

**SYNOPSIS**

**PURCHASERS' USE TAX--RETAILERS' SERVICES PROMOTING AND MARKETING THE PRODUCTS OF A MANUFACTURER CONSTITUTE TAXABLE SERVICES--**The agreement under which a retailer undertakes to sell, promote, and market a product and provide space for the display of the product manufacturer's fixtures, signs, and other promotional materials, constitutes taxable services provided by the retailer. As such, any payments made by the manufacturer to the retailer on account of providing space and performing other promotional and marketing services are properly subject to the purchasers' use tax.

**ADMINISTRATIVE DECISION**

The Auditing Division issued a purchasers' use tax assessment against the Petitioner. This assessment was for the period of January 1, 1998 through September 30, 2000, for tax and interest, through September 30, 2000,.

Thereafter, the Petitioner timely filed a petition for reassessment. Subsequently, notice of a hearing was furnished to the Petitioner and a hearing was held in accordance with W. Va. Code § 11-10-9. Subsequent to the hearing, the parties decided to file briefs. All of the briefs, based upon the briefing schedule, were to be filed by August 25, 2000; however, Petitioner never filed its brief and, therefore, the Division chose not to file a brief.

**FACTS**

The Petitioner is a domestic manufacturer and distributor of cigarettes and has been doing so since 1760.

Pursuant to an audit of the Petitioner's books and records, it was determined that the Petitioner had failed to pay the correct six percent (6%) purchasers' use tax rate on the gross amount of merchandising payments to chain and retail outlets in the State of West Virginia.

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During the course of the hearing, Petitioner's representative stated that the merchants to whom the Petitioner is paying compensation are merely providing preferential space for Petitioner's products or for its sale advertisements, to wit: Petitioner's sales representatives or ("reps") first call on retailers who are selling its products to ensure the appropriate inventory levels are being maintained. The reps will offer special promotional deals on any new product set up displays, etc. From that point on the merchant basically takes over by rotating stock, providing display space, selling a minimum of product, etc., as set forth in the Petitioner's Merchandising Agreement or "Agreement".

### **ISSUE AND DETERMINATION**

The issue presented for determination is whether the Agreement entered into between the Petitioner and a retailer creates a relationship giving rise to a taxable service rendered by the retailer for purposes of the purchasers' use tax.

The arrangement regarding the placement of advertising displays, among others, stems from the so-titled "Merchandising Agreement" entered into between the Petitioner, and a Retailer.

Under this Agreement, and its hybrid varieties, whether based upon packs of cigarettes or cartons, the Retailer must: (Example – Petitioner Excel Merchandising Plan Description).

Sell a Minimum of 1 or more Petitioner (all brands) per qualifying store.  
Continuously stock and display sufficient quantities of Petitioner cigarette brands.  
Maintain distribution of Petitioner brands in the same price tiers as competitive brands stocked.  
Provide Petitioner to evaluate volume data on a quarterly basis.  
Provide Petitioner equal opportunity to place promotions on a permanent or temporary basis and at no time restrict Petitioner from promoting its brands due to restrictions imposed by a competitor  
As legally allowable allow Petitioner to place permanent and temporary point of sale as determined by Petitioner. In no case can Petitioner be competitively disadvantaged in point of sale presence (as determined by Petitioner) If competitively disadvantaged, Petitioner will require additional permanent and/or temporary point of sale advertising material (as determined by Petitioner).

Allow Petitioner to determine acceptability of the capacity, position, visibility, and display method(s) of its products on fixtures.

Allow Petitioner to display the brands and brand packings and place point of sale materials of choice within Petitioner contracted space.

Petitioner offers Plan EP-3 to retailers who merchandise cigarettes in a highly visible fashion, in self-service or non-self service formats.

Petitioner may approve payments for space on non-standard display units, but in each case acceptability will be determined on its individual facts and payments made to the Retailer only for displays and fixtures acceptable to Petitioner Representatives. Petitioner offers this plan in two merchandising venues (1) For Retailers who choose to merchandise cigarettes on Counter Displays (as described below) and (2) For Retailers who choose to merchandise cigarettes on Consolidated Merchandising Fixtures (as described below).

Petitioner will make payments under this plan for one merchandising venue in a single retail store. Requirements for each venue are as follows:

Counter Displays (Available to retailers selling 1 or more Petitioner)

Petitioner must occupy a position(s) acceptable to the Petitioner Representative of its display(s) in relationship to all competing manufacturer(s).

No Less than 12 total cigarette counter display facings must be occupied by Petitioner. Share of total facings must be equal to, or greater than Petitioner Share of total in store industry cigarette sales. (Package facings within industry package fixtures where no space on the fixture is contracted by competing cigarette manufacturers is not included in calculations). An additional schedule for a minimum of 24 total cigarette counter display facings is available for qualifying retailers with a volume of 5 or more Petitioner:

Displays may be self-service or non-self service but must be in parity with competing manufacturer(s) displays. If competitive price value products are merchandised, Petitioner must be allowed to merchandise its price value products.

