

**REDACTED DECISION – DK# 10-079 RC, 10-081 RC, 10-082 RC – BY – CHRISTOPHER B. AMOS, ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION on DECEMBER 30, 2010 – ISSUED ON JUNE 30, 2011**

## **SYNOPSIS**

**TEMPORARY EMPLOYMENT AGENCIES – BURDEN OF PROOF** – In matters before the West Virginia Office of Tax Appeals on a petition for refund the burden of proof is upon a petitioner-taxpayer to show that the entitlement to a refund is due. *See* W. Va. Code Ann. § 11-10A-10(e) (2002) and W. Va. Code St. R. § 121-1-63.1 (2003).

**TEMPORARY EMPLOYMENT AGENCIES – CONSUMERS SALES AND SERVICE TAX GENERALLY** – West Virginia imposes a general consumers sales and service tax. *See* W. Va. Code Ann. § 11-15-1 *et seq.*

**TEMPORARY EMPLOYMENT AGENCIES – CONSUMERS SALES AND SERVICE TAX GENERALLY** – Vendors are required to collect such taxes “[f]or the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article[.]” W. Va. Code Ann. § 11-15-3(a) (West 2010).

**TEMPORARY EMPLOYMENT AGENCIES – TAXATION OF SERVICES** – Article 15 defines “selected services” as “all nonprofessional activities engaged in for other persons for a consideration which involve the rendering of a service as distinguished from the sale of tangible personal property . . . .” W.Va. Code Ann. § 11-15-2(b)(18) (West 2010).

**TEMPORARY EMPLOYMENT AGENCIES – TAXATION OF SERVICES** – West Virginia’s consumers sales and service tax applies to the providing of services, and “[T]he provisions of [Section 8 of Article 15] apply not only to selling tangible personal property and custom software, but also to the furnishing of all services, except professional and personal services . . . .” W.Va. Code Ann. § 11-15-8 (West 2010).

**TEMPORARY EMPLOYMENT AGENCIES – TAXATION OF TEMPORARY EMPLOYMENT AGENCIES GENERALLY** – “Persons hired by employers through temporary employment agencies are not considered to be employees within the scope of the exemption. Instead, the temporary employment agency is considered to be rendering services to the employer which are subject to consumers sales and service tax unless some other provision in Section 9 of these regulations applies.” W. Va. Code St. R. § 110-15-60.4. (1993)

**TEMPORARY EMPLOYMENT AGENCIES – EXEMPTIONS FROM TAXATION GENERALLY** – Exemptions from taxation are strictly construed against the person making the claim for exemption. *See* Syllabus Point 4, *Shawnee Bank, Inc. v. Paige*, 200 W.Va. 20, 488 S.E.2d 20 (1997); and *Davis Memorial Hosp. v. W. Va. Tax Comm’r.*, 222 W. Va. 677, 671 S.E.2d 682 (2008).

**TEMPORARY EMPLOYMENT AGENCIES – EXEMPTIONS FROM TAXATION GENERALLY** – The services the Petitioners are providing are separate from the professional services that their doctors and nurses provide, and are thus subject to West Virginia consumers sales and service tax.

**TEMPORARY EMPLOYMENT AGENCIES – EXEMPTIONS FROM TAXATION GENERALLY** – The fees that the Petitioners receive for their placement services are taxable under West Virginia Code Section 11-15-1 *et seq* and Section 60.4 of Title 110 Series15 of the West Virginia Code of State Rules, and do not become exempt because of the nature of the services that the medical professionals themselves provide to Petitioners’ clients.

**TEMPORARY EMPLOYMENT AGENCIES – PRIOR ADMINISTRATIVE DECISIONS** – The Petitioners did not establish that the administrative decision issued in Docket No. 01-132 C is so clearly similar to the instant cases that it should be considered altogether persuasive.

**TEMPORARY EMPLOYMENT AGENCIES – PRIOR ADMINISTRATIVE DECISIONS** – “The value of a case as precedent is measured by a consideration of how far the precise point for which it is relied upon as authority was presented in argument and considered by the court.” *17 Michie’s Jurisprudence* “Stare Decisis,” § 3 (2010).

