

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.

PURCHASERS' USE TAX – STATUTORY ADMINEMENT(s) INTEND TO CHANGE PRE-EXISTING LAW – Statutory changes are intended to be prospective in nature unless expressly made to be retrospective.

ADMINISTRATIVE DECISION

The Auditing Division issued a purchasers' use tax assessment against the Petitioner. This assessment was for the period of August 1, 1998 through July 31, 2001, for tax and interest, through July 31, 2001.

Thereafter, the Petitioner timely filed a petition for reassessment. Subsequent to the hearing, the parties decided to file briefs. All of the briefs, based upon the briefing schedule, were filed by January 3, 2003.

FACTS

The Petitioner is a state 1 corporation, with its principal place of business and commercial domicile in state 2. The Petitioner is engaged in the business of manufacturing and selling tobacco products in the United States, including West Virginia.

Pursuant to an audit of the Petitioner's books and records, it was determined that during the assessment period, the Petitioner failed to remit purchasers' use tax on the payments made to retailers under various marketing incentive payment plans.

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The pertinent facts as testified by Petitioner's witness are as follows:

Retailers buy products manufactured by Petitioner from wholesalers to sell in their retail establishments. Petitioner and retailers then enter into contracts wherein retailers are encouraged to increase their sale volume of products manufactured by Petitioner and in return retailers are paid a marketing incentive payment. The amount of the payment, however, depends upon the volume the retailer sells of Petitioner's manufactured products, the category of the contract and the type of retail outlet. Additionally, it is well understood by both the retailer and Petitioner that incentive payments will not be paid if the retailer does not increase its sales volume of Petitioner's manufactured products.

Under the guidelines of the incentive contract(s) the retailer is specifically obligated to do the following: Example (Retail Partners Marketing Plan Contract Carton Outlet).

The Petitioner is pleased to announce the following Retail Partners program for all retailers that meet the following criteria:

- Cigarettes represent less than 80% of All Commodity Volume (ACV) for inside sales.
- 51% or more total industry volume sold by the carton.
- Minimum of 80 cartons of Petitioner brands sold per week.
- Distribution of all Petitioner brands in all price tiers as required.
- Cigarettes are merchandised and sold from a centralized tobacco department configuration defined as the following:
 - A consolidated cigarette category section of merchandising located under canopy or signage
 - The category is merchandised in a primary point of purchase location. This location can be manned or unmanned as long as the entire industry is merchandised together.

Retailers not meeting the above requirements should discuss other available merchandising alternatives with Petitioner's representative.

MERCHANDISING / PRESENCE PROGRAM ELEMENTS

Primary Position Merchandising Requirements (Plan)

- Petitioner's brands will be maintained in a highly visible, primary line of sight position, and must occupy the #1 or #2 positions as defined by Petitioner.
- This space will be arranged vertically beginning on the top shelf of merchandiser(s) and continue on lower shelves in a contiguous manner, until space requirement is satisfied. Petitioner's brands must occupy linear space equal to Petitioner's store SOM or Petitioner's local trading SOM or 25%, whichever is highest, but in no case less than 3 linear feet.
- If the retailer elects to designate an "Industry Merchandisers," Petitioner's brands must also occupy space on this fixture that is equal to Petitioner's store SOM or Petitioner's local trading SOM or 25%, whichever is highest. In no case will Petitioner's brands be merchandised in less than the #2 position as determined by Petitioner.
- Retailer will maintain permanent advertising for Petitioner in primary line of sight. Petitioner's permanent signage will be equal to Petitioner's store SOM or Petitioner's local trading SOM or 25%, whichever is highest. Petitioner's signage will be positioned above Petitioner's contracted space and may also be integrated within Petitioner's contracted space. Additional signage outside the merchandising set may also be required to satisfy share of signage requirements.

