future effect, affecting private rights, privileges or interests, and is adopted by the Tax Commissioner to implement, apply, interpret and make specific the law enforced by him, it must be considered a "rule." By statute, it must be either a "legislative," "interpretive" or "procedural." The "rule" TSD-316 clearly is not a "legislative rule," as it does not meet the statutory definition, W. Va. Code § 29A-1-2(d), and did not go through the rigorous promulgation process required of a legislative rule. It is not a "procedural rule," as it clearly does not meet the statutory definition, W. Va. Code § 29A-1-2(g).[4]

West Virginia Code § 29A-1-2(c) provides, in relevant part, the definition of "interpretive rule:"

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[3] Publications designated "TSD-__" are publications issued by the Respondent's Taxpayers' Service "Division."

[4] It is not necessary to reproduce the definition herein.

> (c) "Interpretive rule" means every rule, as defined in subsection (i) of this section, adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests. An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the exercise of private rights or privileges nor to confer any right or privilege provided by law and is not admissible in any administrative or judicial proceeding for such purpose, except where the interpretive rule established the conditions for the exercise of discretionary power as herein provided. However, an interpretive rule is admissible for the purpose of showing that the prior conduct of a person was based on good faith reliance on such rule. The admission of such rule in no way affects any legislative or judicial determination regarding the prospective effect of such rule. Where any provision of this code lawfully commits any decision or determination of fact or judgment to the sole discretion of any agency or any executive officer or employee, the conditions for the exercise of that discretion, to the extent that such conditions are not prescribed by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove such conditions[.][5]

Of the three types of rules created by the Code, TSD-316 comes closer to satisfying the definition of an "interpretive rule" than either of the other types. For purposes of this discussion, TSD-316 must be considered an interpretive rule.

Because TSD-316 is to be considered an "interpretive rule," it must be noted at the outset that there is nothing in the record to disclose that it was properly promulgated as an "interpretive rule." W. Va. Code § 29A-3-1 provides, "[E]very rule and regulation (including any amendment of or rule to repeal any other rule) shall be promulgated by an agency only in accordance with this article and shall be and remain effective only to the extent that it has been or is promulgated in accordance with this article." W. Va. Code § 29A-3-4 provides, "(a) When an agency proposes a procedural rule or an interpretive rule, the agency shall file in the State Register a

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[5] While not particularly relevant here, portions of this definition of "interpretive rule" appear to conflict with the definition of "rule," set forth previously.

notice of its action, including the text of the rule as proposed." It is unclear whether TSD-316 was filed in the State Register as an interpretive rule. If it was not, it is invalid and is of no force and effect. If it is invalid, this Office is not required to give it any deference or weight to which a properly promulgated interpretive rule is entitled.

If TSD-316 was properly promulgated as an interpretive rule, then it should be accorded the degree of weight or deference to which interpretive rules are entitled. In *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 466 S.E.2d 424 (1995), the Supreme Court discussed the three types of rules created by W. Va. Code § 29A-1-2, including interpretive rules. In discussing interpretive rules, the Supreme Court stated that they only clarify existing law and, therefore, do not need to go through the legislative authorization process. More importantly the court stated:

> Although they are entitled to some deference from the courts, interpretive rules do not have the force of law nor are they irrevocably binding on the agency or the court. They are entitled on judicial review only to the weight that their inherent persuasiveness commands. We believe that [*General Elec. Co. v.*] *Gilbert*[,] [citation omitted] furnishes the appropriate analysis for reviewing interpretive rules:
>
> > "'We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, all those factors which give it the power to persuade, if lacking power to control.'" [Cites omitted.]

Id. at 583, 466 S.E.2d at __.

For purposes of this decision, it will be assumed that TSD-316 was properly promulgated and that it should be considered an interpretive rule. This Office would be required to accord it the weight its inherent persuasiveness demands. Such weight would depend on the thoroughness

evident in its consideration, the validity of its reasoning, its consistency with later and earlier pronouncements and all other factors which give it the power to persuade. *Id.* A review of TSD-316 discloses that it is entitled to little or no weight once consideration is given to the factors articulated in *Appalachian Power*.

