

REDACTED DECISION – DK# 15-299 CUS-C

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON MAY 3, 2020
ISSUED ON SEPTEMBER 10, 2021**

**NOTE: THIS ADMINISTRATIVE DECISION WAS APPEALED BEYOND THE OFFICE
OF TAX APPEALS**

FINAL DECISION

On July 7, 2015, the Auditing Division of the West Virginia State Tax Commissioner’s Office (“the Tax Department” or “the Respondent”) issued an Audit Notice of Assessment, against the Petitioner, Company A LLC (hereinafter “the Petitioner” or “Company A”). This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq.*, of the West Virginia Code. The assessment was for combined sales and use tax for the period of January 1, 2011, through March 31, 2015, for tax in the amount of \$_____, and interest in the amount of \$_____, for a total assessed tax liability of \$_____. Written notice of the assessment was served on the Petitioner, as required by law. Thereafter, on September 2, 2015, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition of appeal. *See* W. Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010). Subsequently, notice of a hearing on the petition was sent to all parties, and an evidentiary hearing was held over two days, October 19, 2020, and December 9, 2020, at the conclusion of which the parties filed legal briefs¹. The matter became ripe for a decision at the conclusion of the briefing schedule.

¹ During the hearing on December 9, 2020, which was conducted electronically, the Petitioner sent two photographs to this Tribunal. The photographs were of two documents. These photos were referred to as Petitioner’s exhibits 2 and 3, counsel for the Petitioner stated that the original documents would be sent at a later date. That never occurred, and we have marked the photographs as Petitioner’s Exhibits 2 & 3.

FINDINGS OF FACT

1. The Petitioner is a West Virginia limited liability company, comprised of two members. During the tax years in question, the Petitioner had its principal place of business in two locations, Northtown, West Virginia, and Southtown, West Virginia. Tr. #1P 34 & 44.

2. The Petitioner's business was the retail sale and installation of flooring products. Tr. #1P38-39 at 21-7.

3. At some point in 2013 or 2014, the members of the LLC had disagreements regarding the business, including one member's discovery of possible state tax problems. Tr. #1P51-52 at 19-2. The disgruntled member had concerns that led her to attempt to dissolve the LLC. This member was of the opinion that the LLC could not be dissolved until any outstanding state tax problems were resolved. As a result, she retained a tax preparer to begin a dialogue with the West Virginia State Tax Department. Tr. #1P52-53 at 20-7.

4. The tax preparer's discussions led to what the disgruntled member characterized as a "desk audit." Although, the witness further testified that she was not involved in this audit and did not know exactly what transpired. Tr. #1P52-53 at 20-7.

5. Despite the witnesses' confusion, in March of 2014, the LLC received a "Statement of Good Standing" from the West Virginia State Tax Department. *See* Tax Commissioner's Exhibit 1. Upon receipt of this statement of good standing, the disgruntled member believed that she could now dissolve the LLC through the Secretary of State's office. However, the member discovered that due to non-payment of some administrative fee, the LLC was no longer registered with the Secretary of State's office. Tr. #1P62-63 at 18-12.

6. Sometime in the summer of 2014, this disgruntled member of the LLC was contacted by an auditor with the West Virginia State Tax Department, who explained that she was seeking to conduct an audit of the Petitioner. The member then provided the auditor with various financial documents. Tr. #1P65 at 3-23.

7. The auditor was not provided any sales documents from the business. However, she did have tax returns and bank statements. Those documents showed a discrepancy between the amount of sales reported on the Petitioner's consumer sales returns versus the amount of money shown on the bank deposits and the LLC's income tax returns. Additionally, the auditor found no evidence that the amounts deposited into the LLC's bank account were from any source other than retail sales. Tr. #2P27-29.

8. The result of the 2014 audit was the assessment that forms the basis of this action.

DISCUSSION

Normally, this Tribunal begins the discussion section of each final decision with a brief summary of the issues and then citations the law of the case. This matter is not typical, and at both the prehearing conference and in post hearing briefs, the Petitioner presented no legal authority to support its position that the Tax Commissioner has erred in his issuance of the sales and use tax assessment at issue. Some background is necessary to explain the unique nature of the matter.

