

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – PROFESSIONAL SERVICES EXCEPTION UNPROVEN – Because the environmental laboratories in question failed to meet the minimum education requirement of a college degree for all of its supervisory personnel signifies that Petitioner did not meet all four (4) prongs of the four (4)-part test as provided for in 110 C.S.R. 15, § 8.1.1.1 and, therefore, the environmental services by the Petitioner are not excepted from consumers' sales and service tax as professional services.

ADMINISTRATIVE DECISION

The Division issued a consumers' sales and service tax assessment against the Petitioner.

This assessment was for the period of August 1, 1998 through December 31, 2001, for tax, interest, and no additions to tax. Written notice of this assessment was served on the Petitioner.

Thereafter, the Petitioner timely filed a petition for reassessment.

FACTUAL AND LEGISLATIVE BACKGROUND

Because of the high profile of this and related cases, the following fact pattern and legislative history will be detailed.

In response to this type of assessment, the West Virginia Legislature passed House Bill 4005, effective from the date of passage on March 9, 2002, whereby W. Va. Code § 11-15-9(a)(47) was codified. The enactment exempted "the service of providing technical evaluation for compliance with federal and state environmental standards provided by environmental and industrial consultants who have formal certification through the West Virginia Department of Environmental Protection or the West Virginia Bureau for Public Health or both"

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There is no dispute that if the technical evaluations had been performed by the Petitioner after March 9, 2002, the same would be exempt.

In his opening statement Petitioner stated the following, which was that it met one (1), possibly two (2) of the four (4) criteria necessary to be deemed a “professional” pursuant to Division’s argument, that being the Petitioner is a certified laboratory which must meet the criteria set forth in Title 47, Series 32 of the State Code of Regulations as it pertains to the certification requirement of wastewater laboratories.

Petitioner has submitted to this tribunal a composite of its laboratory personnel reflecting those who have bachelor degrees and those who have high school diplomas plus work experience.

ISSUE AND DETERMINATION

The sole issue for determination is whether the Petitioner has met its burden of proof by showing that the services that it provided are “professional” in nature, as set forth in W. Va. Code §§ 11-15-1, et. seq. and the applicable regulation, 110 C.S.R. 15. § 8.1.1.1 (1992):

In 110 CSR 15, § 8.1.1.1 one finds the following:

The determination as to whether other activities are “professional” in nature will be determined by the State Tax Division on a case – by – case basis, unless the Legislature amends West Virginia Code Section 11-15-1, et. seq. to provide that a specified activity is ‘professional.’ When making a determination as to whether other activities fall within the ‘professional’ classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally

recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements.

Section 8.1 commences with a broad statement that sales of the listed services are exempt from the imposition of the consumers' sales and service tax and the use tax, with the first subsection 8.1.1, entitled Professional Services. The lead sentence states that professional services as defined in Section 2 of these Regulations are provided by certain occupations. Reg. § 110-15-2 is labeled "Definitions" with "Professional Services" found at §2.65 as follows:

'Professional service' means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in West Virginia Code §11-15-1, et. seq. to be professional. See § 8.1.1.1 of these regulations."

The first consideration under the four prong test of §8.1.1.1. is the minimum level of education required for the activity. The level of education required for the activity is found in Table 2, WV CSR §47-32 at §3.7 et. seq. through 3.8 et. seq. That table establishes the education and experience requirements for supervisors, with testing categories requiring a four year college degree, plus two years of experience in the specific field in which they are employed as a supervisor, except for limited chemistry, which requires only a high school diploma, plus two years experience, or a high school diploma and two years in college with emphasis in laboratory technology or a natural science plus one year of experience for limited chemistry supervisor. The table does not address education and experience requirements for non-supervisory personnel. All employees' records documenting training, education, experience and duties must be made available to the examiners

during the certification process each year (§ 3.7.2). Petitioner's manager has a bachelor of science degree with experience. Its laboratory supervisor and supervisory analyst have a high school diploma plus experience while the vast majority of its analytical technicians and support personnel are high school graduates.

The truth is that not all of Petitioner's supervisory personnel have college degrees.

Accordingly, it is **DETERMINED** that because all of the department heads or supervisors are not required by law to have college degrees, the education prong of the four (4)-part test is not satisfied. See Aircorp Services, Inc., dba Survival Tech v. State Tax Department, OHA Docket No. 00-138 C (2000), on appeal in circuit court (college degree required).

Because Petitioner has previously testified that it did not meet all four (4) prongs of the four (4)-part test in 110 C.S.R. 15, § 8.1.1.1, it is not necessary to develop the issue further except to state that all four (4) must be met in order to qualify as a professional in order to be exempt from the collection of consumers' sales and service tax.

Petitioner's failure to carry its burden of proof as to the professional exception mandates that the tax be imposed.

WHEREFORE, it is the **DECISION** of the **STATE TAX COMMISSIONER OF WEST VIRGINIA** that the consumers' sales and service tax assessment issued against the Petitioner for the period of August 1, 1998 through December 31, 2001,

should be and is hereby **AFFIRMED** in accordance with the above Determination(s)
for tax, interest, and no additions to tax.