

**SANITIZED DECISION – 06-241 C – BY GEORGE V. PIPER, ALJ – SUBMITTED for
DECISION on SEPTEMBER 8, 2006 – ISSUED on SEPTEMBER 27, 2006**

SYNOPSIS

CONSUMERS’ SALES AND SERVICE TAX -- TIMELINESS OF RAISING ISSUE OF LACK OF SUBJECT-MATTER JURISDICTION FOR FIRST TIME AT EVIDENTIARY HEARING -- In a proceeding before the West Virginia Office of Tax appeals, any and all issues as to subject-matter jurisdiction may be raised by a party at any time, including at the outset of the scheduled evidentiary hearing.

CONSUMERS’ SALES AND SERVICE TAX -- REQUIRED DISMISSAL, WITH PREJUDICE, OF IMPROPERLY COMPLETED PETITION SHOWN TO BE NOT TIMELY FILED -- A taxpayer who is aggrieved by a determination by the West Virginia State Tax Commissioner, and who wishes for the totally separate and independent West Virginia Office of Tax Appeals to review that determination, must file timely, that is, within sixty (60) days (usually) after the taxpayer’s receipt of written notice of the Commissioner’s determination, a properly completed petition with the West Virginia Office of Tax Appeals, *see, e.g.*, W. Va. Code §§ 11-10-8(a)(1) [2002] & 11-10A-9(a) & (b) [2005] and W. Va. Code St. R. §§ 121-1-21.4.1 & - 21.3.3.f. (Apr. 20, 2003) (statutorily required and published *Rules of Practice & Procedure before the West Virginia Office of Tax Appeals*). If, after (tentative) docketing, a petition is, as here, found to be improperly completed and not timely filed, the West Virginia Office of Tax Appeals lacks subject-matter jurisdiction to review the Commissioner’s determination, and the petition must be dismissed, with prejudice, as improvidently docketed. *See, e.g., Helton v. Reed*, No. 32891, 2006 W. Va. LEXIS 54, at *11-12 (W. Va. Sup. Ct. App. June 13, 2006); syl. pt. 1, *Bradley v. Williams*, 195 W. Va. 180, 465 S.E.2d 180 (1995).

FINAL ORDER

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 January 17, 2006, the Director of this Division of the Commissioner’s Office issued a consumers’ sales and service tax assessment against the Petitioner. This 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, 2002 through October 31, 2005, for tax of \$,

interest, through February 28, 2006, of \$, and no additions to tax, for a total assessed tax liability of \$. Written notice of this assessment was served on the Petitioner on January 19, 2006.

Thereafter, first, by mail postmarked March 10, 2006, and, second, by a facsimile transmission dated March 24, 2006, respectively, the Petitioner lodged with this tribunal, the West Virginia Office of Tax Appeals, purported petitions for reassessment. *See* W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2002].

PROCEDURAL FINDINGS OF FACT

1. Petitioner's first purported petition for reassessment (State's Exhibit No. 2), postmarked March 10, 2006, and received by this tribunal on March 13, 2006, did not: (a) contain a copy of the notice of assessment, which was clearly required to be attached to the original petition for reassessment; or (b) set forth the date on which the Petitioner received the notice of assessment, which critical date clearly must be completed by all such petitioners in all cases. *See* W.Va. Code St. R. §§ 21.4.1 and 21.3.3.f. (Apr. 20, 2003) (*Rules of Practice & Procedure before the West Virginia Office of Tax Appeals*; published in the State Register and on the internet at <http://www.wvota.gov>). These two requirements are also set forth clearly, partially in all capital letters, near the top of page 1 of the petition for reassessment form (which the Petitioner used).

2. Pursuant to W. Va. Code § 11-10-8 (a) [2002], all assessments "shall" become final and conclusive and not subject to either administrative or judicial review under sections ten or eleven or nineteen of article 10A of Code chapter 11, unless the taxpayer (petitioner) to whom the assessment is given "shall," within sixty (60) days after service of the notice of assessment, file a

properly completed petition for reassessment. *See also* W. Va. § 11-10A-9(a) & (b) [2005] (explicitly requiring “timely” filed petitions).

3. In this case, Petitioner’s properly completed petition for reassessment had to be filed on or before March 20, 2006, including the required attachment of a copy of the notice of assessment and the required specification of the date on which the Petitioner received the notice of assessment.

4. On March 21, 2006 (mistakenly typed as March 31, 2006), the Executive Director of this tribunal, voluntarily corresponded with Petitioner under the heading, “Improperly Completed Petition – Returned without Filing or Docketing,” stating that Petitioner’s submission of the significantly deficient “petition” did not suspend or extend the statutorily required period of time for filing with the tribunal a properly completed petition and that this tribunal did not have the legal authority to accept and would not accept a later completed proper petition for filing and docketing unless timely filed [within sixty (60) days] after having received the notice of assessment. His correspondence (politely sent, but not required by law) also specified the two significant deficiencies with the “petition”: (1) the copy of the notice of assessment was not attached as required; and (2) the Petitioner had not stated, on the line therefor on pg. 1 of the petition, the date that the Petitioner had received the notice of assessment.