Secondary Position Merchandising Requirements (Plan S)

- This space will be arranged horizontally, with Petitioner's brands occupying space across the entire shelf(s) in a contiguous manner, until space requirement is satisfied. Petitioner's brands must occupy linear space equal to Petitioner's store SOM or Petitioner's local trading SOM or 25%, whichever is highest.
- If the retailer elects to designate an "Industry Merchandiser," then Petitioner's brands must also occupy space on this fixture that is equal to Petitioner's store SOM or Petitioner's local trading SOM or 25%, whichever is highest. In no case will Petitioner's brands be merchandised in less than the #2 position as determined by Petitioner.

- Permanent advertising signage for Petitioner may also be integrated within Petitioner's contracted space. Additional signage outside of the merchandising set may also be required.

ADDITIONAL MERCHANDISING PRESENCE REQUIREMENTS – (Applicable to both Primary and Secondary Plans)

- Retailer will accept and execute Petitioner's promotions with sales to consumers only including, but not limited to, pre-book(order) book additional product for delivery prior to scheduled promotion; assemble and place Petitioner's promotional displays/advertising in location(s) highly visible to retail consumers.
- Retailer will permit Petitioner to have complete control over display type and advertising configuration in Petitioner's contracted space.
- Petitioner will occupy space on industry package merchandiser(s) in the #1 or #2 positions as defined by Petitioner, equal to Petitioner's Store SOM or Petitioner's Local Segment SOM or 25%, whichever is highest.
- Petitioner will have space and presence representation equal to in cases where packs/cartons are merchandised outside of the industry fixture location. This includes but is not limited to self-service and non-self-service checkland fixtures/displays.
- Petitioner displays and advertising may not be impaired or obstructed from view of consumers by competitive displays or by any other means.
- Petitioner's merchandisers, displays and freestanding signage will be lit as designated by Petitioner.
- Retailer will effectively communicate all Petitioner's buy-down activity to the consumer, via brand specific POS as approved by Petitioner.
- Petitioner's ability to advertise price will be no less than parity with other participating tobacco companies.
- Petitioner reserves the right for final approval of display and advertising types, sizes and locations. Retailers will maintain display and advertising space according to Petitioner's authorized plan-o-gram with no additional competitive permanent fixtures and displays allowed beyond those illustrated in plan-o-gram. Changes in authorized location of displays and advertising, or effectiveness of location, will not be made without Petitioner's approval.
- Retailer will provide Petitioner's accurate volume information and authorizes supplier(s) to provide purchase/return data to Petitioner including specific brand information and promotion activity.
- Retailer will: (1) provide space required for Petitioner's brand style distribution needs as determined by Petitioner; (2) maintain adequate inventory of Petitioner's brands, to include new items for a minimum of 6 months, as requested by Petitioner and (3) permit Petitioner to make reasonable audits of performance and to inspect and rotate Petitioner products.
- Retailer will not restrict Petitioner's ability to display, promote or otherwise distribute Petitioner brands and compete equally with other tobacco companies in all areas at retail, nor will retailer exclude Petitioner from displaying, promotion or otherwise distributing Petitioner brands during any period in which this agreement is in effect.
- If legislation or government regulation restricts point-of-sale advertising, Petitioner will be given the % or number of advertising pieces permitted by law.
- Retailer will not sell or distribute product not intended for domestic sale, nor buy or trade promoted product or discounted product with other retailers or wholesalers.
- Attorneys Fees: In all litigation arising out of the Partners Program, the non-prevailing party shall pay any and all costs and expenses incurred by the prevailing party as a result of such action, including, but not limited to the prevailing party's reasonable attorney's fees.
- Other

Retailer agrees to perform the requirements set forth above. Failure to satisfy requirements will result in forfeiture of monthly payment(s) until compliance is achieved or may result in termination of this Agreement.

Either party can terminate this Agreement upon thirty (30) days notice to the other party. In the event Retailer fails to comply with the requirements of this Agreement, Petitioner may terminate this Agreement immediately upon notification to the Retailer.

MERCHANDISING / PRESENCE PAYMENT

Petitioner volume will be determined by the average weekly sales of all Petitioner brands during the most recent e-month period. Petitioner will pay qualifying retailer \$_____ per month for performance of all requirements described in this Agreement.

