

**SYNOPSIS**

**PURCHASERS' USE TAX – PROFESSIONAL SERVICES EXEMPTION UNPROVEN** – Because the environmental laboratories in question failed to meet the minimum education requirement of a college degree as set forth in the law for all of its supervisory personnel, as well as the failure of certain of the labs to meet State licensing requirements as to its geologists, 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 provided to the Petitioner are not excepted from use tax as professional services.

**FINAL DECISION**

The Auditing Division issued a purchasers' use tax assessment against the Petitioner. This assessment was for the period of January 1, 1999 through December 31, 2001, for tax and interest, through December 31, 2001. Written notice of this assessment was served on the Petitioner.

Thereafter, the Petitioner timely filed a petition for reassessment.

At the hearing, Petitioner's counsel stated for the record that Petitioner has also remitted a partial payment, leaving only the remaining balance in dispute in this proceeding.

**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

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standards provided by environmental and industrial consultants who have formal certification through the West Virginia Department of Environmental Protection (WVDEP) or the West Virginia Bureau for Public Health or both . . . .”

There is no dispute that if the technical evaluations had been performed by the laboratories in question for the Petitioner after March 9, 2002, the same would be exempt except for Company C, because the West Virginia DEP does not certify geophysical labs.

Although Petitioner is the taxpayer in this case the controversy involves the services of three (3) laboratories, namely Company B, Company A and Company C, which provided laboratory testing to Petitioner.

The Petitioner is a subsidiary of a company and operates its business, a subtitle D solid waste facility located in West Virginia. Petitioner is licensed and regulated by the West Virginia Division of Natural Resources, Division of Environmental Protection (WVDEP). In order to comply with the provisions of its permit, Petitioner is required to regularly test the site’s ground water, surface water and leachate; and twice a year, it must provide statistical geochemical analysis of such testing to WVDEP. Additionally, because its landfill is essentially an ongoing construction project, it is required to test and certify to WVDEP the materials used in building the facility, such as the soil, clay, sand and synthetics for use in its construction quality assurance manual. Because Petitioner does not have the internal expertise to do such testing and analysis, it hires outside consultants to assist it in these compliance activities.

Company B, a geophysical and environmental services consultant, has seven employees, all but one of whom has at least a Bachelor's Degree in geology. As a condition of their employment, each of the geologists must become a registered professional geologist. This is a state licensing procedure, which generally "mirrors" the requirements for becoming a professional engineer. To be so recognized, a graduate geologist must meet significant requirements, including scholarly publications, additional education, and about six years of work under the supervision of a licensed geologist. Finally, the geologist must sit for and pass a national exam. In order to retain this designation, it is necessary for him or her to complete continuing education and training as required by, among other things, the requirements of OSHA 1910.210, copies of which were attached to all of the resumes in Petitioner's Exhibit 3.

The President and owner of the company, Mr. B, who has a BS in geology from Syracuse University, a Master's Degree from the University of New Mexico, and a PhD in Environmental Chemistry from the University of Pittsburgh. Doctor B is a registered professional geologist in several out-of-state locations. The State of West Virginia does not in fact certify professional geologists, but does accept one out-of-state's certification.

Company B assists Petitioner with the water sampling and reporting requirements of WVDEP, in that it collects samples of ground water, surface water and leachate at the Petitioner's site, and delivers same to Company B by means of a legal "Chain of Custody" procedure. After Company A completes the lab testing, it sends the test data to Company B, which then performs a complicated geochemical

statistical analysis and report, which is delivered to WVDEP every six (6) months. The report is intended to describe the environmental impact that Petitioner has on ground and surface water. The goal is to demonstrate that there is "No facility impact to the environment." This work requires a level of expertise. Dr. B testified that the collection of samples follows a specific protocol, which, if violated, can cause the entire process to fall apart. The testing is looking for data as minute as one part per billion, which represents essentially an aspirin in one hundred thousand gallons of water. The testing can in fact be contaminated by the person doing the sample by simply stopping at a gas station to fuel a vehicle prior to gathering the sample, or by trace amounts of powder on latex gloves worn while taking samples. Doctor B testified that doing the geochemical analysis requires a minimum of four years of experience.

In addition to the educational and licensing requirements, which Company B personnel must meet, Petitioner's parent company, and the State of West Virginia each impose their own audits of the sampling and testing process. Audit personnel have come to the Petitioner's site at the time samples are taken, and review the procedure and obtain "split samples" which are tested elsewhere, to compare and verify results.

