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**SYNOPSIS**

**BUSINESS REGISTRATION TAX – NURSERY DEALERS NOT EXEMPT**  
W. Va. Code § 11-12-3(c) specifically exempts from the tax persons engaged in the business of agriculture and farming but does extend to those engaged in the business of horticulture or those who hold themselves out to be nursery dealers, because Petitioner is neither a producer nor a grower of said agricultural products.

OFFICE OF THE WEST VIRGINIA  
SECRETARY OF STATE

**CONSUMERS' SALES AND SERVICE TAX – BURDEN OF PROOF --**  
Although Petitioner's tax reporting practices leave a lot to be desired, sales and purchase invoices submitted after the hearing indicate that tax was paid on purchases, tax was collected on individual sales of bushes and trees, and was correctly not collected on major planting jobs which constitute contracting.

**FINAL DECISION**

A Tax Examiner with the Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner.

Thereafter, on July 16, 2002, the Director of this Division of the Commissioner's Office issued a business registration tax assessment against the Petitioner.

This assessment was for the period of July 1, 1999 through June 30, 2003, for tax, interest, through July 31, 2002, and additions to tax.

Written notice of this assessment was served on the Petitioner.

Also, on July 16, 2002, the Commissioner issued a business franchise tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 23 of the West Virginia Code, for the period of January 1, 1999 through December 31, 2001, for tax, interest, through July 31, 2002, and additions to tax.

Written notice of this assessment was served on the Petitioner.

Also, on July 16, 2002, the Commissioner issued a consumers' sales and service tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code, for the period of January 1, 1999 through June 30, 2002, interest, through July 31, 2002, and additions to tax.

Written notice of this assessment was served on the Petitioner.

Also, on July 16, 2002, 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, for the period of July 1, 1999 through June 30, 2002, for tax, interest, through July 31, 2002, and additions to tax.

Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked August 28, 2002, the Petitioner timely filed a petition for reassessment.

At the close of the administrative hearing, Petitioner's representative was afforded a period of thirty (30) days in which to supply invoices and other documentation to prove that all sales and use tax had been paid as required by law.

### **FINDINGS OF FACT**

1. Petitioner is engaged in the general business of landscaping which included major planting projects as well as the selling and planting of individual shrubs and trees.
2. After the audit Petitioner filed no remittance business registration and business franchise tax returns.
3. Because Petitioner refused on several occasions to be field audited, the tax auditor had no other recourse but to issue estimated assessments as to all four (4) taxes.

### **DISCUSSION**

The first issue is whether the Petitioner, as a nursery dealer is exempt from payment of the business registration tax.

W. Va. Code § 11-12-3(c) does exempt from said tax persons engaged in the business of agriculture and farming; however, there is no mention therein that those in the agriculture or in the nursery business are so included, because Petitioner in this instance is neither a producer nor a grower of agricultural products.

The second issue is whether the Petitioner has shown that the business franchise tax assessment is not correct.

At the hearing Petitioner's representative offered absolutely no evidence that the assessment was incorrect, except that the returns filed for the years 1999, 2000, and 2001 were filed in early 2003.

Because Petitioner refused to be audited in this instance, this Tribunal has no alternative but to sustain the assessment as issued.

The third issue to be determined is whether Petitioner has made any showing that the estimated consumers' sales and service tax and purchasers' use tax assessments are incorrect and contrary to law, in whole or in part, see W. Va. Code § 11-10A-10(e).

On April 15, 2003, Petitioner's accountant submitted sales, as well as purchase, invoices for the year 1999, which detail the sales taxes paid for that year.

Although this Tribunal believes that Petitioner's tax reporting practices have been abysmal in the past, it appears that with a few exceptions sales tax was paid on its purchases and sales tax collected on the individual sale of plants and trees, and not on larger jobs when a planting charge was imposed, which would constitute contracting and be tax exempt.

The issues presented in this matter involve the following important rules of administrative agency authority and statutory construction. Initially, it is important at

all times to recognize and to give more than just “lip service” to two general points: (1) rather than utilizing a so-called “de novo” scope of review, deference is to be given to the expertise of the administrative agency, even with respect to an “issue of law,” when that issue of law is one within the peculiar expertise of the administrative agency; and (2) any applicable legislative regulation does not merely reflect the administrative agency’s position but, instead, has been legislatively reviewed and approved, has exactly the same force and effect as a statute, and is, therefore, subject to the usual, deferential rules of statutory construction, see Feathers v. West Virginia Board of Medicine, 211 W. Va. 96, 102, 562 S.E.2d 488, 494 (2002).

The following specific points flow from these general points. “[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the reviewing [tribunal] is whether the agency’s answer is based on a permissible construction of the statute.” Syllabus point 4, in relevant part, Appalachian Power Co. v. State Tax Department, 195 W. Va. 573, 466 S.E.2d 424 (1995) (emphasis added). Similarly, “the Tax Commissioner [or the West Virginia Office of Tax Appeals] need not write a rule [or an administrative decision] that serves the statute in the best or most logical manner; he [, or she, or the Office of Tax Appeals] need only write a rule [or a decision] that flows rationally from the statute.” Id., 195 W. Va. at 588, 466 S.E.2d at \_\_\_\_ (emphasis added). Thus, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syllabus point 3, Shawnee Bank, Inc. v. Paige, 200 W. Va. 20, 488 S.E.2d 20 (1997) (internal citation omitted) (emphasis added). Finally, “courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either

fundamentally unfair or arbitrary.” Appalachian Power, 195 W. Va. at 589, 466 S.E.2d at \_\_\_\_ (quoting Frymier-Halloran v. Paige, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

### **CONCLUSION(S) OF LAW**

Based upon all of the above it is **DETERMINED** 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-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. See W. Va. Code § 11-10A-10(e).

2. The Petitioner-taxpayer in this matter has carried the burden of proof with respect to the sales and use tax assessments.

3. Also, on the other hand, the Petitioner has failed to carry the burden of proof with respect to the issue of the business registration tax or the business franchise tax.

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the business registration tax assessment issued against the Petitioner for the period of July 1, 1999 through June 30, 2003, for tax, interest, updated through July 31, 2003, and additions to tax, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the business franchise tax assessment issued against the Petitioner for the period of January 1, 1999 through December 31, 2001, for tax, interest, updated through July 31, 2003, and additions to tax, should be and is hereby **AFFIRMED**.

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 July 1, 1999 through June 30, 2002, should be and is hereby **VACATED**, and the Petitioner owes no further purchasers' use tax liability for the period in question.

It is **ALSO** 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, 1999 through June 30, 2002, should be and is hereby **VACATED**, and the Petitioner owes no further consumers' sales and service tax liability for the period in question.