

**SANITIZED DECISION – DOCKET NO. 04-668 C – ROBERT W. KIEFER, JR., ALJ –
SUBMITTED for DECISION on MAY 15, 2005 – ISSUED on NOVEMBER 15, 2005**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – BURDEN OF PROOF – A necessary component of satisfying a taxpayer's burden of proof requires that the taxpayer maintain complete and accurate books and records that are sufficient to show the amount of tax that it properly should have collected in accordance with the statute, the amount of tax it actually collected, and the amount of tax it remitted to the State Tax Commissioner. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

CONSUMERS' SALES AND SERVICE TAX – ISSUANCE OF ASSESSMENT BASED ON ESTIMATES AFTER INVESTIGATION BY STATE TAX COMMISSIONER – Where the Petitioner's books and records are incomplete or otherwise deficient, so as to prevent the State Tax Commissioner from arriving at a definite determination of the amount of tax that remains due and owing to the State, the State Tax Commissioner may investigate and determine or estimate the amount of tax due based on such information as is available to him. *See* W. Va. Code § 11-10A-7(a) [2002].

CONSUMERS' SALES AND SERVICE TAX – ISSUANCE OF ASSESSMENT BASED ON ESTIMATES AFTER INVESTIGATION BY STATE TAX COMMISSIONER – Where, after conducting an audit or other investigation of the Petitioner's books and records, the Tax Commissioner determines that the Petitioner's books and records are deficient or so incomplete as to prevent him from arriving at a definite computation of tax owed, he may make a determination of the amount of tax due and owing to the State based upon information he is able to glean from the Petitioner's books and records, information he is able to obtain from other sources, and such estimates and calculations as he may deem reasonable, so as to arrive at a reasonable, estimated determination of the amount of tax actually due and owing, and he may issue an assessment for the same. *See* W. Va. Code § 11-10A-7(a) [2002].

CONSUMERS' SALES AND SERVICE TAX – BURDEN OF PROOF NOT MET – The burden of proof is on the Petitioner to show that the assessment is incorrect and contrary to law, in whole or in part, and its failure to do so mandates that the assessment be upheld, either *in toto* or with respect to those issues for which it has not satisfied its burden of proof. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

CONSUMERS' SALES AND SERVICE TAX – BURDEN OF PROOF NOT MET – Where the State Tax Commissioner has made an investigation and issued an assessment based on an estimated determination of the amount of tax actually due and owing, which assessment is based in whole or in part on estimates or calculations deemed reasonable by the Commissioner, W. Va. Code § 11-10A-10(e) places upon the Petitioner the burden of proving each and every element in the assessment to be incorrect and contrary to law, and its failure to do so mandates that the assessment be upheld *in toto*, notwithstanding Petitioner's contention that the assessment could have been more exact.

CONSUMERS' SALES AND SERVICE TAX – BURDEN OF PROOF NOT MET – W. Va. Code § 11-10A-10(e) places the burden of proof upon the Petitioner to show that the assessment is incorrect and contrary to law, in whole or in part, and its failure to do so mandates that the assessment be upheld *in toto*, notwithstanding Petitioner's conjecture that the assessment could have been more exact.

CONSUMERS' SALES AND SERVICE TAX – WAIVER OF ADDITIONS TO TAX – The Petitioner's systemic failure to create and retain complete and adequate books and records, combined with its management's failure to comply with knowledge that its recordkeeping derived from an earlier audit of another taxpayer owned by the Petitioner's owner, constitutes negligence on the part of the Petitioner, justifying upholding the assessment of additions to tax under W. Va. Code § 11-10-18(c).

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 September 28, 2004, the Director of this Division issued a consumers' sales and service tax assessment against the Petitioner. The 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 May 31, 2004, for tax in the amount, interest in the amount computed through September 30, 2004, and additions to tax of in the amount for a total assessed tax liability. Written notice of this assessment was served on the Petitioner on September 30, 2004.