While the assessment in this matter was issued against Company A, the Petitioner never appeared in this matter. Normally, when an entity such as a corporation or LLC proceeds to hearing, it, the entity, hires lawyers and accountants to explain why the assessment (or refund denial) is wrong. In such a case, a representative of the business may or may not testify regarding some facts related to the alleged error in the assessment. When that happens, those witnesses are obviously speaking on behalf of the entity in which they are employed or associated. None of that happened here. The only

witness in this matter was one of the two members of the LLC, and she most definitely did not testify regarding whether or not Company A remitted the proper amount of West Virginia sales taxes during the years in question. Simply put, her testimony was that she lent a friend money to start a carpet/flooring business and that the LLC, "Company A" was just what she called a "pass through" entity, although she further testified that she was not entirely sure what a "pass through" was. In her mind, the point was that the money she was owed would be put into the Company A's bank account, and she would get repaid in that manner. However, as such situations often do, she was not repaid and grew frustrated. Moreover, she had a full-time job, and she allegedly had little or no involvement with the day to day running of the business. None of these facts are laid out above in the findings of fact because they are not relevant to the case at hand. They are offered here to explain, for lack of a better term, the Petitioner's lack of a traditional appearance in this matter. The witness's testimony was much closer to what would be presented in an officer liability case. In fact, at one point the witness admitted, through her attorney, that such was the case.

JUDGE POLLACK: So why --- you know, to sort of put it bluntly, why do you care? [The Petitioner] --- you know, you don't --- [the Petitioner] presumably doesn't have any money. It doesn't exist anymore. Why are you so concerned about an assessment against an entity that you were barely part of and doesn't exist anymore?

[PETITIONER'S WITNESS]: To clear my name. For lack of better words, I --- to make sure that I've done the right thing.

JUDGE POLLACK: Okay. So ---.

ATTORNEY [REDACTED]: Number one, Your Honor, to a hundred percent penalty assessment.

JUDGE POLLACK: I'm sorry. Say that again, Mr. [REDACTED].

ATTORNEY [REDACTED]: Step number one towards a flow-through attempt to hold the members responsible.

JUDGE POLLACK: Oh, okay. And [Petitioner's witness], had someone advised you that you, down the road, could be personally liable?

[PETITIONER'S WITNESS]: Mr. [REDACTED] had mentioned it. Yes, Your Honor.

JUDGE POLLACK: Okay.

ATTORNEY [REDACTED]: I don't think she --- I don't think she could because I don't think she was the person who was responsible for remitting, but ---.

JUDGE POLLACK: Right. Well, that's obviously an argument for another day.

Tr. #1P69 at 1-19. This background information is included here, because, as stated above, in virtually every instance when a vendor has appealed a sales and use tax assessment, it is the vendor that appears at hearing. Therefore, in a typical final decision, this Tribunal refers to the "Petitioner" throughout. In this final decision, when we refer to the Petitioner, we are speaking of the witness, the disgruntled member of the LLC, who essentially appeared on her own behalf.

Despite this unique situation, the Petitioner did not appear empty handed. The Petitioner presented three arguments. First, she argued that as a "pass through" entity, Company A conducted no business, and therefore it could not owe unremitted sales and use taxes. More specifically, she contended that the other member of the LLC, whom we will refer to as Mr. X, was really operating the flooring business under another name, Mr. X's flooring. As such, if there truly was unremitted sales and use tax, it was owed by Mr. X's flooring. There are numerous problems with this argument, and as such, we are unpersuaded. First and foremost, it fails to address any problems with the audit conducted on Company A, which should have been the only goal in this appeal. The auditor in this matter offered clear, cogent, and unrebutted testimony that during the audit she reviewed federal income tax returns and bank statements of Company A. So, even if we, for the sake of argument, take the Petitioner's version of events as true, it still begs the question, why was Company A filing federal tax returns, and where did this money deposited in its bank account come from? When counsel for the Tax Commissioner inquired of the witness on these topics, she had no satisfactory explanation.

ATTORNEY [REDACTED]: Okay. You stated earlier that Mr. X conducted a desk audit of this business, of [Company A] ---

[PETITIONER'S WITNESS]: Yes.

ATTORNEY [REDACTED]: --- LLC?

[PETITIONER'S WITNESS]: Yes, sir.

