

**SANITIZED DECISION -- DOCKET NOS. 04-377 C & 04-378 U -- BY GEORGE V. PIPER, ALJ -- SUBMITTED for DECISION on JANUARY 20, 2006 -- ISSUED on JUNE 1, 2006**

**SYNOPSIS**

**CONSUMERS' SALES AND SERVICE TAX -- SALES OF TICKETS BY AMATEUR THEATER COMPANY NOT EXEMPT FROM COLLECTION OF TAX** -- Although Petitioner is exempt from federal income tax under Section 501 (c)(3) of the Internal Revenue Code, it is not exempt from collection of consumers' sales and service tax under W. Va. Code §11-15-11(b)(1),(2), & (3) because it did not meet the criteria set forth in (b)(1), in that performances by the amateur theater company did not improve "health and fitness" in the context of "providing recreational opportunities to the public."

**PURCHASERS' USE TAX -- PURCHASES BY AMATEUR THEATER COMPANY TAXABLE** -- Exemption for corporation under W. Va. Code §11-15-9(a)(6)(C) is not applicable to Petitioner because non-cash contributions in the form of professional and non-professional services and/or labor do not constitute "support" under W.Va. Code §11-15-9(a)(6)(F) and, therefore, Petitioner does not meet requirement that it annually received more than one-half of its support from any combination of gifts, grants, direct or indirect charitable contributions, or membership fees.

**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 April 9, 2004, the Director of this Division of the Commissioner's Office issued a consumers' sales and services tax assessment against the Petitioner. This 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 December 31, 2003, for tax of \$, interest, through March 31, 2004, of \$, and no additions to tax, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner on April 13, 2004.

Also, on April 9, 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, 1999 through December 31, 2003 for tax of \$, interest, through March 31, 2004, of \$, and no additions to tax, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner on April 13, 2004.

Thereafter, by mail postmarked June 10, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002] and 11-10A-9(a)-(b)[2002].

Subsequently, notice of a hearing on the petitions was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

At the outset of the evidentiary hearing, Petitioner's representative informed the tribunal that, because she was not a lawyer and could not, therefore, argue the legal issues involved, a continuance of the hearing would be necessary so that Petitioner could obtain legal counsel.

With Respondent's concurrence, the presiding administrative law judge continued the matter for either a hearing to be conducted in person in West Virginia or, if the facts could be jointly stipulated by counsel for the parties, the issues could be submitted for decision on briefs.

On November 18, 2005, Petitioner's legal counsel submitted in writing to Respondent's counsel a revised "Joint Stipulation of Facts" which had been orally agreed

to that same day and requested that the same be signed, dated and forwarded to this tribunal for inclusion into the record.

On December 22, 2005, Respondent's counsel signed said joint stipulation as prepared by Petitioner's counsel, and the same is now part of the record, to-wit:

. . . .

4. For all relevant periods, the Petitioner had a current business registration certificate issued by the Respondent.
5. The Petitioner is a corporation that is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code.
6. As a 501(c)(3) organization the Petitioner files Internal Revenue Service Form 990 annually to report, among other things, the amounts and sources of its support.
7. The Petitioner's "Constitution and By-laws" provide that the purposes for which it was formed are exclusively charitable, literary and educational activities and are to foster, promote, increase and develop amateur dramatics for the enjoyment and education of the general public.
8. Except for its operation of a concession stand at events, the Petitioner's revenue-producing activities are educational, charitable, or provide recreational opportunities to the public.\*

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\*It is well settled that a tribunal is not bound by a stipulation of "fact" which is contrary to the law on point. This tribunal rejects that portion of joint stipulation No. 8 stating that Petitioner's revenue-producing activities provide "recreational" opportunities to the public, based upon the ordinary definition of that term as discussed below.

9. The Petitioner operates a concession stand during its live performances to raise additional funds for its operations and it collects and remits consumers' sales tax on its concession stand sales.

10. The Petitioner offers membership and participation in its programs and activities to the general public by means of:

- (a) Announcements of upcoming events being displayed on the local shopping mall's electronic bulletin boards, on the cable access channel, and on local events websites;
- (b) painted vinyl banners advertising upcoming performances being displayed in three prominent roadway locations;
- (c) posters being displayed publicly before each performance;
- (d) flyers advertising upcoming events being distributed at various hotels, on the commuter train, and in public information areas;
- (e) complimentary tickets being donated to local radio stations for promotional giveaways to listeners;
- (f) The publication by local, daily newspapers of feature stories in their weekend sections on event opening night;
- (g) print advertisements placed in the local daily newspapers and
- (h) in its regularly updated website.

