

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – UNLOADING SERVICES COMMONLY KNOWN AS LUMPER SERVICES CONSTITUTE PURCHASES FOR RESALE – Because common carriers have a contractual obligation to unload goods that they transport, either by the drivers involved or by contracting with others to do so, this activity constitutes purchases for resale because same are being resold to the shippers of the goods.

FINAL DECISION

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 12, 2002, the Director of this Division of the Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner.

This assessment was for the period of April 2, 1999 through February 28, 2002, for tax, interest, through February 28, 2002, and no additions to tax, for a total assessed liability.

Thereafter, by mail postmarked, September 6, 2002, the Petitioner timely filed a petition for reassessment.

At the close of the administrative hearing the administrative law judge directed that the hearing record be kept open for a period of at least thirty (30) days so that corroborating evidence could be supplied to supplement the record.

On April 20, 2003, Petitioner's counsel, via facsimile, enclosed various documents to Commissioner's counsel stating that same confirm that common carriers have the contractual obligation to unload goods that are shipped.

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By letter dated April 30, 2003, Commissioner's counsel replied saying that he would still require the actual written agreements involving the sellers or shippers before making a blanket concession.

On May 5, 2003, Petitioner's counsel informed the administrative law judge (ALJ) that he required additional time to develop the record to include taking depositions because the requested written agreements did not exist. Whereupon, the administrative law judge allowed the record to be kept open for a period of twenty-one (21) additional days so that Petitioner's counsel could take depositions or otherwise provide exculpatory evidence.

By certified mail dated May 29, 2003, Petitioner's counsel submitted signed affidavits and bills of lading to this tribunal to support his argument and advised that Commissioner's counsel had orally agreed that the same would now be accepted, thereby reducing the tax due.

FINDINGS OF FACT

1. Petitioner is engaged in the business of unloading goods shipped by tractor trailers, rail cars and the like, which is commonly known as "lumping" and the individuals as "lumpers."

2. As per the affidavits and bills of lading submitted post hearing, it is the industry practice for common carriers to unload or restack goods that they transport, either by having their drivers unload same or to contract with others such as Petitioner to do so.

3. The lumper services provided by Petitioner, which were purchased by common carriers in fulfillment of the contractual obligation of unloading said common carriers, are being resold to the shippers of the goods which constitutes purchases for resale.

DISCUSSION

The sole issue is whether the lumber services provided by the Petitioner are exempt from the imposition of consumers' sales and service tax pursuant to W. Va. Code § 11-15-2(s), because same were purchased for resale.

Based upon the evidence presented in this case, both sides are now in agreement that because the common carriers, as an industry practice, were required to unload or restack goods that they transport, the purchase of Petitioner's lumber services were in fact resold to the shippers of said goods, thereby making same exempt from consumers' sales and service tax.

CONCLUSIONS 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) and 121 C.S.R. 1, § 63.1) Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has carried the burden of proof with respect to the issue of whether unloading services provided to common carriers are exempt as purchases for resale.

DISPOSITION

WHEREFORE, it is 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 April 9, 1999 through February 28, 2002, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for tax and interest, on the revised tax, for a total revised liability.

Because the Petitioner has previously remitted the amount of tax due, no consumers' sales and service tax or interest thereon remains due to the State Tax Commissioner of West Virginia for the period in question.