

**REDACTED DECISION – DOCKET # 06-241 C – BY GEORGE V. PIPER, ALJ –  
SUBMITTED FOR DECISION on SEPTEMBER 18, 2008 – ISSUED on MARCH 17,  
2009.**

## **SYNOPSIS**

**1. 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.

**2. 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 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 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).

**3. CONSUMERS SALES AND SERVICE TAX - - SUBJECT MATTER JURISDICTION - - NO JUDICIAL REVIEW APPLICABLE - -** Once the totally separate and independent West Virginia Office of Tax Appeals determines that it lacks subject matter jurisdiction in any matter, as for example where Petitioner's petition for reassessment was found to be improperly completed and not timely filed within the statutory sixty - day time period that ruling does not warrant judicial review beyond the record as may be the case in non-jurisdictional matters. *See Frymier-Halloran v. Paige*.

**4. CONSUMERS SALES AND SERVICE TAX - - SUBJECT MATTER JURISDICTION - - TRIBUNAL'S LEGISLATIVE RULES CANNOT BE IGNORED - -** This tribunal's legislative rules requiring that all taxpayers attach a copy of the notice of assessment to the petition for reassessment and to list the date on which a taxpayer received the written notice of assessment that prompted the filing of the petition, along with all the other applicable rules which require that taxpayers list their names, addresses, type of tax, tax

period(s) involved, size of paper, and the like are required and necessary, not superfluous, requirements and having been promulgated by the West Virginia Legislature cannot be ignored and must be enforced. *See* 121 C.S.R. § 121-1-21-4 & 21.3 et al.

**5. CONSUMERS SALES AND SERVICE TAX - - TITLE ABTRACTOR, WHO IS A NONPROFESSIONAL, CANNOT ASSERT THE SERVICE RENDERED FOR RESALE TAX EXEMPTION FOR THE TITLE ABSTRACTING SERVICES WHICH SHE SOLD OR OTHERWISE PROVIDED TO ATTORNEYS - -** Service rendered for resale tax exemption as set forth in W. Va. Code § 11-15-2(s) is not applicable to nonprofessional title abstractor because all purchases of tangible personal property and services by attorneys are considered for use in their business and therefore subject to the payment of consumers sales and service tax. 110 C.S.R. 15, § 99.1.

**6. CONSUMERS SALES AND SERVICE TAX - - TITLE ABTRACTOR - - TITLE REPORT PREPARED BY THE TITLE ABTRACTOR DOES NOT REMAIN INTACT FOR PURPOSE OF RESALE BY EMPLOYING ATTORNEY - -** Inasmuch as title report prepared and sold by title abstractor to the attorney is in fact consumed or otherwise used in the rendering of the attorney's professional legal service the same does not remain intact and therefore does not constitute a service rendered for resale. *See* W. Va. Code § 11-15-2(s).

**7. CONSUMERS SALES AND SERVICE TAX - - TITLE ABTRACTOR, WHO IS A NONPROFESSIONAL, IN PREPARING TITLE REPORT FOR SALE TO EMPLOYING ATTORNEY IS NOT THE ATTORNEY'S SUBCONTRACTOR FOR PURPOSES OF RESALE - -** Examples of subcontracted services set forth in 110 C.S.R. 15, §33.4.5 is not applicable to Petitioner because regulation requires that Petitioner must first subcontract title abstracting services to a third party which then sets up the only resale transaction which is between Petitioner and her subcontractor.

**8. CONSUMERS SALES AND SERVICE TAX - - TITLE ABTRACTOR - - RESPONDENT'S PUBLICATION TSD-373 - -** Professional services exemption which was further extended by exception to charges for nonprofessional services when provided as an integral part of the professional legal service is not applicable to the purchase of a title abstractor's services but rather on the sale of those services to the attorney's client which is part of the attorney's professional legal services.

**9. CONSUMERS SALES AND SERVICE TAX - - TITLE ABTRACTOR - - OFFICE OF TAX APPEALS CANNOT DECLARE STATUTE UNCONSTITUTIONAL - -** The West Virginia Office of Tax Appeals as a part of the executive branch of state government lacks the authority, under W.Va. Constitution, Article V, § 1, to declare a statute unconstitutional.

