

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – RETAIL SALE OF FIREWOOD SUBJECT TO TAX – Sale of tangible personal property (firewood) to individuals to whom Petitioner has issued firewood permits is subject to consumers' sales and service tax regardless of whether Petitioner has paid severance tax to the State of West Virginia on its timber production, which is a separate taxable activity.

CONSUMERS' SALES AND SERVICE TAX – RIGHT OF ENTRY TO HUNT IS NOT LEASE OF REAL PROPERTY – Petitioner's practice of issuing so called hunting leases to individuals for the purpose of hunting game on its properties does not constitute the lease of real property pursuant to 110 C.S.R. 15, § 45 because said individuals have no right to use the property for purposes which are customary in any lease transaction.

FINAL DECISION

The Auditing Division of the Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner.

This assessment was for the period of January 1, 1997 through September 30, 2001, for tax, interest, through November 15, 2001, and additions to tax.

Thereafter the Petitioner timely filed a petition for reassessment.

FINDINGS OF FACT

1. Petitioner is a producer of timber and related wood products.
2. Petitioner routinely allows individuals to whom it issues firewood permits to enter upon its property for the purpose of buying firewood, which is the residue left over after timbering has ended.
3. Petitioner also issues hunting leases, which allows certain individuals to enter upon its property to hunt game.

DISCUSSION

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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The first issue is whether Petitioner has shown that its sale of firewood is not subject to sales tax because it pays severance tax to the State of West Virginia on its timber production.

The fact is that the sale of firewood is the sale of tangible personal property, which is subject to sales tax pursuant to W. Va. Code § 11-15-1 et. seq. and is separate and apart from the activity of timber production that is subject to severance tax.

Accordingly, it is Determined that consumers' sales and service tax is applicable to Petitioner's practice of selling firewood to individuals.

The second issue is whether the issuance of so-called hunting leases to individuals is not subject to consumers' sales and service tax because the same represent a lease of real estate, exempt from taxation pursuant to 110 C.S.R. 15, § 45.

Said regulation exempts leases of real estate for a period exceeding thirty (30) consecutive days, however, the facts in this case are not applicable because all that Petitioner is doing is allowing individuals the right of entry to hunt without giving them any real right of usage, which is customary in a lease transaction.

The issues presented in this matter involve the following important rules of administrative agency authority and statutory construction. Initially, it is important at all times to recognize and to give more than just "lip service" to two general points: (1) rather than utilizing a so-called "de novo" scope of review, deference is to be given to the expertise of the administrative agency, even with respect to an "issue of law," when that issue of law is one within the peculiar expertise of the administrative agency; and (2) any applicable legislative regulation does not

merely reflect the administrative agency's position but, instead, has been legislatively reviewed and approved, has exactly the same force and effect as a statute, and is, therefore, subject to the usual, deferential rules of statutory construction, see Feathers v. West Virginia Board of Medicine, 211 W. Va. 96, 102, 562 S.E.2d 488, 494 (2002).

The following specific points flow from these general points. “[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the reviewing [tribunal] is whether the agency's answer is based on a permissible construction of the statute.” Syllabus point 4, in relevant part, Appalachian Power Co. v. State Tax Department, 195 W. Va. 573, 466 S.E.2d 424 (1995) (emphasis added). Similarly, “the Tax Commissioner [or the West Virginia Office of Tax Appeals] need not write a rule [or an administrative decision] that serves the statute in the best or most logical manner; he [, or she, or the Office of Tax Appeals] need only write a rule [or a decision] that flows rationally from the statute.” Id., 195 W. Va. at 588, 466 S.E.2d at ____ (emphasis added). Thus, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syllabus point 3, Shawnee Bank, Inc. v. Paige, 200 W. Va. 20, 488 S.E.2d 20 (1997) (internal citation omitted) (emphasis added). Finally, “courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary.” Appalachian Power, 195 W. Va. at 589, 466 S.E.2d at ____ (quoting Frymier-Halloran v. Paige, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

CONCLUSION(S) 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-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).

2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the issue of whether the retail sale of firewood is tax exempt or its contention that so-called hunting permits constitute exempt leases of real estate.

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, 1997 through September 30, 2001, for tax, interest, updated through March 31, 2003, and additions to tax, should be and is hereby **AFFIRMED**.