

REDACTED DECISION – DK#'S 14-089 CU-M, 14-090 W-M

**BY: GEORGE V. PIPER, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON AUGUST 26, 2014
ISSUED ON MAY 13, 2015**

SYNOPSIS

TAXATION

SUPERVISION

GENERAL DUTIES AND POWERS OF COMMISSIONER; APPRAISERS

It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

TAXATION

**WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT
COLLECTION OF TAX**

“The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

TAXATION

CONSUMERS SALES AND SERVICE TAX

AMOUNT OF TAX; ALLOCATION OF TAX AND TRANSFERS

“For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the Tax Commissioner in accordance with the provisions of this article.” W. Va. Code Ann. § 11-15-3(a) (West 2010).

TAXATION

CONSUMERS SALES AND SERVICE TAX

FURNISHING OF SERVICES INCLUDED; EXCEPTIONS

“The provisions of this article apply not only to selling tangible personal property and custom software, but also to the furnishing of all services, except professional and personal services” W. Va. Code Ann. § 11-15-8 (West 2010).

OFFICE OF TAX APPEALS

CONCLUSION OF LAW

There is an exemption from the tax in West Virginia Code Section 11-15-3(a) for services which are purchased for resale. *See* W. Va. Code R. § 110-15-33.4.5 (1993).

TAXATION

WEST VIRGINIA OFFICE OF TAX APPEALS

HEARING PROCEDURES

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 or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

**OFFICE OF TAX APPEALS
CONCLUSION OF LAW**

The Petitioner has met its burden of showing that the portion of the assessment issued against it for services provided to Management Company was erroneous because those services were purchased by a Management Company for resale to another consumer.

FINAL DECISION

On January 15, 2014, the Auditing Division of the West Virginia State Tax Commissioner's Office (the Respondent) issued two Audit Notices of Assessment against the Petitioner. These assessments were issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq*, of the West Virginia Code. The first assessment was for withholding tax for the period January 1, 2010, through June 30, 2013, for tax in the amount of \$_____, interest in the amount of \$_____ and additions to tax in the amount of \$_____, for a total assessed tax liability of \$_____. The second assessment was for combined sales and service and use tax for the period January 1, 2010, through June 30, 2013, for tax in the amount of \$_____, and interest in the amount of \$_____, for a total assessed tax liability of \$_____. These two assessments represent a combined total tax liability of \$_____. Written notice of these assessments was served on the Petitioner as required by law.

Thereafter, on March 17, 2014, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010).

Subsequently, notice of a hearing on the petitions was sent to the Petitioner, and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10. However, prior to a hearing being held, the Petitioner stated that it was no longer contesting the assessment for withholding tax.

FINDINGS OF FACT

1. The Petitioner is a West Virginia corporation with its principal place of business in a West Virginia county.

2. The Petitioner's business is providing landscaping, snow removal, and simple business maintenance, for both residential and commercial clients.

3. Sometime in 2013, an auditor with the Tax Department audited the Petitioner's business.

4. During this audit it was determined that the Petitioner was providing services to a business called a Management Company; however, the Petitioner was not collecting and remitting consumers sales and service taxes on these services.

5. The auditor discussed with the Petitioner its failure to collect and remit taxes on the services provided to a Management Company, and the Petitioner explained that a Management Company was just a middleman, and that the actual consumer of the services was the federal government. The auditor then asked the Petitioner to produce exemption certificates from a Management Company; however, none was provided.

6. Due to the fact that no exemption certificates were produced, and that the auditor had no familiarity with a Management Company, the services provided were deemed to be subject to the consumers sales and service tax. This determination led to the assessment that forms the basis of this appeal.¹

¹ A small portion of the assessment involves an improper remittance of use taxes. At hearing, the parties agreed that if this Tribunal were to rule for the Petitioner regarding services provided to a Management Company, the parties would need to consult and recalculate in order to arrive at the proper amount of use tax due and owed.