## **PROCEDURAL HISTORY**

A tax examiner with the Field Auditing Division of the West Virginia State Tax Commissioner's Office ("Commissioner" or "Respondent") conducted an audit of the books and records of Petitioner dba as a consulting firm. Thereafter, on January 17, 2006, the Director of the Field Auditing Division issued against the Petitioner a consumers sales and service tax assessment pursuant to the authority 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 \$\_\_\_\_, combined interest calculated 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 Petitioner on January 19, 2006.

Thereafter by mail postmarked March 10, 2006, Petitioner lodged with this tribunal a petition for reassessment. *See* W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2002]. Petitioner was notified that her petition was significantly deficient, and she attempted to file a corrected petition by facsimile transmission on March 24, 2006.

Notice of a hearing on the petition was sent to Petitioner and a hearing was conducted in accordance with the provision of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003). The Office of Tax Appeals determined, by order entered September 27, 2006, that the petition had not been timely filed and dismissed the petition for lack of subject matter jurisdiction. Petitioner filed for appeal before the Circuit Court of a county in West Virginia.

Subsequent to Petitioner's filing of appeal, the parties, by counsel, signed an "Agreed Order Seeking Remand" dated February 21, 2008, requesting that the matter be remanded to this tribunal "for a decision on the merits." The remand order also bore the signature of a Judge of said county Circuit Court. The pertinent portion of that order is as follows:

AGREED ORDER SEEKING REMAND

NOW HERE COME the Petitioner, by her counsel, and the Respondent, State Tax commissioner of West Virginia, by his counsel, and represent to the Court that they have hereby stipulated and agreed that this matter should be remanded to the West Virginia Office of Tax Appeals (“OTA”), for a decision on merits.

Accordingly it is **ORDERED** that:

This matter be, and is hereby, **REMANDED** to the West Virginia Office of Tax Appeals for a decision on the merits, with each party bearing its own attorneys’ fees and costs.

A status conference with this tribunal was scheduled for May 8, 2008, and the parties were advised by letter dated April 7, 2008, that the purpose of the status conference was to determine, by competent evidence received into the record, whether the Circuit Court of a county in West Virginia had addressed and reversed this tribunal’s only ruling in this matter: that the Office of Tax Appeals did not have subject matter jurisdiction because Petitioner failed to timely file a proper petition for reassessment. Counsel were advised that it is a principle of “black letter law” that the parties may not confer subject-matter jurisdiction upon a tribunal by joint stipulation or agreement.

The status conference was conducted as scheduled with all counsel present; however, neither counsel for Petitioner nor counsel for Respondent offered any evidence as to whether the Judge had addressed this tribunal’s only ruling.

The parties were advised that, for reasons of judicial economy, this tribunal would take under advisement both the remand order and the legal issues raised by Petitioner at the administrative hearing. To that end, the parties were directed to file briefs in this matter as to all pertinent issues.

## FINDINGS OF FACT

### I.

1. Petitioner's 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 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 petitioners in all cases. *See* W.Va. Code St. R. §§ 21.4.1 and 21.3.3.f. (Apr. 20, 2003). These two requirements are also set forth near the top of the first page of the petition for reassessment form, which form was used by Petitioner.

2. In this matter, Petitioner's deadline for filing a properly completed petition for reassessment was March 20, 2006.

3. On March 21, 2006, Office of Tax Appeals Executive Director corresponded with Petitioner through a letter under the heading, "Improperly Completed Petition – Returned without Filing or Docketing." The correspondence was mistakenly dated as March 31, 2006. In that letter, the Executive Director informed Petitioner that her petition was significantly deficient and could not be docketed. He further informed her that the statutorily-required period of time for filing a properly-completed petition was not suspended or extended, and that the Office of Tax Appeals did not have the legal authority to accept a later-completed proper petition for docketing unless timely filed.