**TEMPORARY EMPLOYMENT AGENCIES – DISCRIMINATION CLAIM** – The Petitioners did not establish a case of discrimination under Article X, Section 1 of the West Virginia Constitution.

**TEMPORARY EMPLOYMENT AGENCIES – REFUND OF TAXES PAID** – The Petitioners did not establish as a matter of law that they are entitled to a refund of consumers sales and service taxes paid on the fees that they receive for the placement services that they provide.

## INTRODUCTION

Petitioners are Petitioner A, Petitioner B, and Petitioner C (collectively, the “Petitioners”). On or about February 16, 2010, Petitioners filed with this tribunal petitions for refund of consumers sales and service taxes paid for various periods discussed further, *infra*. Per Petitioners request, these cases were consolidated and a decision is being issued on written briefs and supporting documentation.<sup>1</sup>

## ISSUE

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<sup>1</sup> Originally a fourth company also filed a petition in this matter. However that case was severed and removed from the docket of the Office of Tax Appeals by order dated November 19, 2010. Accordingly, this decision will not encompass that case.

Petitioners are limited liability companies duly registered to conduct business in the state of West Virginia, and all three companies provide professional medical personnel for hire. The issue presented here is whether the Petitioners, as staffing agencies that provide professional personnel, are subject to West Virginia consumers sales and service tax, or if they are instead exempt because the services being provided by the personnel are professional or personal in nature.

## **FINDINGS OF FACT**

### Petitioner A

1. Petitioner A is a foreign (i.e., out-of-state), single-member limited liability company owned by Company A; the principal office of which is headquartered outside of West Virginia.

2. Petitioner A serves as a staffing agency and provides licensed medical professionals to various healthcare facilities, such as hospitals, government agencies, etc., in several different states including West Virginia.

3. Petitioner A contracts with medical professionals (i.e., physicians, nurses, etc.) and then provides those professionals, as the situation dictates, to hospitals and other healthcare facilities as needed.

4. The medical professionals utilized by Petitioner A are independent contractors and are not employees of Petitioner A.

5. When Petitioner A contracts with a healthcare facility, such as a hospital, they charge the facility a fee to cover the costs of doing business as well as the services being provided by the healthcare professional. Petitioner A marks-up the services in order to obtain a reasonable profit for themselves.

6. Neither Petitioner A or Company A owns or maintains any property, office space, or employees in the state of West Virginia.

7. Petitioner A, through the Multistate Tax Commission, filed a voluntary disclosure agreement with the Compliance Division of the West Virginia State Tax Department. This disclosure was accepted by the Tax Department on or about December 7, 2007.

8. Pursuant to that voluntary disclosure agreement, on or about February 28, 2008, Petitioner A filed consumers sales and service tax returns for the period of July 31, 2006, through December 31, 2007, and paid consumers sales and service tax of \$\_\_\_\_ plus \$\_\_\_\_ in interest, for a total payment of \$\_\_\_\_.<sup>2</sup>

9. After filing the above-mentioned returns and remitting the tax and interest, Petitioner A discovered an administrative decision that was issued by the West Virginia Office of Hearings and Appeals on September 24, 2002.<sup>3</sup>

10. On or about July 29, 2008, Petitioner A, through a certified public accountant, wrote to the State Tax Department seeking guidance as to whether the fees received by the taxpayer were subject to consumers sales and service tax.<sup>4</sup>

11. On or about August 14, 2008, General Counsel for Revenue Operations, responded in writing to this inquiry.<sup>5</sup>

12. On or about March 3, 2009, Petitioner A filed amended returns by letter claiming refund of sales tax in the amount of \$\_\_\_\_, plus interest in the amount of \$\_\_\_\_, for a total refund claim of \$\_\_\_\_.<sup>6</sup>

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<sup>2</sup> See Parties' Joint Stipulations, 1.6. See also footnote 6, *infra*.

<sup>3</sup> Because administrative decisions containing taxpayer information are confidential, the decision will be referred to by its docket number only (Docket No. 01-132 C). Additionally, on January 1, 2003, the West Virginia Office of Hearings and Appeals was dissolved and replaced by the independent West Virginia Office of Tax Appeals.