Company A is the lab, which receives the samples from Company B by means of the "Chain of Custody" procedure. It performs tests on groundwater, surface water and leachate from the landfill. It also does NPDES (water discharge permit) testing for Petitioner. Company A's Director of Technical Services, Mr. A, testified that about twenty-five (25) of Company A's sixty (60) employees work on

Petitioner's testing. Of the twenty-five (25) employees, all but clerical and delivery personnel hold bachelor's degrees. Company A's lab is certified by the WVDEP on an annual basis, and is also certified by the National Environmental Laboratory Accreditation Conference (NELAP). NELAP is an organization funded by the United States Department of Environmental Protection, which sets standardized accreditation rules for environmental labs. NELAP certification has been adopted by many states, but not West Virginia, because West Virginia has its own certification program, which requires annual inspection and certification. It is conducted in accordance with Title 47 of the West Virginia State Code of Regulations. Both West Virginia and NELAP require on site inspections, blind sampling, and review of the qualifications of the analysts performing the test, the lab equipment and the protocols and procedures employed. (Tr. 28). The lab must also comply with "ISO 25."

While there are not any formal continuing educational requirements under state law, Company A's personnel must undergo ongoing continuing educational requirements under state law, Company A's personnel must undergo self-imposed ongoing training and education. Each of the processes performed in the lab has a standard operating procedure, which must be learned by anyone performing the process, and for which they must be annually tested and certified. This includes certifications on each piece of lab equipment or apparatus. For such training, Company A has professionals or the equipment manufacturer's representatives come to its facility. Employees also travel to other facilities for training.

The testing done for Petitioner is generally done by a chemist or biologist. Very little of the services provided by Company A can be characterized as "limited chemistry," such as performing ph. conductance tests, which require little education or training.

Company C is a testing lab located outside of West Virginia, which performs geotechnical services for Petitioner, in connection with construction materials. As a landfill facility is expanded, WVDEP requires that Petitioner submit and periodically update its Construction Quality Assurance Manual. The materials used in the construction of the landfill, such as clay, sand soil, and any synthetic materials must be tested and certified. While West Virginia does not require certification for Company A labs, this lab holds a number of nationally recognized certifications as set forth in Petitioner's Exhibit 1. These include certification from GAI-LAP for geosynthetic testing; AASHTO, which is the association of state highway officials; and the Army Corps of Engineers. The construction materials are tested to insure that their physical characteristics meet state regulations and are included in the Construction Quality Assurance Manual. All testing must be performed in accordance with specific standard operating procedures, which change annually. Accordingly, to maintain the standards noted above, the personnel must annually continue their training and education to remain certified. Petitioner's Exhibit 1 includes resumes of Company C's personnel, which reflects that the company employs a number of professional engineers, as well as environmental geologists and biologists.

## DISCUSSION

The sole issue for determination is whether the Petitioner has met its burden of proof by showing that the services provided to it by the three (3) labs 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 (emphasis added):

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 excepted 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.

As stated by Petitioner's counsel, Reg. 8.1.1 contains two specific methods of classifying a particular service. The first is a list of specifically enumerated occupations, which includes those which were "professions" at common law or which are traditionally thought of professions, such as attorneys and various medical specialties. This list includes other occupations commonly considered as "professionals" such as certified public accountants, optometrists, architects, dentists, pharmacists, and interestingly, professional engineers, which as Petitioner's counsel posits is particularly relevant to the issue in this case. All of these are clearly within the commonly understood parameter of "professional" in terms of education level and training and responsibility to provide a high level of specialized expertise to the public.

Conversely, Petitioner's counsel states that the list includes occupations, which may not have so high a level of educational prerequisites, such as certified court reporters, or those who are primarily sales people, such as enrolled agents and real estate brokers.

The second method provided by the regulation is a delegation to the State Tax Division to make case-by-case determinations based on, among other things, four enumerated factors. This delegation of authority is as follows:

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.



Petitioner's counsel argues that the Department's position that the activity or service in question cannot be a "professional service" if it fails to meet one of the four (4) "requirements" is, in his judgment, a misapplication of the express language of the regulation, because Reg. 8.1.1.1 requires that the Department engage in a subjective review of the activity, and that it is to consider certain (four) factors but is not limited to those four.

He, therefore, argues that such mandatory rigidity is unwarranted, that although his client's decision making personnel have college degrees, the regulation does not require same and, more importantly, that the Department simply picks and chooses different criteria to fit a desired result, such as asserting that Dr. B is not a professional geologist because the State of West Virginia does not license or certify professional geologists but then ignores the fact that he is a registered geologist in other states although West Virginia accepts Pennsylvania's certification.