4. Executive Director's correspondence to Petitioner specified two significant deficiencies with the petition: (1) the copy of the notice of assessment was not attached as

required; and (2) Petitioner had not stated, on the line therefor on page one, the date that Petitioner had received the notice of assessment.

5. The attaching of a copy of the notice of assessment is crucial to the process of filing a petition because it provides confirmation that an actual assessment of tax has been issued, not just the preliminary “notice of tax due.” The Office of Tax Appeals has no authority with respect to preliminary notices, but taxpayers sometimes prematurely file petitions upon receipt of the preliminary notices.

6. The date that a petitioner-taxpayer receives the notice of assessment is crucial to the determination of the sixty-day filing period.

7. Inasmuch as Petitioner failed to provide at the time of her initial filing the requisite information about the date on which she received the assessment, the Executive Director could not have been aware when he first corresponded with Petitioner that the statutory deadline for filing a proper petition for reassessment had passed.

8. On March 24, 2006, Petitioner faxed to this tribunal a second petition for reassessment. A copy of the notice of assessment was attached, but the document, like the earlier petition, did not reflect the date on which Petitioner had received the notice of assessment. The second petition was docketed.

9. At the administrative hearing, Respondent’s counsel made a motion asking that the presiding administrative law judge declare Petitioner’s March 24, 2006, petition for reassessment “deficient,” because the same was received by this tribunal after the sixty-day statutory deadline.

10. The presiding administrative law judge ruled that the matter be heard, but that Petitioner submit any information relevant to the receipt of the assessment within ten days after the hearing.

11. Within the allotted time, Petitioner sent to this tribunal a timeline confirming the pertinent dates as set forth above. She stated that, on March 28, 2006, a support-staff employee of this tribunal informed Petitioner by telephone that the second petition for reassessment would be considered timely filed.

## II.

12. The Petitioner provides title abstracting services to attorneys in the states of West Virginia, Ohio, and Kentucky but does not sell any services in the State of West Virginia to non-attorneys such as to public entities or to regular consumers.

13. At all times, Petitioner acts as an independent contractor and is not an employee of the attorneys to whom she provides service.

14. These title abstracting services involve retrieving documentation and photocopies from public courthouses to assist title attorneys in providing title opinions which they use in providing services to their clients. Petitioner's work often culminates in a title report, which she provides to the attorneys with whom she contracts, which the attorneys in turn incorporate into the service they provide to their own clients.

15. Petitioner has been licensed as a title abstracting firm in the State of West Virginia since 1993 and had never been asked directly by Respondent to collect consumers sales and service tax from attorneys.

16. Each year since obtaining her first West Virginia business license, Petitioner has indicated as per the consumer code thereon that her business activity was that of title abstracting.

17. Petitioner inquired of the attorneys with whom she contracted on numerous occasions since 1993 whether she should collect consumers sales and service tax, and was informed by each that as their agent she was not to collect the tax.

18. On other occasions from 1993 to the present, Petitioner pressed the matter with the contracting attorneys about whether she should charge the tax as a precaution, and was told that the attorneys did not owe and would not pay the consumers sales and service tax because Petitioner was working as their agent.

19. Most of Petitioner's competitors are not located in the State of West Virginia and are not licensed here. To Petitioner's knowledge, none of her competitors collect consumers sales and service tax from the attorneys with whom they work.

20. Petitioner testified that it is her belief that if she is required to collect consumers sales and service tax from the contracting attorneys, most will refuse to use her services and will opt instead to use other title abstractors who do not charge consumers sales and service tax.

21. Petitioner testified that the attorneys with whom Petitioner contracts will not allow her to hire anyone to do title abstracting unless they know that that person has mastered the skills to do title research.

22. Petitioner testified that to ensure that Petitioner's employees maintain their mastery of title abstracting, the contracting attorneys verbally engage her employees during their visitations to the attorneys' offices and that one particular attorney comes to Petitioner's office to conduct a group seminar twice a year to teach, review their skills and to make sure that they comply with any legal requirements.

