

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – TAX COMMISSIONER'S AUTHORITY TO ISSUE AN ASSESSMENT – The Tax Commissioner has the authority to issue an assessment when she believes that any tax has been insufficiently returned by a taxpayer, either because of the taxpayer's failure to properly remit tax, or because of the taxpayer has failed to make and file a return, or because the taxpayer has filed a return that is incomplete, deficient or otherwise erroneous. *See* W. Va. Code § 11-10-7(a).

CONSUMERS' SALES AND SERVICE TAX – BURDEN OF PROOF IS ON THE TAXPAYER – Unless otherwise provided by Code or by legislative rule, the burden of proof remains on the taxpayer. *See* W. Va. Code § 11-10A-10(e) [2002]; 121 C.S.R. 1, §§ 63.1 (Apr. 20, 2003).

CONSUMERS' SALES AND SERVICE TAX – TAXPAYER'S FAILURE TO CARRY BURDEN OF PROOF – The failure of the taxpayer to appear at a hearing and to present any evidence respecting its claim will result in a denial of relief to the taxpayer. *See* W. Va. Code § 11-10A-10(e) [2002]; 121 C.S.R. 1, §§ 63.1 and 69.2 (Apr. 20, 2003).

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 March 21, 2003, 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, 2000, through December 31, 2002, for tax, interest, computed through March 31, 2003, and additions to tax.

Thereafter, by mail, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment.

Subsequently, notice of a hearing on the petition was sent to the Petitioner,¹ and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

¹ The undersigned, the administrative law judge assigned to hear this matter, contacted the accountant representing the Petitioner on several occasions prior to scheduling this matter for the purpose of giving said accountant the opportunity of choosing the date and the time on which the accountant wished to attend the hearing. On at least two occasions, the accountant indicated that he would contact the undersigned in order to express a preference for a hearing date and time. However, the accountant failed to do so. Consequently, the undersigned scheduled the hearing at the last possible time, without any input on the part of the Petitioner's accountant.

There was no appearance on behalf of the Petitioner when the hearing was convened. The hearing was held, however, without an appearance on behalf of the Petitioner, in accordance with the provisions of W. Va. Code § 11-10A-10(a) [2002] and 121 C.S.R. 1, § 69.1 (Apr. 20, 2003).

FINDINGS OF FACT

1. The Petitioner operated a bar. The bar sold mixed drinks and beer.²
2. The Tax Commissioner's auditor reviewed the books and records of the Petitioner made available to him and determined that the Petitioner had not reported all sales of mixed drinks, wine and beer at his bar.
3. Throughout the audit period, for sales of beer, the auditor estimated the total sales for beer by taking the number of cases of beer purchased from the distributor, and multiplied the number of cases by 24, the number of bottles of beer in a case. The auditor then estimated the amount that the Petitioner sold each bottle of beer to his patrons for per bottle.³
4. In attempting to compute the Petitioner's sales of mixed drinks, the auditor started with the invoices that were made available to him by the Petitioner. The auditor determined that the Petitioner did not provide all of his invoices.
5. Consequently, for each year of the audit period, the auditor estimated the percentage of the Petitioner's purchases that were not reflected on invoices retained by the Petitioner.
6. To arrive at the estimated percentage for each year, the auditor computed the amount of the Petitioner's beer purchases reflected in the invoices retained by him, as a percentage of the Petitioner's total beer purchases reflected in the invoices provided by the Petitioner's beer

² The audit work papers make no mention of sales of wine. Either auditor included sales of wine with sales of mixed drinks or, to the Petitioner's advantage, he did not include the sale of wine at all.

distributor. The auditor estimated that the Petitioner's retained liquor invoices reflected the same percentage of his liquor purchases for any given year. The auditor attempted to increase the Petitioner's purchases, as shown on the retained invoices, from the estimated percentage to 100%.⁴ The figure at which the auditor arrived was the estimated cost of the liquor purchased by the Petitioner.

7. The auditor then computed the Petitioner's estimated sales of mixed drinks by multiplying the Petitioner's liquor purchases by 3, to reflect the fact that the Petitioner was selling liquor by the drink.⁵

8. The auditor then added the estimated sales of mixed drinks to the estimated sales of beer to arrive at total sales of alcoholic beverages by the Petitioner. These total sales would include sales tax.

