

SANITIZED DECS. – 03-529C, 03-530 N, 03-531 W & 03-532 FN – BY – GEORGE V. PIPER – ISSUED – 11/17/03

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- CORPORATE NET INCOME TAX -- BUSINESS FRANCHISE TAX AND WITHHOLDING TAX – PETITIONS FOR REASSESSMENT DISMISSED -- Refusal or failure to appear at a scheduled prehearing conference pursuant to 121 C.S.R., 1 § 49.1 et. seq. may result in a finding of default as set forth in 121 C.S.R. 1, §§ 49.9 and 54 (Apr. 20, 2003) and the dismissal of Petitioner's petitions for reassessment for failure to prosecute, under 121 C.S.R. 1, § 54.2 (Apr. 20, 2003).

CONSUMERS' SALES AND SERVICE TAX – CORPORATE NET INCOME TAX – BUSINESS FRANCHISE TAX AND WITHHOLDING TAX – BURDEN OF PROOF NOT MET – Refusal by the Petitioner to allow its tax records to be audited after repeated attempts by the tax auditor to review same mandates that the tax figures be upheld in toto because Petitioner has failed to show that the assessments are incorrect and contrary to law, in whole or in part, see by W. Va. Code § 11-10A-10(e) and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

FINAL DECISION

The Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner.

Thereafter, the Director of this Division of the Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner. This assessment was for the period of January 1, 2000 through April 30, 2003, for tax, interest, through June 30, 2003, and no additions to tax.

Also, the Commissioner issued a corporate net income tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 24 of the West Virginia Code, for the period of January 1, 2000 through December 31, 2002, for tax, interest, through June 30, 2003, and no additions to tax.

Also, the Commissioner issued a business franchise tax assessment against the Petitioner under the provisions of Chapter 11, Articles 10 and 23 of the West

Virginia Code, for the period of January 1, 2000 through December 31, 2002, for tax, interest, through June 30, 2002, and no additions to tax.

Also, the Commissioner issued a withholding tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code for the period of January 1, 2000 through December 31, 2002, for tax, interest, through June 30, 2003, and no additions to tax.

Thereafter, by mail, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions for reassessment.

The required prehearing conference on the petitions was scheduled pursuant to 121 C.S.R. 1, § 49.1, and the Petitioner and its representative were served with statutory notice of the prehearing conference.

On October 30, 2003, Commissioner's counsel filed with this tribunal and with copies to both the Petitioner and to its representative, a certain public accountant, his prehearing statement, wherein he stated that all four (4) assessments were estimated because Petitioner failed to make its books and records available for audit and that at a hearing the State would offer testimony from the tax auditor regarding Petitioner's failure to cooperate with efforts to audit said books and records.

After waiting for about thirty (30) minutes after the scheduled starting time for the prehearing conference, the administrative law judge attempted to telephone Petitioner's representative but got no answer (and no answering machine service) on two (2) occasions.

Although no one had appeared on behalf of the Petitioner when same was convened, the pre-hearing conference was held, in accordance with 121 C.S.R. 1, § 49.9, resulting in a finding of default pursuant to 121 C.S.R. 1, § 54.1 and dismissal

of Petitioner's petitions for reassessment for failure to prosecute under 121 C.S.R. 1, § 54.2.

FINDINGS OF FACT

1. Commissioner's tax auditor attempted to contact Petitioner by telephone on several occasions in order to perform the audit but received no response. Petitioner's telephone number has since been disconnected.

2. Although Petitioner argues in its petitions for reassessment that all taxes are current and that it is not subject to any corporate taxes because of its subchapter S status outside of West Virginia, the fact remains that Petitioner never provided any evidence at all disproving any finding in the tax assessments.

DISCUSSION

The sole issue is whether the Petitioner made any showing that the assessment is incorrect and contrary to law, in whole or in part, as required by W. Va. Code § 11-10A-10(e) and 121 C.S.R. 1, § 63.1.

The history in this case is overwhelmingly negative for the Petitioner in that Petitioner either made itself unavailable for audit or merely left the area to avoid such an audit.

In either case, Petitioner has never provided any evidence at all to challenge the Commissioner's tax assessments. Additionally, the Petitioner has never even sought to provide actual income figures to support its position on any of the assessments nor proof that any of the assessments are unwarranted.

It should be noted that in light of the default, as noted above, which resulted in the dismissal of the petition for failure to prosecute, the scheduled hearing in this matter set for November 25, 2003, is hereby stricken from the docket.

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-taxpayer to show that the assessment is incorrect and contrary to law, in whole or in part. See W. Va. Code § 11-10A-10(e) and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the issue of whether it is exempt from corporate taxes as an surrounding state Subchapter S corporation or that the tax amounts arrived at by the tax auditor were erroneous.

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 January 1, 2000 through April 30, 2003, for tax, interest, updated through November 15, 2003, and no additions to tax, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the corporate net income tax assessment issued against the Petitioner for the period of January 1, 2000 through December 31, 2002, for tax, interest, updated through November 15, 2003, and no additions to tax, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the business franchise tax assessment issued against the Petitioner for the period of January 1, 2000 through December 31, 2002, for tax, interest, updated through November 15, 2003, and no additions to tax, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the withholding tax assessment issued against the Petitioner for the period of January 1, 2000 through December 31, 2002, for tax, interest, updated

through November 15, 2003, and no additions to tax, should be and is hereby
AFFIRMED.