

**SANITIZED DECISION -- 06-258 U -- BY GEORGE V. PIPER, ALJ --
SUBMITTED for DECISION on JUNE 15, 2006 -- ISSUED on JUNE 26, 2006**

SYNOPSIS

PURCHASERS' USE TAX -- ADDITIONS TO TAX IMPOSED FOR NEGLIGENCE OR DISREGARD OF RULES AND REGULATIONS VACATED -- Tax Commissioner's finding that Petitioner, pursuant to W. Va. Code § 11-10-18(c), was negligent or that it intentionally disregarded rules and regulations will not be sustained where Petitioner showed that no extensive underreporting and/or underremitting occurred, in that its 23 West Virginia stores had as many as 9,500 use tax transactions, which involved multiple vendors selling to multiple stores in multiple taxing jurisdictions, and, yet, its deficiency percentage was only about five (5) percent for the audit period, most of which involved two (2) vendors using electronic spread billing sheets for which Petitioner was not accustomed to handle during the audit period.

FINAL DECISION

A tax examiner with the Field Auditing Division ("the Division") of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") conducted an audit of the books and records of the Petitioner. Thereafter, on March 23, 2006, the Director of this Division of the Commissioner's Office issued a purchasers' use tax assessment against the Petitioner. The assessment was issued under the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code. The assessment was for the period of April 1, 2003 through March 31, 2006, for tax of \$, interest, through March 31, 2006, of \$, and additions to tax for negligence of \$, for a total assessed tax liability of \$. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked April 4, 2006, 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] and 11-10A-9(a)-(b) [2002].

In due course, the presiding administrative law judge determined that the matter was to be decided on documents only, in lieu of holding a hearing in person, because he

determined, with the concurrence of the parties, that their appearances in person were not necessary in order to render a decision on the merits.

By letter dated April 20, 2006 the parties were informed that on or before June 15, 2006, each must send to the presiding administrative law judge detailed written arguments which support their positions regarding imposition of the additions for negligence.

FINDINGS OF FACT

1. In its May 2, 2006 letter, Petitioner stated that it requested all vendors to collect use tax on taxable purchases; however, the process is impractical in those cases when one vendor supplies items to multiple stores in multiple states and local taxing jurisdictions. In those instances Petitioner must use a manual process to self-assess use tax.

2. Petitioner further stated that it operated 23 stores in West Virginia during the three year audit period and had approximately 9,500 use tax transactions, of which the tax auditor determined that use tax had not been paid on only 515 invoices. Moreover, of the 515 invoices in question, 325 or 65% related to just two (2) vendors, which clearly distorted the Respondent's findings.

3. Petitioner noted that these two (2) vendors do not send individual paper invoices, but, rather, send an electronic spreadsheet detailing which stores were charged and for how much, resulting in the invoices never being identified.

4. Petitioner finally stated that as a result of this audit, the use tax accrual procedures are being modified to include electronic billings, instead of only paper invoices.

DISCUSSION

The only issue is whether the Petitioner is entitled to abatement of the additions to tax assessed for negligence or intentional disregard of rules and regulations.

Additions to tax may be assessed in the case of any underpayment of tax that is due to negligence on the part of the taxpayer, or where a taxpayer intentionally disregards any rules or regulations respecting any tax administered under the Tax Procedures Act. W. Va. Code § 11-10-18(c) provides:

(c) Negligence or intentional disregard of rules and regulations. -- If any part of any underpayment of any tax administered under this article is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the amount of tax due five percent of the amount of such tax if the underpayment due to negligence or intentional disregard of rules and regulations is for not more than one month, with an additional five percent for each additional month, or fraction thereof during which such underpayment continues, not exceeding twenty-five percent in the aggregate: Provided, That these additions to tax shall be imposed only on the net amount of tax due and shall be in lieu of the additions to tax provided for in subsection (a), and the tax commissioner shall state in his notice of assessment the reason or reasons for imposing this addition to tax with sufficient particularity to put the taxpayer on notice regarding why it was assessed. (Emphasis added.)

When the Commissioner determines that the taxpayer has been negligent, or has disregarded rules or regulations, additions to tax may be assessed at 5% per month, up to a maximum amount of 25%.

In an attempt to comply with the requirement in W. Va. Code § 11-10-18(c) that the notice of assessment is to state the reason(s) for imposing additions to tax for negligence or intentional disregard of rules, the notice of assessment for purchasers' use tax stated, "Additions to tax are being imposed under 11-10-18c [sic] of the WV Code due to negligence or intentional disregard of rules and regulations (but without intent to defraud) because you extensively underreported and/or underremitted consumers' sales

and service tax. You filed use tax returns for the past 36 months listing a total of \$ of purchases subject to tax when this audit revealed that you made \$ in taxable purchases during this time.”

This Office must begin by noting that the State Tax Commissioner appears to justify the assessment of additions to tax in the purchasers’ use tax assessment by merely asserting that the Petitioner failed to pay the full amount of use tax on its total purchases. This does not in and of itself constitute grounds for assessment of additions for negligence under W. Va. Code § 11-10-18(c).

