SANITIZED DEC. – 01-640 U – BY – GEORGE V. PIPER – ISSUED - 02/28/02 – SUBMITTED FOR DECISION ON BRIEFS – 10/18/02

SYNOPSIS

PURCHASERS' USE TAX – PROFESSIONAL SERVICES EXCEPTION UNPROVEN – Because the environmental laboratories in question failed to meet the minimum education requirement of a college degree for all of its supervisory personnel signifies that Petitioner did not meet all four (4) prongs of the four (4)-part test as provided for in 110 C.S.R. 15, § 8.1.1.1 and, therefore, the environmental services provided to the Petitioner are not excepted from use tax as professional services.

ADMINISTRATIVE DECISION

The Auditing Division issued a purchasers' use tax assessment against the Petitioner.

This assessment was for the period of July 1, 1998 through June 30, 2001, for tax, interest, through June 30, 2001, and no additions to tax, for a total assessed liability.

Thereafter, the Petitioner timely filed a petition for reassessment.

At the hearing, Petitioner's counsel stated for the record that Petitioner has remitted a certain amount of which the amount of the invoices in dispute is much less.

FACTUAL AND LEGISLATIVE BACKGROUND

Because of the high profile of this and related cases, the following fact pattern and legislative history will be detailed.

In response to this type of assessment, the West Virginia Legislature passed House Bill 4005, effective from the date of passage on March 9, 2002, whereby W. Va. Code § 11-15-9(a)(47) was codified. The enactment exempted "the service of providing technical evaluation for compliance with federal and state environmental standards provided by environmental and industrial consultants who have formal certification through the West Virginia Department of Environmental Protection or the West Virginia Bureau for Public Health or both . . . ."

There is no dispute that if the technical evaluations had been performed by the laboratories in question for the Petitioner after March 9, 2002, the same would be exempt.

Although Petitioner is the taxpayer in this case, the controversy involves the services of two (2) laboratories, one of which is Lab A, which provided laboratory testing to Petitioner.

As to Lab B and Lab A, it is a fact that both entities provided the aforesaid technical evaluation services in West Virginia from the early 1980's until 1999 and although previously audited, were not found to be liable for the collection of consumers' sales and service tax with respect to said services.

In his opening statement Petitioner's counsel posited the following, which Division's counsel did not question, that this matter did not become an issue until a 1999 decision by an administrative law judge, which found that Lab B, as a certifier of water purification to a bottled water company, was found <u>not</u> to have rendered professional services. Further, during Lab B's last audit conducted in 1999, the tax auditor handed Lab B a copy of the aforementioned administrative decision stating that maybe the next time Lab B was audited that decision might be binding law. No assessment was issued against Lab B at that time for the services, which are at issue in this case.

Because of Petitioner's reliance upon the rules governing environmental laboratories, its counsel asked this tribunal to take judicial notice of the West Virginia Code of State Rules, Article 47-32-1, which is the environmental laboratory certification rules, as well as the Section 32 series of regulations governing environmental laboratories.

PETITIONER TESTIMONY

Petitioner is a professional consulting firm, which employees 225 persons and does geotechnical, civil engineering, and environmental consulting. Its environmental services manager has a baccalaureate degree in science and geology from West Virginia University. He holds the license of a remediation specialist in the State of West Virginia.

Lab B and Lab A invoices, which were introduced into evidence as Petitioner's Exhibit 1 and 2, were each related to a specific project and a set of regulations under the category of environmental protection, ranging from the Clean Water Act to the West Virginia and Kentucky Solid Waste Management Act, Brownfield Projects, the Ground Water Protection Act, and the Underground Storage Tank Act.

LABORATORY TESTIMONY

A physician, who is also President of Lab B, has a Bachelor of Science degree in chemistry from Glenville State College and a Master of Science and Ph.D. in analytical chemistry from West Virginia University. His considerable work experience included participation in writing the West Virginia CSR Series 32 regulations under Title 47 as a member of the regulation writing committee.

Petitioner's Exhibit No. 3 was introduced, that being the application to the West Virginia Department of Environmental Protection ("DEP") for the annual certification of Lab B for the years 1999, 2000 and 2001.

The doctor described the laboratory's certification process by the DEP in order to conduct business, as well as the continuing education of personnel, which was described as changes to technical standard operating procedures regarding new technologies. Laboratory procedures and processes are on a national standard under Federal EPA regulations.

Concerning the other laboratory's Table of Organization, each of the department heads, the quality control person, and laboratory process managers are required by the other laboratory to be degreed personnel at the bachelor level. The doctor's testimony also addressed the fact that in the State of West Virginia persons holding academic degrees in biology, geology, or chemistry are not licensable.

The other laboratory's manager, has a baccalaureate degree in biology, being a biology major with a chemistry minor. He introduced the same application for certification to DEP as did the doctor, stating that Lab A was a certified laboratory under West Virginia DEP from 1997 through 2002.