<sup>4</sup> See Parties' Joint Stipulations, Exhibit D.

<sup>5</sup> See Parties' Joint Stipulations, Exhibit E. This response will be discussed further, *infra*.

<sup>6</sup> See Parties' Joint Stipulations, Exhibits F and G, as well as Joint Stipulations, 1.10 which all state that the interest paid by Petitioner A was \$\_\_\_\_ and not \$\_\_\_\_ as indicated in Joint Stipulation 1.6. This difference of \$\_\_\_\_ appears to be a typographical error. Exhibit G in the Parties' Joint Stipulations summarizes the interest paid by Petitioner A on their March 31, 2007, return as \$\_\_\_\_, when the interest on the actual return for that month in Exhibit H totals \$\_\_\_\_; a difference of \$\_\_\_\_. Also, the total interest reported by Petitioner A on their actual returns in Stipulation Exhibit H actually totals either \$\_\_\_\_ or \$\_\_\_\_ (the exact number is not clear because Petitioner A's return for May 31, 2007, appears to

13. Having not received a response after 90 days from the date that they filed their refund request, on or about February 16, 2010, Petitioner A filed a petition for refund with the Office of Tax Appeals.

Petitioner B

14. Petitioner B is a foreign (i.e., out-of-state), single-member limited liability company owned by Company B; the principal office of which is headquartered outside of West Virginia.

15. Petitioner B serves as a staffing agency and provides licensed medical professionals to various healthcare facilities, such as hospitals, government agencies, etc., in several different states including West Virginia.

16. Petitioner B contracts with medical professionals (i.e., physicians, nurses, etc.) and then provides those professionals, as the situation dictates, to hospitals and other healthcare facilities as needed.

17. The medical professionals utilized by Petitioner B are independent contractors and are not employees of Petitioner B or Company B.

18. When Petitioner B contracts with a healthcare facility, such as a hospital, they charge the facility a fee to cover the costs of doing business as well as the services being provided by the healthcare professional. Petitioner B marks-up the services in order to obtain a reasonable profit for themselves.

19. Neither Petitioner B nor Company B owns or maintains any property, office space, or employees in the state of West Virginia.

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indicate that the interest paid was \$\_\_\_\_ but the total on Line 18 of that return comes to \$\_\_\_\_. Thus, it is not clear whether the exact total for that return should have been \$\_\_\_\_ or \$\_\_\_\_).

20. Petitioner B, through the Multistate Tax Commission, filed a voluntary disclosure agreement with the Compliance Division of the West Virginia State Tax Department. This disclosure was accepted by the Tax Department on or about December 7, 2007.

21. Pursuant to that voluntary disclosure agreement, on or about February 28, 2008, Petitioner B filed consumers sales and service tax returns for the period of December 31, 2003, through December 31, 2007, and paid consumers sales and service tax of \$\_\_\_\_ plus \$\_\_\_\_ in interest, for a total payment of \$\_\_\_\_.<sup>7</sup>

22. After filing the above-mentioned returns and remitting the tax and interest, Petitioner B discovered an administrative decision that was issued by the West Virginia Office of Hearings and Appeals on September 24, 2002.<sup>8</sup>

23. On or about July 29, 2008, Petitioner B, through a certified public accountant, wrote to the State Tax Department seeking guidance as to whether the fees received by the taxpayer were subject to consumers sales and service tax.<sup>9</sup>

24. On or about August 14, 2008, General Counsel for Revenue Operations, responded in writing to this inquiry.<sup>10</sup>

25. On or about March 3, 2009, Petitioner B filed amended returns by letter claiming refund of sales tax in the amount of \$\_\_\_\_, plus interest in the amount of \$\_\_\_\_, for a total refund claim of \$\_\_\_\_.<sup>11</sup>

26. Having not received a response after 90 days from the date that they filed their refund request, on or about February 16, 2010, Petitioner B filed a petition for refund with the Office of Tax Appeals.

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<sup>7</sup> See Parties' Joint Stipulations, 2.6.

<sup>8</sup> This is the same administrative decision as mentioned in Findings of Fact 9, *supra*.

<sup>9</sup> This is the same letter and Joint Exhibit as mentioned in Findings of Fact 10, *supra*.

