

SANITIZED DECS. – 01-0372 C, 01-373 U, 01-374 C & 01-375 U – BY GEORGE V. PIPER – 09/11/03 – SUBMITTED FOR DECISION 07/07/03

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX AND PURCHASERS' USE TAX – ASSESSMENTS REVISED – Upon verification after the hearing, estimated assessments will be revised to reflect actual income figures.

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 Petitioners.

Thereafter, the Director of this Division issued a consumers' sales and service tax assessment against the Petitioner. The assessment was for the period of January 1, 1998 through December 31, 2000, for tax, interest, and additions to tax.

Written notice of this assessment was served on the Petitioner.

Also, 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 January 1, 1998 through December 31, 2000, for tax, interest, and additions to tax.

On April 20, 2001, 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, 1998 through December 31, 2000, for tax, interest, and additions to tax.

Written notice of this assessment was served on the Petitioners.

Also, the Commissioner issued a purchasers' use 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, 1998 through December 31, 2000 for tax, interest, and additions to tax.



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Written notice of this assessment was served on the Petitioners.

Thereafter by mail, Petitioners timely filed with this tribunal petitions for reassessment.

Written notice of a hearing on the petitions was sent to the Petitioners and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10.

Subsequent to the first hearing, this tribunal was advised by the Petitioners' new attorney in a "Motion To Reopen Hearing" as follows:

Now come the petitioners, by their counsel, . . . , and move to reopen the hearing in the above-referenced matter. As grounds for this motion, the petitioner would relate that during testimony presented at the hearing, the Auditor represented that there were not sufficient records for an adequate audit. Contrary to that statement, the companies had at the time of the audit and still have in their possession, detailed three-ring binders containing annual balance sheets, profit and loss statements, general ledger and sales journal for each of the companies for each of the years in question, of which documents only the 1998 book was chosen for review by the Auditor. As further grounds, [prior] counsel for the taxpayers failed to introduce the information available through said ledgers and the supporting documents and otherwise provided ineffective assistance of counsel to the petitioners in this matter.

The petitioners believe that should they not prevail in the hearing as it now stands and that the same be appealed, that the same would simply be remanded for further hearing due to the false and misleading statements presented at the hearing by the agent for the state and ineffective assistance provided by [prior] counsel for the taxpayer.

For purposes of judicial economy, it would appear appropriate that this matter be rescheduled for a hearing on the actual records necessary for a resolution

by the Hearing Examiner [and that such records] are actually presented to the Hearing Examiner for his review.

In due course the successor administrative law judge granted Petitioners' motion to reopen the hearing and the same was subsequently held.

It should be noted that at the outset of the reconvened hearing the administrative law judge advised the parties that the second hearing would not totally supplant the prior hearing and that any arguments made at the prior hearing, unless changed or disregarded, would remain part of the record.

By letter, Commissioner's counsel informed this tribunal that he had reviewed Petitioners' memorandum with respect to the Petitioner's Docket Nos. and was in agreement with the final calculations of tax liability contained therein.

It should be noted that prior to writing this administrative decision Petitioners' counsel sent to the administrative law judge the amount which represents the whole of the use tax assessment issued against the Petitioners.

Subsequent thereto, the administrative law judge inquired of Commissioner's counsel whether he was also in agreement with Petitioners' memorandum concerning Petitioners' Docket Nos. Having received no response the administrative law judge then asked Petitioners' counsel to provide to him final tax calculations for the aforementioned assessments.

Upon review, it was determined that Petitioners' calculations regarding the consumers' sales and service tax and purchasers' use tax assessments were acceptable.

FINDINGS OF FACT

1. This tribunal accepts the calculations provided by Petitioners' counsel with regard to the purchasers' use tax assessment pertaining to Petitioners.

2. This tribunal also accepts the calculations submitted by Petitioners' counsel concerning both the other consumers' sales and service and purchasers' use tax assessments noting that Commissioner's counsel has previously agreed to or failed to contest same.

DISCUSSION

The sole issue remaining for determination concerns the consumers' sales and service tax assessment pending against Petitioners, and whether Petitioners have shown that the assessment is incorrect and contrary to law, in whole or in part, see W. Va. Code § 11-10A-10(e).

Petitioners have conceded that consumers' sales and service tax was due and owing for the month of August, 2000 and the same has since been paid.

What remains consists of tax liability which the tax auditor projected over a three (3)-year period in the belief that a large number of "Z" or cash register tapes were missing.

At the second hearing during his cross examination of the tax auditor, Petitioners' counsel elicited testimony showing that the sales journal does in fact accommodate the alleged missing "Z" tapes, thereby proving that no projection of tax was necessary.

Because the Commissioner's counsel refused to counter Petitioners' argument that no additional consumers' sales and service tax is due and owing, this tribunal concurs with Petitioners' argument that the assessment may not lawfully be sustained.

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).

2. The Petitioners in this matter have carried the burden of proof with respect to consumers' sales and service tax assessments issued and the purchasers' use tax assessment issued.

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 Petitioners for the period of January 1, 1998 through December 31, 2000, should be and is hereby **VACATED**, and that Petitioner owes no further consumers' sales and service tax liability for the period in question.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers' use tax assessment issued against the Petitioners for the period of January 1, 1998, through December 31, 2000, should be and is hereby **MODIFIED** in accordance with the above Conclusion(s) of Law for tax, interest, on the revised tax, updated through August 31, 2003, and additions to tax.

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 Petitioners for the period of January 1, 1998 through December 31, 2000, should be and is hereby **MODIFIED** in accordance with the above Conclusion(s) of Law for tax, interest, on the revised tax, updated through August 31, 2003, and additions to tax.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers' use tax assessment issued against the Petitioners for the period of January 1, 1998 through December 31, 2000, should be and is

hereby **AFFIRMED** in accordance with the above Conclusion(s) of Law for tax, with interest thereon.

Because the Petitioners previously remitted the assessed tax, no purchasers' use tax remains due and owing for the period in question; however, accrued interest thereon remains due and owing.