

**REDACTED DECISION – DK# 06-426 U & 06-427 C – BY –CHRISTOPHER B. AMOS,
ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION on MAY 9, 2011,
ISSUED ON NOVEMBER 8, 2011**

FINAL DECISION

SYNOPSIS

WEST VIRGINIA OFFICE OF TAX APPEALS – 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 any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code St. R. § 121-1-63.1 (2003).

CONSUMERS SALES AND SERVICE TAX – “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.” W. Va. Code Ann. § 11-15-3(a) (West 2010).

CONSUMERS SALES AND SERVICE TAX – “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (West 2010).

CONSUMERS SALES AND SERVICE TAX – “Each vendor shall collect from the purchaser the consumer sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code St. R. § 110-15-4.1 (1993).

CONSUMERS SALES AND SERVICE TAX – “If the tax commissioner believes that any tax . . . has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.” W. Va. Code Ann. § 11-10-7 (West 2010).

CONSUMERS SALES AND SERVICE TAX – The Commissioner may add interest and additions to tax where applicable. *See* W. Va. Code Ann. §§ 11-10-17, and 11-10-18, (West 2010).

FINDINGS OF FACT

1. Petitioner owns and operates a vacuum sales company headquartered in West Virginia.

2. Petitioner and Company A sells vacuum cleaners in West Virginia, and out-of-state sales areas including Ohio and Kentucky, either by way of Petitioner, or through various independent dealers who make sales for the Petitioner and in return receive a commission.

3. Independent dealers who make a commission for selling vacuum cleaners receive a form 1099 from the Petitioner to report said commission for income tax purposes.

4. When a sale is made to a customer, it is recorded on a master sales log kept at the main office of Company A.

5. Not all sales materialize in that some customers are denied financing or choose to exercise their three day option to cancel the sales contract.

6. In late 2005, Petitioner was audited by the West Virginia State Tax Department (hereinafter Respondent).

7. As a result of the audit, two assessments were issued against the Petitioner. The first being a use tax assessment for \$____, and \$____ in interest, for a total assessed amount of \$____, covering tax periods October 1, 2000, through September 30, 2005. The second, a consumers sales and service tax assessment in the amount of \$____, plus \$____ in interest and \$____ in additions, for a total assessed amount of \$____, covering tax periods January 1, 2002, through September 30, 2005.

PROCEDURAL HISTORY

After receiving the consumers sales and service and use tax assessments issued against him, Petitioner timely filed petitions for reassessment with the West Virginia Office of Tax Appeals. The matter was assigned to the Honorable Robert W. Kiefer, Jr., Administrative Law Judge. After numerous motions to continue were granted to both parties, an evidentiary hearing was held in Charleston, West Virginia, on November 16, 2007. Petitioner was represented by counsel, Mr. B, Esquire, as well as by Mr. C, Certified Public Accountant. The Respondent appeared by counsel Mr. Jan Mudrinich, Esquire, supervising attorney, Mr. Louis Martin and Ms. Pearl E. Short, auditors, and Mr. Anthony Bell, tax unit supervisor.

The record was kept open at the conclusion of the evidentiary for the submission of written briefs. By order, dated December 28, 2010, the matter was reassigned to Administrative Law Judge, Christopher B. Amos. A briefing schedule was issued to the parties on February 7, 2011. The final brief was received on May 9, 2011, and at that time the record was formally closed and the matter became mature for decision.¹

ISSUES AND BURDEN OF PROOF

The sole question presented in this case is whether the Petitioner is responsible for consumers sales and service tax, as assessed.² 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 any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code St. R. § 121-1-63.1 (2003).

DISCUSSION

¹ By the time the briefing schedule was ordered Petitioner was no longer represented, and as such has proceeded *pro se*.

² Prior to the evidentiary hearing the parties mutually agreed upon a revised use tax assessment. As such, the only matter that will be discussed in this decision is whether the Petitioner is liable for the consumers sales and service tax assessment.

West Virginia Code Section 11-15-3(a) states that, “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.”³ W. Va. Code Ann. § 11-15-3(a) (West 2010). Further, West Virginia Code Section 11-15-4 states that, “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. §11-15-4 (West 2010).

According to West Virginia Code of State Rules Section 110-15-4.1, “Each vendor shall collect from the purchaser the consumer sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. W. Va. Code R. § 110-15-4-1 (1993). Such tax shall be added to and constitute a part of the sales price.” Also, “If the tax commissioner believes that any tax . . . has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.” W. Va. Code Ann. § 11-10-7 (West 2010). Finally, the Commissioner may add interest and additions to tax where applicable. *See* W. Va. Code Ann. §§ 11-10-17, and 11-10-18 (West 2010).

In late 2005, Mr. Martin, auditor for the West Virginia State Tax Department, met with the Petitioner for purposes of conducting an audit on Petitioner’s vacuum sales business. Mr.

³ Vendor means “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(b)(26) (West 2010). Company A, a business selling vacuum cleaners, meets the definition of a vendor and is therefore required to collect and remit tax on the vacuums that it sells. The amount of consumers sales and service tax is “six cents on the dollar of sales or services, excluding gasoline and special fuels, which remain taxable at the rate of five cents on the dollar of sales.” W. Va. Code Ann. § 11-15-3(b) (West 2010).

Martin asked Petitioner to produce his 2004 records because that was the sample year that the auditor chose for purposes of conducting the audit. However, sometime prior to the audit, Petitioner's 2004 state sales records had been seized by the West Virginia Attorney General's Office, and as such he was unable to provide the auditor with that information. The Petitioner was, however, able to provide the auditor with his 2004 federal Schedule C, a rather complete collection of out-of-state sales records, sales journals from the main office, records of sales to other dealers, and QuickBooks records.