Petitioner will make payments by check as soon as practicable after the end of each calendar quarter. Payments will be made for stores rendering full performance during a quarter, and on a pro rata basis for stores rendering performance for less than one full quarter, but more than one calendar month. Retailer will not deduct amounts due under the contract from invoices due Petitioner.

ISSUE AND DETERMINATION

The primary issue presented for determination is whether Petitioner has shown that the marketing incentive payment contracts are not taxable services for use tax purposes.

Petitioner avers that the West Virginia retailers who purchase its products are not rendering services to Petitioner essentially because the retailers are performing few overt acts. They are only permitting the Petitioner to use their space to promote Petitioner's products. Thus, the retailer's role in performing its obligations under said contracts is no service activity.

The use tax statute, however, adopts the definition of service found in the consumers' 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.

Because the statute does not define "nonprofessional activities," the Petitioner also claims that the statute is ambiguous and vague, Woodell v. Dailey, 160 W. Va. 65, 230

S.E.2d 466 (1977), and Western Maryland Ry. Co. v. Goodwin, 167 W. Va. 804, 282 S.E.2d 240 (1981), requiring the application of the rules of construction in determining the definition of the term "taxable services." Thus, Petitioner argues that these contracts should not be considered taxable services.

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 incentive program not only involves the Petitioner's passive use of space, or spaces, of the retailer's store for the exclusive placing of its fixtures, displays and signs, it requires the retailer to stock the designated space with the Petitioner's products and periodically rotate the same. Depending upon the agreed-upon level of performance, the retailer is required to account and execute promotions of the Petitioner's products to West Virginia consumers, to include assembling, placing, displaying/advertising said products, all of which must have Petitioner's approval. 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 Agreement 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. Further, if litigation arises under these contracts, the non-prevailing-party, which could be the retailer, is liable for all costs and expenses, including the prevailing party's reasonable attorney fees.

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 contract require a certain level of performance which cannot fairly be characterized as being merely passive.

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 also **DETERMINED** that the constitutional issues raised by the Petitioner in this proceeding are not within the province of this tribunal because the West Virginia Office of

Tax Appeals is part of the executive branch of government rather than the judiciary and, therefore, does not have the authority to declare statutes unconstitutional on their face.

It is further **DETERMINED** that Petitioner's alternative argument that, should a taxable service be found, the same is still exempt because it was purchased for the purpose of resale, is not applicable in this case given the fact that the taxable service is being performed by the retailer for the Petitioner and the same is not resold under a contract.

The Petitioner's final written argument. -- submitted after the briefing schedule was closed -- is also rejected.

It is well settled that the very fact that the statute is amended materially demonstrates that there was an intent to change the pre-existing law, and the presumption is that the intent was to change the statute in all particulars with respect to which there is a material change in the language of the act. Van Nuis v. Los Angeles Soap Co., 36 Cal. App. 3d 222, 111 Cal. Rptr. 398 (1973). Further, in determining pre-enactment history, it has been held that post-enactment statements as to legislative history are not entitled to substantial consideration in construing a statute. Appalachian Power Co. v. State Tax Department, 195 W. Va. 573, 587 n. 16, 466 S.E.2d 424, ____ n. 16 (1995).

Also, a statute is presumed to be prospective in its operation unless expressly made retrospective. W. Va. Code § 2-2-10(bb) and State v. Bannister, 162 W. Va. 447, 453, 250 S.E.2d 53, ____ (1978).

Accordingly, it is finally **DETERMINED** that the subsequent legislative change in W. Va. Code §§ 11-15-9 and 11-15-2(s) demonstrates that the activities in question were

subject to sales and use tax during an audit period, like here, prior to the change in the statutes.

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers' use tax assessment issued against the Petitioner for the period of August 1, 1998 through July 31, 2001, for tax and interest, updated through April 15, 2003, should be and is hereby **AFFIRMED**.