Thereafter by mail postmarked October 15, 2004, and received on October 18, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W.Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W.Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. The Petitioner operates a private club located in the State.
2. The Petitioner purchases beer and wine and dispenses beer and wine at retail to its customers.
3. The Petitioner purchases distilled alcoholic beverages and dispenses the distilled alcoholic beverages, primarily in the form of mixed drinks at retail to its customers
4. The Petitioner purchases food and either sells the food to its customers or provides complimentary food to its customers.
5. The Petitioner's books and records were incomplete respecting certain of its purchases.
6. The State Tax Commissioner was able to determine the Petitioner's purchases of some items by obtaining information from the Petitioner's suppliers' records respecting their sales to the Petitioner.
7. The Tax Commissioner was unable to make an exact determination respecting the Petitioner's purchases of beer products, and purchases of food and miscellaneous items.
8. In order to estimate the amount of the beer purchases and the purchases of food and other items, the Tax Commissioner was forced to resort to calculations based on certain information available to him.
9. The Petitioner disagrees with the Tax Commissioner's calculations respecting the purchases of Beer products and food items.

EQUATION USED TO CALCULATE THE PETITIONER' UNREPORTED SALES

10. The parties agree as to the equation that is used to calculate the Petitioner's Estimated Unreported Sales.
11. The parties agree that for each year of the audit period, Reported Purchases should be multiplied by the Percentage of Unreported Purchases, arriving at a product called Estimated

Unreported Purchases. See State's Exhibit No. 2, Schedule B-1; Petitioner's Exhibit No. 3 and Petitioner's Exhibit No. 6.¹

12. Based on an estimated profit margin of 70% (.70), the parties then divide Estimated Unreported Purchases by .30 to arrive at Estimated Unreported Sales.²

13. Since the Petitioner was supposed to collect and remit consumers' sales and service tax of six percent (6%) on all of its sales, but did so only on its reported sales, the Estimated Unreported Sales are multiplied by 6% (.06) to arrive at the consumers' sales and service tax the Petitioner should have collected and remitted.

14. The parties agree on that the calculation used to compute the Percentage of Unreported Purchases is the amount of Unreported Purchases divided by the Purchases as Shown on the Check Register.

15. The parties disagree as to the amounts used in arriving at the Percentage of Unreported Purchases, which causes them to disagree as to the Percentage of Unreported Purchases to be used.

CALCULATION OF UNREPORTED PURCHASES OF BEER PRODUCTS

The Tax Commissioner's Calculation

16. As shown on Schedule B-4, the State Tax Commissioner calculated the Petitioner's purchases of beer products.

17. The Tax Commissioner was able to determine the amount of the Petitioner's purchases of alcoholic beverages, other than beer products, based on records obtained from the Petitioner's suppliers.

¹ In State's Exhibit No. 2, on which the assessment is based, the Tax Commissioner uses a Percentage of Unreported Purchases of 25.88% (.2588). In Petitioner's Exhibit No. 3, in which the Petitioner uses its figure respecting unreported purchases of Beer products but accepts the Tax Commissioner's computation respecting unreported purchases from Foods, the Petitioner uses a Percentage of Unreported Purchases of 17.59% (.1759). In Petitioner's Exhibit No. 6, in which the Petitioner uses its figures respecting unreported purchases of Beer products and unreported purchases from Foods, the Petitioner uses a Percentage of Unreported Purchases of 6.78% (.0678).

18. The Tax Commissioner determined that the Petitioner made purchases of other brands of beer in the amount.

19. The Tax Commissioner determined that the market share in West Virginia for brands of beer other than beer products was .84 (84%).³

20. The Tax Commissioner assumed that the Petitioner was purchasing and selling certain beer products in the same percentage as other retailers in the State of West Virginia

21. The Tax Commissioner took, the amount of the Petitioner's purchases of other brands of beer, and divided that by .84 (84%), to arrive at an estimated total of beer purchases in the amount. Subtracting the actual purchases of other brands of beer from the total estimated beer purchases, the Tax Commissioner estimated the Petitioner's purchases of beer products.