Each of Lab A's individual managers and personnel were identified by name on its Table of Organization, with the degreed personnel shown in the Application for Certification. The manager further testified that Lab A had not been audited by the Division during his term as manager of the West Virginia office.

ISSUE AND DETERMINATION

The sole issue for determination is whether the Petitioner has met its burden of proof by showing that the services provided to it by Lab B and Lab A are "professional" in nature, as set forth in W. Va. Code §§ 11-15-1, et. seq. and the applicable regulation, 110 C.S.R. 15. § 8.1.1.1 (1992):

In 110 CSR 15, § 8.1.1.1 one finds the following:

> The determination as to whether other activities are "professional" in nature will be determined by the State Tax Division on a case – by – case basis, unless the Legislature amends West Virginia Code Section 11-15-1, et. seq. to provide that a specified activity is 'professional.' When making a determination as to whether other activities fall within the 'professional' classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements.

Section 8.1 commences with a broad statement that sales of the listed services are exempt from the imposition of the consumers' sales and service tax and the use tax, with the first -subsection 8.1.1, entitled Professional Services. The lead sentence states that professional services as defined in Section 2 of these Regulations are provided by certain occupations. Reg. § 110-15-2 is labeled "Definitions" with "Professional Services" found at §2.65 as follows:

> 'Professional service' means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in West Virginia Code §11-15-1, et. seq. to be professional. See § 8.1.1.1 of these regulations."

As stated by Petitioner's counsel, the application of the tax-sheltered "professional service" to supporting group activities is not unique under Section 2.65 when applied to other professions. The medical industry operates medical laboratories, in which a licensed physician is not present, to draw blood, or prepare the product for testing or to send the sample to a center where it is machine tested and reported to the ordering physician; much of the work in the accounting industry is performed by non-licensed individuals under some supervision of CPA's or licensed public accountants; lawyers are using paralegals in addition to highly trained legal secretaries, both non-licensed, to prepare cases for trial; in fact, most professions are using non-licensed personnel to assist in rendering their professional process. Ergo, professional activities have been ongoing for years by persons who are not degreed, not licensable, but are working under a professional person.

As stated in § 8.1.1.1., it is the activities that are to be determined professional by the Tax Division and not the credentials of each and every person involved, which is the determining factor. This tribunal does not go as far as Petitioner's counsel in saying that it does not matter whether the doctor/President/CEO/LAB Director of Lab B, or General Manager of Lab A, have one college degree or several college degrees, or have published numerous academic or scientific articles, because their academic backgrounds must indeed come into play under the four (4)-part test in § 8.1.1.1. The issue is the conduct of the group and the processes which these people use and whether those processes as a group are a professional activity.

It is the Petitioner's contention that the laboratories' annual testing procedure, in which each laboratory must be re-certified to render services on environmental studies, is a more stringent demand than the demands placed upon the listed group of professions at the beginning of §8.1.1.1., such as physicians, dentists, lawyers, etc. This contention misses the mark because the other occupations mentioned by the Petitioner are explicitly excepted by the Legislature and are not subject to the four-part test that the Division must employ for occupations not explicitly determined by the Legislature to be "professional."

The first consideration under the four-prong test of §8.1.1.1. is the minimum level of education required for the activity. The level of education required for the activity is found in Table 2, WV CSR §47-32 at §3.7 et. seq. through 3.8 et. seq. That table establishes the education and experience requirements for supervisors, with testing categories requiring a four-year college degree, plus two years of experience in the specific field in which they are employed as a supervisor, except for limited chemistry, which requires only a high school diploma, plus two years experience, or a high school diploma and two years in college with emphasis in laboratory technology or a natural science plus one year of experience for limited chemistry supervisor. The table does not address education and experience requirements for non-supervisory personnel. All employees' records documenting training, education, experience and duties must be made available to the examiners during the certification process each year (§ 3.7.2). At Lab B, the actual laboratory personnel, excluding administrative and office, aquatic toxicity technicians, field service custody personnel and sales personnel, are thirty-two (32) individuals employed in the laboratories, of which eighteen (18) have B.S. degrees in science or a Bachelors degree in engineering; comparably, at Lab A twenty-five (25) total personnel are involved in the laboratory process, which consists of sixteen (16) B.S. degrees in science and one (1) Masters of Science degree.

In his reply brief, Division's counsel argues that Petitioner fails the minimum education prong of the test because the required minimum education level at the labs to engage in this activity (governing the licensure of environmental labs) can be as little as a high school diploma (with certain practical experience).

