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### SYNOPSIS

**CONSUMERS' SALES AND SERVICE TAX -- "PROFESSIONAL SERVICES" EXEMPTION NOT APPLICABLE TO SERVICES OF LICENSED ENVIRONMENTAL LABORATORIES** -- Because the Petitioner failed to meet the minimum education requirement of a college degree for all of its supervisory personnel, 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 (1992) and, therefore, the environmental services provided by the Petitioner are not excepted from the consumers' sales and service tax as "professional" services.

### FINAL DECISION

The Director of this Division of the Commissioner's Office issued a purchasers' use tax assessment against the Petitioner.

This assessment was for the period of January 1, 1998 through June 30, 2001, for tax, interest, through September 30, 2001, and no additions to tax. Written notice of this assessment was served on the Petitioner.

Thereafter, the Petitioner timely filed a petition for reassessment by mail postmarked on or about January 7, 2002.

### 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 (WVDEP) or the West Virginia Bureau for Public Health or both . . . .”

There is no dispute that if the technical evaluations had been performed by the Petitioner after March 9, 2002, the same would have been exempt.

### **FINDINGS OF FACT**

1. The Petitioner, an environmental testing service, tests soil, water, and materials for the presence of contaminants. Its usual customers are landfills and natural resources producers.

At the hearing, Petitioner’s counsel was allowed to supplement the record by using the whole of the testimony presented by one of Petitioner’s competitors during an earlier administrative proceeding because of its relevancy in this case, the applicable of which is as follows:

2. Dr. A, who is also president of the technical evaluation services provider, 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.

This technical evaluation services provider’s Exhibit No. 3 was introduced in the earlier case, that being the application to the West Virginia Department of Environmental Protection (“DEP”) for the annual certification of this technical evaluation services provider’s laboratory for the years 1999, 2000 and 2001.

Dr. A 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 this technical evaluation services provider's Table of Organization, each of the department heads, the quality control person, and laboratory process managers are required by this provider to be degreed personnel at the bachelor level. Dr. A'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.

As to this technical evaluation services provider, it is a fact that as an entity, it 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.

3. It should be noted that Petitioner's president testified as to his own credentials, which were consistent with that of Dr. A. He also testified that his three (3) supervisory personnel have college degrees.

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.

## DISCUSSION

The sole issue for determination is whether the Petitioner has met its burden of proof by showing that the services it provided are excepted from the consumers' sales and service tax as being "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 (emphasis added):

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 excepted 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, Reg. 8.1.1 contains two specific methods of classifying a particular service. The first is a list of specifically enumerated occupations, which includes those which were "professions" at common law or which are traditionally thought of professions, such as attorneys and various medical specialties. This list includes other occupations commonly considered as "professionals" such as certified public accountants, optometrists, architects, dentists, pharmacists, and interestingly, professional engineers, which as Petitioner's counsel posits is particularly relevant to the issue in this case. All of these are clearly within the commonly understood parameter of "professional" in terms of education level and training and responsibility to provide a high level of specialized expertise to the public.

Conversely, Petitioner's counsel states that the list includes occupations which may not have so high a level of educational prerequisites, such as certified court reporters, or those who are primarily sales people, such as enrolled agents and real estate brokers.

The second method provided by the regulation is a delegation to the State Tax Division to make case-by-case determinations based on, among other things, four enumerated factors. This delegation of authority is as follows (emphasis added):

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.

Petitioner's counsel argues that the Department's position that the activity or service in question cannot be a "professional service" if it fails to meet one of the four (4) "requirements" is, in his judgment, a misapplication of the express language of the regulation, because Reg. 8.1.1.1 requires that the Department engage in a subjective review of the activity, and that it is to consider certain (four) factors but is not limited to those four.

He, therefore, argues that such mandatory rigidity is unwarranted, that although his client's decision making personnel have college degrees, the regulation does not require same.

In determining this issue 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 Petitioner's personnel 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 a 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).

### **CONCLUSION(S) OF LAW**

1. 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).

2. 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.

3. 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. 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).



4. 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 laboratory 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. Petitioner's testimony made clear 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. 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.

#### **SUMMARY**

Accordingly, because of Petitioner's 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 the consumers' sales and service tax.

The issue presented in this matter involves the following important rules of statutory construction and of administrative agency authority. “[I]f [as here] 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 an 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.”, 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- Holloran v. Paige, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

In addition to all of the foregoing substantive law, a relevant procedural law is that the burden of proof is upon a petitioner-taxpayer to show that a state tax assessment is incorrect and contrary to law, in whole or in part. See W. Va. Code § 11-10A-10(e).

#### **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 June 30, 2001, should be and is hereby **AFFIRMED** in accordance with the above Conclusion(s), as to tax and interest, updated through July 31, 2003.