TSD-316 provides, in relevant part:

> The West Virginia State Tax Department has received many questions about the sales and use tax considerations associated with the rental of private houses, condominiums, or apartments and the rental of sleeping rooms at bed and breakfast inns, tourist homes, rooming houses, or other types of lodging. This publication answers many of these questions. However, it is not a substitute for tax laws or regulations.
>
> * * * *
>
> **Homeowners [sic] Association Fees**
>
> In instances where individuals are billed a monthly maintenance fee by a homeowners [sic] association to pay for taxable services provided by the association such as security, road maintenance, pest control, fire protection, and housekeeping, consumers sales and service tax must be charged on the monthly fee at the time of billing. If charges for both taxable and nontaxable service are included in the maintenance fee, then a breakdown of the amounts attributable to taxable and nontaxable services must be maintained by the association. Failure to do so will result in the entire maintenance fee being treated as taxable upon audit.
>
> The association may issue an exemption certificate to any third party provider of these services and assert a purchase for resale exemption.
>
> The imposition of the consumers sales and service tax depends on whether the activity performed by the provider is a taxable service. Below are examples of table and nontaxable service commonly provided by homeowners associations or similar organizations:
>
> **TAXABLE**
>
> | | |
> |---|---|
> | Road Maintenance | Pest Control |
> | Parking Lot Maintenance | Housekeeping |
> | Snow Removal | Television Cable Charges (for internal distribution) |
> | Security | Telephone Lines (for internal distribution) |
> | Fire Protection | |
>
> **NONTAXABLE**
>
> Bona-fide Association Dues
> Trash & Refuse Collection (if provided by a PSC regulated company)

Water & Sewer (if provided by a PSC regulated company)

(Joint Exhibit No. 1.)

First, it appears that the Respondent gave little consideration to the facts and the law in producing TSD-316, much less thorough consideration. At the risk of sounding like this Office is nitpicking, the TSD makes no reference to the fact that the "homeowners [sic] association" identified therein is a "unit owners' association" under the "Uniform Common Ownership Interest Act." Due consideration of the "Uniform Common Ownership Interest Act" is important in the context of the issue to be decided. The "Uniform Common Ownership Interest Act" confers certain rights and imposes certain duties on unit owners' associations and unit owners. As discussed above, these rights and duties confer a certain uniformity of interest and ownership on the unit owners' association and the unit owners. In effect, the Act requires the two operate as a single entity. Thus, unless TSD-316 concerns unit owners' associations, it is of little relevance to this matter.

Nothing in the TSD gives any indication that the Respondent considered the provisions of the "Uniform Common Ownership Interest Act." Nothing indicates that he was familiar with the "Uniform Common Ownership Interest Act." Did he consider the provision that vests each unit owner with a proportionate share of the common elements? Did he consider that the unit owners are the sole and exclusive members of the unit owners' association? Did he consider that the "Uniform Common Ownership Interest Act" and the unit owners statutorily act as a single entity? Did he consider that when unit owners are assessed for the upkeep and maintenance of common elements, they in effect impose the assessments on themselves? Was he aware that the expenditure of funds on common elements is an expenditure on property in which the unit owners have an ownership interest that is conferred by statute? Was he aware that upon termination of the common interest community, the unit owners are vested with an undivided

ownership interest in all of the common elements? TSD-316 gives no indication of whether or not the answer to any of these questions was affirmative or negative, or whether they were even considered. Knowing the answers to these questions would allow this Office to judge the degree to which the Tax Commissioner analyzed this situation. It would also allow this Office to determine the facts and legal considerations on which he relied. It would allow this Office to determine the degree to which he applied the correct legal standard.

A related consideration is the fact that TSD-316 refers to "homeowners associations[s]." A homeowners' association may be a unit owners' association, or it may be some other similar organization that does not have the same statutory rights and duties. A "homeowners' association" may not be the same as a "unit owners' association." It may be that TSD-316 contemplated a unit owners' association. It may be that it contemplated organizations that operate differently, that do not have the unity of ownership between the unit owners and the association. The type of organization contemplated by the State Tax Commissioner is not made clear by the TSD.

