REDACTED DECISION -- 07-159 RC -- BY R. MICHAEL REED, CHIEF ALJ -- SUBMITTED for DECISION on AUGUST 23, 2007 -- ISSUED on FEBRUARY 15, 2008

SYNOPSIS

1. **CONSUMERS' SALES AND SERVICE TAX -- PURCHASER, NOT VENDOR, USUALLY IS "TAXPAYER" WHO IS TO FILE A CLAIM FOR REFUND OF OVERPAID TAX** -- In the context of filing a claim with the State Tax Commissioner for a tax refund, W. Va. Code § 11-10-14(c) [2003], the "taxpayer" who is to file the refund claim is, clearly, the person who actually paid the tax with his/her/its funds, not the vendor who, as here, merely collected the tax from the purchaser and remitted the same to the State Tax Commissioner and who filed the tax return.

2. **CONSUMERS' SALES AND SERVICE TAX -- PURCHASER, NOT VENDOR, USUALLY IS ENTITLED TO REFUND OF OVERPAID TAX** -- A vendor who collects and remits too much consumers' sales and service tax is not entitled to a refund of the overpaid sales tax, without submitting to the State Tax Commissioner an assignment of the refund claim from each purchaser who actually paid the tax.

FINAL DECISION

On October 27, 2006, the Petitioner filed with the Respondent, the West Virginia State Tax Commissioner, a claim for the refund of an (intentionally) unspecified total dollar amount of consumers' sales and service tax for, essentially, the period of April 21, 2002, through October 27, 2006. Thereafter, by letter dated December 01, 2006, the

Sales Tax Unit of the Internal Auditing "Division" of the West Virginia State Tax Commissioner's Office ("the Commissioner" or the "Respondent"), denied the entire claim. The two reasons stated in the refund claim denial letter for the total denial of the refund claim were: (1) that a field audit involving the consumers' sales and service tax, completed on April 21, 2005, had (allegedly) become final; and (2) that the refund claim for a certain earlier portion of the refund claim period was not timely filed, that is, it was filed allegedly in violation of the general three-year statute of limitation set forth in W. Va. Code § 11-10-14(*l*)(1) [2003].

It is noted that the first reason the Respondent stated for the denial was incorrect, because the field audit did not result in any assessment, or in any administrative decision, which had become final. Instead, the closing letter after the field audit stated that no additional consumers' sales and service tax was due. (That letter was silent about any overpayments of that tax.)

Due to some unusual mail-receipt circumstances, the Petitioner did not receive the Respondent's tax refund claim denial letter until January 09, 2007 (as the result of a follow-up mailing by first-class, regular mail, after the initial mailing by certified mail had been returned with the notation of "unclaimed").

Thereafter, by mail postmarked February 20, 2007, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund (inaccurately labeled by the Petitioner as a "claim" for refund). *See* W. Va. Code §§ 11-10A-8(2) [2002, 2007] and 11-10A-9(a)-(b) [2005].

Subsequently, after granting proper continuance requests of the Petitioner, this tribunal sent to the parties a notice of a prehearing conference and of a hearing on the

merits. After conducting the prehearing conference this tribunal held the hearing on the merits 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).

The parties agreed to determine, on their own, the actual tax overpayment amounts involved, after this tribunal's final decision on the issues of (1) whether the Petitioner (as opposed to its members) is entitled to receive the refund for the tax overpayments and, if so, (2) for what period of time. As a "fall back" position, the Petitioner has been in the process of obtaining written assignments from many of its members of their claims for refund, for the consumers' sales and service tax overpayments involved in this matter. These assignments would be timely presented to the Respondent State Tax Commissioner, if this tribunal rules herein adverse to the Petitioner as to its entitlement to the refund.

Near the conclusion of the hearing in this matter, this tribunal granted the Petitioner's request that the matter be left open (not yet submitted for decision) for an additional seven (7) days, to allow time for the Petitioner to file a brief about a certain West Virginia Supreme Court of Appeals' precedent involving the statute of limitation in consumers' sales and service tax cases (that brief was never filed).

FINDINGS OF FACT

The material facts in this matter are not disputed. This tribunal bases the following findings of fact primarily upon the parties' Joint Exhibit No. 1 submitted at the hearing in this matter.

1. The Petitioner operates a private country club and, in conjunction therewith, operates, among other unspecified things, a golf course, located in West Virginia. Its members pay *bona fide* membership dues, within the meaning of W. Va. Code St. R. § 110-15-2.40 (July 15, 1993) (part of the legislative regulations on consumers' sales and service tax and use tax).

