

**SANITIZED DEC. 05-125 C – BY GEORGE V. PIPER - SUBMITTED FOR
DECISION 7/25/05 – DATE ISSUED 7/25/05**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – TAXABILITY OF SERVICES INVOLVING REIMBURSED COSTS -- BURDEN OF PROOF NOT MET – Providing services to a railroad company in the form of making an employee available to look after the needs of the railroad's employees were not shown to be nontaxable under W. Va. Code §§ 11-15-8, 11-15-6, and 11-15-2(b) (8).

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 October 20, 2005, the Director of this Division of the Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner. This 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, 2004 through June 30, 2004, for tax and interest, through October 13, 2004, and additions to tax, for a total assessed liability.

Thereafter, by mail postmarked October 29, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

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] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. Petitioner received a monthly amount from the railroad under an arrangement whereby it provided an employee from the hours of 11:00 p.m. to 6:00 a.m., to at its business, to look after the needs of employees.

2. The services performed by the Petitioner included preparing meals for employees during the time the restaurant was closed, helping employees secure lodging and making the employees aware of the exact time(s) that their work shifts began.

DISCUSSION

The issue is whether the Petitioner has shown that the assessment is incorrect and contrary to law, in whole or in part. Petitioner argues that the monthly payments from the railroad are merely reimbursed costs because the same are ultimately used to pay the employee whose job it is to look after the needs of the railroad employees. Notwithstanding the above, it is clear from the evidence that what Petitioner is providing to is a taxable service for which no consumers' sales and service tax was ever collected. "Gross proceeds means the amount received in money...from...services within this state without deduction on account of the cost of property sold...or other expenses whatsoever." W. Va. Code § 11-15-2(b) (8) (in relevant part).

CONCLUSIONS OF LAW

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

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to its' contention that the services provided by Petitioner are not taxable services. *See* W. Va. Code St. R. § 121-1-69.2 (Apr. 20, 2003). *See also* W. Va. Code § 11-15-8 and 11-15-6.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the period of January 1, 2001 through June 30, 2004, should be and is hereby **AFFIRMED** as to the **tax** and **interest** for a **total** liability; the **ADDITIONS** to tax are, however, **VACATED** in full.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this consumers sales and service tax assessment until this liability is fully paid.