23. Petitioner's Exhibit No. 4 reflected that one of Petitioner's contracting attorneys did upon her request acknowledge in writing that he always considered the title abstracting work that she performed for him to be his own work, that the work produced to be his work product and that any communications between her office and his were considered by him confidential.



24. Petitioner is required by each contracting attorney to carry a professional liability errors and omissions policy of insurance.

25. In addition to performing title abstracting work for attorneys, Petitioner acts as agent for those same attorneys at real estate closings. After the attorney receives the documentation from the lending institution and reviews the same for accuracy, Petitioner is sent the necessary documents and told to attend the closing. She or her employees always are in possession of a letter from the attorney advising the participants that Petitioner is a closing agent who is acting under the direct supervision of that particular attorney. The letter advises that any and all legal questions which may arise during or after the closing must be directed solely to the attorney by contacting him or her directly at a listed telephone number. Petitioner's role as closing agent is to conduct an orderly and technically correct execution of the lender's required documents. Petitioner is the legal representative for neither the borrower nor the lender. After the closing has been completed the paperwork is returned to the attorney for his or her signature, at which time any necessary changes may be made.

26. Petitioner also acts as a disclosed agent in trustee papers and in the newspapers for attorneys seeking evictions as part of foreclosure proceedings they initiated before county magistrates. This requires Petitioner stand on the courthouse steps and perform the trustee sale for the attorney, culminating in Petitioner or her employees either signing or recording the trustee's sale document, or both, as agent for the attorney /trustee.

## **DETERMINATIONS**

### **I.**

Hearings before the West Virginia Office of Tax Appeals are conducted in accordance with the contested case procedures of the State Administrative Procedures Act found at W.Va. Code § 29A-5-1 et seq. W.Va. Code § 11-10A-10(b) (2002). An aggrieved party may institute a hearing by “timely filing a written petition that succinctly states: (1) the nature of the case; (2) the facts on which the appeal is based; and (3) each question presented for review by the office of tax appeals.” W.Va. Code § 11-10A-9(a) (2002). A petition is considered “timely filed if postmarked or hand-delivered to the office of tax appeals within sixty days of the date a person received written notice of an assessment. . . .” W.Va. Code § 11-10A-9(b) (2002).

The Office of Tax Appeals requires, in accordance with its procedural rule, certain information designed to ensure that petitioners provide sufficient details about the nature of their cases, supporting facts, and questions presented to allow the Office of Tax Appeals to process appeals in an efficient manner. W.Va. C.S.R. § 121-1-21 (2003). Among the information required is “[t]he date on which the petitioner received the written notice that prompted the filing of the petition.” W.Va. C.S.R. § 121-1-21.3(f) (2003). The Office of Tax Appeals also requires that each petitioner attach a copy of the determination of the State Tax Department which is, in this case, a copy of the notice of assessment. W.Va. C.S.R. § 121-1-21.4 (2003). This information allows the Office of Tax Appeals to quickly determine whether a petitioner has filed within the sixty-day time frame set forth by statute, and whether the petition is based on a reviewable action of the Tax Department. A form provided on the Office of Tax Appeals web site ensures, if fully completed by a petitioner, that all required information is provided.

In this case, Petitioner’s initial petition was deficient in that it contained neither the required date on which Petitioner received the notice of assessment from the State Tax Department, nor the required attached notice of assessment. Upon receiving notice from the

Office of Tax Appeals that she had filed a deficient petition, Petitioner forwarded a second petition for reassessment. The corrected petition was received four days after the statutory sixty-day deadline. By order issued September 27, 2006, for reasons fully set forth therein, the undersigned determined that based on the deficiency of the earlier-filed petition, it could not be considered timely filed and the Office of Tax Appeals therefore did not have subject matter jurisdiction to make a determination on the merits. The petition was dismissed and the assessment of the Commissioner was affirmed.

Thereafter, Petitioner filed an appeal with the Circuit Court of a county in West Virginia. In the midst of those proceedings, the parties submitted, and the Circuit Court entered on February 21, 2008, an Agreed Order Seeking Remand. Based on that order, this matter was remanded to the Office of Tax Appeals for a decision on the merits.