2. Until nearly the end of the refund claim period in this matter, the Petitioner did not have actual knowledge of the Respondent State Tax Commissioner's published "Administrative Notice" No. 91-16 (effective retroactively to July 01, 1989), which explicitly provides a "safe harbor," for country clubs providing "ordinary services" (as defined in that Administrative Notice), to exclude 60% of their members' so-called membership dues, as *bona fide* membership dues, from the consumers' sales and service tax; the remaining 40% of the so-called dues are, under this "safe harbor" provision, considered to be for such country clubs' furnishing of "services" (or for related sales of tangible personal property, or both), and are, therefore, subject to that tax. Under that Administrative Notice a country club may utilize the safe harbor provision for consumers' sales and service tax purposes if the country club separately states the *bona fide* dues portion (60% of the total dues) in the billing for the total so-called membership dues.

3. During the refund claim period, the Petitioner, being actually unaware of this "safe harbor" provision, incorrectly collected the six percent (6%) consumers' sales and service tax on the entire amount (100%) of each of its members' annual

membership dues, instead of properly collecting the tax on merely 40% of such dues, resulting in an undisputed overpayment of the consumers' sales and service tax.

4. The Petitioner made another mistake of incorrectly including the consumers' sales and service tax within the total amount billed for the membership dues, rather than correctly adding the tax to the amount of the bill for the membership dues. For example, for a $1,500 total bill to a member for the annual membership dues, the Petitioner calculated a $90 tax due (6% of $1,500), subtracted that amount from the $1,500 total, leaving a $1,410 stated charge for the actual dues, and a $1,500 total bill (including the tax). Ignoring, for the moment, the "safe harbor" provision, the correct method of billing for the 6% sales tax would have been to add the $90 tax to the $1,500 membership dues, for a total charge of $1,590. [W. Va. Code St. R. §§ 110-15-4.6.1 to -4.6.2 (July 15, 1993), addressing those limited types of transactions, such as movie tickets or admission fees, for which the sales tax may be included properly and explicitly in the total charge for the item or service, is clearly not applicable here.]

5. The Petitioner's method of billing, see Finding of Fact No. 4 above, resulted in the Petitioner's **undercharging its members for actual dues** (in the example there, $1,410, not $1,500) (again, ignoring, for a moment, the "safe harbor" provision); the Petitioner's method of billing did not, however, result in the Petitioner's paying the consumers' sales and service tax. Instead, the Petitioner collected all of that tax from its members. The member, in the example above, should have remitted to the Petitioner $36 ($1,500 x .40 x .06), not $90 ($1,500 x .06), for sales tax. But, in that example -- and

with respect to all members billed -- it was the Petitioner's member, not the Petitioner, who remitted the tax. Obviously, the Petitioner may not obtain a consumers' sales and service "tax refund" from the Respondent State Tax Commissioner for undercharged membership dues. That undercharge would, of course, be collectible, instead, by the Petitioner from its members.

6. The Petitioner's members (the purchasers), not the Petitioner country club itself (the vendor), overpaid the consumers' sales and service tax. See Findings of Fact Nos. 3-5.

7. At no time (before,) during or after the field audit of the Petitioner (including an audit for sales tax purposes) -- which field audit was concluded on April 21, 2005 -- did anyone connected with the Respondent State Tax Commissioner inform the Petitioner directly that the sales tax had been overpaid, in light of the safe harbor provision established by Administrative Notice No. 91-16 (summarized in Finding of Fact No. 2 above). Instead, after that field audit, the Petitioner -- or, perhaps, one of its members; the record is not clear -- learned of that provision on an unspecified date, and from an unspecified source, shortly before filing its claim for refund involved in this matter.

DISCUSSION

The Petitioner raises two issues: (1) is the Petitioner country club itself, as opposed to its members, entitled to the tax refund for the overpaid sales tax?; and (2) should the general three-year statute of limitations be extended for the equitable reason

that the Respondent State Tax Commissioner should have informed the Petitioner of the safe harbor provision during the April, 2005 field audit?

However, in light of Findings of Fact Nos. 3 through 6, the only issue which needs to be addressed here is the first issue. The dispositive issue of law here may be stated in this manner: Is a vendor who collects and remits too much consumers' sales and service tax entitled to a refund of the overpaid sales tax, without submitting to the State Tax Commissioner an assignment of the refund claim from each purchaser who actually paid the tax? The clear answer, under unambiguous statutory law, and common sense, is: no.