22. The Tax Commissioner then determined the unreported purchases of beer products by taking the estimated beer purchases subtracting the known beer purchases as shown on the check register, resulting in estimated unreported purchases of beer products of.

23. The Petitioner disagrees with the Tax Commissioner's calculation of unreported purchases of beer products.

24. It maintains that it is an "upscale" bar whose clientele consists of doctors, lawyers and professionals, not a pool hall, and that it was unfair for the Tax Commissioner to apply the West Virginia market share for beer products to it. Stated differently, the Petitioner maintains that because it is an "upscale" bar, its percentage of sales of beer products is substantially less than the 16% market share for beer products sold throughout the State of West Virginia.

² The theory is that of the sales price of the product, 30% is the cost of the product and 70% is profit.

³ The audit workpapers, Schedule B-4, indicate that the Tax Commissioner was given this figure by the taxpayer. The owner testified that this information may have come from him, he having derived it from a trade magazine. He gave the figure to the president, who provided it to the Tax Commissioner.

25. The Petitioner maintains that the Tax Commissioner's method of calculating the Petitioner's purchase of beer products, as shown on the last line of Schedule B-4, is erroneous.

26. The Petitioner calculated that its purchases of beer products in two manners, both of which yield similar numbers.

Petitioner's Calculation for Beer Purchases Based on "Loss Percentage" (Schedule B-2)

27. One way the Petitioner calculated its unreported purchases of beer products was the "loss percentage" method.

28. As used by the Petitioner in this action, the term "loss percentage" refers to the percentage of Petitioner's purchases which were not paid for by means of a check recorded in its check register.

29. The Petitioner's purchases paid for by check are shown in Schedule B-2, Column 4 of the audit workpapers.

30. The Petitioner's actual purchases from its suppliers, as verified by the Tax Commissioner, are shown in Schedule B-2, Column 2.

31. The Petitioner calculated the "loss percentage" by taking the purchases from its suppliers as per the check register, and dividing it by the actual purchases, as verified by the Tax Commissioner. This yields a figure of .9356908 (93.56908%), which is the percentage of its purchases paid for by check. Subtracting this figure from 1.00 (100%) yields the "loss percentage" of .0643092 (6.43092%). This calculation is shown on Petitioner's Exhibit No. 2.

32. The Petitioner contends that this loss percentage then should have been applied to arrive at purchases from other suppliers, for which there was no evidence showing its actual purchases.

33. Using this method, the Petitioner took the amount of beer purchases as shown in its check register and multiplied it by the loss percentage of 6.43092%, yielding unreported purchase.

The Petitioner then added the unreported purchases to the purchases shown in the check register, arriving at total beer purchases.

34. This is the method that the Petitioner used to calculate the unreported purchases of beer products.

35. The Petitioner's calculation is incorrect, because it multiplies the purchases shown in the check register by the loss percentage, when it is total purchases that should be multiplied by the loss percentage to arrive at unreported purchases.

36. The proper calculation using the "loss percentage" method is to recognize that the purchases from other suppliers shown on the check register are .9356908 (93.56908%) of the total purchases from other suppliers, as verified by the Tax Commissioner. Applying this methodology to purchases of beer products, beer purchases as per the check register divided by the unknown total beer purchases would equal .9356908. This is represented by the formula $\text{beer purchases} = .9356908$, which yields estimated total beer purchases.

37. Using the proper calculation of the "loss percentage" method, yields unreported beer product purchases.

Petitioner's Calculation Based on its Percentage of Beer Products Sales (Schedule B-4)

38. The Petitioner also computed its unreported purchases of beer products based on its calculation of the percentage of beer products it sells in relation to sales of all alcoholic beverages to its customers.