Little weight can be conferred on the TSD, because there is an apparent lack of thoroughness in the consideration that went into the TSD.

With respect to the validity of the Tax Commissioner's legal reasoning, it is impossible to determine whether the reasoning is valid. Many of the same factors considered in the immediately preceding discussion call into question the validity of the Tax Commissioner's legal reasoning. Succinctly stated, given the variety of potential situations that could be presented, it is impossible to tell whether or not the Commissioner based his decision on facts that are relevant to the Petitioner. Stated differently, the TSD is stated in general terms that may or may

not be pertinent to the Petitioner. Thus, it is impossible to assess the validity of the Commissioner's reasoning.

Clearly, the TSD is inconsistent with the Tax Commissioner's prior pronouncements. In fact, the Commissioner appears to have taken a position that is a polar opposite of prior letter rulings issued by his Office. One decision was longstanding, having been issued in 1990. The other had been issued a mere seven months before. No reason was given for the reversal in policy.

A review of the two letter rulings entitles them to greater weight than the TSD. A primary consideration in the 1990 letter ruling is the "Uniform Common Ownership Interest Act" and, specifically, the structure and purposes of the common interest communities and unit owners' associations created thereunder. Presumably the Commissioner's personnel reviewed the statute and gave due consideration to these factors. The text and the analysis certainly indicate that this was done. The 1999 letter ruling does not explicitly rely on the "Uniform Common Ownership Interest Act." However, the legal analysis indicates the same reliance. There is nothing to indicate that the same factors were considered in TSD-316. Considering these factors, this Office is not persuaded that TSD-316 is entitled only to minimal deference or weight, if any, to the extent that it applies to assessments paid by unit owners to unit owners' associations.

This reversal of the Tax Commissioner's position is somewhat problematic because the letter rulings appear to have been based on a recognition and understanding of the "Uniform Common Ownership Interest Act" that was involved also, apparently, in TSD-316. This tends to lend greater weight to the persuasiveness of the letter rulings in the present situation for several reasons. First, it can be assumed that the facts of the letter rulings are more relevant to the

present situation, because the Petitioner was created under the same statutory scheme as was considered in the letter rulings. Second, they clearly gave consideration to the statutory scheme under which the Petitioner was created, lending credence to their legal reasoning. Third, the fact that the letter of January 8, 1999, was issued to the Petitioner herein further increases the likelihood that it gave full consideration to the facts presented herein. It is not just that the TSD is inconsistent with prior pronouncements, it is that it is inconsistent with prior pronouncements that are legally and factually more relevant.

As recognized in the letters of April 10, 1990, and January 8, 1999, the sale of tangible personal property and taxable services occurs when the unit owners' association purchases them. The unit owners' association does not resell the property or services to its individual members. The unit owners' association is, in effect, the individual unit owners engaging in collective action. As a unit, they make purchases at the time that the vendor sells the property or provides the service. The evidence is that the unit owners' association pays the consumers' sales and service tax on those purchases at that time. Under of the structure of the "Uniform Common Ownership Interest Act" this is wholly proper and legally correct.

If the Legislature had not enacted the "Uniform Common Ownership Interest Act," the position taken by the State Tax Commissioner might be viable. Depending on circumstances, the unit owners' association could be considered a separate business entity, owning its own real estate in which the unit owners have no legal title or equitable title, or other interest. The association might be operating with its own business purpose, one of which is providing tangible property and taxable services to its members. However, the "Uniform Common Ownership Interest Act," gives a statutory, legislative *imprimatur* to the idea that the unit owners are the actual owners of the common elements and that the association exists merely for the purpose of

facilitating the maintenance and upkeep of those common elements. In essence, the unit owners and the unit owners' association are one and the same. Being one and the same, the unit owners' association cannot be required to collect consumers' sales and service tax on the amounts that it assesses the owners, that is, the unit owners cannot be required to collect consumers' sales and service tax on the amounts they assess themselves for the payment of common expenses.