Because the auditor had no record of West Virginia sales, he had to use the records provided to him and work backwards in order to calculate the amount of taxable sales in West Virginia for the year 2004. The auditor began with Petitioner's 2004 federal Schedule C. On line 1 of this return Petitioner reported that his overall sales and receipts for that year totaled \$____. Since the auditor had a complete list of out-of-state customer sales that took place in Ohio and Kentucky, he merely totaled the out-of-state customer sales figures and backed that amount out from the overall customer sales receipts in order to determine West Virginia sales. In other words, sales to customers for all of 2004 totaled \$____, and from that figure the auditor eliminated the out-of-state sales, which totaled \$____, and concluded that the remaining customer sales were sales made in West Virginia, which totaled \$____.

The auditor compared that figure to the amount of sales to other dealers, which records provided to him showed to be \$____. The total amount of sales, \$____, plus the sales to other dealers, \$____, added together came to \$____. The difference between the reported figures on Line 1 of Petitioner's Schedule C, \$____, and the total sales to customers and dealers, \$____, came to \$____. The auditor attributed that figure of \$____ to miscellaneous sales, such as parts and services. After having calculated the amount of taxable sales in West Virginia for 2004, the

auditor compared that figure to the amount of tax actually paid by the Petitioner for that year. From this the auditor concluded that there was a deficiency between the amount of taxable West Virginia sales for 2004 and the amount of tax actually paid by the Petitioner for that year.

However, prior to issuing an assessment against the Petitioner, the auditor was made aware that Petitioner's master log of sales included all sales initially made, but that some of the sales ultimately fell through because there were customers who were denied financing and others who exercised their right to cancel within three days. Based upon this additional information the auditor met with the Petitioner's CPA on December 14, 2006, and again on January 19, 2007, to discuss this further. After these meetings, the auditor took into account sales not realized and then issued the assessment at issue in this case.

Petitioner begins by arguing that the auditor did not take into consideration the fact that some sales had fallen through. However, the evidence adduced at hearing proves otherwise. The auditor provided clear and uncontroverted testimony that he met with Petitioner's accountant following the initial audit, and that:

we were informed that these charge backs which were sales gone bad, that might be on the journal, but were never received by the taxpayer. Mr. Bell, my supervisor, Mr. C, the CPA, and I agreed on an adjustment there, and it is included in the final prorated amount of estimated sales and therefore in the final assessment of tax.

Transcript, page 51.

Clearly, the auditor consulted with Petitioner's accountant and an agreement was reached as to how the audit should be adjusted to reflect those sales that did not materialize. Therefore, the sales that fell through were adequately accounted for prior to the assessment being issued.

Petitioner also argues that, numerous sales were made by some of his independent dealers which were run through his books, and that he received money from finance companies which

was ultimately paid out to the dealers who made these sales. In other words, Petitioner argues that all sales went through him initially and receipt of those funds from finance companies went through him before being dispersed to the dealer that made the sale. However, there was no evidence presented at the hearing, such as bank records, that substantiated payouts to these dealers. This argument is also suspect for the reason that it was not until the evidentiary hearing that the auditor ever heard of this supposed arrangement. Petitioner's argument that he acted as a clearing house for these funds is also not convincing for the reason that it does not explain why he would report such sales on his own federal Schedule C.

Finally, in his reply brief, Petitioner avers that, "Throughout the year customers' occasional [sic] default on the loan given to them to purchase the vacuum. When this happens, the funds received from those sales get charged back directly from new funds received." Petitioner's Reply Brief, Page 1. This appears to be an argument that, if a customer receives financing from a third party to purchase a vacuum from Petitioner, and later defaults on that loan, the Petitioner somehow has to offset his profits because of that default. This argument is not cogent for the fact that a default between the customer and a third party finance company should not in any way have a bearing on Petitioner's revenue obtained from other sales.⁴ Furthermore, one would expect that even if this were the case, any charge backs that are applied to new funds received would be accounted for on Petitioner's federal Schedule C. Nothing in the record supports the conclusion that this was the case.

The auditor's method of calculating West Virginia sales was valid. The Petitioner did not meet his burden of proof and establish that the assessment of consumers sales and service tax at

⁴ It is clear from the transcript that customer financing is obtained from financing companies (i.e., financing is not provided by the Petitioner). *See* Transcript, page 15.

issue in this case was erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code St. R. § 121-1-63.1 (2003)

CONCLUSIONS OF LAW

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 any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010), and W. Va. Code St. R. § 121-1-63.1 (2003).

2. “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.” W. Va. Code Ann. § 11-15-3(a) (West 2010).

3. “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (West 2010).

4. “Each vendor shall collect from the purchaser the consumer sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code St. R. § 110-15-4.1 (1993).

5. “If the tax commissioner believes that any tax . . . has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.” W. Va. Code Ann. § 11-10-7 (West 2010).

6. The Commissioner may add interest and additions to tax where applicable. *See* W. Va. Code Ann. §§ 11-10-17 and 11-10-18 (West 2010)

7. The Petitioner did not carry his burden of proof and establish that the assessment of consumers sales and service tax at issue in this case was erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code St. R. § 121-1-63.1 (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 the Petitioner, in the amount of \$____, plus \$____ in interest and \$____ in additions, for a total assessed amount of \$____, covering tax periods January 1, 2002, through September 30, 2005, should be and hereby is **AFFIRMED**.