ATTORNEY [REDACTED]: Did you explain to Mr. X that [Company A] wasn't doing business?

[PETITIONER'S WITNESS]: Mr. X actually worked through my tax preparer and they discussed it. I just received ---.

ATTORNEY [REDACTED]: But you don't know --- you don't know if Mr. X was ever informed that [Company A] was wasn't doing business. Right?

[PETITIONER'S WITNESS]: I --- all I know is Mr. X was provided tax --- tax prepared --- prepared tax documents. I'm sorry.

ATTORNEY [REDACTED]: Well, okay. Again, I'm not sure what tax documents would need to be prepared if this company was not engaging in business.

[PETITIONER'S WITNESS]: I don't know how to answer that.

Tr. #1P18 at 7-22.

ATTORNEY [REDACTED]: And you had gross receipts of ---. Let me see. In 2014, the tax liability was [\$____] ---. Well, in 2013, the tax liability was [\$____]- -- [\$____], almost [\$____]. That's [\$____] --- roughly, [\$____] in gross receipt to [Company A], that went into [Company A's] bank account. Is that correct?

[PETITIONER'S WITNESS]: I had no control over the ---. I'm not going to say I didn't have any control over the bank account. I did not know what was going in the bank account. As my responsibility, the rent was in my name. The utilities were in my name personally. And I ensured they were paid.

Tr. #1P21 at 8-15. This testimony shows the inherent difficulty in this argument by the Petitioner. On one hand, she states that she has a full-time job and knows nothing about the business, but on the other hand, she knows that Company A was not conducting business. Simply put, without a credible explanation as to the source of the income on Company A's federal tax returns, and the money in its bank account, this Tribunal cannot rule that the auditor committed an error in attributing that income to the sales of goods and services. Additionally, no explanation was given as to why this information about Mr. X and Mr. X's Flooring was not provided to the auditor during the audit, and was brought up for the first time during the evidentiary hearing.

The Petitioner's next argument is that she was given a "Statement of Good Standing" after the purported desk audit and that because Company A was in good standing it cannot be assessed for

allegedly unpaid sales and use taxes for periods prior to the date of the statement. The most obvious problem with this argument is that the statement of good standing says, on its face “The issuance of this Statement of Good Standing shall not bar any audits, investigations, assessments, refund or credits with respect to the Taxpayer named above and is based only on a review of the tax returns and not on a physical audit of records.” See Respondent’s Ex. 1. (emphasis added). The purpose of statements of good standing was explained at hearing by an Assistant Director from the Tax Department’s Compliance Division.

ATTORNEY [REDACTED]: Okay. Are you familiar with this type of letter?

MS. : Yes.

ATTORNEY [REDACTED]: And just briefly explain what type of letter this is.

MS. [REDACTED]: This letter is issued to a taxpayer when they request the good standing. It states that at that period of time that the taxpayer filed and paid all the outstanding taxes that are due at that period of time.

ATTORNEY [REDACTED]: Okay. Is this a letter that the Compliance Division has a little bit of hand in when it’s issued?

MS. [REDACTED]: Yes. We can --- we can review and let them know, let the good standing unit know that the taxpayer is in good standing.

ATTORNEY [REDACTED]: Okay. Now, does this --- does this letter normally ---? Let me rephrase that. To be in good ---. Oh. To be in a good standing, does that mean that the taxpayer has filed all of their required returns?

MS. [REDACTED]: Yes.

ATTORNEY [REDACTED]: Does that mean that the taxpayer has paid whatever the amounts are on those returns?

MS. [REDACTED]: Yes.

ATTORNEY [REDACTED]: Okay. Does a Letter of Good Standing mean that the taxpayer can’t be determined to owe additional money for those same periods in the future?

MS. [REDACTED]: No. It does not mean that.

ATTORNEY [REDACTED]: Does it mean they can't be audited in the future for those periods?

MS. [REDACTED]: No.

ATTORNEY [REDACTED]: When the Tax Department receives a tax return and let's say the tax return shows a liability of sales tax of \$100, and the taxpayer sends in a check for \$100 and the return shows they owed \$100 ---

MS. [REDACTED]: Uh-huh (yes).

ATTORNEY [REDACTED]: --- just exactly, I mean do we actually check to see if they actually owed \$100 when that return comes in?