11. The Petitioner charges admission fees and membership dues in a manner which make its programs and activities accessible by a reasonable cross-section of the community as follows:

- (a) providing in its Constitution and By-laws that any person having interest in theatrical presentations or in any of the purposes mentioned above, shall be eligible for membership;
- (b) structuring its membership dues and admission fees so that membership dues and regular admission prices for stage productions ranged;
- (c) discounting the admission prices for school children at daytime performances;
- (d) discounting all matinee tickets to enable seniors to attend more economically;
- (e) providing opportunities for persons to see performances free of charge by volunteering as an usher, or simply by notifying the box office of their inability to pay;
- (f) maintaining a policy of making membership, tuition, admission, and other services available at no cost to anyone with a stated financial need;
- (g) providing full or partial scholarships to financially disadvantaged children to participate in its annual Youth Summer Workshop;
- (h) providing complimentary tickets to individuals and groups such as patients from the local hospital; and

(i) providing discounted tickets to seniors through the local centers and to school students through their schools.

12. The Petitioner's gross cash support reported on its Form 990 during the periods 1999 through 2003 was in the amount of \$.

13. The Petitioner's gross support during the period 1999 through 2003 included admission income from the sale of tickets to its various scheduled performances in the total amount of \$.

14. The Petitioner's gross support during the period 1999 through 2003 included income from the rental of its facilities to third parties in the amount of \$.

15. The Petitioner's gross support during the period 1999 through 2003 included income from the sale of advertisements in its printed programs in the total amount of \$.

16. The Petitioner's gross support during the period 1999 through 2003 included other miscellaneous income that did not represent gifts, grants, charitable contributions or membership dues in the total amount of \$.

17. The Petitioner's gross support in the year 2002 included its gross receipts in the amount of \$ from the sale of tickets, from corporate donations and grants in connection with a special performance.

18. The Petitioner's gross support during the period 1999 through 2003 included interest income in the total amount of \$, all of which was from the interest earned on the remaining balance of a substantial charitable bequest it received prior to 1999 from an estate.

19. The Petitioner's gross support during the period 1999 through 2003 included gross concession stand income in the total amount of \$.

20. The Petitioner's gross support during the period 1999 through 2003 included tuition from its Youth Summer Workshop program in the amount of \$.

21. The Petitioner's gross support during the period 1999 through 2003 included the sale of flowers and balloons in conjunction with its performances in the amount of \$.

22. The Petitioners' gross support during the period 1999 through 2003 included membership dues income (exclusive of related ticket sales) in the amount of \$.

23. The Petitioner's gross support during the period 1999 through 2003 included gifts, bequests and grants from State and local governments and private businesses in the amount of \$.

24. In addition, the Petitioner's gross support during the period 1999 through 2003 included withdrawals from the bequest fund in the total amount of \$.

25. Although it has not been the accounting policy of the Petitioner to include non-cash contributions in its reports of the sources of its support on its Form 990, tangible property donations that it also receives each year include, but are not limited to: clothing and furniture, paint, flooring, plumbing and electrical equipment, posters, linen, rope, office equipment and supplies, lumber and other building supplies.

26. The total value of the non-cash donations of tangible personal property received by the Petitioner during the period 1999 through 2003 can be objectively estimated to be in the amount of \$.

27. Although it has not been the accounting policy of the Petitioner to include such non-cash contributions in its reports of the sources of its support on its Form 990, it receives substantial donations of time by many unpaid volunteers both in connection with the live performances it presents and in connection with the various administrative duties it requires to carry out its tax exempt purposes.

28. The volunteers who provided their services to enable the Petitioner to present live performances include costume tailors, make-up artists, hair stylists, playbill designers, publicity agents, set designers and builders, box office agents, ushers, concession stand operators, stage technicians (lighting, electrical, curtain operation), actors and producers (the show volunteers).

29. Based on an hourly value for the time donated by the show volunteers to the Petitioner during the period 1999 through 2003, the total value of that time can be objectively estimated to be in the amount of \$.

30. The services provided to the Petitioner to enable it to conduct the administrative services inherently necessary to its operations include those of board members, officers and theatre clean up crews (the non-professional administrative services) and those of a certified public accountant to maintain its financial records and prepare tax returns (the professional administrative services).

31. Based on an hourly value for the time donated by those providing nonprofessional administrative services to the Petitioner during the period 1999 through 2003, the total value of that time can be objectively estimated to be in the amount of \$.



32. Based on an hourly value for the time donated by the CPA providing the professional administrative services to the Petitioner during the period 1999 through 2003, the total value of that time can be objectively estimated to be in the amount of \$.

33. The items and services purchased by the Petitioner are used and consumed in the activities for which it qualifies for exemption from federal income taxes.

### DISCUSSION

Because it is well settled that all tax exemption statutes are strictly construed against the one who is claiming the tax benefits of an exemption, *e.g.*, syl. pt.2, *Tony P. Sellitti Constr. Co. v. Caryl*, 185 W. Va. 584, 408 S.E.2d 336 (1991), *cert. denied*, 502 U.S. 1073, 112 S.C. 969, 117 L. Ed. 2d 135 (1992), the sole issue to be determined regarding the consumers' sales tax and services assessment is the correct legal interpretation of W. Va. Code §11-15-11(a)-(b).