<sup>10</sup> This is the same response as mentioned in Findings of Fact 11, *supra*.

<sup>11</sup> See Parties' Joint Stipulations, 2.10. The amount of interest paid by Petitioner B appears to have been \$\_\_\_\_ instead of \$\_\_\_\_; a difference of \$\_\_\_\_. See also Joint Stipulations, Exhibit O.

### Petitioner C

27. Petitioner C is a foreign (i.e., out-of-state), single-member limited liability company owned by Company C; the principal office of which is headquartered outside of West Virginia.

28. Petitioner C serves as a staffing agency and provides licensed medical professionals to various healthcare facilities, such as hospitals, government agencies, etc., in several different states including West Virginia.

29. Petitioner C maintains a staff of registered nurses who are employees of Petitioner C and, unlike Petitioner A and Petitioner B, *supra*, do not operate as independent contractors. Petitioner C provides these nurses, as the situation dictates, to hospitals and other healthcare facilities as needed

30. When Petitioner C contracts with a healthcare facility, such as a hospital, they charge the facility a fee to cover the costs of doing business as well as the services being provided by the nursing professional. Petitioner C marks-up the services in order to obtain a reasonable profit for themselves.

31. Neither Petitioner C nor Company C owns or maintains any property, office space, or employees in the state of West Virginia, other than the registered nurses that it furnishes from time-to-time to hospitals and other healthcare facilities located in West Virginia.

32. Petitioner C, through the Multistate Tax Commission, filed a voluntary disclosure agreement with the Compliance Division of the West Virginia State Tax Department. This disclosure was accepted by the Tax Department on or about December 7, 2007.

33. Pursuant to that voluntary disclosure agreement, on or about February 28, 2008, Petitioner C filed consumers sales and service tax returns for the period of May 31, 2006,

through December 31, 2007, and paid consumers sales and service tax of \$\_\_\_\_ plus \$\_\_\_\_ in interest, for a total payment of \$\_\_\_\_.<sup>12</sup>

34. After filing the above-mentioned returns and remitting the tax and interest, Petitioner C discovered an administrative decision that was issued by the West Virginia Office of Hearings and Appeals on September 24, 2002.<sup>13</sup>

35. On or about July 29, 2008, Petitioner C, through a certified public accountant, wrote to the State Tax Department seeking guidance as to whether the fees received by the taxpayer were subject to consumers sales and service tax.<sup>14</sup>

36. On or about August 14, 2008, General Counsel for Revenue Operations, responded in writing to this inquiry.<sup>15</sup>

37. On or about March 3, 2009, Petitioner C filed amended returns by letter claiming refund of sales tax in the amount of \$\_\_\_\_, plus interest in the amount of \$\_\_\_\_, for a total refund claim of \$\_\_\_\_.

38. Having not received a response after 90 days from the date that they filed their refund request, on or about February 16, 2010, Petitioner C filed a petition for refund with the Office of Tax Appeals.

39. Petitioners A, B, and C billed their clients for an amount that would cover the fees to be paid to the respective medical professional as well as an amount that would cover the Petitioner's mark-up (i.e., there was no separate billing arrangement for the medical professionals and the mark-up).

40. Petitioners at times attempted to collect sales taxes but their clients refused, believing that the services were non-taxable.

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<sup>12</sup> See Parties' Joint Stipulations, 3.6. See also Joint Stipulations, Exhibit U.

<sup>13</sup> This is the same administrative decision as mentioned in Findings of Fact 9 and 22, *supra*.

<sup>14</sup> This is the same letter and Joint Stipulations Exhibit as mentioned in Findings of Fact 10 and 23, *supra*.

<sup>15</sup> This is the same response as mentioned in Findings of Fact 11 and 24, *supra*.



41. At all times relevant herein, Petitioners A and C's contracts allowed them to impose an \$\_\_\_\_ per day administrative service fee. However, that amount never appeared to be collected *per se*, and the billing arrangement as described in Findings of Fact 39 was apparently utilized instead.<sup>16</sup>

42. At all times relevant herein, Petitioner B collected administrative service fees in the amount of \$\_\_\_\_.<sup>17</sup>

### **BURDEN OF PROOF**

In matters before the West Virginia Office of Tax Appeals on a petition for refund the burden of proof is upon a petitioner-taxpayer to show that the entitlement to a refund is due. *See* W. Va. Code Ann. § 11-10A-10(e)(West 2010) and W. Va. Code St. R. § 121-1-63.1 (2003).