W. Va. Code § 11-10-18(c) provided that additions to tax may be imposed under that section if “any part of any underpayment of any tax administered under this article is due to negligence or intentional disregard of rules and regulations (but without intent to defraud).” What is of concern to this tribunal is the State Tax Commissioner’s finding that “you (Petitioner) extensively underreported and/or underremitted consumers’ sales and service tax.” However, “extensively,” which is the term that is relied upon by the Respondent here, does not apply to a deficiency percentage of only about five (5) percent, derived by dividing the number of invoices (9,500) (sample was 10,000) by the number 515, which constitutes the invoices for which no use tax was paid by the Petitioner.

Insofar as the notice of assessment can be read as an attempt to impose additions to tax for intentional disregard of rules and regulations, it also fails to satisfy the statute. In order to impose additions to tax under this section, the State Tax Commissioner must state his reasons therefore “with sufficient particularity to put the taxpayer on notice regarding why [they were] assessed.” Quite simply for the Respondent to merely conclude that Petitioner extensively underreported and/or underremitted tax without further defining what extensively means in the context of this case is fatally lacking.

As stated above, the Tax Commissioner must comply with the requirements of W. Va. Code § 11-10-18(c). That subsection requires the Tax Commissioner to “state in the notice of assessment the reason or reasons for imposing this addition to tax with sufficient particularity to put the taxpayer on notice regarding why it was assessed.”

In the present matter, the reason articulated in the audit workpapers does not, by itself, specify any act of negligence pursuant to W. Va. Code § 11-10-18(c). Instead, it merely states that the taxpayer underreported or underremitted (failed to pay) the use tax for which it was assessed. These appear to be nothing more than actions for which additions to tax may be assessed pursuant to W. Va. Code § 11-10-18(a) (1) & (2). These reasons, by themselves, do not rise to the level of negligence. In order to demonstrate that the Petitioner was negligent, the Tax Commissioner must come forward with some evidence sufficient to make at least a *prima facie* showing of negligence on the part of a taxpayer; that was not done.

This tribunal concludes that requiring the Tax Commissioner to come forward with evidence sufficient to make at least a *prima facie* showing of negligence on the part of a taxpayer is not contrary to W. Va. Code § 11-10A-10(e) [2002] or W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003), which place the burden of proof on the taxpayer to prove that the assessment is incorrect. In other circumstances, where the Tax Commissioner presents the assessment and audit workpapers, he has presented evidence which constitutes at least a *prima facie* showing of the amount of tax due, plus interest thereon. The assessment and the audit workpapers, taken together, constitute evidence of the taxpayer’s actions that give rise to the assessment.

The same is not true with respect to an assertion of negligence. Where the Tax Commissioner intends to assert that the taxpayer was negligent or intentionally disregarded

rules and regulations, the audit workpapers and the assessment, standing alone, do not constitute evidence of negligence.* If this were not the case, mere failure to file or failure to pay would constitute negligence.

In this matter, the Tax Commissioner assessed additions to tax against the Petitioner because, in his view, the Petitioner was negligent.

Notwithstanding this assertion by the Tax Commissioner, the facts of this case tell an entirely different story. First, Petitioner is not operating just one store; it is operating 23 stores and it is not buying materials, services and equipment from one vendor, but from many, and in turn, those vendors are selling to a myriad of customers having multiple stores in multiple states and other taxing jurisdictions.

To engage in 9,500 user tax transactions under these circumstances and to be deficient only about five percent of the time, coupled with the fact that most of that was with two (2) vendors whose billing system was not of the type used by the Petitioner, does not constitute negligence. Consequently, the Petitioner is entitled to an abatement of the additions to tax assessed pursuant to W. Va. Code § 11-10-18(c).

CONCLUSIONS OF LAW

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] or W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

* They can constitute proof of a taxpayer's failure to file or failure to pay, since those actions on the part of a taxpayer are apparent from the face of the audit workpapers, and those are facts that may be objectively determined. On the other hand, negligence is not apparent from the audit workpapers, and negligence is a more subjective determination.

2. The Petitioner-taxpayer in this matter has carried the burden of proof with respect to its contention that the underpayment of use tax as found in the audit was not caused by negligence or intentional disregard of state tax rules and regulations. See W. Va. Code St. R. § 121-1-69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchaser's use tax assessment issued against the Petitioner for the period of April 1, 2003, through March 31, 2006, for tax of \$ and interest of \$, **totaling \$**, should be and is hereby **AFFIRMED**; the **ADDITIONS** to tax, for **NEGLIGENCE**, in the amount of \$, are, however, **VACATED** in full.

Because the Petitioner has previously remitted \$ of the assessed purchasers' use tax liability for all of the actual tax and interest, no purchasers' use tax, interest or additions to tax **remains due** to the State Tax Commissioner of West Virginia for the period in question.