

**REDACTED DECISION—08-165 C—BY ROBERT W. KIEFER, JR., ALJ—
SUBMITTED FOR DECISION on OCTOBER 29, 2009 —ISSUED on APRIL 27, 2010.**

SYNOPSIS

CONSUMERS SALES AND SERVICE TAX – BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the taxpayer to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

CONSUMERS SALES AND SERVICE TAX – PERSONAL SERVICES EXCEPTION -- Petitioner has failed to carry its burden of proving that it provides personal services to its clients and that the assessment of taxes against it is erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

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 June 16, 2008, the Director of this Division issued a consumers sales and service tax assessment against the Petitioner. The 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, 2006, for tax in the amount of \$____, interest in the amount of \$____, computed through June 20, 2008, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____. According to the petition for reassessment, written notice of this assessment was served on the Petitioner on June 26, 2008.

Thereafter, by mail postmarked July 7, 2008, received in the offices of the West Virginia Office of Tax Appeals on July 9, 2008, the Petitioner timely filed a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9 [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 taxpayer, is engaged in the business of locating home care providers for its clients.
2. The home care providers, referred to as “sitters,” provide nonprofessional services to persons in their own homes who are unable to fully care for themselves.
3. Services provided include aiding the clients with personal hygiene, ensuring that they take medication, aiding with feeding and other light housekeeping duties, providing transportation to doctors’ appointments and other similar nonprofessional services.
4. Petitioner’s president and principal employee is Ms. A.
5. Petitioner solicits clients through doctors’ offices and hospitals’ social services offices.
6. Potential clients contact Ms. A looking for sitters.
7. Upon contact by a prospective client, Ms. A, will go to the home and assess the needs of the client and formulate a plan of care with the prospective client or a person responsible for the prospective client, such as a relative.
8. As part of the assessment and formulation of a plan of care, Ms. A may check the house to see if changes can be made that will benefit client, for instance, to make it safer.

9. If the prospective client decides to engage Petitioner's services, he or she enters into a contract with Petitioner. *See* State's Exhibit No. 2.

10. Petitioner, in turn, enters into a contract with a sitter to provide services to the client in accordance with the plan.

11. Petitioner will provide various logs to the client or the person responsible for the prospective client, including daily activity sheets, medication schedules and hygiene schedules, and maintain the logs in a binder so that the relative or other person responsible for the client can see what is occurring on a daily basis.

12. The client pays a fee to Petitioner for providing the sitter and pays a fee to the sitter for providing the actual care.

13. Petitioner does not have any paid employees who provide care.

14. The client is required to prepare and provide Forms 1099 to the sitters.

15. Petitioner is not licensed to provide care of this nature and does not normally provide actual care.

16. Ms. A might provide some care when a sitter is ill or does not show up, but only until she is able to get another sitter to the client's home.

DISCUSSION

The issue is whether Petitioner is engaged in the business of providing a personal service. Petitioner contends that it is providing a personal service. The Tax Commissioner contends that Petitioner is in the business of locating sitters to provide care for its clients.

The Tax Commissioner's characterization of the nature of Petitioner's relationship with the clients and the sitters is more accurate than that of Petitioner. The service provided by Petitioner is that of locating a sitter for its prospective clients. In effect, it knows of a pool of

sitters who are willing to provide services and are willing to act within certain parameters of care established by Petitioner. It then goes out and locates clients who need the type of care that the sitters are willing and able to provide. The client, not Petitioner, pays the sitter. Once the contract is entered into, Petitioner provides certain oversight and ensures a certain level of quality control.

Based on the evidence it is clear that Petitioner is not providing in-home care that might qualify as personal services, as described in W. Va. Code St. R. § 110-15-8.1.2. Thus, it is required to collect consumers sales and service tax on the services that it provides. It did not. Therefore, the assessment of tax is correct.

Petitioner also argued that it was being required to pay tax on tax. In effect it argues that the consumers sales and service tax was included in the fees that it collected from the clients, and that assessment of consumers sales and service tax on the whole amount is tantamount to assessing tax on the tax. The State Tax Commissioner argues that this is not the case, since the tax was not separately stated and collected, as required by law. W. Va. Code § 11-15-4. The Tax Commissioner is correct.

The State Tax Commissioner conceded that additions to tax should be waived. Consequently, they will be waived.

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 reassessment, the burden of proof is upon the taxpayer to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. In this matter, Petitioner has failed to carry its burden of proving that it provides personal services to its clients and that the assessment of taxes against it is erroneous, unlawful, void or otherwise invalid.

3. The State Tax Commissioner has conceded that additions to tax should be waived.

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 for the period of January 1, 2003, through December 31, 2006, for tax in the amount of \$____, interest in the amount of \$____, computed through June 20, 2008, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____, should be and is hereby **AFFIRMED** as to the tax in the amount of \$____, and interest in the amount of \$____, computed through June 20, 2008, for a total liability of \$____. However the additions to tax, in the amount of \$____, are **VACATED** in full.