In reviewing the consumers' sales and service tax audit workpapers, there is a line item for every month designated "Rental Income." The amount of "rental income" varies from month to month. These figures may include the amounts paid by the unit owners as assessments for common expenses. If this is the case, one of several things is occurring. Either the Petitioner is not collecting the same amount in assessments each month; what the auditor designated as "rental income" includes receipts for items other than assessments for the payment of common expenses; or some combination thereof. In addition, each June during the audit period, there are two line items. One is designated "Additional taxable income;" the other is designated "Exempt purchases/tax paid." Absent some further delineation in the audit workpapers, it is impossible to determine exactly how these items relates to the assessments for "common expenses" that need to be removed from the assessment. It is impossible to make this determination both with respect to the nature of the receipts and the amount thereof.

Accordingly, it will be necessary for the parties to provide this Office with a computation of the amounts to be removed from the audit, and a computation showing the amount by which the consumers' sales and service tax assessment must be reduced, and the amount of consumers' sales and service tax that remains due and owing, if any.

CONCLUSIONS OF LAW

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

1. 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 § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. A "unit owners' association," organized pursuant to the provisions of W. Va. Code § 36B-3-101, as last amended, and its unit owners, who have a statutorily created ownership interest in the "common elements" of their "common interest community," W. Va. Code §§ 36B-1-105 & 36B-2-118(f), each as last amended, operate as a single entity, and should be treated as a single entity for purposes of the consumers' sales and service tax.

3. The transfer of funds to a "unit owners' association" by its unit owner members in the common interest community pursuant to an assessment for the payment of the common interest community's "common expenses," W. Va. Code § 36B-2-107(a) and §§ 36B-3-102 & -115(b), each as last amended, does not constitute a sale of tangible personal property and the provision of certain selected services for purposes of the West Virginia consumers' sales and service tax. W. Va. Code § 11-15-3 [1989, 2003].

4. A "unit owners' association" is not required to collect consumers' sales and service tax on the amount it assesses its unit owner members in the common interest community for the payment of the common interest community's "common expenses." W. Va. Code § 36B-2-107(a) and §§ 36B-3-102 & -115(b), each as last amended.

5. A "unit owners' association" is required to pay consumers' sales and service tax on all of its purchases for use and consumption in its ordinary, every day operations, including the repair, maintenance and upkeep of all "common elements," unless its purchases are otherwise

exempt from the payment of consumers' sales and service tax by some other provision of the law.

6. The Petitioner in this matter has carried its burden of showing that it is not required to collect consumers' sales and service tax on the amounts that it assesses its unit owner members for the payment of their common expenses.

7. Having failed to present any evidence respecting purchasers' use tax, the Petitioner has failed to carry its burden of showing that the purchasers' use tax assessment is erroneous, unlawful, void or otherwise invalid.

DISPOSITION AND ORDER

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers' use tax assessment issued against the Petitioner for the period of January 1, 2000, through December 31, 2004, for tax in the amount of $______, and interest in the amount of $______, computed through December 31, 2004, for a total assessed liability of $______, should be and is hereby **AFFIRMED**.

It is **ALSO** 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 January 1, 2001, through September 30, 2004, for tax in the amount of $______, and interest in the amount of $______, computed through December 31, 2004, totaling **$______**, should be and is to be **MODIFIED** or **ABATED**. However, after a review of the consumers' sales and service tax audit workpapers, it is impossible to determine exactly whether the assessment should be abated or should be modified, and if it is to be modified, it is impossible to determine that amount by which it should be modified. Accordingly, it is **HEREBY ORDERED**:

1. That within twenty (20) days of receipt of this Decision, the Petitioner shall submit a computation showing the amount by which it contends the assessment shall be reduced, and the amount of the consumers' sales and service tax that remains due and owing, if any;

2. That within twenty (20) days of receipt of the Petitioner's computation, the Respondent shall either agree to the Petitioner's computation, in writing, or submit a computation showing the amount by which it contends the assessment shall be reduced, and the amount of the consumers' sales and service tax that remains due and owing, if any;

3. That if the parties cannot agree as to the amount by which the assessment shall be reduced and the amount of the consumers' sales and service tax that remains due and owing, then the parties shall schedule a hearing with this Office for a date that is no later than sixty (60) days following the issuance of this Decision.

Interest continues to accrue on any unpaid tax until the liability is fully paid.