

REDACTED DECISION—09-085 C, 09-086 U—BY MICHELE DUNCAN BISHOP, CALJ—SUBMITTED FOR DECISION on JULY 30, 2009 —ISSUED on DECEMBER 22, 2010.

SYNOPSIS

A contractor, having made direct purchases of tangible purchase property in the course of providing contracting services to an entity that may have enjoyed tax-exempt status, is nevertheless subject to the consumers sales and purchasers use taxes as described in Chapter 11, Articles 15 and 15A of the West Virginia Code.

OVERVIEW

Company (Petitioner) filed its Petition for Appeal with the West Virginia Office of Tax Appeals on March 18, 2009, asking for review of the West Virginia State Tax Department's Audit Notice of Assessment dated February 17, 2009. The Tax Department's assessment covered several periods between January 1, 2004, and June 30, 2008, and listed unpaid use tax in the amount of \$____, together with interest, for a total amount due of \$____ at that time.

A hearing was conducted by a presiding administrative law judge on August 13, 2009, at which hearing both parties appeared. The respondent was represented by counsel, and the petitioner appeared by its president. This matter was submitted for decision upon conclusion of

that hearing. By letter dated February 10, 2010, the respondent requested that the record be reopened to allow the parties additional time for discussion and, possibly, to supplement the record. That request was granted by order dated April 1, 2010, and the parties were permitted to present additional evidence through June 24, 2010. No additional evidence was submitted, and the matter is ripe for decision on the existing record.

FINDINGS OF FACT

1. The Tax Department presented its Notice of Assessment, to which was attached a schedule of certain use tax purchases made by the petitioner between February 2005 and December 2007. The schedule showed, among other things, the vendor from which each purchase was made; a brief description referencing, in most cases, the job for which the purchase was made; and the invoice amount. This information is contained in Schedule E-1-a located at Respondent's Exhibit 1.

2. President of the company said that he could not explain why taxes had not been paid on many of the purchases identified by the State Tax Department.

3. President of the company suggested that some of the identified purchases may have been related to projects for churches, and he testified that he understood at the time of making those purchases that his purchases as the contractor for the church would not be subject to consumers sales or use tax.

4. President of the company testified that the petitioner contested only those purchases related to the "truss project" for the development authority for a county in West Virginia. Those

purchases were made on or after January 31, 2007, and are described using the word “Kenna” on pages 2 through 4 of Schedule E-1-a.

5. The truss project was initiated after the company entered into a contract with the development authority to complete a 32,000 square foot wood truss manufacturing project at a business park in West Virginia.

6. The company is identified as the “contractor” on the contract documents dated June 2006.

7. The president of the company had been advised by a representative of the development authority that the project would be bid as a tax-exempt project.

8. All material purchases for the project were made by the company, and not by the development authority.

9. No additions or penalties were included on the February 17, 2009, assessment, because the Tax Department determined that the petitioner had acted in good faith.

DISCUSSION

In a hearing before the West Virginia Office of Tax Appeals, the burden of proof is on the petitioner to show that any assessment of tax against him is erroneous, unlawful, void, or otherwise invalid. W.Va. Code § 11-10A-10(e) [2002].

The West Virginia Legislature has imposed “[a]n excise tax . . . on the use in this state of tangible personal property, . . . to be collected and paid . . . at the rate of six percent of the purchase price of the property . . .” W.Va. Code § 11-15A-2. It is undisputed the petitioner is a contractor subject to the use tax.

The consumers sales and service tax and the purchasers use tax are complementary taxes and, where possible, are to be construed to accomplish such intent as to the imposition,

administration, and collection of the two taxes. *See* W. Va. Code § 11-15A-1a. Tangible personal property and services that are exempted by the provisions of the consumers sales and service tax law are exempt from the purchasers use tax. *See* W. Va. Code § 11-15A-3. Consequently, tangible personal property and services taxable under the consumers sales and service tax law are subject to the purchasers use tax. Any person who uses personal property upon which the tax has not been paid is required to make payment to the State Tax Commissioner. *See* W. Va. Code § 11-15A-11. Thus, we must look to the consumers sales and service tax law to determine whether the property upon which the State Tax Commissioner seeks to impose the tax is taxable and whether the petitioner is required to pay said tax.

Contracting services are not subject to the consumers sales tax. W.Va. Code § 11-15-8a(a). However, purchases by the contractor of tangible personal property or taxable services used in providing those services are taxable. *Id.* Each purchase made by the petitioner that was identified in the respondent's schedule of purchases was linked to a particular job, and the president of the company explained that he contested only those purchases related to the project in which the petitioner was engaged on behalf of the development authority for the truss project. He explained, however, that he contested those purchases on the basis that a representative of the development authority had explained to him that the project was exempt from taxation, and that the petitioner's purchases would also be exempt.

The above-referenced statute unequivocally states that purchases made by a contractor in the course of the performance of the contracting service are subject to the consumers sales tax and, thus, the purchasers use tax. While certain churches or organizations enjoy exemption from the consumers sales and purchasers use taxes [see W.Va. Code § 11-15-9(a)(6)], there is no exemption for contractors making purchases on behalf of, or in providing services to, such

organizations. Each purchase identified by the respondent was made by the petitioner directly and is subject to the purchasers use tax.¹

It is uncontroverted that the petitioner had no intent to evade the payment of the taxes that are the subject of the assessment, and that the failure to timely remit those taxes was the result of a misunderstanding or the result of the receipt of misinformation.

CONCLUSIONS OF LAW

1. The petitioner has failed to carry its burden to show that the assessment of tax against it is erroneous, unlawful, void, or otherwise invalid.

2. The petitioner, a contractor, having made direct purchases of tangible purchase property in the course of providing contracting services to an entity that may have enjoyed tax-exempt status, is nevertheless subject to the consumers sales and purchasers use taxes as described in Chapter 11, Articles 15 and 15A of the West Virginia Code.

3. The assessment of the West Virginia State Tax Department dated February 17, 2009, in the amount of \$____, together with accrued and accruing interest, is AFFIRMED.

¹ All purchases related to the truss project shown in Schedule E-1 appear to have been made prior to July 1, 2007. There being no evidence that purchases for the truss project were made after that date, no definitive evidence that the development authority is a qualified 501(c)(3) organization, and no evidence that the petitioner routinely performed contracting service for any charitable organizations such to affect the sample of this audit, the undersigned does not undertake a discussion of W.Va.Code § 11-15-8d(b).