

**SANITIZED DECISION – DOCKET NO. 05-473 C – GEORGE V. PIPER, ALJ –
SUBMITTED for DECISION on NOVEMBER 2, 2005 – ISSUED on NOVEMBER 16, 2005**

SYNOPSIS

CONSUMERS’ SALES AND SERVICE TAX -- STATUTE OF LIMITATION ON ASSESSMENTS NOT VIOLATED -- As stated in this tribunal’s Final Decisions in Docket Nos. 02-693 C and 05-167 RC (Apr. 24, 2003 & June 17, 2005, respectively), the generally applicable three-year statute of limitation for issuing a tax assessment, W. Va. Code § 11-10-15(a)-(b)(1) [1986], does not commence to run at the time the monthly (or quarterly) consumers’ sales and service tax return is due during a tax year, but, instead, commences to run only after the due date of 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, due 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).

CONSUMERS’ SALES AND SERVICE TAX -- ADDITIONS TO TAX DUE TO NEGLIGENCE OR FOR INTENTIONAL DISREGARD OF RULES AND REGULATIONS APPLICABLE -- Petitioner’s failure or refusal to properly report its tax-exempt transactions, despite being so advised during a prior audit, constitutes negligence or the intentional disregard of rules and regulations, thereby precluding the abatement of the additions to tax imposed under W. Va. Code § 11-10-18(c) [1986].

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 August 11, 2005, 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 June 1, 2002 through May 31, 2005, for tax in the amount, interest in the amount, and additions to tax in the amount, for a total assessed liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked August 25, 2005, 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].

In its petition for reassessment, Petitioner waived its right to a hearing in person on the issues, opting instead for a decision based upon the documentation previously submitted.

FINDINGS OF FACT

1. The Petitioner is in the business of selling and servicing copiers.
2. During tax year 2002, Petitioner filed consumers' sales and service tax returns for all twelve (12) individual months.
3. During her conduct of the detailed audit, the tax auditor found that Petitioner was unable to provide proper exemption certificates for nine (9) of its customers, thereby requiring that consumers' sales and service tax be assessed.
4. In the audit memorandum, the tax auditor remarked that a prior audit of the Petitioner revealed the same problem regarding exemption certificates, which prompted the tax auditor to impose additions to tax.

DISCUSSION

In its petition for reassessment Petitioner argues that the month of June, 2002 was erroneously assessed because the statute of limitations had expired.

As stated in this tribunal's Final Decisions in Docket Nos. 02-693 C and 05-167 RC (Apr. 24, 2003 & June 17, 2005, respectively), the generally applicable three-year statute of limitation for issuing a tax assessment, W. Va. Code § 11-10-15(a)-(b)(1) [1986], does not commence to run at the time the monthly (or quarterly) consumers' sales and service tax return is due during a tax year,

but, instead, commences to run only after the due date of 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, due 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).*

The second issue raised by Petitioner is that the negligence penalty assessed on the remainder of the assessment should be abated because Petitioner has already remitted the

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- 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.
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 - (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 31st together with any other information which the Tax Commissioner may require

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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.

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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[.]

consumers' sales and service tax during the audit period and that what remains due and owing is a merely very small percentage of that total.

Petitioner opines that it has a high percentage compliance rate of properly determining and coding tax-exempt customers and, therefore, Petitioner may not be considered negligent or that it intentionally disregarded the rules and regulations pertaining to the obtaining and coding of tax exempt customers.

W. Va. Code § 11-10-18(c) provides that if any part of any underpayment of tax is due to negligence or intentional disregard of rules and regulations, there shall be added additions to tax not exceeding twenty-five (25) percent in the aggregate.

In her "Notice of Assessment Page 2" the tax auditor relates that said additions to tax for negligence were imposed because Petitioner had been previously audited and it was determined that it had failed to collect tax on sales without adequate exemption documents.

This tribunal has consistently held that if a taxpayer, during the conduct of any audit, has been advised of errors in tax reporting and thereafter makes these same types of errors in a subsequent audit, the same constitutes negligence or intentional disregard of the rules and regulations and that such additions to tax will not be abated.

It is, therefore, of no overriding consequence that Petitioner's overall tax reporting history is good, given the fact that it repeatedly misreports some of its tax-exempt transactions.

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 taxpayer to show that the assessment is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002].

2. In light of W. Va. Code § 11-15-21 [1979] and W. Va. Code St. R. § 110-15-5.3.3 (July 15, 1993), the Petitioner-taxpayer in this matter has failed to carry its burden of showing that consumers' sales and service taxes assessed for the month of June, 2002 were time-barred by the statute of limitation set forth in W. Va. Code § 11-10-15(a)-(b)(1) [1986].

3. The Petitioner-taxpayer in this matter has failed to carry its burden of showing that its repeated failure or refusal to properly report its tax-exempt transactions did not constitute negligence or the intentional disregard of rules and regulations.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the tax assessment issued against the Petitioner for the for the period of June 1, 2002 through May 31, 2005, for tax in the amount, interest in the amount, and additions to tax in the amount, for a total assessed liability, 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.