### **DISCUSSION**

To begin with, West Virginia imposes a general consumers sales and service tax. *See* W. Va. Code Ann. § 11-15-1 *et seq.* Vendors are required to collect such taxes “[f]or the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article[.]” W. Va. Code Ann § 11-15-3(a) (West 2010). Article 15 defines “selected services” as “all nonprofessional activities engaged in for other persons for a consideration which involve the rendering of a service as distinguished from the sale of tangible personal property . . . .” W.Va. Code Ann. § 11-15-2(b)(18) (West 2010). Section 8 of Article 15 reiterates that West Virginia’s consumers sales and service tax applies to the providing of services, and states “[T]he provisions of this article apply not only to selling tangible personal property and custom software, but also to the furnishing of all services, except professional and personal services . . . .” W.Va. Code Ann. § 11-15-8 (West 2010).

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<sup>16</sup> *See* Reply Brief of Petitioners, Attachment A (affidavit of the Chief Financial Officer for Petitioners).

<sup>17</sup> *Id.*

The Petitioners do not argue that their placement services are *per se* professional services. Rather, they argue that their placement services are related to the professional medical services that the doctors and nurses provide, and as such they should be exempt from consumers sales and service tax. Section 60.4 of Series 15, Title 110 of the West Virginia Code of State Rules addresses temporary employment agencies and reads:

“Persons hired by employers through temporary employment agencies are not considered to be employees within the scope of the exemption. Instead, the temporary employment agency is considered to be rendering services to the employer which are subject to consumers sales and service tax unless some other provision in Section 9 of these regulations applies.”

W. Va. Code St. R. § 110-15-60.4(1993).

The Petitioners argue that the reference to Section 9 in the above-quoted language provides them with a mechanism for their desired exemption. Specifically, the Petitioners argue that because Section 9 of Series 15, Title 110 contains an exemption for professional services, and because the doctors and nurses they provide are performing professional or personal services, the Petitioners therefore are providing a service that is part-and-parcel with the professional medical services being provided.<sup>18</sup>

The Respondent does not dispute that the medical personnel provided to Petitioners’ clients are rendering professional services for purposes of the West Virginia consumers sales and service tax. Rather, the Respondent argues that two services are being rendered: the professional services that the medical personnel provide to the Petitioners’ clients, which is non-

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<sup>18</sup> The term “professional service” is not defined by the West Virginia Code. However, “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 Section 11-15-1 *et seq.* to be professional.” W. Va. Code St. R. § 110-15-2.65(1993). Professional service includes those services provided by physicians and registered professional nurses. *See* W. Va. Code St. R. § 110-15-8.1.1.1. Additionally, personal services are those services performed on the person and includes the services of nurses. *See* W. Va. Code St. R. § 110-15-8.1.2.1(1993).

taxable, and the administrative service that the Petitioners provide by way of the placement of these medical professionals, for which Petitioners receive a fee. It is this fee or mark-up received by Petitioners that is the subject of taxation in these cases.

Petitioners have failed to persuade that statutory or regulatory authority specifically envisions an exemption for placement agencies that provide medical professionals as a matter of course. Petitioners are all providing services as temporary employment agencies, and while the nurses and doctors that they provide do render professional medical services to Petitioners' clients, the fees that the Petitioners receive for these placement services are taxable under West Virginia Code Section 11-15-1 *et seq.* and West Virginia Code of State Rules Section 110-15-60.4, and do not become exempt because of the nature of the services that the medical professionals themselves provide to Petitioners' clients.

