SANITIZED DECISION – DOCKET NO. 04-369 C – ROBERT W. KIEFER, JR., ALJ – SUBMITTED for DECISION on MAY 18, 2005 – ISSUED on NOVEMBER 9, 2005

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – STATE TAX COMMISSIONER NOT ESTOPPED TO ASSESS AND COLLECT TAX – The State Tax Commissioner is not estopped to assess and collect consumers' sales and service tax because of incorrect representations by one of his employees that was unauthorized by law and was, therefore, *ultra vires*.

CONSUMERS' SALES AND SERVICE TAX – TAXPAYER'S DUTIES RESPECTING COLLECTION AND REMITTANCE OF TAX – A taxpayer has a statutory duty to add consumers' sales and service tax to the price of the item or service being sold, to collect the tax and keep it separate from the other proceeds of the sale, and to remit the same to the State Tax Commissioner. W. Va. Code § 11-15-4 [1984] and W. Va. Code § 11-15-10 [1943].

FINAL DECISION

A tax examiner with the Field Auditing Division ("the Division") of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") conducted an audit of the books and records of the Petitioner. Thereafter, on February 5, 2004, the Director of this Division issued a consumer's sales and service tax assessment against the Petitioner. The assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of January 1, 2001, through September 30, 2003, for tax in the amount and interest in the amount, computed through December 31, 2003, for a total assessed tax liability.

Thereafter, by mail postmarked March 30, 2004, and received on April 1, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment.[1]

[1] The Petitioner's President and its sole witness at the hearing testified that the Petitioner paid the tax and interest due on or about February 11, 2004. However, there is no tangible evidence of this payment. Assuming the payment was made, and this tribunal has no reason to doubt the Petitioner's certified public accountant's testimony, this matter constitutes a petition for refund.

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

FINDINGS OF FACT

1. The Petitioner is a corporation whose home office is located in this State.

2. The Petitioner is engaged in the business of sponsoring bicycle races in various states throughout the country.

3. As part of its business of sponsoring bicycle races, the Petitioner charges entry fees to participants in its races, and awards cash and non-cash prizes.

4. The Petitioner also collects booth fees. Booth fees constitute a form of advertising. Booths are typically purchased by vendors of goods and services in the industry, who promote their services and products to race entrants.

5. One year during audit period, the Petitioner charged gate fees. Gate fees were charges for to admission to entertainment that was related to bicycle races.

6. In the assessment, the Petitioner was given credit for cash purses. It was not given credit for "prize purses," which are non-cash prizes.

7. The Petitioner's president and its only witness at the evidentiary hearing, testified that the estimated amount of non-cash prizes awarded by the Petitioner, based on the wholesale or purchase price, was approximately equal to the cash prizes awarded by it.

8. Based on the figures shown in the audit workpapers, the Petitioner calculated that it awarded cash prizes in the amount.

9. During the audit period, the Petitioner did not separately state or charge consumers' sales and service tax on its entry fees.

10. The president testified that the Petitioner is not currently separately stating or charging consumers' sales and service tax on its entry fees. However, it remits consumers' sales

and service tax out of the entry fees it collects. The Petitioner computes the consumers' sales and service tax by dividing the entry fee by 1.06, and then remits the amount represented by the .06 as consumers' sales and service tax.

11. At the hearing the Petitioner was given the option of submitting evidence respecting the value of the non-cash prizes it awarded to entrants, but it did not do so.

DISCUSSION

The Petitioner in this matter did not collect consumers' sales and service tax on entry fees, late fees, booth fees, gate fees, merchandise sales and camping fees. There is no question that tax should have been collected on those items. *See* W. Va. Code § 11-15-8. The Petitioner concedes this point, but maintains that it was misinformed with respect to its duty to collect the tax. One issue is whether the Petitioner is entitled to some relief because it was informed that it was not required to collect consumers' sales and service tax on services provided by it.

The Petitioner's witness testified that when the Petitioner commenced business he contacted the Office of the State Tax Commissioner and asked whether or not the Petitioner was required to collect consumers' sales and service tax on entry fees. He testified that he was advised that the consumers' sales and service tax applied only to "tangible goods." He testified honestly that he did not document this statement and that he did not ask that this opinion be put in writing. He further testified that had he been properly advised that he was required to collect consumers' sales and service tax on entry fees, the Petitioner would have done so.

The Petitioner contends that the Tax Commissioner provided incorrect information to it, which caused it not to collect consumers' sales and service tax from its various customers. It maintains that it is now forced to absorb the consumers' sales and service tax, rather than the customers on whom the incidence of the tax is intended to fall. Although, as a layperson, the president did not use the term, the Petitioners, in effect, take the position that the State Tax

Commissioner is estopped from collecting the tax from it because it was misled by the erroneous information provided when the president called and expressly inquired as to whether or not the Petitioner was required to collect consumers' sales and service tax.

"A state is not bound by the unauthorized acts of public officers. Their misconduct is no estoppel against the state." Syl. pt. 5, *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970); and syl. pt. 5, *State v. Chilton*, 49 W. Va. 453, 39 S.E. 612 (1901). The doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine of estoppel against the state. *See* Syl. pt. 7, *Samsell v. State Line Dev. Co.*, *supra*. Because a state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers; all persons must take note of the legal limitations upon the power and authority of its officers. *Samsell v. State Line Dev. Co.*, *supra* at 59, 174 S.E.2d at 325; *Cunningham v. Wood County Court*, supra. at 309-10, 134 S.E.2d at 729; *Schippa v. Liquor Control Comm.*, 132 W. Va. 51, 54, 53 S.E.2d 609, 611 (1948); *Armstrong Products Corp. v. Martin*, 119 W. Va. 50, 53, 192 S.E. 125, 127 (1937); *State v. Conley*, 118 W. Va. 508, 531, 190 S.E. 908, 918 (1937); *City of Beckley v. Wolford*, *supra* at 393, 140 S.E. at 345 (1927); *Coberly v. Gainer*, 69 W. Va. 699, 703, 72 S.E. 790, 792 (1910); Syl. pts 4 & 5, *State v. Chilton*, 49 W. Va. 453, 39 S.E. 612 (1901); and *Totten v. Nighbert,* 41 W. Va. 800, 805; 24 S.E. 627, 629 (1896).

