

**SANITIZED DECISION – 06-225 RU – BY ROBERT W. KIEFER, JR ALJ –
SUBMITTED for DECISION on JUNE 13, 2006 – ISSUED on DECEMBER 13, 2006**

SYNOPSIS

PURCHASERS’ USE TAX – STATUTE OF LIMITATIONS – In order for a taxpayer to be entitled to a refund of purchasers’ use tax paid to the State Tax Commissioner, it must file a claim for refund within three years of the due date of the tax return with respect to the tax due, or within two years of the date on which the tax was paid, whichever is later. W. Va. Code § 11-10-14(I)(1) [2003].

PURCHASERS’ USE TAX – STATUTE OF LIMITATIONS – There being no annual return required by the purchasers’ use tax statute, W. Va. Code § 11-15A-1, *et seq.*, a claim for refund of purchasers’ use tax must be filed within three years of the due date of the quarterly purchasers’ use tax return.

PURCHASERS’ USE TAX – STATUTE OF LIMITATIONS – The Petitioner is not due a refund of the purchasers’ use tax it paid to the State of West Virginia because it did not file its claim for refund within three years of the due date of the tax return with respect to the tax due, or within two years of the date on which the tax was paid. W. Va. Code § 11-10-14(I)(1) [2003].

FINAL DECISION

On or about January 31, 2006, the Petitioner, filed a claim for refund of purchasers’ use tax in the amount of \$ for the period of June 1, 1994, through July 31, 2002. The Sales Tax Unit of the Internal Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or the “Respondent”), by letter dated February 3, 2006, informed the Petitioner that it had received purchasers’ use tax payments from the Petitioner in the amount of \$ for the year 2002,¹ and denied the refund claim in its entirety. The reason stated for the denial was that the refund claim for payments made in 2002 was not timely filed; that is, it was filed after January 15, 2006, in violation of W. Va. Code § 11-10-14(I)(1) [2003].

¹ The evidence in the record shows that the payments were received for all or part of the 3rd quarter and the 4th quarter of 2002.

Thereafter, on March 16, 2006, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund. W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a) – (b) [2005].

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 is in the business of dispensing medical devices to individuals.
2. The Petitioner, a sole proprietorship, commenced operations in April, 1994.
3. Prior to and possibly into June, 2002, the Petitioner's business was a sole proprietorship operated by the Petitioner.
4. Some time in June, 2002, the Petitioner was incorporated.
5. In terms of the functions performed and the services provided, the two businesses were one and the same.
6. At the time that the Petitioner commenced operations, he inquired of the State Tax Commissioner's Office as to what taxes he was required to collect and pay.
7. He testified that he was informed that he was not required to collect consumers' sales and service tax on hearing aids it sold to its customers, but that it was required to pay purchasers' use tax on items purchased by it and used or consumed in the conduct of its business.
8. The Petitioner and its predecessor operated in this manner for the period between 1994 and 2005.
9. The Petitioner maintains that since he commenced operations, he has followed the direction of employees of the State Tax Commissioner respecting the collection and payment of

consumers' sales and service tax and purchasers' use tax, with respect to both the sole proprietorship and the corporation.

10. In 2005, the Petitioner was the subject of a field audit by the State Tax Commissioner.

11. Some time between December 12, 2005, and December 16, 2005, as a result of the field audit, the Petitioner was advised by the auditing supervisor that it was entitled to a refund of purchasers' use tax.

12. At the same time advised the Petitioner that it was required to pay consumers' sales and service tax on the amount of sales it had made to its customers, but for which it failed to collect consumers' sales and service tax, for the three-year period preceding the audit.

13. The auditing supervisor advised the Petitioner that it would be required to collect and pay over consumers' sales and service tax on all future sales of medical devices its customers without a prescription.

14. The Petitioner was not assessed consumers' sales and service tax for sales of medical devices made to customers without a prescription during the audit period.

15. In response to the information received from the auditor and his supervisor, the Petitioner called the State Tax Commissioner's Office respecting the consumers' sales and service tax and purchasers' use tax consequences on the Petitioner's business. In a conversation with an employee of the State Tax Commissioner, the Petitioner received responses to certain questions, which he memorialized in writing. *See* Petitioner's Exhibit No. 2.

16. The Petitioner maintains that the answers he received from the State employee conflicted with information he had previously received.