MS. [REDACTED]: Not through the good standing process, no.

ATTORNEY [REDACTED]: Okay. So the good standing process is not a matter of whether the returns are correct. It's a matter of whether they're filed and whatever they say is paid?

MS. [REDACTED]: Correct.

Tr. #2P2-4. At hearing, and in her post hearing brief, the Petitioner offered no statutory, regulatory or case law authority to rebut the plain language of the Statement itself, or the testimony from Assistant Director [REDACTED].

The Petitioner's final argument is actually part and parcel of the Statement of Good Standing argument. She argues that because she took the Statement of Good Standing to the Secretary of State's office, in order to dissolve the LLC, and that the LLC was in fact no longer in existence at the time of the audit, then the Tax Commissioner cannot have issued the assessment at issue. This Tribunal finds this argument to be particularly unconvincing. If going to the Secretary of State's office to shut down a business wiped out the ability of the Tax Commissioner to conduct an audit, then the Secretary of State's office would be busier than the DMV. The Petitioner again offers no statutory, regulatory or case law authority for the proposition that dissolving an LLC prevents the Tax Commissioner from conducting an audit, because no such authority exists. The ability of all fifty

states and the federal government to audit taxpayers is such a part and parcel of the fabric of life in America that in this context it is not even a question of law.²

In this matter, as a practical matter, the Petitioner, Company A never appeared. One member of the LLC did appear, to argue on the one hand that she was just a silent partner who knew nothing about the business, but on the other hand, she was intimately familiar with the machinations of her co-member, and his attempts to cheat her/and or the Tax Department. None of the evidence presented on those points was relevant to the correctness of the audit and resulting assessment. As for the legal arguments made by the member, she was unable to present any authority for the proposition that a statement of good standing or the dissolution of a business prevents the Tax Commissioner from conducting an audit.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. Article Fifteen of the West Virginia Tax Code imposes a general consumer’s sales and service tax, for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services, and it is the duty of the vendor to collect the same. *See* W. Va. Code Ann. § 11-15-1 and § 11-15-3 (West 2010).

² Obviously, there are limitations on the Tax Commissioner’s ability to conduct audits such as West Virginia Code Section 11-10-15, which, with some exceptions, limits assessments to three years after a return is filed. The Petitioner advances no argument under Section 15. Again, there is no blanket statutory prohibition on the Tax Commissioner’s ability to issue an assessment after an entity is administratively dissolved with the Secretary of State.

4. “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (West 2010).

5. “(b) The vendor shall keep records necessary to account for: (1) The vendor’s gross proceeds from sales of personal property and services; (2) The vendor’s gross proceeds from taxable sales; (3) The vendor’s gross proceeds from exempt sales; (4) The amount of taxes collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the tax commissioner” W. Va. Code Ann. § 11-15-4 (West 2010).

6. “To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established.” W. Va. Code Ann. § 11-15-6(b) (West 2010).

7. “Every person doing business in the State of West Virginia . . . shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993).

8. If, when auditing taxpayer records, said records are, “. . . inadequate to accurately reflect the business operations of the taxpayer, the tax auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993).

9. The Petitioner failed to account for and remit to the Tax Commissioner all of the sales taxes collected from its customers.

10. The records which were provided to the Tax Commissioner were not complete and accurate enough to determine the Petitioner’s liability for consumer sales and use tax purposes. Nor were they adequate to accurately reflect the Petitioner’s business operations.

11. The Tax Commissioner was not clearly wrong or arbitrary and capricious when he determined that the best information available, as that term is used in Section 14b.4, to reflect the Petitioner’s sales of goods and services was the Petitioner’s banks statements and federal tax filings.

12. “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.” W. Va. Code Ann. § 11-10-7(a) (West 2010).

13. 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 any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

14. The Petitioner in this matter has not met its burden of proof showing that the combined sales and use tax assessment against it was erroneous as discussed above.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that: the combined sales and use tax assessment issued against Company A on July 7, 2015, for a total assessed tax liability of \$_____ is hereby **AFFIRMED**.

Interest continues to accrue on these unpaid taxes until fully paid. W. Va. Code Ann. § 11-10-17(a) 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. “Fenway” Pollack
Chief Administrative Law Judge

Date Entered