

REDACTED DECISION – DK# 15-310 CU

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON APRIL 18, 2018
ISSUED ON MAY 3, 2018**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On July 29, 2015, the Auditing Division of the West Virginia State Tax Department (the Tax Commissioner or Respondent) issued an Audit Notice of Assessment against the Petitioner. This assessment was 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 assessment was for combined sales and use tax for the period January 1, 2010, through December 31, 2014, for tax in the amount of \$ _____ and interest in the amount of \$ _____, for a total assessed tax liability of \$ _____.

Thereafter, on September 10, 2015, 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 petition was sent to the Petitioner, and, in accordance with the provisions of West Virginia Code Section 11-10A-10, a hearing was held on

July 27, 2016, after which the parties filed legal briefs. A second evidentiary hearing was held on April 18, 2018¹.

FINDINGS OF FACT

1. Petitioner is an out-of-state limited liability company, with its principal place of business in _____.

2. Petitioner provides specialized travel accommodation services to corporate clients throughout the United States. For example, Petitioner may contract with a national tree removal company and provide the lodging when its crews travel to locations to do repairs after a storm. As part of its specialized service, the Petitioner will research room prices, give the client various hotel options, book the rooms, have the billing sent to its corporate offices for review and perform personalized services, depending on the client's needs. These personalized services include things like ensuring that the client's employees don't incur extra room charges or ensuring that if certain employees leave the job location early each hotel room usage is utilized by at least two workers.

3. The President and CEO of the Petitioner is a licensed travel agent.² TR P17 20-21.

4. Petitioner's business model provides two income streams. First, as a licensed travel agent they receive a commission on each room booked. This commission comes from the hotel. TR P18-19 3-18. Additionally, they charge their clients two dollars (\$2.00) per room per night as a service fee. TR P26 12-13.

¹ The first evidentiary hearing in this matter was conducted by Chief Administrative Law Judge Heather Harlan. Since the date of the hearing, Judge Harlan has resigned her position. The second evidentiary hearing was held by Chief Administrative Law Judge A.M. "Fenway" Pollack, and he authored this decision as well.

² Petitioner's Exhibit 2 is an accredited travel agent card that lists both the name of the business and also has a picture and the name of Petitioner's President and CEO. The record is unclear if this card is for the company as a whole or just for its President and CEO as an individual. However, this omission does not affect our decision.

5. When it books rooms for its clients Petitioner will obtain the most favorable rate in one of two ways. It will either book the room at what it calls its “overarching agreement” rate, which is a rate it obtains from national chains, and applies nationwide. TR P42 17-23. Other times, the Petitioner will contact a hotel directly and negotiate a discounted rate. TR P43-44 3-8.

6. Petitioner does not obtain any hotel rooms prior to its clients expressing a specific need. TR P9 4-15.

7. Typically, the Petitioner will not pay the hotel bill for the client. However, it will take the bills and reformat and aggregate them, add its commission and fees, and have the client send the funds to Petitioner. Petitioner will then forward on the monies to the individual hotels. TR P15 8-19. As part of this billing service, Petitioner will ensure that the West Virginia sales tax on the room rental is also paid. TR P25 7-23.

8. The auditor in this matter found that all the room reservations made by Petitioner in West Virginia were subject to sales and use tax. She assessed tax on both the two-dollar (\$2.00) service fee and on the commissions earned by the Petitioner. She did so based upon her belief that Petitioner was renting the hotel rooms and re-renting them to its clients. TR P59 2-12, TR P77 14-18.

DISCUSSION

The record in this matter shows that Petitioner earns its money two different ways. First, it charges its clients two dollars (\$2.00) per night, for every room it books, nationwide. Second, as a licensed travel agent, it earns a commission from the hotels, when it places guests in those rooms. The question before us is, which, if any, of these financial transactions are subject to West Virginia’s combined sales and use tax?

The tax at issue is found in West Virginia Code Section 11-15-3:

Vendor to collect. -- For the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article, the vendor shall collect from the purchaser the tax as provided under this article and article fifteen-b of this chapter, and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article or article fifteen-b of this chapter.

W. Va. Code Ann. §11-15-3(a) (West 2018). Vendor is a defined term in Article 15, “Vendor” means any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property or custom software. “Vendor” and “seller” are used interchangeably in this article.” W. Va. Code Ann. §11-15-2(b)(26) (West 2018). Finally, the legislative rules for consumer sales and service and use taxes contains two sections that directly pertain to travel agents and the monies earned by Petitioner. “Charges for services provided by travel agencies (such as arranging for motel accommodations, meal accommodations, reservation of rental cars, booking cruises, reserving airline tickets, arranging bus tours or selling passage on international tours for their clients) are subject to tax” W. Va. Code R. §110-15-81.1 (1993).

Commissions earned by the travel agency from services provided to various businesses such as hotels, airlines, and bus lines are subject to sales and service or use tax. These persons should either collect and remit the tax due on these commissions or obtain a direct pay permit number from the entity for whom the service was rendered.

W. Va. Code R. §110-15-81.3 (1993).

Petitioner advances numerous legal arguments regarding why it has no duty to collect and pay sales tax on the services it provides.