39. Based on daily cash register receipts showing sales of alcoholic beverages to its customers, the Petitioner estimates that its sales of beer products are approximately 2.69% of its total sales of alcoholic beverages to its customers.

40. The Petitioner testified that this figure came from the cash register receipts that were entered into evidence at the evidentiary hearing. The Petitioner used four cash register receipts, which he described as “a rough sample.”

41. The Petitioner presented the four cash register receipts, which were from July 8, 2004, July 11, 2004, July 13, 2004 and July 14, 2004. Petitioner’s Exhibit No. 1.

42. The Petitioner then took its gross sales for each year of the audit period, which the Petitioner testified are also derived from cash register receipts, and multiplied it by 2.69% to determine its sales of beer products. For example, for the year 2003, it had gross sales. Multiplying by .0269 (2.69%) yields gross sales of beer products. *See* Petitioner’s Exhibit No. 2.

43. Using a profit margin of 70% on sales of alcoholic beverages, as determined by the Tax Commissioner, the Petitioner estimated its beer products purchases. It arrived at this figure by multiplying its sales of beer products by .30 (30%), which is sales (1.00 or 100%) minus profit (.70 or 70%).

44. Using a profit margin of 50%, which it contends is closer to the actual profit margin on beer, the Petitioner estimated its beer products purchases. It arrived at this figure by multiplying its sales of beer products by .50 (50%), which is sales (1.00 or 100%) less profit (.50 or 50%).

45. Using this method, the Petitioner concluded that unreported sales of beer products were. *See* Petitioner’s Exhibit No. 2.⁴

46. The Petitioner used this calculation to attempt to verify the accuracy of its “loss percentage” calculation.

CALCULATION OF UNREPORTED PURCHASES FROM X FOODS

The State Tax Commissioner’s Calculation

⁴ There is a scrivener’s error in carrying the amount from the first page of Petitioner’s Exhibit No. 2 to the second page, where the unreported purchases are shown.

47 In calculating the amount of unreported purchases of food items from X, the Tax Commissioner calculated the Petitioner's purchases for the four month period of January, 2003 through April, 2003. The Tax Commissioner calculated the total purchases for this period, then divided by 4 to arrive at estimated monthly purchases. He then multiplied the monthly estimate by 12, calculating estimated annual purchases.

48. The Tax Commissioner then calculated the Petitioner's unreported food purchases, by taking its estimated annual food purchases, and deducting reported purchases as per the Petitioner's check register, arriving at annual unreported food purchases.

Petitioner's Calculation for Foods Purchases Based on "Loss Percentage" (Schedule B-2)

49. As with its purchases of beer products, the Petitioner also used the "loss percentage" method to calculate the unreported purchases of food products from X.

50. The Petitioner used the same "loss percentage," .0643092 (6.43092%), as it used to calculate its unreported food purchases from X.

51. Using this method, the Petitioner took the food purchases shown in its check register and multiplied it by the loss percentage of 6.43092%, yielding unreported purchases. The Petitioner then added the unreported purchases to the purchases shown in the check register arriving at total food purchases from X.

52. The Petitioner's calculation is incorrect, because it multiplies the purchases shown in the check register by the loss percentage, when it is total purchases that should be multiplied by the loss percentage to arrive at unreported food purchases.

53. Consistent with the correct methodology, as set out above (Findings of Fact Nos. 35 & 36), the correct formula for the "loss percentage" method Food Purchases = .9356908. This yields total food purchases from X. The unreported Food purchases uses this method. In contrast, see

Petitioner's Calculation for Foods Purchases Based on Double Inclusion (Schedule B-2).

54. The Petitioner also maintains that the Tax Commissioner erred because he included certain amounts twice in computing the monthly estimate of food purchases from X.