17. The Petitioner maintains that this evidences the conflicting information that he received from the State Tax Commissioner's Office, resulting in the Petitioner's failure to properly collect and pay over consumers' sales and service tax.

18 The Petitioner further testified that subsequently he had a meeting with Deputy State Tax Commissioner and General Counsel to the State Tax Commissioner, who together advised him that if he had been provided the information set out in Petitioner's Exhibit No. 2, he had been misinformed, but that they could do nothing for periods three years prior to the date the Petitioner filed its claim for refund because of the expiration of the statute of limitations.

19. The Petitioner maintains that General Counsel to the State Commissioner advised him that the Petitioner was not required to collect consumers' sales and service tax after the date of the decision of the Supreme Court of West Virginia in *Syncor Int'l Corp v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001).

20. The Petitioner further testified that the Deputy State Tax Commissioner and General Counsel to the State Tax Commissioner advised him that after the *Syncor* decision, the State Tax Commissioner could no longer collect purchasers' use tax from the Petitioner, or taxpayers in similar positions.

21. On or about July 9, 2003, the Petitioner paid its purchasers' use tax for the quarter beginning July 1, 2002, and ending September 30, 2002.

22. On or about February 15, 2003, the Petitioner paid its purchasers' use tax for the quarter beginning October 1, 2002, and ending December 31, 2002.

23. The Petitioner recalls that the he filed its claim for refund on or about January 31, 2006.

24. At the direction of an employee of the State Tax Commissioner, the Petitioner filed an affidavit in support of his claim for refund on March 14, 2006.

DISCUSSION

The issue in this matter is whether the Petitioner filed its claim for refund within the limitations period established by W. Va. Code § 11-10-14(1)(1) [2003], which provides:

(1) Limitation on claims for refund or credit.

(1) General rule.

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.

This section required the Petitioner to file its claim for refund either within three years of the due date of the applicable purchasers' use tax return, or within two years of the date that the purchasers' use tax was paid.

For the third quarter of 2002, the due date of the purchasers' use tax was October 15, 2002. Using this date as the benchmark, the claim for refund was required to be filed by October 15, 2005. The purchasers' use tax for that quarter was paid on July 9, 2003. Using this as the benchmark, the claim for refund had to be filed by July 9, 2005. Thus, the Petitioner's claim for refund for the third quarter of 2002 was required to be filed no later than October 15, 2005. Since it was filed on or about January 31, 2006, it was not timely filed.

For the fourth quarter of 2002, the due date of the purchasers' use tax was January 15, 2002. Using this date as the benchmark, the claim for refund was required to be filed by January 15, 2006. The purchasers' use tax for that quarter was paid on February 15, 2003. Using this as the benchmark, the claim for refund had to be filed by February 15, 2005. Thus, the Petitioner's claim for refund for the third quarter of 2002 was required to be filed no later than January 15, 2006. Since it was filed on or about January 31, 2006, it was not timely filed.

The Petitioner argues that it was misinformed by employees of the State Tax Commissioner respecting the manner in which it should have been collecting and reporting the consumers' sales and service tax and the purchasers' use tax. It further maintains that this purportedly erroneous information resulted in an overpayment for the periods in question.

Regardless of whether or not information imparted by employees of the State Tax Commissioner was erroneous, as alleged, and regardless of whether or not such information, if erroneous, resulted in the overpayment of purchasers' use tax by the Petitioner, the Petitioner is not entitled to a refund. In order for the Petitioner to be entitled to a refund, it is required to comply with the provisions of the Tax Procedures Act, W. Va. Code § 11-10-1, *et seq.* This includes complying with the statute of limitations for filing a claim for refund, W. Va. Code § 11-10-14(l)(1) [2003]. The provision of erroneous information by employees of the State Tax Commissioner does not absolve the Petitioner of its duty to protect its refund claim by complying with the procedural requirements of the Code. *See Bradley v. Williams*, 195 W. Va. 180, 465 S.E.2d 180 (1995).

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 refund, the burden of proof is upon the Petitioner to show that it is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002].
2. The Petitioner did not comply with the provisions of W. Va. Code § 11-10-14(1)(1) [2003], because it did not file its claim for refund within the time periods prescribed by the statute for the filing of such claims.
3. The Petitioner has failed to carry its burden of showing that it is entitled to a refund.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's **PETITION** for **REFUND** for purchasers' use tax in the amount of \$, for the period of July 1, 2002, through December 31, 2002, is hereby **DENIED**.