5. Attaching a copy of the notice of assessment is crucial, primarily because it confirms that this tribunal has subject-matter jurisdiction, in that an actual assessment of tax has been issued, not just the preliminary “notice of tax due,” with respect to which this tribunal has no subject-matter jurisdiction (and with respect to which, taxpayers from time to time prematurely file “petitions”). Similarly, the petitioner-taxpayer’s stating the date that the petitioner-taxpayer received the notice of assessment is crucial, because, at the time the purported petition is

submitted, this independent tribunal does not have access to the State Tax Commissioner's return receipt card indicating the date on which the petitioner-taxpayer received the notice of assessment, and this date is the commencement date for the sixty (60)-day petition-filing period, which time period may not be extended or suspended by anyone for any reason (that is, it is "jurisdictional," not merely directory).

6. This tribunal did not know when the Executive Director first corresponded voluntarily with the Petitioner that the statutory due date (March 20, 2006) for filing a proper petition for reassessment had already passed. This independent tribunal does not have access to the State Tax Commissioner's "return receipt" card showing the date that the taxpayer received the notice of assessment (and, as previously stated, the Petitioner-taxpayer here failed to indicate that date on the line therefor on pg. 1 of the petition form).

7. On March 24, 2006, in response to the Executive Director's letter of March 21, 2006, Petitioner faxed to this tribunal another purported petition for reassessment which now contained a copy of the notice of assessment, but, curiously, still did not reflect the date on which Petitioner had received said notice of assessment. Tentatively "giving the benefit of the doubt" as to timeliness to the Petitioner, we docketed this "petition."

8. At the administrative hearing, Respondent's counsel made a motion that Petitioner's petition for reassessment submitted on March 24, 2006, be determined by this tribunal as being "deficient," because the same was received by this tribunal after the sixty (60)-day statutory period afforded petitioner to file its petition for reassessment, which period is a jurisdictional matter.

9. The presiding administrative law judge ruled that the matter should, at that point, tentatively go forward, and he instructed the Petitioner to submit whatever information which she

had to the tribunal within ten (10) days after the hearing and that the same would be considered for decision, if necessary.

10. Within the allotted time, Petitioner sent to this tribunal a timeline confirming the pertinent dates as set forth above, including Petitioner's statement that, on March 28, 2006, a support-staff employee of this tribunal called Petitioner back informing her that the second petition for reassessment would be "considered" as timely filed.

11. It should be noted that at the time that the tribunal's support-staff employee informed Petitioner that the new (second) purported petition for reassessment would be considered timely filed, she (the employee) was unaware that the due date to file the same had passed.

12. Since inception of its operations on January 1, 2003, this tribunal has consistently required adherence to all procedural requirements for a properly completed and timely filed petition.

DISCUSSION

The only issue necessary and proper to decide in this matter is whether this tribunal has subject-matter jurisdiction based upon a properly completed petition for reassessment that was timely filed. The undisputed procedural facts in this matter, set forth above, show that the answer is clearly no.

Citing its prior precedents, the West Virginia Supreme Court of Appeals recently reaffirmed its conclusions that state tax petition-filing requirements "are not readily susceptible to equitable modification or tempering," and that the "taxpayer's failure to abide by the express procedures established for challenging a decision of the West Virginia State Tax Commissioner

precludes the taxpayer's claim[.]” *Helton v. Reed*, No. 32891, 2006 W. Va. LEXIS 54, at *11-12 (W. Va. Sup. Ct. App. June 13, 2006).

In light of this authority, a taxpayer who is aggrieved by a determination by the West Virginia State Tax Commissioner, and who wishes for the totally separate and independent West Virginia Office of Tax Appeals to review that determination, must file timely, that is, within sixty (60) days (a different time period for jeopardy assessments, not involved here) after the taxpayer's receipt of written notice of the Commissioner's determination, a properly completed petition with the West Virginia Office of Tax Appeals, *see, e.g.*, W. Va. Code §§ 11-10-8(a)(1) [2002] & 11-10A-9(a) & (b) [2005] and W. Va. Code St. R. §§ 121-1-21.4.1 & -21.3.3.f. (Apr. 20, 2003) (statutorily required and published *Rules of Practice & Procedure before the West Virginia Office of Tax Appeals*). If, after (tentative) docketing, such a petition is, as here, found to be improperly completed and not timely filed, the West Virginia Office of Tax Appeals lacks subject-matter jurisdiction to review the Commissioner's determination, and the petition must be dismissed, with prejudice, as improvidently docketed. *See, e.g., Helton v. Reed*, No. 32891, 2006 W. Va. LEXIS 54, at *11-12 (W. Va. Sup. Ct. App. June 13, 2006); syl. pt. 1, *Bradley v. Williams*, 195 W. Va. 180, 465 S.E.2d 180 (1995).

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a proceeding before the West Virginia Office of Tax Appeals, any and all issues as to subject-matter jurisdiction may be raised by a party at any time, including at the outset of the scheduled evidentiary hearing.

2. The Petitioner-taxpayer in this matter did not file a properly completed petition for reassessment with this tribunal within the statutory sixty (60)-day period, leaving this tribunal with no legal recourse but to dismiss, with prejudice, the Petitioner's untimely submitted and improperly completed petition for reassessment.

DISPOSITION

WHEREFORE, it is the **FINAL ORDER** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the "petition" is **DISMISSED**, with prejudice, as improvidently docketed. This dismissal operates as an adjudication on the merits; accordingly, the consumers' sales and service tax assessment issued against the Petitioner for the period of January 1, 2002 through October 31, 2005, for tax of \$, interest of \$, and no additions to tax, **totaling \$**, must be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest continues to accrue** on this consumers' sales and service tax assessment until this liability is fully paid.