It is well settled that exemptions from taxation are strictly construed against the person making the claim for exemption. *See* Syllabus Point 4, *Shawnee Bank, Inc. v. Paige*, 200 W.Va. 20, 488 S.E.2d 20 (1997); and *Davis Memorial Hosp. v. W. Va. Tax Comm'r.*, 222 W. Va. 677, 671 S.E.2d 682 (2008). Here, regardless of how West Virginia Code Sections 11-15-3(a) and 11-15-8 are construed, it is evident that the services the Petitioners are providing are separate from the professional services that their doctors and nurses provide, and are thus subject to West Virginia consumers sales and service tax.

Petitioners also rely upon an administrative decision issued by the Office of Hearings and Appeals, as well as a letter from General Counsel for Revenue Operations, and further aver that Respondent's treatment of them amounts to discrimination under Article X, Section 1 of the West Virginia Constitution. The Respondent counters by arguing that the decision issued in Docket No. 01-132 C is not controlling because it does not address the matter of the mark-up which is at issue in the present instance, that it is vague in its factual background, and because

the Office of Hearings and Appeals was dissolved on January 1, 2003, and replaced with the current Office of Tax Appeals.

The legal issue raised here is not exactly novel, as it has been addressed to some degree in prior administrative decisions. Certain aspects of those earlier decisions, however, raise some questions as to either the consistency of the rulings in those cases or the precise facts upon which they are based. On or about July 30, 1996, an administrative decision was issued by the Office of Hearings and Appeals. That case, which will be referred to herein as Docket No. 95-041 RC, addressed issues that appear similar to those presented in the instant matter. At issue in Docket No. 95-041 RC was whether a temporary employment agency that provided physical therapists to various healthcare facilities in the state was exempt from the imposition of sales tax because the services provided by those physical therapists were either personal or professional in nature.

The Petitioner in that case provided employees by one of two methods. In some situations the physical therapists became employees of the healthcare facility. It is not clear from the scant five page decision in Docket No. 95-041 RC whether those individuals were independent contractors that eventually became employees of the healthcare facilities, or instead whether they were directly placed with those facilities by the Petitioner and had never worked for the facility prior to being placed.<sup>19</sup> In other situations the physical therapists were employees of the Petitioner at all times while they provided services to various healthcare facilities. With respect to that type of arrangement the Administrative Law Judge in Docket No. 95-041 RC ruled that, while physical therapists may be considered professionals pursuant to West Virginia Code of State Rules Section 110-15-8.1.1.1, the Petitioner was not rendering professional services, but was instead providing a temporary employment service to healthcare facilities for a

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<sup>19</sup> In those placement situations it was found that the “Petitioner’s invoice to the facility **merely represents a placement fee plus cost remuneration.**” *In the Matter of \_\_\_\_\_*, Docket No. 95-041 RC (1996) at 2. (Emphasis added). However, the precise nature of that particular placement arrangement is probably of little significance because in that case it was noted that the “Petitioner concedes that this type of service is taxable and is not claiming a refund for the portion of tax related to this type of placement arrangement.” *Id* at 2 and 3.

fee. In that case the placement fee was ruled taxable under the provisions of West Virginia Code Section 11-15-1 *et seq.*

On September 24, 2002, a similar administrative decision was issued by a different Administrative Law Judge, also with the Office of Hearings and Appeals. In Docket No. 01-132 C the question presented was whether the Petitioner, who placed nurses with various healthcare facilities as either employees of the Petitioner or as independent contractors, was exempt from taxation because the services rendered by those nurses were either personal or professional in nature. The Respondent in that case relied upon the holding in Docket No. 95-041 C to support its argument that the services provided by the Petitioner should be held taxable. The factual background in Docket No. 95-041 C is also noticeably limited; however, in that case the Administrative Law Judge, observing that under West Virginia Code of State Rules Section 110-15-60.4, employment agencies are taxable unless an exception applies under Section 9 of the regulations, found that “The services of nurses are explicitly stated to be “personal” or “professional” [and] . . . The aforementioned administrative decision (No 95-041 RC) is overruled to the extent that it is inconsistent with this ruling.”