55. Specifically, the Petitioner maintains that purchases by invoices dated March 31, 2003, Invoice Numbers, totaling, and included in the Tax Commissioner's calculation, were paid for by Check No., dated April 15, 2003, in the amount, which was also included in the Tax Commissioner's calculation.⁵

56. Other than the fact that the amounts were close, the Petitioner presented no evidence that Check No., was used to pay Invoice Numbers.

57. Removing the purported duplicate food purchases from X, from the Tax Commissioner's estimate and otherwise using the Tax Commissioner's method, the Petitioner determined that the food purchases from X were (less the purportedly duplicate purchases equals for 4 months which, when divided by 4 results in a monthly average which, when multiplied by 12, yields a yearly total).

58. Invoice Number, dated March 31, 2003, in the amount, was not included by the Petitioner in determining that the other invoices were included twice in the Tax Commissioner's calculation of purchases from Foods.

59. Invoice Number bears the same date as all other invoices that the Petitioner contends were included twice in the Tax Commissioner's computation of food purchases from X.

60. At the hearing, when asked why he determined that Invoice Number should not be included in his determination that the Tax Commissioner included certain amounts twice in computing the food purchases from X, without any elucidation the Petitioner testified that he simply did not consider it.

⁵ The Petitioner surmises that the difference between the total amount of the invoices and the amount of the check could have resulted from the return of one or more inexpensive items.

The Owners' Ownership of Another Bar and Prior Audit Thereof

61. The Owner and vice-president of the Petitioner previously owned Pub.

62. The Pub was the subject of a prior audit by the State Tax Commissioner, which the Petitioner believed occurred in or about 1996.

63. The Owner admitted that as a result of the prior audit, the Pub was assessed consumers' sales and service tax for, *inter alia*, failing to report cash purchases.

64. Both witnesses for the Petitioner testified that there is a manager, that does all of the purchasing for the Petitioner. This includes the writing of checks or cash payments for all purchases.

65. Counsel for the Tax Commissioner represented that the Petitioner previously had been audited at a prior location, in approximately 1996, that the same type of accounting and recordkeeping errors had occurred, and that constituted grounds for assessment of additions to tax. The Tax Commissioner presented no evidence respecting the prior audit, including the Petitioner's deficiencies in recordkeeping.

DISCUSSION

The issue in this matter is whether the Petitioner has presented evidence that is sufficient to satisfy its burden of proving that the assessment is incorrect. Because the Petitioner's records were inadequate to allow the State Tax Commissioner to simply review the records to determine if the Petitioner reported the proper amount of sales and consumers' sales and service tax collected, and that it remitted the tax that it collected, the State Tax Commissioner had to resort to issuing an assessment based on certain estimates that he deemed reasonable. W. Va. Code § 11-10-7(a) provides:

(a) General -- If the tax commissioner believes that any tax administered under this article has been insufficiently returned by a taxpayer, either because the

taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefore.

In this matter, the Tax Commissioner made an investigation and determined that the Petitioner had failed to remit the proper amount of tax or filed returns which were incomplete, deficient or erroneous. He proceeded to make an investigation of the Petitioner's books and records. He apparently determined that the Petitioner's books and records were incomplete or deficient, because he sought information from other sources, such as the Petitioner's suppliers. The Petitioner admits that its books and records are incomplete. The Tax Commissioner then estimated the Petitioner's tax liability, using what information was available to him, and using certain calculations derived therefrom. Because the Tax Commissioner did not use the actual amounts of tax collected by the Petitioner, the amount of consumers' sales and service tax that the Commissioner determined to be due was estimated. This is within the statutory authority of the Tax Commissioner. *See* W. Va. Code § 11-10-7(a). The Commissioner's actions resulting in the assessment are consistent with W. Va. Code § 11-10-7(a).

The assessment, including the estimates upon which it is based, are presumed to be correct and the Petitioner has the burden of proving that the estimates are incorrect. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003). It is incumbent on the Petitioner to show that the methodology used by the State Tax Commissioner to estimate the amount of consumers' sales and service tax the Petitioner should have collected, but did not, is incorrect.

