

FINAL ORDER ON
MOTION FOR RECONSIDERATION

FACTS AND PROCEDURAL BACKGROUND

The Auditing Division issued a purchasers' use tax assessment against Petitioner. Said assessment was served upon the Petitioner as evidenced by the certified mail return receipt card. No petition for reassessment was timely filed within sixty (60) days after receipt of the assessment.

A revenue agent with the Compliance Division was assigned the responsibility of collecting the finalized assessment referenced above.

Whereupon, sent to Petitioner a Notice and Demand requiring Petitioner to pay within fifteen (15) days in order to avoid collection action. The updated liability, which included a small franchise tax assessment, is not in contest in this proceeding.

Upon receipt of the Notice and Demand, Petitioner, through its representative, contacted Auditing, inquiring whether the use tax assessment could be reduced because certain of the purchases involved damaged goods.

Petitioner's request was agreed to by Compliance's Director, reducing the gross amount of purchases subject to use tax.

By fax Compliance informed Petitioner as follows:

We have reduced your use tax due on audit. See Notice & Demand attached. Please pay balance within fifteen (15) days.

2003 JUL 23 A 11:05
OFFICE WEST VIRGINIA
SECRETARY OF STATE
FILED

The attached Notice and Demand, dated October 2, 2002, reflected a total use tax liability and stated that failure to pay same would necessitate the filing of a lien and issuance of a distress warrant.

A fax from Compliance to the Petitioner and marked urgent stated the following:

I have been advised that your petition for reassessment was not timely filed. I have sent two (2) notices for payment. Payment in full must be received by November 25, 2002 or I will update interest and file lien and warrant.

Petitioner's representative does not dispute the receipt of the aforementioned taxes.

Notwithstanding the above, Petitioner's representative testified that in early October of 2002, along with the aforementioned Notice and Demand, he received what was styled "Assessment of Tax Liability" which reflected the original amount of use tax due as per the earlier assessment, but with interest updated from August 1, 2002 to October 4, 2002.

In response to this "Assessment of Tax Liability" Petitioner filed a petition for reassessment, within thirty (30) days of receipt of this "assessment," which "assessment" and petition for reassessment Petitioner's counsel contends should be controlling in this case.

It should be noted that on November 14, 2002, this tribunal informed Petitioner, as well as Compliance, that Petitioner had been served with the July assessment on July 16, 2002 and that Petitioner's November 6, 2002 petition for reassessment had been filed beyond the sixty (60)-day filing period and was

untimely and therefore could not be considered by this tribunal. Accordingly, this tribunal stated in its November 14, 2002 letter that it does not have jurisdiction to consider the untimely filed petition for reassessment.

By letter dated December 13, 2002 the following was sent to Petitioner, its counsel and the Legal Division's attorney:

Dear Counsel:

To confirm the telephone discussions with the parties' counsel about the same, an administrative hearing will be held in this matter.

The hearing will not involve the merits of the case and will not involve evidence or argument as to why any delinquent filing of the petition for reassessment should be excused as a matter of equity. Instead, the hearing will be limited to the issue of whether the petition for reassessment was in fact timely filed, due to an alleged revision of the original assessment of tax.

It is noted that the taxpayer, by a letter from counsel, has waived the normal 20-day period for notice of a hearing, in order to expedite the hearing and decision on this narrow, procedural issue.

The parties are to bring two (2) copies of any relevant documents offered for admission at the hearing. Counsel are to be prepared to argue the matter completely at the conclusion of the hearing, in lieu of establishing a briefing schedule.

DETERMINATION

In a nutshell, Petitioner's argument is two-fold. First, the October, 2002 Assessment of Tax Liability, from the Petitioner's point of view, was intended to be a revised assessment of tax liability, which, having superceded the earlier assessment, now legitimizes its petition for reassessment. Secondly, the Petitioner argues that equity dictates that Petitioner's petition for reassessment be heard in any event.

The core issue here, though, is whether the petition for reassessment was in fact timely filed because of an alleged revision of the earlier or original assessment.

The answer is no. The October, 2002 "Assessment of Tax Liability" is not a revised assessment; the tax portion of the assessment is the same as the original (July, 2002) assessment. The October, 2002 "Assessment of Tax Liability" only updates the interest. This point is buttressed by the fact that the October, 2002 "assessment" is not signed by the Division Director, as any actual assessment or actual revised assessment would be. The July, 2002 assessment became final in mid-September, 2002, before all of the subsequent collection attempts, and all of the subsequent "negotiations" and the interest update could not revive a totally elapsed period for petitioning the July, 2002 assessment.

The Legislature has charged the State Tax Commissioner with the "duty" of "faithfully enforc[ing]" the state tax statutes. W. Va. Code § 11-1-2. Thus, the State Tax Commissioner lacks the authority to extend or to suspend the statutory period for filing a petition for reassessment or for a refund for any reason not set forth in the statutes. The courts have uniformly so held. For example, the West Virginia Supreme Court of Appeals has concluded:

Our holding today [time limitations under the Workers' Compensation Act are procedural, not jurisdictional, and a late filing may be excused by a showing of excusable neglect, unavoidable cause, fraud, et.] should not be considered a judicial declaration of open season on statutory time limitations – it is limited to the Work[ers'] Compensation Act. This statute, by its beneficiient [sic] and remedial character, distinguishes itself from other statutes whose purpose is custodial or regulatory. The precise effect and literal application unarguably due most statutory provisions are inappropriate to the Work[ers'] Compensation program[.]

Bailey v. SWCC, 170 W. Va. 771, 776, 296 S.E.2d 901, ___ (1982).

Accordingly, it is **DETERMINED** that Petitioner's Motion for Reconsideration is **DENIED**.

The State Tax Commissioner, through the Compliance Division, may, at any time, compromise this liability by formal agreement with the Petitioner, as set forth by statute.