As noted *supra* the facts giving rise to the administrative decisions in both Docket Nos. 95-041 RC and 01-132 C are not entirely clear. While at first blush they seem nearly identical, a closer reading of both decisions raises questions as to the billing and fee arrangements in each case and whether those were important or perhaps even decisive factors. Interestingly, in Docket No. 01-132 C it was found that “Petitioner’s clients pay for each hour worked by one of Petitioner’s nurses or nursing assistants. **From that hourly wage . . . Petitioner retains a portion of same and pays the remainder to the RN, LPN or CNA involved, less any applicable income or withholding taxes that are due and owing.**” *In the Matter of \_\_\_\_\_*, Docket No. 01-132 C (2001) at 3. (Emphasis added).

In Docket No. 01-132 C the taxpayer may not have charged a mark-up as such, but perhaps instead took a portion of the payment that was dedicated to the actual performance of the non-taxable professional services. In other words, it is not clear whether the Petitioner in Docket No. 01-132 C charged a fee for their placement services *per se* or whether they instead carved away for themselves a portion of the remuneration that the nurses received for the non-taxable services that they as medical professionals provided to the Petitioner's client.<sup>20</sup>

It is unclear from the decision in Docket No. 01-132 C whether such an arrangement was the basis for the outcome in that case. In light of that potentially important factor, the extent to which the decision in Docket No. 95-041 RC was overruled as being inconsistent with that of Docket No. 01-132 C is particularly uncertain. In short, while the present case appears to share some similarities with prior administrative decisions, the facts behind Docket Nos. 95-041 RC and 01-132 C are not so clearly similar to the instant cases that either administrative decision should be considered altogether persuasive, and neither decision goes far enough in their factual discussions to merit a conclusion that they are categorically applicable to the Petitioners here.

Furthermore, this tribunal is reluctant to accept the proposition that either administrative decision has any value to this decision because, at least in part, the lack of precise factual background in each of those cases calls into question the extent to which they should be considered valuable precedent by the undersigned Administrative Law Judge. "The value of a case as precedent is measured by a consideration of how far the precise point for which it is relied upon as authority was presented in argument and considered by the court." 17 *Michie's Jurisprudence* "Stare Decisis," § 3 (2010).

Petitioners rely also upon a letter written on or about August 14, 2008, by General Counsel for Revenue Operations, wherein it was stated:

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<sup>20</sup> As so little is known about the facts in Docket No. 01-132 C, this observation should not be read as a conclusion that such a method of billing would be an appropriate method of tax planning.

“When we spoke on the phone, you posed the question: Is the resale of services subject to consumer sales tax when they otherwise would not be?”  
“Based upon previous cases before the West Virginia Office of Tax Appeals, it is our position that the resale of physicians’ services is not subject to consumer sales and service tax, as those services are considered professional services, according to 110 C.S.R. 15, § 8.1.1.1.”

This letter was apparently based upon facts presented to General Counsel for Revenue Operations by Mr. X of an accounting firm, pursuant to a telephone conversation held between the two sometime after the July 29, 2008, letter that was sent to the State Tax Department and referenced *supra* as Joint Stipulations, Exhibit D. What is problematic with Petitioners’ reliance thereon is the fact that in his letter General Counsel for Revenue Operation expressly stated that the facts presented to him yielded an opinion about the resale of physician services. It should be pointed out that, under certain provisions of the West Virginia tax statutes and its regulations, services that are indeed purchased for resale are typically exempt from sales tax because the taxes on those goods or services get passed on to the ultimate end consumer.<sup>21</sup>

While the parties reference generally West Virginia Code Section 11-15-2(b)(18), they do not specifically argue a resale of services or subcontracting issue such as that found in West Virginia Code of State Rules Section 110-15-33.4.5. Instead, the issue presented to this tribunal is the taxability of the fee that the Petitioners, as temporary employment agencies, receive for providing medical professionals to their clients. Additionally, in his letter General Counsel for Revenue Operations indirectly makes reference to decisions issued by the Office of Tax Appeals, but the administrative decisions discussed *supra* and cited by the parties were issued instead by the Office of Hearing and Appeals. For these reasons it cannot be concluded with certainty that General Counsel for Revenue Operation’s letter actually addresses the same issues that are presented in the cases being decided here.