The Petitioner does not have a problem with the equation used by the State Tax Commissioner to compute the amount of unreported sales. The Petitioner and the Tax Commissioner use the same equation: Reported Purchases x Percentage of Unreported Purchases

(“Loss Percentage”) / Profit Margin = Estimated Unreported Sales. However, the dispute between the parties is the proper computation of the percentage of unreported sales, or “loss percentage.”

The Petitioner undertook to show that the methodology used by the State Tax Commissioner is incorrect by presenting alternatives to the Commissioner’s computations of Unreported Purchases of products from X and beer products. Its alternative to the Commissioner’s computation of Unreported Purchases of beer products is based on “loss percentage,” which it attempts to verify based on its estimate that Beer products constitute 2.69% of its beer sales. It presents two alternatives to the Commissioner’s computation of Unreported Food Purchases of from X, one based on “loss percentage,” and the other based on a purported error in computation by the State Tax Commissioner.

A. The Petitioner Has Failed to Prove That Its Sales of Beer Products Constitute 2.69% of Its Beer Sales.

This Office has several problems with the Petitioner’s attempt to show that sales of beer products constitute 2.69% of its total beer sales. There are two problems with the methodology by which the Petitioner arrives at this conclusion. First, the evidence presented is inadequate to prove that the Petitioner’s sales of beer products constitute only 2.69% of its sales. It presented only four receipts from July, 2004 to support its calculation. The Petitioner’s certified public accountant indicated that the calculation was based solely on the four receipts. Four receipts from a single month is inadequate evidence to prove sales over a three-year period. It is incumbent upon the Petitioner to present evidence sufficient to support its computation, or at least enough to prove that the calculation is more accurate than that of the State Tax Commissioner.

Second, the records on which the calculation is based are from July, 2004, a month outside the audit period. These records, standing alone, fail to prove that its calculation is accurate for the audit period. The Petitioner’s sales of beer products may or may not have changed from the audit

period to 2004, either increasing or decreasing, or they may have remained the same. There is simply no way for this Office to determine receipts from a month outside of the audit period reflect sales for the audit period. Additionally, there is nothing to show that sales for July, 2004, or July of any year, accurately reflect the sales for this particular business for the remaining months of the year.⁶ This Office determines that the Petitioner's evidence respecting the percentage of its sales of beer products is simply not adequate to prove the percentage of its beer sales for the audit period.

B. The Petitioner Has Failed to Prove That The State Tax Commissioner Included Certain Amounts Twice In Computing His Estimate of Unreported Purchases From Foods

With respect to the Petitioner's criticism of the Tax Commissioner's computation respecting food purchases from X, the Petitioner did not satisfy its burden of proving that the Commissioner is incorrect. It surmises that the amount paid by check number was for those supplies identified in Invoice Numbers. However, it offers no proof to show this, other than that the amounts are approximately the same. Somewhat damning to the Petitioner's theory with respect to this issue is that it does not explain why Invoice Number, bearing the same date, is not paid for by check number. It defies logic for the Petitioner to argue, as it does implicitly, that all invoices of March 31, 2003, but one, were billed and paid for by one check, while a single invoice was paid for separately. If there is a rational explanation for this that is consistent with the Petitioner's theory, it should have been presented by the Petitioner. The absence of an explanation leads this Office to conclude that there is none.

C. The Petitioner's Calculations Using "Loss Percentage" Are Insufficient To Satisfy the Petitioner's Statutory Burden of Proving That the Commissioner's Calculations Are Incorrect.

⁶ The Petitioner is located in a college town. The Petitioner maintains that students do not constitute a substantial portion of its customer base. However, it is likely that the Petitioner's customer base includes a substantial number of students. Many college students leave during the summer months, including July. Thus, it is possible that sales during July do not reflect its sales for the remainder of the year.