Upon remand, the undersigned, together with the former Chief Administrative Law Judge, conducted a status hearing on May 8, 2008, for the purpose of determining whether the Circuit Court addressed the question of the jurisdiction of the Office of Tax Appeals to make a determination in this matter. The parties subsequently filed briefs addressing both the procedural and the substantive questions.

The Office of Tax Appeals has no authority to consider petitions that are not timely filed. A petition is considered not timely filed if it is significantly deficient based on its lack of necessary information. On this basis, the petition in question was deemed untimely and dismissed. Recognizing the authority of the circuit court to remand matters for our consideration, however, we turn to the facts before us for a determination on the merits, despite our having already determined that we are without jurisdiction to do.

## II.

Having concluded that we are bound by the Circuit Court's remand order, the sole issue remaining for determination is whether by a preponderance of the evidence Petitioner has shown that she was exempt from collecting consumers sales and service tax from the attorneys for whom she performed title abstracting work.<sup>1</sup> It is "presumed that all sales and services are subject to the tax until the contrary is clearly established." W.Va. Code § 11-15-6.

### A.

As stated by Petitioner's counsel, the heart of her case is that Petitioner is exempt from collecting consumers sales and service tax because the services which she sold or otherwise provided to attorneys were in turn resold by those same attorneys for whom she worked.

W.Va. Code § 11-15-3 requires that "[f]or the privilege of selling tangible personal property and of dispensing certain selected services the vendor shall collect from the purchaser the [consumers sales and service] tax and shall pay the amount of tax to the tax commissioner." W.Va. Code § 11-15-2(s) then provides that "service" or "selected services" does not include "any service rendered for resale." The legislative regulations offer three examples of services for resale which services are as follows:

Example 1. X is a printer and enters into a contract with Y to print 500 bulletins. X subcontracts the job to Z. Z prints the 500 bulletins for X. There is no tax on the contract between X and Z since X is purchasing the printing service from Z for resale to Y. In this transaction Y provides the paper upon which the bulletins are printed.

Example 2. B owns a used car lot. E Purchases an automobile from B. as a condition of such sale B agrees to make repairs to the automobile. However, B subcontracts such repair work to C. E has agreed to pay B for the repair services and for the sale price of the automobile. Under these circumstances, the

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<sup>1</sup> In her reply brief Petitioner's counsel stated that Petitioner does not argue that she, herself, is a professional under the four-part test in 110 C.S.R. 15, § 8.1. We agree that she is not a professional for this purpose.

repair services furnished by C to B constitute a sale of such service to B for resale to E who is the consumer of the services.

Example 3. B owns an auto repair shop and C brings an automobile in to have the air conditioning fixed. B is unable to fix the unit so the car is sent to G who is an air conditioning specialist. The sale of G's service to B is a sale for resale by B to C. 110 Code of State Regulations Series 15, §33.4.5.

Petitioner's counsel argues that her client's situation vis á vis the employing attorney is analogous to the printing shop, used car lot or auto repair shop because a final physical manifestation of the Petitioner's services, the title abstract, passes from Petitioner through the hands of Petitioner's customer attorney to the attorney's client. Counsel argues further that, none of Petitioner's services having been consumed, subsumed or otherwise used by the employing attorney when he renders his or her own services to the ultimate customer, the title report remains intact like the printed circulars, the repaired vehicle or the automobile air conditioning unit and therefore constitutes a sale for resale transaction.

We cannot agree, however, that the service provided by Petitioner is unchanged once in the hands of the professional attorney. When reviewed and approved by an attorney, the title reports of the abstractor becomes a professional opinion upon which the ultimate consumer may rely. Indeed, without having been passed through the hands of the attorney, it is not likely Petitioner would find a market in this state for her service at all.

Respondent's counsel cites the following regulation which we find to be on point and controlling.

