

**SANITIZED DECISION -- DOCKET NO. 05-167 RC -- BY R. MICHAEL REED
-- SUBMITTED ON JUNE 13, 2005 FOR DECISION -- ISSUED ON JUNE 17,
2005**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- CLAIM FOR REFUND OR CREDIT -- STATUTE OF LIMITATION -- RUNS FROM DUE DATE OF STATUTORILY REQUIRED ANNUAL, RECONCILIATION RETURN -- As with respect to the general statute of limitation on an assessment of consumers' sales and service tax, the general three-year statute of limitation for filing a claim for refund (or credit) of consumers' sales and service tax, *see* W. Va. Code § 11-10-14(l)(1) [2002], *as interpreted in Houyoux v. Paige*, 206 W. Va. 357, 524 S.E.2d 712 (1999), commences to run, not from the filing due date of a monthly (or quarterly) return but, instead, from the filing due date of the annual, reconciliation return required for all taxpayers by W. Va. Code § 11-15-21(a) [1979] and W. Va. Code St. R. § 110-15-5.3.3 (July 15, 1993).

FINAL DECISION

FINDINGS OF FACT

1. Between July 17, 2000 and August 27, 2001, the Petitioner purchased tax-exempt items (not specified on the record) from a certain vendor, at an automobile auction; the vendor improperly collected West Virginia consumers' sales and service tax from the Petitioner for these tax-exempt transactions and filed tax returns and remitted the tax to the Respondent State Tax Commissioner of West Virginia.

2. On January 14, 2005, the Petitioner filed with the Respondent's Sales Tax Unit a claim for refund of West Virginia consumers' sales and service tax for the period of July, 2000 through August, 2001.

3. The Respondent's Sales Tax Unit, by letter dated March 08, 2005, denied the entire claim. The reason stated for this denial was that the refund claim was barred by the statute of limitation set forth in W. Va. Code § 11-10-14(d)(1) [2002].

4. Thereafter, by mail postmarked March 30, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund of consumers' sales and service tax for the period of January, 2001, through August, 2001. *See* W. Va. Code § 11-10A-8(2) [2002]. The Petitioner's petition for refund, unlike the prior claim for refund, did not seek refund of the West Virginia consumers' sales and service tax paid prior to January, 2001.

5. In its petition for refund the Petitioner requested that its case be submitted for decision by this tribunal on the petition and other documents of record, in lieu of an evidentiary hearing in person. That request was granted, and the Respondent subsequently filed a detailed written response to the petition.

6. This matter was submitted on June 13, 2005, for decision on documents only.

DISCUSSION

The only issue to be decided is a narrow one of law: whether the consumers' sales and service tax refund for the time period petitioned before this tribunal is barred by W. Va. Code § 11-10-14(l)(1) [2002]. This tribunal holds that it is not.

The generally applicable statute of limitation for filing a claim for refund (or credit) of most West Virginia state taxes, including the consumers' sales and service tax, is set forth in W. Va. Code § 11-10-14(l)(1) [2002], which provides as follows:

Whenever a taxpayer claims to be entitled to a refund or credit of any tax (or fee), additions to tax, penalties or interest imposed by this article, or any article of this chapter, or of this code, administered under this article, paid into the treasury of this state, the taxpayer shall, except as provided in subsection (d) of this section, file a claim for refund, or credit, within three years after the due date of the return in respect of which the tax (or fee) was imposed, determined by including any authorized extension of time for filing the return, or within two years from the date the tax, (or fee), was paid, whichever of the periods expires the later, or if no return was filed by the taxpayer, within two years from the time the tax (or fee) was paid, and not thereafter.

(emphasis added) The West Virginia Supreme Court of Appeals interpreted this statute's application to a (purchaser's) claim for refund of the consumers' sales and service tax in *Houyoux v. Paige*, 206 W. Va. 357, 524 S.E.2d 712 (1999), the sole syllabus point of which states: "Pursuant to the provisions of West Virginia Code § 11-10-14(l)(1) (1999) [the 2002 amendment to W. Va. Code § 11-10-14 does not amend the wording of subsection (l), paragraph (1)], a claim seeking a refund of sales taxes is subject to a three-year statute of limitations when the vendor to whom the sales tax was paid filed the sales tax return relative to the purchases at issue. When, however, the vendor fails to file the

requisite sales tax return, the applicable limitations period is two years from the date the purchaser paid the sales taxes.”

Here, as stated in Finding of Fact No. 1, the vendor filed consumers’ sales and service tax returns with respect to the tax collected from (and remitted for) the Petitioner; therefore, the applicable portion of W. Va. Code § 11-10-14(*l*)(1) is the portion involving “three years after the due date of the return[.]”

This matter turns upon determination of the “due date of the return.” The Respondent’s argument in this refund matter is that, per W. Va. Code § 11-15-16(a) [1990], the consumers’ sales and service tax return filing and remittance due date for most vendors, including the vendor in question in this matter, is the 15th day of the month next succeeding the month in which the tax was collected. Therefore, for example, for the last month during the time period petitioned here, namely, August, 2001, the due date for the return was September 15, 2001, which was more than three years prior to the Petitioner’s filing of the refund claim on January 14, 2005. Thus, according to the Respondent, all of the time period within the petition for refund is barred by W. Va. Code § 11-10-14(*l*)(1) [2002].