As set out above, method used by the Petitioner for computing its unreported purchases is the “loss percentage” method. *See* Findings of Fact Nos. 27-37 and 49-53. Unlike the Petitioner’s other computations, its “loss percentage” method of computing the Percentage of Unreported Purchases does not contain apparent factual problems.

The Petitioner contends that the methodology used by the State Tax Commissioner does not accurately reflect the amount of consumers’ sales and service tax that collected from its customers. The Petitioner proposes its own methodology, the “loss percentage” method, for estimating the amount of tax it should have collected from its customers. Needless to say, the Petitioner’s methodology yields an amount due that is less than the amount the Commissioner determined was due.

Neither of the two methodologies used to estimate the amount of consumers’ sales and service tax that the Petitioner collected from its customers gives this Office great faith in their accuracy. Given the choice between two methodologies, both of which result in estimates, this Office must err on the side of the State Tax Commissioner. There are two related reasons for this choice.

First, the West Virginia Code and the Rules of Practice and Procedure before the West Virginia Office of Tax Appeals place the burden of proof on the Petitioner. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003). In the context of the issues presented by this matter, the Petitioner has the burden of proving that its methodology is more accurate than that of the State Tax Commissioner and more likely to reflect the actual consumers’ sales and service tax collected by it. It has not done so.⁷

⁷ The State Tax Commissioner has not shown that his methodology is superior to and more accurate than that of the Petitioner. However, the Tax Commissioner has the advantage of the statutory presumption that his assessment is correct.

Second, and the primary source of the problem in this matter, the Petitioner has simply failed to maintain and retain records that demonstrate its actual sales and the actual amount of consumers' sales and service tax that it should have collected and did collect. The Petitioner's failure to maintain adequate books and records has made it necessary for the Tax Commissioner to seek records from other sources, compare those records with the records the Petitioner did maintain, and make estimates of what the Petitioner owes.

The Petitioner criticizes the Tax Commissioner's estimates and responds with estimates of its own. The Petitioner's criticisms of the Tax Commissioner's methods for determining its sales are somewhat disingenuous. The Tax Commissioner's calculations are not perfect. However, the root problem lies with the Petitioner, specifically in its failure to maintain books and records sufficient to show its sales and the consumers' sales and service tax it collected.

The failure of the Petitioner to maintain adequate and accurate books and records clearly appears to be systemic. It does not result from the loss of records from a limited, discrete period of time or from the loss of a limited number of documents. It does not result from the loss of records due to casualty, such as fire or flood. Instead, the inadequacy of the Petitioner's records appears to result from the failure of its management to insure that the proper records are created and collected at the time of the transactions, and management's failure to maintain the records for the requisite period of time. Having failed to create, collect and maintain adequate records, and having failed to adequately recreate figures which it should have maintained in the first place, the Petitioner's complaints about the Tax Commissioner's methodology is somewhat disingenuous. Its problem is one of its own making.⁸

⁸ This is not meant to be critical of the Petitioner's certified public accountant. It appears that he did the best with the limited records available to him. He is simply unable to overcome the statutory presumption.

This Office does not presume to speak for the Tax Commissioner, but it seems logical that he would prefer to review complete records that accurately and adequately verify the nature and amount of the Petitioner's sales, show the amount of consumers' sales and service tax that the Petitioner should have collected, and determine whether or not the Petitioner collected that amount. This would enable the Tax Commissioner to either accept the Petitioner's returns as filed, or assess the amount of tax collected but not remitted. This Office is relatively certain that the State Tax Commissioner does not relish the idea of going to a taxpayer's place of business, finding incomplete and inadequate records, which necessitate obtaining records from other sources, and then using a hodgepodge of records to develop a methodology which arrives at a mere estimate. Review of complete, accurate records maintained by a taxpayer requires less time and less work on the part of the State Tax Commissioner and is less costly. Of utmost importance, it leads to more accurate results.