That statute makes clear that sales of taxable services by a corporation or organization exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code are exempt from the collection of consumers' sales and services tax if all of the criteria in W.Va. Code §11-15-11(b)(1),(2), and (3) are met.

As to subsections (2) and (3) Petitioner has shown both that it makes its performances accessible to a reasonable cross section of the community by discounting tickets to those who cannot pay full price and by even giving tickets to those who volunteer to help or simply are unable to pay at all.

The problem arises with respect to subsection (1) which states as follows (emphasis added):

- (1) -- The corporation or organization is organized and operated primarily for charitable or educational purposes and its activities and programs contribute importantly to promoting the general welfare of youth, families and the aged, improving health and fitness and providing recreational opportunities to the public.

The phrase in controversy is “improving health and fitness and providing recreational opportunities to the public.”

Respondent’s counsel directs us to 110 C.S.R.15D, § 3.7, wherein the term “health and fitness” is defined to mean “physical health and fitness of individuals but does not include mental health and fitness or spiritual health and fitness.”

Although the above is only an interpretive rule and not part of the statute, the phrase “health and fitness” when coupled--which it must be--to, “and providing recreational opportunities to the public,” can lead to only one inescapable conclusion, which is that watching a theatrical performance, regardless of its content, does not rise to the level of health and fitness “providing recreational opportunities to the public.” The ordinary definition of “recreational” does not equate that term with the purely “aesthetic,” but, instead, necessarily involves some physical activity (albeit with some accompanying mental stimulation).

The Petitioner argues, in effect, that many of the relatively recent state tax precedents of the West Virginia Supreme Court of Appeals, such as *CNG Transmission Corp. v. Craig*, 211 W. Va. 170, 564 S.E.2d 167 (2002), and *Syncor Int’l Corp. v. Palmer*, 208 W. Va. 658, 524 S.E.2d 479 (2001), stand for the proposition that legislative rules or interpretive rules must not ever use or add any meaningful language not found in

the relevant statute, but, instead, must always merely “parrot” or restate verbatim -- without any variance at all (other than purely stylistic) -- what the statute says; otherwise such a legislative or interpretive rule is automatically and always invalid as in “conflict” with (enlarging or reducing) the relevant “clear” statutory language. While, at first blush, the *results* in many of the recent state tax precedents of the West Virginia Supreme Court of Appeals may give the impression that such a proposition would be accepted, this tribunal does not, however, believe that this State’s high court would confine legislative rules -- which have the force and effect of a statute once reviewed and approved by the legislature -- or even interpretive rules of an administrative agency charged with enforcing the statute (interpretive rules are not legislatively reviewed and approved) to having merely an exact “mirror role,” without a “clarification or explanatory role” on ambiguous specific points. In fact, for example, that court, in its preeminent precedent in this area, namely, *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (Cleckley, J., writing for a unanimous court; Miller., J., retired, sitting by temporary assignment to replace Albright, J.), deferred to and **upheld** the more **detailed** tax-imposition language **added** by the legislative rule to the **general** language in the relevant statute; instead of holding that the rule invalidly conflicted with the general language of the tax-imposition statute by improperly enlarging its reach, the court held that the statute was **silent**, and, therefore, **ambiguous**, as to the **specific** point in question, and the rule was **a reasonable** interpretation (not needing to be the “best” interpretation as determined by the court) that had been made (initially) by the knowledgeable agency charged with enforcing the statute. That is the case, too, in the matter now before this

tribunal, especially in the context of a tax exemption statute (construed strictly against a taxpayer).

Admission prices to events such as those performed by Petitioners are all subject to the imposition of consumers' sales and service tax, and, therefore, to extend the exemption in W. Va. Code § 11-15-11 to that of amateur theatre would most assuredly result in the exemption being misapplied, far beyond that ever intended by the West Virginia Legislature.

Accordingly, it is determined that the Petitioner is subject to the collection of consumers' sales and service tax with respect to the sale of theatre tickets.

The only issue presented for determination concerning the purchasers' use tax assessment is in reality the mirror image of the preceding issue.

W.Va. Code § 11-15-9(a)(6) states as follows:

(a) The following sales of tangible personal property and services are exempt as provided in this subsection:

.....

(6) Sales of tangible personal property or services to a corporation or organization which has a current registration certificate issued under article twelve of this chapter, which is exempt from federal income tax under Section 501 (c)(3) or (4) of the Internal Revenue Code of 1986, as amended, and which is:

.....

(C) A corporation or organization which annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions or membership fees;

.....