DISCUSSION

There are numerous provisions in West Virginia's taxing statutes regarding how services like those provided by the Petitioner are taxable. *See e.g.* W. Va. Code Ann. § 11-15-3(a)(West 2014) (For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser, the tax as provided under this article, and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article); W. Va. Code Ann. § 11-15-8 (West 2014) (The provisions of this article apply not only to selling tangible personal property and custom software, but also to the furnishing of all services, except professional and personal services); W. Va. Code Ann. § 11-15-6(b) (West 2014) (To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established). Section 6(a) of Article 15 states:

The burden of proving that a sale or service was exempt from the tax shall be upon the vendor, unless the vendor takes from the purchaser an exemption certificate signed by and bearing the address of the purchaser and setting forth the reason for the exemption and substantially in the form prescribed by the tax commissioner

Id. Finally, there is an exemption for services which are purchased for resale. *See* W. Va. Code R. § 110-15-33.4.5 (1993).

The dispute between the parties in this matter centers around the auditor's unfamiliarity with a Management Company and the Petitioner's inability to obtain exemption certificates. The auditor testified that he uses his firsthand knowledge and common sense during audits, and that if the Petitioner had, for example, been providing services for a board of education he would not have required exemption certificates before he would have felt comfortable finding the services to have been exempt. At the evidentiary hearing in this matter, an employee of the Petitioner testified

that a Management Company was not the ultimate consumers of its services and that the ultimate consumer was the federal government. This employee's testimony was unrebutted and by the end of the hearing the auditor testified that he was now satisfied that the services at issue were, in fact, exempt.

This is a curious case. We are sympathetic to the auditor's plight. One cannot expect him to be clairvoyant and know for certain that a Management Company was not the ultimate consumer of the Petitioner's services, or that the federal government was the ultimate consumer. On the other hand, it is not clear why the Petitioner could not establish those facts prior to proceeding to an evidentiary hearing. For example, the Petitioner could have provided the auditor or Tax Commissioner's counsel with a copy of its contract with a Management Company, which presumably would show that it is not the ultimate consumer. However, the Petitioner still has not provided any documents showing the nature of its relationship with a Management Company. Therefore, the only evidence in this matter is the unrebutted testimony of the Petitioner's secretary and we must decide if that will be sufficient to allow the Petitioner to prevail.

This Tribunal is not bound by the West Virginia Rules of Evidence. Rather, it may "admit and give probative effect to evidence of a type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs." W. Va. Code Ann. § 11-10A-10(c) (West 2010). We have always taken that language to mean that we should use common sense in weighing the probative effect of evidence before us. Common sense suggests that an employee would not falsely swear to facts that could so easily be disproved. Despite the Petitioner's difficulties in obtaining exemption certificates from a Management Company, one would only have to visit the lobby of the building or the record room at the courthouse, to establish who is the ultimate consumer. Therefore, any lies by the Petitioner's witness would be easy to discover. Our opinion about the

veracity of the Petitioner's evidence is bolstered by the fact that by the end of the hearing the auditor testified that he would now feel more comfortable granting the requested exemption. As a result, we rule that the Petitioner has met its burden of showing that the portion of the assessment in this matter regarding services provided under its contract with a Management Company should be vacated.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. "The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable." W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. "For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the Tax Commissioner in accordance with the provisions of this article." W. Va. Code Ann. § 11-15-3(a) (West 2010).

4. "The provisions of this article apply not only to selling tangible personal property and custom software, but also to the furnishing of all services, except professional and personal services" W. Va. Code Ann. § 11-15-8 (West 2010).

5. There is an exemption from the tax in West Virginia Code Section 11-15-3(a) for services which are purchased for resale. *See* W. Va. Code R. § 110-15-33.4.5 (1993).

6. 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 or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

7. The Petitioner has met its burden of showing that the portion of the assessment issued against it for services provided to a Management Company was erroneous because those services were purchased by a Management Company for resale to another consumer.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals, that the assessment issued against the Petitioner on January 15, 2014, for combined sales and service and use tax for the period January 1, 2010, through June 30, 2013, for tax in the amount of \$ _____, and interest in the amount of \$ _____, for a total assessed tax liability of \$ _____ is hereby **MODIFIED** to reflect a tax due of \$ _____.

Interest continues to accrue on this unpaid tax until this liability is fully paid. W. Va. Code Ann. § 11-10-17(a) (2010).

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____

George V. Piper²
Administrative Law Judge

Date Entered

² Chief Administrative Law Judge, A. M. "Fenway" Pollack heard this matter; however, Judge Pollack is no longer with the West Virginia Office of Tax Appeals. Therefore, the entered decision was prepared and signed by Administrative Law Judge, George V. Piper.