From the standpoint of this Office, it is also advantageous for a taxpayer to maintain complete, adequate and accurate books and records. This matter perfectly illustrates why this should be done. As is evident from this matter, the parties present two differing methods for computing sales and tax collections. It is difficult to say with confidence whether either method is accurate. As a consequence, this Office is left to choose between two estimates, neither of which is particularly palatable or inspires confidence in the correctness of the ultimate outcome. Had the Petitioner maintained adequate and accurate books and records, there may have been no dispute in the first place. This entire proceeding may have been avoided.

Ultimately, this Office has determined that the Tax Commissioner's methodology is correct because it is clothed with the statutory presumption, codified in W. Va. Code § 11-10A-

10(e) [2002],⁹ which places the burden of proof on the taxpayer. If the taxpayer does not satisfy its burden of proving that the assessment is incorrect and that its own figures are correct, then the Tax Commissioner's assessment must be upheld. Ultimately, that is the basis for this Office's decision in this matter. It is the conclusion of this Office that the State Tax Commissioner's use of a percentage of Unreported Purchases of .2588 is correct and that the Petitioner has failed to meet its burden of proving that the Tax Commissioner's use of that percentage is erroneous, unlawful, void or otherwise invalid.

D. The Petitioner Is Not Entitled To A Waiver of Additions to Tax.

As stated above, the failure of the Petitioner to maintain adequate and accurate books and records clearly appears to be systemic. It appears to be the result of a complete lack of concern on the part of its management to insure that the proper records are created and collected at the time of the transactions, and management's failure to maintain the records for the requisite period of time. The owner testified that he leaves these details to his bar manager. The manager apparently does not put much stock in maintaining adequate records. This systemic failure to create and maintain adequate and complete books and records rises to the level of negligence or intentional disregard of rules and regulations.

This holding is bolstered by the fact that this is not the first time that the Petitioner's owner has encountered tax problems of this nature. The Owner and vice-president, previously owned another Pub. The owner admitted that that other Pub was the subject of a prior audit by the State Tax Commissioner, which the Petitioner believed occurred in or about 1996. He further admitted that as a result of the prior audit, the Pub was assessed consumers' sales and service tax for, *inter alia*, failing to report cash purchases. Even though the Tax Commissioner presented no evidence

⁹ See also W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

respecting the prior audit, including the Petitioner's deficiencies in recordkeeping, the Petitioner's admissions respecting the prior audit cause this Office to conclude that the Petitioner's actions, as more fully described herein, constitute negligence. Additions to tax will not be waived.

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 to show that the assessment issued against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. The Petitioner in this matter has failed to carry its burden of showing that the assessment is erroneous, unlawful, void or otherwise invalid

3. The Petitioner's evidence respecting the "loss percentage" method is inadequate to overcome the statutory presumption to which the State Tax Commissioner's assessment is entitled. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

4. The Petitioner's assertion that its sales of Beer products constitute only 2.69% of its total beer sales is not supported by credible evidence sufficient to support that assertion.

5. The Petitioner's assertion that the State Tax Commissioner's computation of food purchases from X included amounts more than once is not supported by credible evidence sufficient to support that assertion.

6. The Petitioner has failed to prove that any of the components challenged by it are erroneous, unlawful, void or otherwise invalid.

7. Because the Petitioner has failed to prove that any of the components challenged by it are erroneous, unlawful, void or otherwise invalid, it has not met its statutory burden of proof, and the assessment must be upheld in its entirety.

8. The Petitioner's systemic failure to create and retain complete and adequate books and records, combined with its management's failure to comply with knowledge that its recordkeeping derived from an earlier audit of another taxpayer owned by the Petitioner's owner, constitutes negligence on the part of the Petitioner justifying upholding the assessment of additions to tax. *See W. Va. Code § 11-10-18(c).*

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, 2001, through May 1, 2004, for tax in the amount, interest in the amount, through September 30, 2004, and additions to tax in the amount, totaling should be and is hereby **AFFIRMED**.