9. The auditor then divided the total estimated sales by 1.06 to determine the Petitioner's total estimated sales, not including sales tax. The difference is the estimated sales tax which, as per the auditor's methodology, the Petitioner should have remitted to the Tax Commissioner.

DISCUSSION

In his petition for reassessment, the Petitioner challenged the auditor's methodology. His challenge is twofold. First, he maintains that the percentage by which the auditor increased known liquor purchases was too high, citing the 59% figure that was used for tax year 2000.⁶

³ The undersigned is of the opinion that the estimated price per beer is, if anything, on the low side.

⁴ As shown below, the auditor's computation was incorrect. This error worked to the benefit of the Petitioner.

⁵ In his petition for reassessment, the Petitioner contends that this portion of the auditor's methodology is, in essence, a determination that the Petitioner was selling mixed drinks for a certain price per drink. He contends that this price per drink is too high. However, the Petitioner's contention is correct only if the number of drinks he was able to obtain from each bottle equaled the price he paid for the bottle. If, as is likely, he was able to obtain more drinks from the bottle, then the auditor's estimate comes to less than the original price per drink.

⁶ In fact, the actual figure used by the auditor is closer to 63% (in actual purchases as shown by the Petitioner's invoices, divided by the amount in estimated purchases found by the auditor equals .6289, or 62.89%).

Second, the Petitioner maintains the auditor was incorrect in determining that the Petitioner charged a certain amount per mixed drink.

With respect to the first issue, involving the auditor's methodology whereby the purchases were increased to account for missing invoices, two things must be noted. First, the 59% figure objected to by the Petitioner applied only to the year 2000. For 2001, the auditor increased known purchases by 20%. For 2002, the auditor increased known purchases by 53%. Thus, the petitioner objects to the figure that is least favorable to him, although that figure was used for only one year.

Second, and more importantly, the methodology by which the auditor increased the purchases was incorrect. The auditor's error actually worked to the benefit of the Petitioner. The figures actually used by the auditor are less than the figures that were nominally used. The problem is best demonstrated by an illustration.

For 2000, the auditor presumed that the Petitioner only presented invoices showing 41% of his liquor purchases. He based this presumption on the fact that the Petitioner only presented invoices showing 41% of his beer purchases. State's Exhibit No. 3, Schedule No. B-2, Page 1 of 1. Thus, the auditor concluded that the Petitioner's known liquor purchases constituted only 41% of his liquor purchases for that year. The auditor then increased the Petitioner's known liquor purchases by 59% to arrive at his estimated total liquor purchases for that year.⁷ State's Exhibit No. 3, Schedule No. B-1, Page 1 of 3.

However, this methodology is incorrect. The amount in known purchases is, given the auditor's presumption, 41% of the Petitioner's total purchases. Stated mathematically, divided by total purchases equals 41%. Thus, the total estimated purchases should have been a different

⁷ Mathematically, the auditor's calculation is incorrect. (41% increased by 59% equals 65.19% [.41 x 1.59 = 1.65]) For 2000, the estimated sales calculated by the auditor were only 65.19% of what he intended to calculate.

amount, not the amount as computed by the auditor. Stated differently, the amount in known purchases is 62.9% in estimated total purchases computed by the auditor, not 41%.

Using the correct methodology, for 2001, the auditor should have computed total estimated sales in a different amount, other than the original estimated amount. State's Exhibit No. 3, Schedule No. B-1, Page 2 of 3. The one amount in known sales is 83.3% of the amount the auditor computed, not 80%. Similarly, for 2002, the auditor should have computed total estimated sales, not the amount actually computed. The one amount in known sales is 65.4% of the amount that the auditor actually computed, not 53%. State's Exhibit No. 3, Schedule No. B-1, Page 3 of 3.

As these calculations make clear, the methodology used by the auditor in computing the Petitioner's estimated total purchases is not as severe as the Petitioner contends.

The second issue raised by the Petitioner is that the auditor's methodology was incorrect insofar as the auditor estimated that the Petitioner charged a certain amount per mixed drink. The Petitioner maintains that an estimate of a lesser amount per mixed drink is more reasonable.