If Satellite Fixtures are present, Petitioner must be represented on these fixture(s) or by additional fixture(s) supplied by Petitioner at or above Petitioner Share of total in store industry cigarette sales. If Petitioner's County

Displays are placed on the front counter, self-service or non-self service shielded, in a position acceptable to the Petitioner Representative, and in party with competitive displays (i.e. full price and price value) specific Satellite Fixture requirements may be waived at the option of the Petitioner Representative.

Consolidated Merchandising Fixtures Available to retailers selling 5 to 14 Petitioner or where retailer employs 8 linear feet or less of consolidated space)

Petitioner must occupy a position acceptable to the Petitioner Representative of and on fixtures in relationship to all competing manufacturer(s).

A minimum of 4 square feet of fixturing, where the total square feet of available industry consolidated merchandising fixtures is less than 35 square feet, or 6 square feet of the total fixturing, where the total square feet of available industry consolidated merchandising fixtures is 35 square feet or more; but no less than Petitioner Share of total in store industry cigarette sales must be allocated to Lorillard. An additional schedule is available for a minimum of 9 square feet for qualifying retailers.

If competitive price value products are merchandised, Petitioner must be allowed to merchandise its price value products.

If Satellite Fixtures are present, Petitioner must be represented on these fixture(s) or by additional fixture(s) supplied by Petitioner at or above Petitioner Share of total in store industry cigarette sales.

All space allocated to Petitioner must be completely visible to the consumer when standing at the primary point of purchase.

The Petitioner argues that the Agreement, pursuant to which the payments are made to a retailer, does not require that retailer perform meaningful activities to earn its fee and that all that the retailer is doing is the normal day-to-day activities that a merchant undertakes to sell any product which is in his or her self interest.

The use tax statute adopts the definition of "service" found in the consumers' sales

and service tax statute. W. Va. Code § 11-15A-2(a). The definition in W. Va. Code § 11-15-2(s) states:

'Services' or 'selected service' includes all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal property, but shall not include contracting, personal services or the services rendered by an employee to his employer or any service rendered for resale.

In order to be entitled to the payments from the Petitioner, the Agreement is replete with AFFIRMATIVE obligations and duties that must be PERFORMED by the retailer. For instance, the "Excel Merchandising Plans" aspect of the program not only involves the use of spaces in the retailer's store for the exclusive placing of Petitioner's fixtures, displays and signs, it requires the retailer to stock the designated space with the Petitioner's products and periodically rotate same. Depending upon the agreed-upon level of performance, the retailer must allow regular promotions of the Petitioner's products to West Virginia consumers without restriction. While the evidence indicates that the Petitioner's sales representatives are responsible for the initial installation or replacement of the Petitioner's fixtures and displays, the retailer's duty under the Merchandising Agreements is to maintain those fixtures and displays as required by the Petitioner. The required maintenance in that context obligates the retailer to make certain that the Petitioner's displays and fixtures remain secure and unobstructed at their specific locations and at all times acceptable to the Petitioner's reps.

A rule of construction applicable here is that a document is construed strictly against the preparer of the document, which, in this matter, is the Petitioner. See Nisbet v. Watson, 162 W. Va. 522, 530, 251 S.E.2d 774, 780 (1979).

Based upon the foregoing, it is **DETERMINED** that, in order to be eligible for payment from the Petitioner, the retailer's duties as set forth in the Agreement require a certain level of performance which cannot fairly be characterized as being merely passive in nature. Accordingly, the Petitioner's payments to retailers are payments for "services," subject to the purchasers' use tax.

The issues presented in this matter involve the following important rules of statutory construction and of administrative agency authority. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the [reviewing] court is whether the agency's answer is based on a permissible construction of the statute." Syllabus point 4, in part, Appalachian Power Co. v. State Tax Department, 195 W. Va. 573, 466 S.E.2d 424 (1995). Similarly, "the Tax Commissioner need not write a rule [or and administrative decision] that serves the statute in the best or most logical manner; he [or she] 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 \_\_\_\_\_. 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). 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)).

It is, therefore, **DETERMINED** that the Petitioner Merchandising Agreement entered

into between the Petitioner and a retailer creates a relationship between the parties giving rise to taxable services performed by the retailers. As such, any payments made by the Petitioner to retailers on account of those services are properly subject to the purchasers' use tax.

**WHEREFORE**, it is the **DECISION** of the State Tax Department that the purchasers' use tax assessment issued against the Petitioner for the period of January 1, 1998 through September 30, 2001, for tax and interest, updated through September 30, 2002, should be and is hereby **AFFIRMED**.

It is further **DETERMINED** that the interest on this tax liability for the period of October 1, 2002 through the date of this Administrative Decision is **ABATED**, pursuant to the provisions of the W. Va. Code § 11-10-7b(a)(2).