Because the whole of the activity must be considered in making this determination, Petitioner's counsel argued in his rebuttal brief that Division counsel misrepresented by the Doctor/President's testimony, to wit: In response to the question posed by Petitioner's counsel to the doctor/president, "Could you tell me what the education requirement is for certification in the category of limited chemistry. The answer was "twelve (12) years and two (2) years experience: rather than just a high school diploma. He (Petitioner's counsel) also correctly points out that Division's reply does not address six (6) other categories of supervisory minimum education and experience for different departments according to Table 2 to 110 C.S.R. 47 § 32-3.1 (Requirements for Certification) such as microbiology, Bachelor's Degree, plus one year's experience; atomic absorption, Bachelor's Degree, plus two years' experience; gas chromatography, Bachelor's Degree, plus two years' experience; mass. spectrometry, Bachelor's Degree, plus two years' experience; aquatic toxicity, Bachelor's Degree, plus two years' experience; radio chemistry, Bachelor's Degree, plus two years' experience. A third column in Table 2 lists additional special requirements, limiting the two years' experience to that of certain categories of laboratory activity.

Accordingly, as to the environmental labs, it is **DETERMINED** that because all of the department heads or supervisors are not required by law to have college degrees, the education prong of the four (4)-part test is not satisfied. See Aircorp Services, Inc., dba Survival Tech v. State Tax Department, OHA Docket No. 00-138 C 2000, on appeal in circuit court (college degree required).

The second prong of the test is the nature and extent of nationally recognized standards for performance. This prong of the test is indeed met because the entire discipline of environmental protection is controlled by federal statute coupled with federal regulations, which are binding on all of the states, with similar state enactment of both the statutes and regulations to that of the federal requirements. The laboratories are required to perform according to national standards. Testing procedures under West Virginia CSR § 47-32-1.5 incorporate by reference the guidelines test procedures from the Federal Code of Regulations at §40 CFR 136 and testing methods under Federal EPA SW 846, including such other methods as may be approved by the Federal EPA. The certification process is clearly uniform and national in scope.

The third prong of the § 8.1.1.1 test is licensing requirements on the state and national level. The certification required annually by the laboratories is on a national standard and state standard and is accepted interstate (see the testimony regarding Kentucky environmental compliance laws using one of the laboratories here). Licensing in §8.1.1.1 and certification of the laboratory processes in CSR§47-32-1 are interchangeable terms. Under the professional licensing laws of West Virginia, the professional is licensed after satisfying entry level qualifications by education and experience and a test determined by a Board. The license remains valid indefinitely, unless charges of misconduct are determined to be true, and for some professions an annual or biannual education requirement is met. Nothing in the licensing of professions is as vigorous or stringent annually, or ever again, as laboratory certification to EPA standards. (Certain medical specialty boards require re-examination over 4-5 year intervals, but failure does not affect state licensing).

Laboratory certification is expensive. The applications for certification of the two laboratories (Petitioner Exhibits Nos. 3, 4, 9, 10, 11 and 12) show initial fees ranging from \$3,300.00 to \$4,300.00 per year, plus the unidentified costs of running "blind" tests submitted by the state examiners and the on-site visitation for one (1) or two (2) days, including one-on-one testing of individuals, probably exceeds \$10,000.00 per year for each laboratory.

The fourth and final prong of the test is the extent of continuing education requirements. While there is no specific continuing education requirement listed under the federal or state regulations, such as minimum number of hours per calendar year as for some of the listed professions, the annual certification process requires that all personnel in the <u>laboratory</u> be current with all testing procedures for which they are responsible. To be current includes all changes in procedures promulgated by EPA on a national level, through either regulatory change or other methods, resulting in changes from the scientific knowledge about the environment and the effect of certain elements on the environment. The doctor's/president's testimony states that there is an annual update of the standard operating procedure for the laboratory tests, annual review and upgrading of the testing apparatus and computers used in the laboratories to stay abreast with current procedures and testing parameters. The doctor/president further testified that personnel attend national meetings, annual HAZMAT meetings and those who were not in attendance are promptly briefed by the attendees so that all persons in the laboratory are current with the required body of knowledge for their work. While it cannot be specifically said that a minimum hour annual continuing education is specified, it is implicitly understood that a minimum continual education is required or else the laboratory would not pass the certification test next given. Therefore, the answer to the fourth prong must be yes, there is a minimum education standard but not specified in actual hours per year. It is unlikely that any laboratory person would fail to have some continuing education because of the preparation for the on-site visit and quiz on their particular functions.

Accordingly, due to the failure to meet the minimum education requirement of a college degree for all supervisory personnel, it is **DETERMINED** that the Petitioner has not met all four (4) prongs of the four (4)-part test as provided for in 110 C.S.R. 15, §8.1.1.1 and, therefore, the environmental services provided to Petitioner by the labs in question are not excepted from use tax.

WHEREFORE, it is the **DECISION** of the **STATE TAX COMMISSIONER OF WEST VIRGINIA** that the purchasers' use tax assessment issued against the Petitioner for the period of July 1, 1998 through June 30, 2001, should be and is hereby **AFFIRMED** in accordance with the above Determination(s) for tax, interest, and no additions to tax for a total updated liability.

Because the Petitioner has previously remitted part of the assessed purchasers' use tax liability, only the balance remains due to the State Tax Department of West Virginia.