- ❖ It is not “renting rooms” as that term is used in the sales and service and use tax regulations.³

³ “Persons engaged in renting rooms in hotels, motels, tourist homes and rooming houses on a daily basis shall compute the consumers sales and service tax upon the daily charge.” W. Va. Code R. §110-15-38.1 (1993)

- ❖ It is not a vendor engaged in providing services in West Virginia.
- ❖ That by West Virginia's adoption of the Streamlined Sales and Use Tax Administration Act, it cannot source to West Virginia, the Petitioner's services to its clients.
- ❖ That taxing its services violates the Due Process Clause of the U.S. Constitution and the Dormant Commerce Clause, specifically prongs one and three of the Complete Auto test.

First, we address the two-dollar (\$2.00) service fee Petitioner charges to its clients. During the audit and in post hearing briefs the Tax Commissioner takes the position that because the Petitioner is renting the rooms, and then re-renting them to its clients, all the monies it earns from these activities is taxable as a furnished service in West Virginia. However, the record is clear that unlike certain online travel companies, such as Hotels.com, Petitioner never obtains control of an inventory of rooms, which it then re-rents, as the need arises. Therefore, when Petitioner contracts with XYZ Tree Removal, a (fictional) national corporation, based in Dallas, the two-dollar fee it is charging per night per room is for a host of services that are being provided, in Texas, by another out-of-state LLC. At that moment, the Petitioner is not a vendor, engaged in this state in furnishing services, as those terms are used in West Virginia Code Section 11-15-2(b)(26).

Turning now to the commissions Petitioner earns when it books hotel rooms, there are two questions. First, when Petitioner calls a West Virginia hotel directly to book rooms and negotiate a rate, is it a vendor engaged in furnishing a service in this state, and if so, does it have sufficient nexus with West Virginia, such that taxing it as a service provider would not violate the Dormant Commerce Clause.

During the first evidentiary hearing it was unclear if Petitioner's calls to West Virginia hotels directly versus booking rooms under its overarching agreement, changed the circumstances of the commissions it received. This Tribunal was unsure if those direct calls could have established sufficient nexus. However, according to the Tax Commissioner's witnesses, they do not. During the first hearing the auditor who actually performed the audit on Petitioner was asked: "ATTORNEY A: So would you agree that if it's not determined that Petitioner is a renter of these rooms that their services would not be subject to sales tax in West Virginia? MS. MILLS: If the Court decides that, yes, it'd be true." TR P 75 at 18-21. During the second evidentiary hearing the Tax Commissioner's Director of Field Auditing testified, a woman with 30 years' experience with the Tax Department. She was given a fictional scenario by the presiding administrative law judge:

JUDGE POLLACK: I'm a travel agent in Kansas City. People come in office and say we're going to a wedding in Charleston, West Virginia next week. Can you hook us up?

MS. ANGELL: Uh-huh

JUDGE POLLACK: They call up the Hampton Inn here in Charleston, they make their reservation, they send him here. They get a commission. Is that --- who's supposed to collect that service tax on that commission? The Hampton Inn here in Charleston or the travel agent in Kansas City?

MS. ANGELL: If the travel agent is located outside of West Virginia, so the commission wouldn't be subject to tax. Correct?

JUDGE POLLACK: You tell me . . .

MS. ANGELL: So, the company that we're addressing right now, we consider online travel companies, so we're auditing a different way. If we're auditing an online travel company, those issues that apparently were brought up in this audit are subject to tax. Travel agent however, located outside of West Virginia, the only time we would actually go physically audit that travel agent is if there were activities within the scope of their business that brought them into

West Virginia. If they had representatives here at present. Some of them do, some of them don't. So just to arbitrarily say all online --- or I'm sorry, all travel agents located outside of West Virginia, they would have to have some activity that would make them have presence here in order to conduct that audit. We do have out-of-state travel agents that are registered in West Virginia and paying their taxes.

TR #2 P21 at 2-11 & P22 at 13-23. Director Angell's testimony reveals two crucial facts. First, that she, like Auditor Mills, still considered Petitioner to be no different from an online travel company such as Hotels.com. Secondly, and most importantly, without a physical presence or a representative here in West Virginia, the Tax Department would not consider a traditional travel agent located outside of West Virginia to be performing a taxable service in this state, when they place travelers in hotel rooms here.

In summation, the Tax Commissioner's position in this matter has consistently been that Petitioner is akin to an online travel company that buys up an inventory of rooms and then resells them. It is puzzling that the Tax Commissioner continues to insist as such, because two times the Petitioner's President and CEO offered un rebutted testimony that they do not do that. Nor has the Tax Commissioner presented any evidence to the contrary. The evidence in this matter clearly shows that Petitioner is a travel agency, albeit one with a unique business model, but a travel agency nonetheless. If that fact, that the Petitioner is a travel agency, is taken as established, then both of the Tax Commissioner's witnesses testified that it would not be considered a vendor providing a taxable service in West Virginia.

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. “Vendor” means any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property or custom software. “Vendor” and “seller” are used interchangeably in this article.” W. Va. Code Ann. §11-15-2(b)(26) (West 2018).

4. Petitioner is not a “person engaged in this state in furnishing services”, as those terms are used in West Virginia Code Section 11-15-2(b)(26).

5. As such, it does not have the duty to collect West Virginia consumer sales and service and use taxes from its customers. *See* W. Va. Code Ann. §11-15-3(a) (West 2018).

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 assessment issued against it was erroneous, unlawful, void or otherwise invalid.

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the combined consumer sales, service and use tax assessment, issued against the Petitioner on July 29, 2015, for a total tax due of \$_____, is hereby **VACATED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. “Fenway” Pollack
Chief Administrative Law Judge

Date Entered