The State or one of its subdivisions acting in a governmental capacity, as opposed to performing a proprietary function, is not subject to the law of equitable estoppel. *McMillian v. Berkeley Co. Planning Comm.*, 190 W. Va. 458, 465, 438 S.E.2d 801, 808, 438 S.E.2d 801, 808 (1993); *Martin v. Pugh*, 175 W. Va. 495, 503, 334 S.E.2d 633, 641 (1985) (particularly good discussion); *Cunningham v. Wood County Court*, 148 W. Va. 303, 309-10, 134 S.E.2d 725, 729 (1964); *Cawley v. Bd. of Trustees*, 138 W. Va. 571, 583, 76 S.E.2d 683, 690 (1953); and *City of*

Beckley v. Wolford, 104 W. Va. 391, 393, 140 S.E. 344, 345 (1927). Taxation is a function that is a governmental function, as opposed to a proprietary function. *City of Beckley v. Wolford*, *supra*. at 393, 140 S.E. at 344. Therefore, any unauthorized or *ultra vires* act of the State Tax Commissioner may not act as an estoppel against the State in the enforcement of the law, especially in collecting tax that is lawfully due and owing.

The Petitioner implies that the State Tax Commissioner ought to be estopped from collecting the consumers' sales and service tax because it was misled by one of the Commissioner's employees. However, in light of well-established principles of law articulated by the West Virginia Supreme Court of Appeals, the State Tax Commissioner is not estopped to deny the validity of *ultra vires* act of one of his employees. The verbal issuance of mistaken instructions is an *ultra vires* act on the part of the employee, which is not authorized by law. It is a mistake that was undertaken in the performance of a governmental function, not a proprietary function. Consequently, the State is not estopped from enforcing the statute of limitations against the Petitioners.

The Petitioner also maintains that since the incidence of the tax is upon the consumer, not the vendor, the tax is included the sums that it collected from its customers. It maintains that the tax should not be assessed in addition to the sums it collected. Instead, it maintains that the taxes should be treated as having been included in what was collected from its customers. This would have the effect of reducing the amount of tax that the Petitioner owes.

W. Va. Code § 11-15-10 [1943] requires that consumers' sales and service tax shall be paid by the consumer. The tax is required to be added to the sales price, constitutes part of the sales price and is collectible as part of the sales price. W. Va. Code § 11-15-4 [1984] requires that the consumers' sales and service tax shall be added to and constitute part of the purchase price, and be collected by the vendor. It further requires the vendor to keep the tax separate from

the other proceeds of the sale, unless authorized by the Tax Commissioner to commingle the tax with other funds.

In this matter, the Petitioner did not separately state the consumers' sales and service tax on its statements or on the invoices to its customers. The tax was not added it to the sales price, i.e. the entry fees, the booth fees, or other fees collected, so as to become part of the sales price. The Petitioner's witness candidly stated that there was no representation made that the tax was to be included in the price of the service provided by it.

The Petitioner could have satisfied these statutory requirements by stating that the consumers' sales and service tax was included in the amount of the fee paid, separately maintaining the consumers' sales and service tax collected and remitting the same to the State Tax Commissioner. However, it did not do so. Because the Petitioner did not undertake these tasks, it did not comply with the statutory requirements. Consistent with the testimony of the Petitioner did not intend to collect the tax and did not do so. This Office cannot permit the Petitioner to do now what it could have and should have done at the time of the transaction. Accordingly, it is not entitled to the relief requested.

The Petitioner also raised the issue of its entitlement to a credit for the non-cash prizes that it awarded to qualifying entrants. The Petitioner was advised that it would have the opportunity to provide information respecting the value of the non-cash prizes it awarded. In response to the Petitioner's argument, counsel for the State Tax Commissioner advised the president that said items would be treated as used or consumed in the Petitioner's business and, as such, would be subject to purchasers' use tax. The president surmised that the Petitioner might not provide the information and, ultimately, did not do so. Accordingly, this argument must be deemed to have been waived by the Petitioner.

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 refund, the burden of proof is upon the taxpayer to show that it is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. The Petitioner has not demonstrated that the State Tax Commissioner is estopped from collecting the consumers' sales and service tax as the result of representations of one of his employees which are contrary to law and, therefore, *ultra vires.*

3. The Petitioner failed to add consumers' sales and service tax to the prices charged for the services provided by it, and failed to collect the tax and keep it separate from the other proceeds of the sale, and to remit the same to the State Tax Commissioner. W. Va. Code § 11-15-4 [1984] and W. Va. Code § 11-15-10 [1943].

4. The Petitioner is not entitled to the relief requested by it, which is treating the consumers' sales and service tax as if it was included in the fees collected by the Petitioner.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumer's sales and service tax assessment issued against the Petitioner for the period of January 1, 2001, through September 30, 2003, for tax in the amount, interest in the amount, computed through December 31, 2003, should be and is hereby **AFFIRMED.**[2]

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[2] Assuming the Petitioner paid the tax and interest due on or about February 11, 2004, as the president testified, then this matter constitutes a petition for refund, and the Petitioner's petition for refund should be denied.