

**SYNOPSIS**

**CONSUMERS' SALES AND SERVICE TAX, WITHHOLDING TAX AND PURCHASERS' USE TAX – SANCTIONS FOR FAILURE TO APPEAR AT PREHEARING CONFERENCE** – Petitioner's refusal or failure to appear at a scheduled prehearing conference upon notice thereof, pursuant to 121 C.S.R., 1 § 49.1 *et seq.*, may result in entry of an order of default against the Petitioner, as more fully set forth in 121 C.S.R. 1, §§ 49.9 and 54 (Apr. 20, 2003), and may result in dismissal of Petitioner's petitions for reassessment for failure to prosecute, pursuant to 121 C.S.R. 1, § 54.2 (Apr. 20, 2003).

**FINAL ORDER DISMISSING THE PETITION FOR REASSESSMENT AND AFFIRMING THE ASSESSMENTS AGAINST THE PETITIONER**

On or about January 20, 2004, the Field Auditing Division of the West Virginia State Tax Commissioner's Office issued three estimated assessments against the Petitioner. The assessments were as follows:

- 1) A consumers' sales and service tax assessment covering the period January 1, 1998, through September 30, 2003, for tax, interest, and additions to tax;
- 2) A purchasers' use tax assessment, also covering the period January 1, 1998, through September 30, 2003, for tax, interest, and additions to tax; and
- 1) A withholding tax assessment covering the period January 1, 1998, through December 31, 2002, for tax, interest, and additions to tax.

The assessments were issued pursuant to the authorization of the Commissioner, under the provisions of Chapter 11, Articles 10, 15, 15A and 21 of the West Virginia Code. Written notice of the assessments was served on the Petitioner.

Thereafter, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, three separate petitions for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002]. The petitions for reassessment were received on April 5, 2004. In its petition for reassessment, the Petitioner designated an accountant as its representative.

By letter dated April 20, 2004, the parties were notified that the prehearing conference required by 121 C.S.R. 1, § 49.1 was scheduled for June 8, 2004, at 1:30 p.m.\* The Petitioner and its representative were served with statutory notice of the prehearing conference, by means of certified mail, return receipt requested. The Petitioner's representative received notice on April 22, 2004, as evidenced by the PS Form 3811, Domestic Return Receipt (the "Green Card"). The Petitioner personally received notice on May 6, 2004, also as evidenced by the PS Form 3811, Domestic Return Receipt (the "Green Card").

On or about June 1, 2004, the State Tax Commissioner, by counsel, filed her required prehearing statement with this Office, serving copies of the same on the Petitioner's designated representative. In lieu of a detailed prehearing statement, the Commissioner stated that the assessments against the Petitioner were estimated because Petitioner failed to comply with the Commissioner's attempts to audit the Petitioner's books and records. The Petitioner did not file a prehearing statement.

On June 8, 2004, at approximately 1:30 p.m., the State Tax Commissioner appeared, by counsel and by those individuals identified in the caption of this Order. The Petitioner did not appear at that time. After allowing the Petitioner fifteen (15) minutes to appear, the prehearing conference commenced at approximately 1:45 p.m., without any appearance by or on behalf of the Petitioner. Upon commencement of the prehearing conference, counsel for the Commissioner moved for dismissal of the petitions for reassessment.

121 C.S.R. § 4. provides, in relevant part:

49.1. *Required.* – Except in small claim cases and except as otherwise ordered by the presiding administrative law judge, a prehearing conference shall be held in all proceedings before the office of tax appeals.

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\* In the same document, the parties were also notified that the evidentiary hearing in this matter was scheduled for June 29, 2004.

49.2. *Filing of prehearing statement.* – Not less than five (5) days before the prehearing conference, each party shall exchange and file with the executive director a prehearing statement in a form determined by the office of tax appeals.

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49.9. *Failure to appear.* -- Failure to appear at a duly scheduled prehearing conference may result in the dismissal of the appeal or the scheduling of a default hearing as provided in section 54 of this rule.

In this matter, the Petitioner failed to file the required prehearing statement. It neither asked for nor was granted a continuance of the prehearing conference. It failed to appear at the date and time of the scheduled prehearing conference, despite being served with statutory notice of that conference. Other than filing the petition for reassessment, the Petitioner's participation in the hearing process has been nil. Accordingly, because the Petitioner failed to file a prehearing statement and to attend the required prehearing conference, and because it has otherwise failed to participate in the hearing process, the Commissioner's motion to dismiss is **GRANTED**.

#### **DISPOSITION**

**WHEREFORE**, it is the **FINAL ORDER** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that, because the Petitioner failed to file a prehearing statement and to appear at the scheduled, mandatory prehearing conference, each of the three petitions for reassessment filed by the Petitioner should be and are hereby **DISMISSED**, and each of the three assessments issued by the State Tax Commissioner should be and is hereby **AFFIRMED**.