In determining this issue as stated in § 8.1.1.1., it is the activities that are to be determined professional by the Tax Division and not the credentials of each and every person involved, which is the determining factor. This tribunal does not go as far as Petitioner's counsel in saying that it does not matter whether Petitioner's personnel have one college degree or several college degrees, or have published numerous academic or scientific articles, because their academic backgrounds must indeed come into play under the four (4)-part test in § 8.1.1.1. The issue is the conduct of the group and the processes which these people use and whether those processes as a group are a professional activity.

It is the Petitioner's contention that the laboratories' annual testing procedure, in which each laboratory must be re-certified to render services on environmental studies, is a more stringent demand than the demands placed upon the listed group of professions at the beginning of §8.1.1.1., such as physicians, dentists, lawyers, etc. This contention misses the mark because the other occupations mentioned by the Petitioner are explicitly excepted by the Legislature and are not subject to the four-part test that the Division must employ for occupations not explicitly determined by the Legislature to be "professional."

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 a 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).

Accordingly, as to the environmental labs, 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).

The second prong of the test is the nature and extent of nationally recognized standards for performance. This prong of the test is indeed met because the entire discipline of environmental protection is controlled by federal statute coupled with federal regulations, which are binding on all of the states, with similar state enactment of both the statutes and regulations to that of the federal requirements. The laboratories are required to perform according to national standards. Testing procedures under West Virginia CSR § 47-32-1.5 incorporate by reference the guidelines test procedures from the Federal Code of Regulations at §40 CFR 136 and testing methods under Federal EPA SW 846, including such other methods as may be approved by the Federal EPA. The certification process is clearly uniform and national in scope.

The third prong of the § 8.1.1.1 test is licensing requirements on the state and national level. The certification required annually by the laboratories is on a national standard and state standard and is accepted interstate. Licensing in §8.1.1.1 and certification of the laboratory processes in CSR§47-32-1 are interchangeable terms. Under the professional licensing laws of West Virginia, the professional is licensed after satisfying entry level qualifications by education and experience and a test determined by a Board. The license remains valid indefinitely, unless charges of misconduct are determined to be true, and for some professions an annual or biannual education requirement is met. Nothing in the licensing of professions is as

vigorous or stringent annually, or ever again, as laboratory certification to EPA standards. (Certain medical specialty boards require re-examination over 4-5 year intervals, but failure does not affect state licensing.)

Although Petitioner's counsel believes that geologists are professionals in West Virginia, the fact remains that the State does not specifically license them, which, as to those geologists, is a further impediment to satisfying the licensing requirement.

The fourth and final prong of the test is the extent of continuing education requirements. While there is no specific continuing education requirement listed under the federal or state regulations, such as minimum number of hours per calendar year as for some of the listed professions, the annual certification process requires that all personnel in the laboratory be current with all testing procedures for which they are responsible. To be current includes all changes in procedures promulgated by EPA on a national level, through either regulatory change or other methods, resulting in changes from the scientific knowledge about the environment and the effect of certain elements on the environment. Petitioner's testimony made clear that there is an annual update of the standard operating procedure for the laboratory tests, annual review and upgrading of the testing apparatus and computers used in the laboratories to stay abreast with current procedures and testing parameters. While it cannot be specifically said that a minimum hour annual continuing education is specified, it is implicitly understood that a minimum continual education is required or else the laboratory would not pass the certification test next given. Therefore, the answer to the fourth prong must be yes, there is a minimum

education standard but not specified in actual hours per year. It is unlikely that any laboratory person would fail to have some continuing education because of the preparation for the on-site visit and quiz on their particular functions.

Accordingly, because of Petitioner's failure by law to meet the minimum education requirement of a college degree for all supervisory personnel, as well as the failure of certain of the labs to meet licensing requirements for its geologists, it is **DETERMINED** that the Petitioner has not met 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 provided to Petitioner by the labs in question are not excepted from use tax.

**WHEREFORE**, it is 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 July 1, 1998 through June 30, 2001, should be and is hereby **AFFIRMED** in accordance with the above Determination(s) for tax and interest, and no additions to tax, for a total updated liability.

Because the Petitioner has previously remitted a partial portion of the assessed purchasers' use tax liability, only the remaining tax and interest remain due to the State Tax Department of West Virginia.