

**SYNOPSIS**

**PURCHASERS' USE TAX – GOVERNMENTAL EXEMPTION NOT APPLICABLE** – Contract between Petitioner and a private party to build a federal prison facility under which Petitioner supplied items of tangible personal property which were ultimately delivered into the State of West Virginia is not exempt from use tax because the contract is not between the Petitioner and the federal government.

**FINAL DECISION**

The Director of the Field Auditing Division of the Commissioner's Office issued a business franchise tax assessment against the Petitioner. This assessment was for the year 1998, for tax and interest, through December 31, 2001.

Written notice of this assessment was served on the Petitioner on January 11, 2003.

The Commissioner issued a purchasers' use tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code, for the period of January 1, 1998 through September 30, 2001, for tax and interest, through December 31, 2001.

Written notice of this assessment was served on the Petitioner on January 11, 2003.

Thereafter, by mail postmarked, February 1, 2003, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions for reassessment.

**FINDINGS OF FACT**

1. During the audit period Petitioner sold appliances and other items of tangible personal property, which were delivered into the State of West Virginia.

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2. Said items were delivered in connection with the construction of bachelors' officers' quarters and a mess hall to a site located in West Virginia.

3. The contract under which the materials were sold and delivered was between Petitioner and Company A located out-of-state.

4. With respect to the business franchise tax assessment Petitioner conceded same at hearing, noting that payment in full had already been made.

### **DISCUSSION**

The sole issue is whether the Petitioner has shown that the use tax assessment is incorrect and contrary to law, in whole or in part. See § W. Va. Code § 11-10A-10, because Petitioner sold items of tangible personal property to the federal government.

Although Petitioner's representative continues to argue that that is true, the simple fact is that Petitioner contracted with a private party to supply said items and not with the federal government.

This fact coupled with the realization that said items were delivered into the State of West Virginia by Petitioner as per the contract mandates that the use tax assessment be upheld in toto.

The issue 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 [or the West Virginia Office of Tax Appeals] need not write a rule [or an administrative decision] that serves the statute in the best or most logical manner; he [, or she, or the Office of Tax Appeals] 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 \_\_\_\_ (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 \_\_\_\_ (quoting Frymier-Halloran v. Paige, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

### **CONCLUSION(S) 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).

2. In light of the substantive law discussed above, the Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the issue raised. 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 business franchise tax assessment issued against the Petitioner for the year 1998, for tax and interest, should be and is hereby **AFFIRMED**.

Because the Petitioner has previously remitted the entire liability, no business franchise tax remains due to the State Tax Commissioner of West Virginia for the period in question.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers' use tax assessment issued against the Petitioner for the period of January 1, 1998 through September 30, 2001, for tax and interest, updated through June 30, 2003, should be and is hereby **AFFIRMED**.