The Petitioner points to the fact that W. Va. Code § 11-10-14(c) [2003] requires "the taxpayer" to file timely with the State Tax Commissioner a claim for refund, as the first step to obtaining a state tax refund. The Petitioner then points to the fact that the West Virginia Tax Procedure and Administration Act, at W. Va. Code 11-10-4(g) [2002, 2007], defines the term "taxpayer" to mean, generally, "<u>any person required to file a return for any tax</u> administered under this article, <u>or</u> any person liable for the payment of any tax administered under this article." (emphasis added by the Petitioner) Similarly, this tribunal notes that the West Virginia Consumers' Sales and Service Tax Act, at W. Va. Code § 11-15-2(b)(21) [2003], gives the usual definition of the term "taxpayer," for purposes of the consumers' sales and service tax, as "any person liable for the tax imposed by this article, or additions to tax, penalties and interest imposed by article ten of this chapter[.]" A <u>vendor</u> is liable for the <u>tax</u> for <u>failing to collect and to remit all</u> the required consumers' sales and service tax , W. Va. Code § 11-15-4a [2003], and the vendor is liable, for example, for additions to tax for failing to file timely the required tax

returns, W. Va. Code § 11-10-18(a)(1) [2006]. (A purchaser who is the ultimate consumer, *see* W. Va. Code § 11-15-10 [1937], is liable for the consumers' sales and service tax for refusing to pay or otherwise not paying the required tax to the vendor or directly, in certain circumstances, to the State Tax Commissioner, W. Va. Code § 11-15-4b [2003].)

This tribunal is aware, however, that the general definition of terms will not apply when "the context in which the word is used clearly indicates that a different meaning is intended by the Legislature." W. Va. Code § 11-15-2(a) [2003]. In the context of filing a claim with the State Tax Commissioner for a tax refund, W. Va. Code § 11-10-14(c) [2003], the "taxpayer" who is to file the refund claim is, clearly, the person who actually paid the tax with his/her/its funds, not the vendor who merely collected the tax from the purchaser and remitted the same to the State Tax Commissioner and who filed the tax return. As stated in Findings of Fact Nos. 5 and 6 above, the consumers' sales and service tax was actually paid here, on this record -- as usual -- by the purchasers (here, the members of the Petitioner country club), not by the Petitioner country club as the vendor.

In light of the foregoing holding on the first issue, specifically, that the Petitioner is not entitled to the refund, on this record, for any time period, this tribunal need not address the second issue raised, specifically, about how far back in time the Petitioner may properly claim the refund. This tribunal does note that, as a limited-jurisdiction, executive-branch, quasi-judicial tribunal, it is barred by the so-called separation of

powers clause (or "division of powers" clause) of this State's Constitution, W. Va. Const. art. V, § 1, from extending the general three-year statute of limitation, W. Va. Code § 11-10-14(*l*) (1) [2003], for equitable estoppel reasons which may, in very limited, "unconscionably harsh" circumstances, lead a general-jurisdiction, judicial-branch court to extend appropriately the statute of limitation for claiming a tax refund from the State. *Helton v. Reed*, 219 W. Va. 557, ___ n. 6, 638 S.E.2nd 160, 164 n. 6 (2006) (giving the example of "an unsophisticated taxpayer who was given erroneous information by a tax official").

CONCLUSIONS OF LAW

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

1. In the context of filing a claim with the State Tax Commissioner for a tax refund, W. Va. Code § 11-10-14(c) [2003], the "taxpayer" who is to file the refund claim is, clearly, the person who actually paid the tax with his/her/its funds, not the vendor who, as here, merely collected the tax from the purchaser and remitted the same to the State Tax Commissioner and who filed the tax return.

2. A vendor who collects and remits too much consumers' sales and service tax is not entitled to a refund of the overpaid sales tax, without submitting to the State Tax Commissioner an assignment of the refund claim from each purchaser who actually paid the tax.

3. In a hearing before the West Virginia Office of Tax Appeals on a petition

for refund, the burden of proof is upon the petitioner-taxpayer, to show that the petitioner-taxpayer is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

4. In light of Conclusions of Law Nos. 1 and 2, the Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the issue of whether it was entitled to the refund. *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 Petitioner's petition for refund of an (intentionally) unspecified total dollar amount of consumers' sales and service tax (and any statutory interest), for the period of April 21, 2002, through October 27, 2006, is hereby **DENIED**.