Persons who are engaged in a business and are deemed to be professionals, such as lawyers, doctors, and any other person considered to be a professional pursuant to Section 8.1.1 of these regulations, are not required to collect and remit consumers sales and service tax on their services rendered or on any sales of tangible personal property incidental to such services. However, such professionals must pay consumers sales and service tax on all purchases for use in their business, except for purchases for resale when the resale is a nonprofessional sale subject to the consumers

sales and service tax, for which an exemption certificate may be used. 110 C.S.R. 15 § 110-15-99.1.

The facts of this case show Petitioner only sells to attorneys who, as professionals, only provide professional services. Attorneys are required to pay consumers sales and service tax on all purchases of tangible personal property and nonprofessional services for use in their business and there is no exception for purchases for resale because no nonprofessional service is being resold.

Accordingly, it is determined that the title report having been purchased by the attorney for use in the attorney's business, and having been changed substantially through the transaction so that no "sale-for-resale" has occurred, Petitioner was legally required to collect consumers sales and service tax on the value of her title services sold to employing attorneys.

#### **B.**

The second argument put forth by Petitioner's counsel is that Petitioner is also exempt from collecting consumers sales and service tax because of Respondent's Publication TSD-373, which sets forth the rule that when attorneys provide legal services, those services are professional in nature and no consumers sales and service tax needs to be collected. The publication also says that "[t]he exception may also include charges for nonprofessional service, but only when these activities are provided as an integral part of the professional legal service." The examples are that of typing of wills and the photocopying of tax returns. TSD-373 only applies, in this regard, to services provided by attorneys, however, and clearly states that purchases by attorneys are taxable. Inasmuch as Petitioner was an independent contractor from whom the various attorneys purchased services, we find TSD-373 inapplicable to the facts before us, for the reasons set forth in Part A, above.

**C.**

Petitioner's final argument is that to impose this tax upon Petitioner would mean that Petitioner would be the only taxpayer engaged in this type of business subject to the tax and thus that would be a violation of the equal protection clauses of both the West Virginia and United States Constitutions.

There is no evidence before this tribunal showing that Petitioner has been treated disparately by the Respondent. This tribunal does not sit as a court of equity and cannot therefore render its decisions on that basis. Further, there is an even more important principle which comes into play, which is that this tribunal is part of the executive branch, not the judicial branch, of West Virginia government, and therefore lacks the authority, under W.Va. Constitution Article V, § 1, to declare any statute of the West Virginia Legislature unconstitutional.

**D.**

Finally, we note that Petitioner's client attorneys would be liable for payment of the consumers sales and use tax in those instances where Petitioner requested payment and the attorneys refused. W. Va. Code § 11-15-4b. Inasmuch as the Tax Commissioner is not all-knowing, however, a vendor is only relieved of liability where she notifies the Tax Commissioner in writing pursuant to W.Va. C.S.R. 110-15-6.1.1.2 that a purchaser has refused to pay. Petitioner did not comply with this rule and therefor remains liable.

**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 reassessment, the burden of proof is upon the petitioner to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, a petitioner must prove that the assessment is incorrect and contrary to law, in whole or in part, by a preponderance of the evidence.

3. Petitioner has not carried the burden of proof by a preponderance of the evidence with respect to the finding that the title report produced by Petitioner was consumed, subsumed or otherwise used up by the employing attorney in performing his or her professional legal service and therefore the same was subject to the collection of consumers sales and service tax.

4. Petitioner has not carried the burden of proof by a preponderance of the evidence with respect to the finding that Respondent's Publication TSD-373 is applicable to Petitioner's situation because TSD-373 does not address nonprofessional services purchased from an independent contractor by the attorney.

5. This tribunal does not undertake to address this issue on equitable grounds, particularly where Petitioner has presented no evidence showing that other similarly-situated taxpayers have been treated more favorably than she.

#### **DISPOSITION**

**WHEREFORE**, it is the **FINAL ORDER** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers sales and service tax assessment issued against the



Petitioner for the period January 1, 2002, through October 31, 2005, for tax of \$\_\_\_\_, and interest of \$\_\_\_\_, totaling \$\_\_\_\_, should be and is hereby **AFFIRMED**.