

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – VIDEO POKER MACHINES -- RENTAL AGREEMENT CONTROLS TAX LIABILITY -- Because Petitioner had entered into a rental agreement with the machine's owner, whereby Petitioner paid a fixed amount per month per machine, Petitioner is in fact the one in "control" as the lessee, and the lessor's role was only that of servicer of its own machines.

CONSUMERS' SALES AND SERVICE TAX – VIDEO POKER MACHINES -- MEASURE OF THE TAX -- Because winnings returned to players constitute neither trade-ins or refunds, the same, including amounts paid to the lessor, are merely costs of doing business and may not lawfully be deducted from the Petitioner's tax base. See W. Va. Code § 11-15-2(b)(8) [2003] ("gross proceeds" defined).

CONSUMERS' SALES AND SERVICE TAX – VIDEO POKER MACHINES -- RENTAL OF MACHINES NOT RENTAL OF REAL PROPERTY -- Lease agreements between Petitioner and machine owner, whereby Petitioner rented video-poker machines by the month, constitutes rentals of tangible personal property and not a lease of real property. See 110 C.S.R. 15, § 45.3 (May 1, 1992).

CONSUMERS' SALES AND SERVICE TAX – VIDEO POKER MACHINES – "WRONG TAXPAYER" DEFENSE MISPLACED -- Because Petitioner, and not the related "Club," previously remitted sales tax to the Tax Commissioner on the seventy (70) percent of receipts which it retained and also signed the exemption certificate in its own name, it is clear that Petitioner, rather than the Club, is the responsible party for consumers' sales and service tax purposes.

FINAL DECISION

A Tax Examiner with 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 1, 2001, the Director of this Division of the Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner. This assessment was for the period of January 1, 1998 through August 31, 2001, for tax, interest, through October 15, 2001, and additions to tax, for a total assessed liability.

Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked November 20, 2001, the Petitioner timely filed with this tribunal a petition for reassessment. See W. Va. Code § 11-10A-8(1) [2002].

Subsequently, written 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].

At the conclusion of the hearing, the parties agreed that the deposition of Petitioner's Treasurer, should be taken and the same made a part of the record.

FINDINGS OF FACT

1. The Petitioner is a fraternal organization operated under the laws of the State of West Virginia and is a member of the national Order.

2. The Petitioner operates an association or Club organized under the laws of the State of West Virginia. The club was organized separate and apart from the Petitioner because the Petitioner is prohibited by the national organization from operating a bar.

3. The Petitioner and the Club keep separate books and the Club pays rent to the Taxpayer for the use of a portion of the Petitioner's lodge facility.

4. The Club maintains a retail liquor license from the Alcohol Beverage Control Commission of the State of West Virginia

5. During the audit period in question, the Club maintained a relationship with a company, which own various amusement devices including video poker machines and pool tables.

6. Under their rental agreement, the Club would allow that company to place their video poker machines in the Club room for use by members of the Petitioner's fraternal organization.

7. As an example of the video poker machine's usage, a player who placed one dollar into the machine would receive four (4) credits. If after playing the machine for a while, the player is left with two credits, the Club would pay the player fifty (50) cents representing the two (2) remaining credits.

8. The video poker machine company would customarily come in once a week and conduct an accounting or "take the machines off."

9. In consideration for said machine rentals, the Club would receive seventy (70) percent of the proceeds from the video poker machines less the winnings paid to the players.

10. The video poker machine company received a rental amount per video poker machine. A fifty-fifty (50-50) split was used for the other amusement devices.

11. The Club subsequently paid West Virginia consumers' sales and service tax on the seventy (70) percent they received from the owner of the video poker machines for using its space.

12. During the audit period, the owner of the video poker machines maintained ownership of the amusement devices and retained the right to remove the machines at any time.

13. The owner of the video poker machines also retained the keys that provided sole access to the mechanical operation of the video poker machines, including the only access to the "counter" that kept track of the amount of money

placed into the machine, and also retained the sole ability to set the odds that would determine the amount of credits to be given.

14. The owner of the video poker machines also serviced the machines and neither the Club nor the taxpayer knew how to operate the machines.

15. In certain circumstances, the Club would run short on its ability to pay winnings from the video poker machines. In such instances, the owner of the video poker machines would provide a key that would grant the Club access to a machine's cash drawer.

16. The Club also kept a record of any amount removed from the cash drawer, and this record would be used in calculating the periodic split between the two parties. The key available to the Club did not, however, provide access to the mechanical part of the machine.

DISCUSSION

The primary issue is whether the Petitioner has shown that the assessment is incorrect and contrary to law, in whole or in part, because the owner of the video poker machines, had complete control over the operation of same and, therefore, is the one responsible for the collection and payment of the consumers' sales and service tax. 110 C.S.R. 15, § 46.2 (May 1, 1992)

Despite the very capable advocacy of counsel, the fatal flaw in the Petitioner's case is that the documentary evidence introduced by the Tax Commissioner is the "best evidence" and trumps all of the Petitioner's testimony, including that of one who sought, unsuccessfully, to discredit said documentary evidence.

To begin with, State's Exhibit #4 plainly states the name of the music and

game company, Petitioner's business name, business owner's name, number of machines rented, rental amount per machine, years in which machines were rented, and agreed that the above rental agreement is true to the best of their knowledge, signed by the one who sought, unsuccessfully, to discredit said documentary evidence.

Clearly, the above means what it says. It is a "rental agreement," whereby the owner of the video poker machines was to receive a set amount per machine, per month during the audit period, rather than a split of each machine's proceeds.