In contrast, the Respondent has repeatedly argued differently with respect to commencement of the general three-year statute of limitation for an assessment of consumers’ sales and service tax, *see* W. Va. Code § 11-10-15(a) [1986]. In that context the Respondent has for years argued (successfully) that the statute of limitation for such a tax assessment does not commence to run at the time the monthly (or quarterly) return is filed during a tax year, but, instead, commences to run only after the vendor files the subsequent annual, “reconciliation”-type return required by W. Va. Code § 11-15-21

[1979] and W. Va. Code St. R. § 110-15-5.3.3 (July 15, 1993), in the form, usually, of the December monthly (or quarterly) return, usually filed by the 31st day of the next succeeding month of January, *see* W. Va. Code St. R. § 110-15-5.3.3 (July 15, 1993).*

* W. Va. Code § 11-15-21[1979] provides, in relevant part:

(a) Date due. -- On or before thirty [thirty-one?] days after the end of the tax year, each person liable for the payment of any tax due under this article shall make and file an annual return in such form as may be required by the tax commissioner, showing:

- (1) Total gross proceeds of his business for [the] preceding tax year,
- (2) Gross proceeds upon which the tax for that year was computed, and
- (3) Any other information necessary in the computation or collection of the tax that the tax commissioner may require.

....

(c) Payment. -- After deducting the amount of prior payments during the tax year, the taxpayer shall forward the annual return along with payment of any remaining tax, due for the preceding tax year, to the tax commissioner. . . .

(d) Extension of time. -- The tax commissioner for good cause shown, may, on written application of a taxpayer, extend the time for making any return required by the provisions of this article.

(emphasis added)

W. Va. Code St. R. § 110-15-5.3.3 (July 15, 1993) and its relevant subparts provide:

5.3.3. Annual Return; Extension of Time. - On or before the end of the calendar year, each person liable for the payment of consumers sales and service tax shall file an annual return. The annual return shall consist of the final monthly or quarterly return for the year and is due on or before January 31 [January 30?]. The form of such return shall be as follows:

5.3.3.1. For taxpayers filing on a monthly basis, such annual return shall show the total gross proceeds of business and the gross proceeds of business upon which the tax is based for the month of December together with any other information which the Tax Commissioner may require.

5.3.3.2. For taxpayers filing on a quarterly basis, such annual return shall show the total gross proceeds of business and the gross proceeds of business upon which the tax is based for the calendar quarter ending December 31st together with any other information which the Tax Commissioner may require.

....

5.3.3.4. Payment. - The taxpayer shall forward the annual return along with payment of any remaining consumers sales and service tax, due for the preceding tax year, to the Tax Commissioner. The taxpayer or his duly authorized agent shall verify the return under oath.

5.3.3.5. Extension of Time. - The Tax Commissioner for good cause shown and on written application of a taxpayer, may extend the time for making any return required by the

This tribunal agreed with the Respondent's position that the filing (actually, the due date for filing for returns filed prior to that date, *see* W. Va. Code § 11-10-15(b)(1) [1986]) of the subsequent annual, not the normal monthly (or quarterly), consumers' sales and service tax return triggers the running of the general three-year statute of limitation for issuing a state tax assessment, in this tribunal's Final Decision issued on April 24, 2003 in Docket No. 02-693 C (*not appealed*).

The same rule applies in the context of a claim for refund (or credit): the due date (the next succeeding January 31st, for calendar-year taxpayers, as here) of the statutorily required annual consumers' sales and service tax return, not the due date of the normal monthly (or quarterly) return, triggers the running of the general statute of limitation for filing a claim for a state tax refund (or credit), set forth in W. Va. Code § 11-10-14(l)(1) [2002].

The due date of the annual consumers' sales and service tax return for the time period petitioned in this matter (January, 2001 through August, 2001) was January 31, 2002, which was within three years of the Petitioner's filing of the claim for refund on January 14, 2005. Accordingly, the claim for refund, for the time period petitioned here, was timely filed.

provisions of W. Va. Code § 11-15-1 et seq., but no extension of time may be granted for payment of tax.

(emphasis added)

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 refund, the burden of proof is upon a petitioner-taxpayer, to show that the petitioner-taxpayer is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. As with respect to the general statute of limitation on an assessment of consumers' sales and service tax, the general three-year statute of limitation for filing a claim for refund (or credit) of consumers' sales and service tax, *see* W. Va. Code § 11-10-14(l)(1) [2002], *as interpreted in Houyoux v. Paige*, 206 W. Va. 357, 524 S.E.2d 712 (1999), commences to run, not from the filing due date of a monthly (or quarterly) return but, instead, from the filing due date of the annual, reconciliation return required for all taxpayers by W. Va. Code § 11-15-21(a) [1979] and W. Va. Code St. R. § 110-15-5.3.3 (July 15, 1993).

3. In light of Conclusion of Law No. 2, the Petitioner-taxpayer in this matter has carried the burden of proof with respect to the issue of whether it is entitled to the refund petitioned before this tribunal. *See* W. Va. Code St. R. § 121-1-69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of \$ of West Virginia consumers' sales and service tax, for the period of January, 2001 through August, 2001, is hereby **AUTHORIZED**, plus any statutory interest.

As set forth in W. Va. Code § 11-10A-18 [2002], the West Virginia State Tax Commissioner's Office is to see that the payment of the tax refund, plus any statutory interest, is issued promptly.