The problem with the Petitioner's second contention is that the auditor did not estimate that the Petitioner was charging the larger amount per mixed drink. The auditor estimated that the Petitioner was selling liquor, in the form of mixed drinks, for 3 times what he paid for it. The assumption on which the Petitioner's second contention is based is correct only if the Petitioner was getting the same number of mixed drinks out of each bottle of liquor as the price he paid for the bottle in dollars. For the Petitioner's assumption to hold true, the Petitioner would have to get more drinks out of an expensive bottle of liquor than he would out of a cheap bottle.⁸ This is

⁸ As an illustration, if a bottle of liquor cost \$15, the auditor estimated that the Petitioner sold mixed drinks from that bottle for \$45. If, as the Petitioner contended, mixed drinks cost \$3, then the Petitioner got 15 drinks from the bottle ($\$15 \text{ cost per bottle} \times 3 = \$45/\$3 \text{ per drink} = 15 \text{ drinks}$). If, on the other hand, the bottle cost \$20, the auditor estimated that the Petitioner's sales of mixed drinks totaled \$60 which, at \$3 per drink, totaled 20 drinks

simply not a reasonable assumption. It is more reasonable to assume that the Petitioner was getting a similar number of mixed drinks out a bottle, regardless of the price of the bottle.

While this methodology is not perfect and, as a result, may be subject to some criticism and second-guessing, this Office cannot say that the auditor's estimates of sales were so outlandish as to be unreasonable. W. Va. Code § 11-10-7 provides, in relevant part:

(a) *General.* --If the tax commissioner believes that any tax administered under this article has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.

In this action, the Tax Commissioner, by his auditor, conducted an investigation of the Petitioner's records. The Petitioner's records were incomplete. The auditor determined that the Petitioner neither filed accurate returns nor properly remitted the tax due. Based on the records available to the auditor, the Tax Commissioner made an estimated assessment. The assessment is presumed to be correct, unless proven incorrect.

W. Va. Code § 11-10A-10(e) provides, "Except as otherwise provided by this code or legislative rules, the taxpayer or petitioner has the burden of proof." Thus, the burden is on the Petitioner to provide evidence that the methodology used by the auditor is incorrect. The Petitioner did not appear at the hearing and did not produce any evidence that might prove that the assessment was incorrect.⁹ The Petitioner did not meet his burden of proving that the tax commissioner's assessment was incorrect.

from that bottle. This assumption is not logical. It is more logical to assume that drinks were fairly uniform in the amount of liquor they contained and that, as a consequence, the Petitioner would get the same or nearly the same number of drinks out of similarly sized bottles, regardless of the cost of the bottle of liquor. If one brand of liquor was more expensive than another, it is likely that the Petitioner charged more for a mixed drink containing the more expensive brand of liquor.

⁹ The Petitioner recognized that the most competent evidence to show that the assessment was incorrect was invoices in the possession of the vendor from whom he purchased his liquor. In his petition for reassessment, he

Prior to the date of the hearing, the Petitioner, through his accountant, submitted information in which he asserted that the assessment was incorrect.¹⁰ The Petitioner's accountant apparently determined that it was not necessary to attend the hearing. This Office would note that the information submitted was not, strictly speaking, evidence. Instead, it would more properly characterize the information submitted as a reiteration of the arguments made in its petition for reassessment. This Office has considered the information submitted and agrees with the Tax Commissioner that it does not warrant setting aside the assessment, either in whole or in part.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. When a taxpayer fails to file return, or fails to remit the full amount of tax due, or makes a return that is incomplete, deficient or otherwise erroneous, the Tax Commissioner is authorized to investigate and determine or estimate the amount of the taxpayer's liability, and to make an assessment therefor. W. Va. Code § 11-10-7(a).

2. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that the assessment is incorrect. See W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

3. The Petitioner in this matter has failed to carry carried its burden of showing that it is entitled to a refund. See 121 C.S.R. 1, §§ 69.1 & 69.2 (Apr. 20, 2003).

indicated that he would obtain duplicates of the receipts showing the actual amount he paid for the liquor he purchased. As stated in his petition for reassessment, "We object to using the 59% formula increase and will get verification of our figures from the ABC store owner."

¹⁰ The named recipient of the information was a paralegal with the Legal Division of the State Tax Department. However, the information was sent to the address of the Office of Tax Appeals. It appears that the information was furnished in an attempt to reach a settlement with the Tax Commissioner. The Tax Commissioner, by counsel, determined that the information contained therein did not warrant settling the matter and contended that it was inadequate to justify this Office in overturning the assessment, either in whole or in part.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the tax assessment issued against the Petitioner for the year period of January 1, 2000, through December 31, 2002, for tax, interest, updated through November 15, 2003, and additions to tax, should be and is hereby **AFFIRMED**.