

**REDACTED DECISION – DOCKET #S 09-080 U, 09-081 C, 09-082 CU – BY
GEORGE V. PIPER, ALJ – SUBMITTED FOR DECISION on JULY 21, 2009 –
ISSUED on JANUARY 19, 2010.**

SYNOPSIS

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

2. CONSUMERS SALES AND SERVICE TAX -- WAIVER OF ADDITIONS TO TAX -- Additions to tax imposed pursuant to W.Va. Code § 11-10-18(c) because underpayment of tax was due to negligence or intentional disregard of rules and regulations can only be waived under W.Va. Code § 11-10-18(a)(2) if the failure to pay was due to reasonable cause and not due to willful neglect.

3. CONSUMERS SALES AND SERVICE TAX -- BURDEN OF PROOF FOR WAIVER OF ADDITIONS TO TAX NOT MET BY PETITIONER -- Petitioner's repeated failure to properly report and remit consumers sales and service tax collected from guests with respect to food sales; the proceeds of which were erroneously converted by Petitioner for its own purposes for a period of over two and one-half years until discovered by Respondent constituted willful neglect and was not due to reasonable cause.

FINAL DECISION

A tax examiner with the Field Auditing Division of the West Virginia State Tax Commissioner's Office ("the respondent") conducted an audit of the books and records of the petitioner. Thereafter, on February 12, 2009, the director of this division 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, 2005 through June 30, 2008, for tax of \$____, interest of \$____, computed through January 12, 2009, and additions to tax of \$____, for a total assessed tax liability of \$____. Written notice of this assessment was served on the petitioner as required by law.

Also, on February 12, 2009, the Commissioner issued a purchasers use tax assessment against the petitioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code. The assessment was for the period of October 1, 2004 through June 30, 2008, for tax of \$____, interest of \$____, computed through January 12, 2009, for a total assessed tax liability of \$____. Written notice of this assessment was served on the petitioner as required by law.

Also on February 12, 2009, the Commissioner issued a combined sales and use tax assessment against the petitioner under the provisions of Chapter 11, Articles 10, 15, and 15A of the West Virginia Code. The assessment was for the period of July 1, 2008 through September 30, 2008, for tax of \$____, interest of \$____, computed through January 12, 2009, and additions to tax of \$____ for a total assessed tax liability of \$____. Written notice of this assessment was served on the petitioner as required by law.

Thereafter, by mail postmarked February 27, 2009, the petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, 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 parties and a hearing was conducted in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

After filing a petition for reassessment the petitioner remitted full payment for all three assessments to stop the running of interest on the assessments; however, the petitioner is contesting the additions to tax in the amount of \$____ with respect to the consumers sales and service tax assessment. Accordingly, the petition for reassessment has been converted to a petition for refund, under the provisions of W. Va. Code § 11-10-8(c) [2002].

FINDINGS OF FACT

1. The petitioner is the owner of the a hotel located in a city in West Virginia.
2. The petitioner is engaged in the hospitality business consisting of renting rooms and providing food and beverage service in its bar and restaurant which are located on the premises.
3. The result of the respondent's audit was a finding that the petitioner allegedly under-remitted consumers sales and service tax on all of its food sales made in the bar and the restaurant from February 2006 through June 30, 2008.
4. The petitioner's representative testified that beginning in February 2006, although the petitioner continued to charge its guests six percent consumers sales and service tax on all food sold either in the bar or the restaurant, it remitted a lesser amount of consumers sales and service tax to the respondent than that which was collected because it mistakenly believed that when the sales tax on food sold in grocery stores was reduced that applied to prepared food sold on its premises.
5. The petitioner's representative further testified that its practice of under-remitting consumers sales and service tax on it food sales continued for almost three years until the practice was discovered by the tax auditor during the course of the tax audit.
6. The petitioner's representative testified that the mistake was his and his alone and that the business did have use of the collected but under-remitted consumers sales and service tax until the mistake was discovered.

DISCUSSION

The sole issue is whether the Petitioner has shown reasonable cause for waiver of the additions to tax imposed with respect to the consumers sales and service tax assessment.

Pursuant to W. Va. Code § 11-10-18(c) the additions to tax were applied by respondent because the tax auditor determined that the under-payment of tax was due to negligence or intentional disregard of rules and regulations by the petitioner. W.Va. Code § 11-10-18(a)(2) allows for waiver of the additions to tax if the failure to pay was due to reasonable cause and not due to willful neglect.

Consumers sales and service tax is a trust tax which the petitioner was legally required to remit to the respondent in total. Because the petitioner failed to properly remit the tax over a considerable period of time this failure to properly report and remit taxes due constituted willful neglect and was not due to reasonable cause.

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 any assessment of tax is erroneous, unlawful, void or otherwise invalid, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. The petitioner in this matter has failed to carry the burden of proof with respect to its argument that its failure to properly report and remit taxes to respondent was due to reasonable cause and not due to willful neglect.

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, 2005 through June 30, 2008, for tax of \$____, interest of \$____, and additions to tax of \$____, totaling \$____, should be and is hereby **AFFIRMED**.

Because the petitioner has previously remitted \$____, no amount of consumers sales and service tax, interest or additions to tax remains due and owing to the State Tax Commissioner of West Virginia for the assessment period.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers use tax assessment issued against the petitioner for the period of October 1, 2004 through June 30, 2008, for tax of \$____, interest of \$____ totaling \$____ should be and hereby is **AFFIRMED**.

Because the petitioner previously remitted \$____, no amount of purchasers use tax or interest remains due and owing to the State Tax Commissioner of West Virginia for the assessment period.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the combined sales and use tax assessment issued against the petitioner for the period of July 1, 2008 through September 30, 2008, for tax of \$____, interest of \$____, and additions to tax of \$____, totaling \$____ should be and is hereby **AFFIRMED**.

Because the petitioner has remitted \$____, no amount of combined sales and use tax, interest or additions to tax remains due to the State Tax Commissioner of West Virginia for the assessment period.