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<sup>21</sup> See West Virginia Code Section 11-15-2(b)(18). See also W.Va. C.S.R. § 110-15-33.4.5 (1993)

Finally, Petitioners raise a discrimination claim under Article X, Section 1 of the West Virginia Constitution. By analogy, Petitioners compare themselves to pharmacies that sell tax exempt prescriptions under West Virginia Code Section 11-15-9(a)(11); sales of services by other professionals under West Virginia Code Section 11-15-8, such as lawyers, accountants, engineers, and dentists, including contracted professionals; and sales of interrelated services by hospitals under West Virginia Code of State Rules Section 110-15-36. In all of these examples the Petitioners point out that the Respondent does not treat separately the non-taxable services and the administrative functions related to providing those services. While Petitioners' counsel articulates some good points, they are not entirely persuasive because the law firms, hospitals, etc., to whom they compare themselves are all in the business of providing those services. Temporary employment agencies are not in the business of providing professional services; rather, they are in the business of providing personnel who at times may themselves provide professional services.

For the foregoing reasons it is held that the Petitioners did not establish as a matter of law that they are entitled to a refund of consumers sales and service taxes paid on the fees that they receive for the placement services that they provide.

### **CONCLUSIONS OF LAW**

Based upon the above it is **DETERMINED** that:

1. In matters before the West Virginia Office of Tax Appeals on a petition for refund the burden of proof is upon a petitioner-taxpayer to show that the entitlement to a refund is due.

*See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code St. R. § 121-1-63.1 (1993).

2. West Virginia imposes a general consumers sales and service tax. W. Va. Code Ann. 11-15-1 *et seq.*(West 2010)



3. Vendors are required to collect such taxes “[f]or the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article[.]” W. Va. Code Ann. § 11-15-3(a) (West 2010).

4. Article 15 defines “selected services” as “all nonprofessional activities engaged in for other persons for a consideration which involve the rendering of a service as distinguished from the sale of tangible personal property . . . .” W.Va. Code Ann. § 11-15-2(b)(18) (West 2010).

5. West Virginia’s consumers sales and service tax applies to the providing of services, and “[T]he provisions of [Section 8 of Article 15] apply not only to selling tangible personal property and custom software, but also to the furnishing of all services, except professional and personal services . . . .” W.Va. Code Ann. § 11-15-8 (West 2010).

6. “Persons hired by employers through temporary employment agencies are not considered to be employees within the scope of the exemption. Instead, the temporary employment agency is considered to be rendering services to the employer which are subject to consumers sales and service tax unless some other provision in Section 9 of these regulations applies.” W.Va. Code St. R. § 110-15-60.4 (1993).

10. Petitioners have failed to persuade that statutory or regulatory authority specifically envisions an exemption for placement agencies that provide medical professionals as a matter of course.

11. Exemptions from taxation are strictly construed against the person making the claim for exemption. *See* Syllabus Point 4, *Shawnee Bank, Inc. v. Paige*, 200 W.Va. 20, 488 S.E.2d 20 (1997); and *Davis Memorial Hosp. v. W. Va. Tax Comm’r.*, 222 W. Va. 677, 671 S.E.2d 682 (2008).

12. The services the Petitioners are providing are separate from the professional services that their doctors and nurses provide, and are thus subject to West Virginia consumers sales and service tax.

13. The fees that the Petitioners receive for their placement services are taxable under West Virginia Code Section 11-15-1 *et seq.* and West Virginia Code of State Rules Section 110-15-60.4, and do not become exempt because of the nature of the services that the medical professionals themselves provide to Petitioners' clients.

14. The Petitioners did not establish that the administrative decision issued in Docket No. 01-132 C is so clearly similar to the instant cases that it should be considered altogether persuasive.

15. "The value of a case as precedent is measured by a consideration of how far the precise point for which it is relied upon as authority was presented in argument and considered by the court." *17 Michie's Jurisprudence* "Stare Decisis," § 3 (2010).

16. The Petitioners did not establish a case of discrimination under Article X, Section 1 of the West Virginia Constitution.

17. The Petitioners did not establish as a matter of law that they are entitled to a refund of consumers sales and service taxes paid on the fees that they receive for the placement services that they provide.

#### **DISPOSITION**

**WHEREFORE**, it is the final decision of the West Virginia Office of Tax Appeals that the decision of the State Tax Commissioner in this matter is hereby **AFFIRMED**.