State's Exhibit #5 is consistent with State's Exhibit #4 in that the owner of the video poker machines got the Petitioner to sign an exemption certificate stating, "Purchase of tangible personal property or taxable services for resale or for use in performing taxable services where such property becomes a component part of the property upon which the services are performed and will be actually transferred to the purchaser." W. Va. Code 11-15-9(a)(9).

State's Exhibit #6 then fits perfectly into the equation because it unequivocally states that the Club paid a "service charge," which most assuredly applies to the video poker machines and is the aforementioned "rent."

These three (3) documents make crystal clear that the real situation is not the normal split of proceeds from video poker machines but an out-and-out rental whereby Petitioner was the one in "control" as the lessee, and the owner of the video poker machines' role was only that of a servicer of its own machines.

Accordingly, because of the pre-existing rental agreement, coupled with the supporting documentation, it is **DETERMINED** that the Petitioner, rather than the

owner of the video poker machines, is the responsible party for consumers' sales and service tax purposes.

The second issue to be determined is, if the Petitioner is responsible for the sales tax, should its tax liability be limited to the amounts which it received.

Petitioner argues that W. Va. Code § 11-15-3(c) imposes a consumers' sales and service tax based upon the "monetary consideration" received. Further, 110 C.S.R. 15, § 2.51 (May 1, 1992) defines "monetary consideration" as "the actual cost to the purchaser of tangible personal property or a service . . ." Therefore, Petitioner concludes that the actual cost to all the purchasers of amusement services would be the amount of money put into the machine minus any refund received.

Petitioner also cites 110 C.S.R. 15, § 3.2 (May 1, 1992), which requires coin-operated amusement and vending machine sales to be aggregated for purposes of application of the consumers' sales tax. Consequently, the overall cost to all the purchasers of amusement services would be represented by the amount of money taken out of the machines and apportioned between the owner of the video poker machines and the Club. Thus, Petitioner argues the tax base for the purposes of application of the consumer's sales and service tax would be the amount retrieved from the machines.

The problem with Petitioner's argument is that it first supports the prior finding of this Tribunal that Petitioner was in fact the purchaser of the tangible personal property or a service (State's Exhibit 5), but then concludes that the winnings paid to the players represent trade-ins or refunds.

W. Va. Code § 11-15-16(a) makes the base for sales tax to be the gross proceeds from transactions subject to tax. Further, “gross proceeds” as defined in W. Va. Code § 11-15-2(b)(8) [2003] are to be without deduction for the cost of property sold or other expenses whatsoever, Losses may not be deducted, but credit or refund for goods returned may be deducted.

Petitioner is not returning goods to its players, it is making illegal payments on a game of chance which is a cost of doing business and, therefore not deductible.

The third issue raised by Petitioner is its argument that in any event the sales tax is not applicable because the owner of the video poker machines is leasing real property from the Petitioner.

Suffice it to say that argument is misplaced, given the fact that the owner of the video poker machines, as per the signed rental agreement, has contracted with the Petitioner to rent its video poker machines, which is tangible personal property. There is no leasing or renting of the Club or any part thereof. See 110 C.S.R. 15, § 45.3 (May 1, 1992) (tax exemption limited to long-term rentals of real property).

Petitioner’s fourth defense to the tax assessment is that the Tax Commissioner assessed the wrong taxpayer, because the Petitioner is not allowed to serve alcoholic beverages; however, the Club did so, and the Club should be the one assessed because it alone had the relationship with the owner of the video poker machines.

As stated in the Tax Commissioner’s brief, the Petitioner, and not the Club, was the entity that remitted sales tax to the Tax Commissioner, obviously on behalf of the Club. Moreover, the exemption certificate (State’s Exhibit #1) was signed by the

Petitioner using its identification number. Accordingly, it is determined that this argument must also be rejected.

The issues presented in this matter involve the following important rules of administrative agency authority and statutory construction. Initially, it is important at all times to recognize and to give more than just “lip service” to two general points: (1) rather than utilizing a so-called “de novo” scope of review, deference is to be given to the expertise of the administrative agency, even with respect to an “issue of law,” when that issue of law is one within the peculiar expertise of the administrative agency; and (2) any applicable legislative regulation does not merely reflect the administrative agency’s position but, instead, has been legislatively reviewed and approved, has exactly the same force and effect as a statute, and is, therefore, subject to the usual, deferential rules of statutory construction, see Feathers v. West Virginia Board of Medicine, 211 W. Va. 96, 102, 562 S.E.2d 488, 494 (2002).

The following specific points flow from these general points. “[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the reviewing [tribunal] is whether the agency’s answer is based on a permissible construction of the statute.” Syllabus point 4, in relevant part, Appalachian Power Co. v. State Tax Department, 195 W. Va. 573, 466 S.E.2d 424 (1995) (emphasis added). Similarly, “the Tax Commissioner need not write a rule that serves the statute in the best or most logical manner; he [or she] need only write a rule that flows rationally from the statute.” Id., 195 W. Va. At 588, 466 S.E.2d at ___ (emphasis added). 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) (emphasis added). 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 440 (quoting Frymier-Halloran v. Paige, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

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 reassessment the burden of proof is upon the 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 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).
2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the issue of whether the owner of the video poker machines, rather than the Petitioner, should be liable for the consumers’ sales and service tax assessment.

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, 1998 through August 31, 2001, for tax, interest, updated through February 29, 2004, and additions to tax, should be and is hereby **AFFIRMED**.