(F) For purposes of this subsection:

(i) The term "support" includes, but is not limited to:

(I) Gifts, grants, contributions or membership fees;

(II) Gross receipts from fundraisers which include receipts from admissions, sales or merchandise, performance of services or furnishing of facilities in any activity that is not an unrelated trade or business within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended;

- (III) Net income from unrelated business activities, whether or not the activities are carried on regularly as a trade or business;
- (IV) Gross investment income as defined in Section 509(e) of the Internal Revenue Code of 1986, as amended;
- (V) Tax revenues levied for the benefit of a corporation or organization either paid to or expended on behalf of the organization; and
- (VI) The value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170 (c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge. This term does not include any gain from the sale or other disposition of property which would be considered as gain from the sale or exchange of a capital asset or the value of an exemption from any federal, state or local tax or any similar benefit;
- (ii) The term “charitable contribution” means a contribution or gift to or for the use of a corporation or organization, described in section 170(c)(2) of the Internal Revenue Code of 1986, as amended ; and
- (iii) The term “membership fee” does not include any amounts paid for tangible personal property or specific services rendered to members by the corporation or organization[.]

W.Va. Code § 11-15-9(a)6) (emphasis added).

Petitioner’s counsel argues that more than half of the Petitioner’s annual support, during the years in question, represents subsidies, grants, gifts and/or direct or indirect charitable contributions given in order to enable it to accomplish its charitable purpose.

As stated previously, any tax exemption must be strictly construed against Petitioner, not broadly extended, and, therefore, the key element here is what constitutes the term “support” in Code § 11-15-9(a)(6)(C) as defined in (F).

This exercise would be easier but for the fact that (F)(i) states, “ the term ‘support’ includes, but is not limited to” the laundry list set forth on the preceding page beginning with Code § 11-15-9(a)(6)(F)(i)(I) through (VI) (iii).

We note that Respondent’s counsel is in agreement with opposing counsel, as are we, concerning corporate donations, membership income and gift, bequests and grants

from state and local government and private businesses, which account for almost thirty (30) percent of the overall support.

The problem with the remainder of Petitioner's argument is that it, frankly, is quite a reach (although imaginative). For example, Petitioner seeks to include in its computations to reach the fifty (50) percent threshold certain non-cash contributions as support. Specifically, Petitioner advances the argument that services provided by accountants, carpenters, electricians, lawyers (professional and craftsmen if you will), as well as those provided by "show volunteers," such as, playbill designers, set designers, box office personnel, ushers, etc., must all be included.

But "support" as defined in W. Va. Code §11-15-9(a)(6)(F)(i)(VI) is for the value of services or facilities furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge, which is not applicable in this case.

In the next subsection of the above (VI)(ii), "charitable contributions" are said to mean a contribution or a gift to or for the use of a corporation or organization described in Section 170(c)(2) of the Internal Revenue Code of 1986, as amended; however, a review of that section of the Code reveals that such contributions are to be in the form of monetary gifts and property donations, not in the form of services, regardless of how much or how little a professional or a non-professional chooses to value his or her services. The result is that none of the services which Petitioner seeks to value are applicable under the exemption statute, including the services provided by trustees or board members.

As to the financial support which Petitioner received from the Estate bequest, Respondent is correct that the Statement of Financial Accountability Standards require that the donation be recognized at the time the bequest is received, which in this case was prior to tax year 1999 and not thereafter. Further, any interest earned in subsequent years on those monies is therefore a non-gift, non-grant or a non-charitable contribution and may not be considered.

Accordingly, it is determined that, because Petitioner never received more than half of its support from any combination of gifts, grants, direct or indirect charitable contributions, or membership fees, as further defined as “support” in W. Va. Code §11-15-9(a)(6)(c) and (F), it was not exempt from purchasers’ use tax on its purchases during the audit period.

### **CONCLUSIONS OF LAW**

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

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a 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)[2002] and W.Va. Code St. R § 121-1-63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to its argument that it was not legally required to collect consumers’ sales and service tax on its sale of theatre tickets. *See* W.Va. Code St. R. §121-1-69.2 (Apr. 20, 2003).

3. The Petitioner has also failed to carry the burden of proof with respect to its argument that as a non-profit corporation all of its purchasers are exempt from purchasers' use tax.

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment against the Petitioner for the period of January 1, 2001 through December 31, 2003, for tax of \$, interest of \$, and no additions to tax, **totaling \$**, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W.Va. Code § 11-10-17(a)[2002], **interest accrues** on this consumers' sales and service tax assessment until this liability is fully paid.

It is **ALSO** 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, 1999 through December 31, 2003, for tax of \$, interest of \$, and no additions of tax, **totaling \$**, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W.Va. Code § 11-10-17(a)[2002], **interest accrues** on this purchasers' use tax assessment until this liability is fully paid.