

**REDACTED DECISION -- 06-731 C -- BY GEORGE V. PIPER, ALJ -- SUBMITTED for DECISION on NOVEMBER 2, 2007 -- ISSUED on NOVEMBER 28, 2007**

**SYNOPSIS**

**CONSUMERS' SALES AND SERVICES TAX -- SALES OF SERVICES FOR THE PURPOSE OF RESALE -- BURDEN OF PROOF NOT MET** -- Although Petitioner claimed at the hearing that numerous sales of services for the purpose of resale had taken place, the failure, with one exception, to have properly executed purchase-for-resale exemption certificates from each of its customers mandates that all, but one, of the contested sales of services for the purpose of resale be considered taxable. W. Va. Code § 11-15-6 & § 11-15-9(a).

**FINAL DECISION**

A tax examiner with the Field Auditing "Division" of the West Virginia State Tax Commissioner's Office ("the Commissioner" or Respondent") conducted an audit of the books and records of the Petitioner. Thereafter, on October 16, 2006, the Director of this "Division" of the Commissioner's Office issued 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, 2003 through December 31, 2005, for tax of \$\_\_\_\_\_, interest, through November 30, 2006, of \$\_\_\_\_\_, and no additions to tax for a total assessed liability of \$\_\_\_\_\_. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked December 17, 2006, 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] and 11-10A-9(a)-(b) [2005].

Subsequently, a notice of a hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

At the conclusion of the administrative hearing, the presiding administrative law judge allowed Petitioner an additional period not to exceed thirty (30) days in which to obtain any and all resale exemption certificates.

On October 29, 2007, Petitioner's representative forwarded to this tribunal a resale exemption certificate signed by Company A evidencing the fact that the same had indeed purchased otherwise-taxable services for the purpose of resale. In due course, the presiding administrative law judge contacted Respondent's counsel about whether he agreed that the sales to Company A should be deleted from the assessment and was informed that he had no objection to those sales being deleted.

As a result of this additional revision, Petitioner's updated consumers' sales and service tax liability is \$\_\_\_\_\_, with updated interest of \$\_\_\_\_\_, for a total liability of \$\_\_\_\_\_.

Prior to the issuance of this administrative decision, Petitioner's representative contacted this tribunal by telephone about the possibility of keeping the hearing record open for an unspecified period of time to allow Petitioner the opportunity to finalize negotiations with another of its customers concerning the obtaining of an additional resale exemption certificate.

Because this matter is conjectural, at best, and beyond the period of time specified at the administrative hearing for the submission of such resale exemption certificates this tribunal will not agree to keep the record open for any additional time period, especially an open-ended one; however, Petitioner is encouraged to contact Respondent if and when any additional resale

exemption certificates are properly obtained to see if the same should be deleted from the total revised liability found to be due and owing in this decision.

### **FINDINGS OF FACT**

1. Petitioner is a provider of temporary staffing services.
2. Petitioner's temporary staffing services are of two (2) types. The first type is internal placements, which are normally sales people or job recruiters, and the second type is external placements, which consist of revenue generators such as assembly line workers, fork-lift operators, etc.
3. During the audit period Petitioner sold certain temporary staffing services to (a) Company B, which Petitioner claimed had a direct pay permit; (b) Company C, which Petitioner claimed had an exemption letter; and (c) Company D, which Petitioner also claimed had a direct pay permit or was otherwise exempt.
4. At the hearing, Respondent's counsel agreed that the sales to Company B, Company C, and Company D, were indeed exempt and submitted a revised consumers' sales and service tax assessment into the record which reflected that Petitioner now owed revised tax of \$ \_\_\_\_\_, with updated interest of \$ \_\_\_\_\_, for a total liability of \$ \_\_\_\_\_.
5. In its petition for reassessment, Petitioner also contested sales to certain other staffing companies stating that the same were resold by these same staffing companies; however, those companies had never tendered purchase-for-resale exemption certificates to the Petitioner at the time of sale, nor has Petitioner been able to obtain such exemption certificates prior to the time of the hearing.

## DISCUSSION

The only issue is whether the Petitioner met its burden of proof by merely stating that the contested portion of the assessment consisted of sales of temporary staffing services for the purpose of resale, instead of submitting signed resale exemption certificates from each of those customers.

W. Va. Code § 11-15-6 places the burden of proving that a sale or service is exempt upon the vendor unless that vendor obtains from the purchaser a signed exemption certificate setting forth the specific reason for the exemption; without such an exemption certificate the sale or service is subject to tax.

W. Va. Code § 11-15-9(a) sets forth the exemptions for which an exemption certificate may be issued, and one category is sales of service(s) for the purpose of resale in the form of the same service, which is akin to sales of tangible personal property to a person for the purpose of resale in the form of tangible personal property.

The key element in any sale for resale transaction is proof that the purchaser intends to resale that item or service to another in that same form. Merely informing the vendor orally of what the purchaser intends to do is not sufficient because a properly prepared resale exemption certificate is required under the consumers' sales and service tax statute (W. Va. Code § 11-15-6) to prove what the purchaser actually intended to do with the item or service when the same was purchased.

In this case, other than the sales of temporary staffing services to Company A, Petitioner was unable to provide this tribunal with any other properly executed resale exemption certificates, thereby mandating that the remainder of the assessment be upheld.

## CONCLUSIONS OF LAW

Based upon all of the above 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 a 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) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003)

2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the sale of certain temporary staffing services to others which it claimed was for the purpose of resale but for which, with one exception, it could not produce properly executed resale exemption certificates to prove same. *See* W. Va. Code St. R. § 121-1-69.2 (Apr. 20, 2003)

## 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 Petitioner for the period of January 1, 2003 through December 31, 2005, for tax of \$\_\_\_\_\_, interest of \$\_\_\_\_\_, and no additions to tax, **totaling** \$\_\_\_\_\_, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for **revised** tax of \$\_\_\_\_\_, interest, on the revised tax, through November 13, 2007, of \$\_\_\_\_\_, and no additions to tax, for a **total revised** liability of \$\_\_\_\_\_.