

**REDACTED DECISION—07-450 HP—BY ROBERT W. KIEFER, JR., ALJ—
SUBMITTED FOR DECISION on OCTOBER 29, 2009 —ISSUED on APRIL 29, 2010.**

SYNOPSIS

HEALTH CARE PROVIDER TAX – BURDEN OF PROOF – In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the taxpayer to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

HEALTH CARE PROVIDER TAX – PAYMENTS CREDITED AGAINST AMOUNT ASSESSED – The taxpayer is entitled to be credited with the payment it made in November, 2008 against the tax assessed by the State Tax Department.

HEALTH CARE PROVIDER TAX – WAIVER OF ADDITIONS TO TAX – The taxpayer in this matter has failed to carry its burden of proving that the assessment of additions to tax against it should be waived because its failure to pay tax was due to reasonable cause and not due to willful neglect. W. Va. Code § 11-10-18(a).

FINAL DECISION

On June 15, 2007, the Internal Auditing Division of the West Virginia State Tax Commissioner's Office issued a health care provider tax assessment against the petitioner (the Corporation). This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 27 of the West Virginia Code. The assessment was for the year January 1, 2006, through December 31, 2006, for tax in the amount of \$____, interest in the amount of \$____, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____. According to the petition for reassessment, written notice of this assessment was served on the corporation on June 17, 2007.

Thereafter, by mail postmarked August 8, 2007, received in the offices of the West Virginia Office of Tax Appeals on August 10, 2007, the corporation timely filed with this tribunal a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9 [2005].

Subsequently, notice of a hearing on the petition was sent to the corporation and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. The corporation, is a corporation that provides medical services to patients in West Virginia.
2. It provides those services primarily through the Doctor.
3. The assessment in this matter is for health care provider taxes for calendar year 2006.
4. The corporation's health care provider tax return for 2006 should have been filed on or before January 31, 2007.
5. The return was not timely filed.
6. Counsel for the corporation admitted that the calculation of tax due was based upon an erroneous statutory percentage rate, which rate changed during the course of the tax year.
7. The parties are in agreement that the amount of tax owed, without taking into account any interest and additions to tax for late payment and/or late filing, was \$_____.
8. In November, 2008, by check dated November 12, 2008, a payment was forwarded to the State Tax Department in the amount of \$_____.
9. The check was posted on a day in November, 2007.
10. The difference due after the payment made by check was tax in the amount of \$_____.
11. The corporation, by counsel, stipulated that the tax was paid late.

12. Counsel for the corporation presented a calculation prepared by the State Tax Department that shows that the corporation owes interest on the entire amount due through the date that the initial payment was received and on the net amount due from the date of the payment through the date of the hearing as \$_____.

13. The corporation, by counsel, concedes that the interest calculation is correct.

14. The corporation contests only the assessment of additions to tax.

15. Counsel for the corporation represented that the doctor suffers from severe depression and has a history of acute mental health problems.

16. Counsel for the corporation represented that in December, 2008, the doctor attempted to take their own life and was confined in a psychiatric hospital for their own protection pursuant to an involuntary commitment proceeding.

17. Counsel for the corporation represented that since December, 2008, the corporation and the doctor, with the assistance of counsel and a certified public accountant, have attempted to comply in good faith with the state and federal tax laws.

18. Prior to the doctor's commitment, up until the day the doctor attempted to take their life, the doctor and the corporation received assistance from an out-of-state lawyer who was not licensed in West Virginia.

19. The doctor and the corporation received said assistance for approximately four or five years.

20. Counsel represented that prior counsel was not providing adequate representation.

21. Counsel represented that from what he has seen of the documents regarding the representation of the out-of-state lawyer, that a "first year law student" would recognize that there were significant problems with the representation the corporation received.

22. Counsel represented that he is of the opinion that the lawyer from whom the corporation was receiving advice was a “tax protester,” and that the corporation also had received advice from a tax protester group located in North Carolina or South Carolina.

23. Counsel represented that the lawyer and/or the group would prepare papers and sign the doctor’s name to the papers, apparently without the doctor’s consent.

24. Counsel represented that the doctor now recognizes that the advice that the doctor and the corporation received from prior counsel, which he describes as “chicanery,” is absolutely incorrect and that they must correct what has occurred as a result of the erroneous advice.

25. Counsel for the corporation argued that the substance of the petition for reassessment in this matter is no longer the position taken by the corporation in this matter.

26. Counsel for the State Tax Department presented State’s Exhibit No. 1 which shows that the corporation had previously failed to pay health care provider tax for the periods ending December 31, 2000, December 31, 2001, December 31, 2002 and December 31, 2005, which amounts were the subject of liens and distress warrants issued by the Department.

27. Counsel for the State Tax Department represented that the corporation’s failure to pay health care provider tax is “habitual.”

DISCUSSION

The first issue presented by this matter is an issue of due process that is not expressly raised by the corporation, but which needs to be addressed. The corporation was assessed tax in the amount of \$____. The amount assessed was derived from the corporation’s return and was assessed because the corporation did not pay the tax shown due. The taxpayer’s calculation was in error because the tax rate had changed during the year. The correct calculation should have been \$____. In November 2008, the corporation made a payment of \$____.

Even though the parties appear to have come to a different agreement, this Office is constrained to find that the net tax due is \$____, the difference between the assessment of \$____ and the payment of \$____. The reasons for this are twofold. First, it would seem to violate principles of due process to have a taxpayer file a petition for reassessment, pursue this matter to resolution and end up in a worse position than when it began the process, in the absence of proper notice from the State Tax Department that its liability may be higher than originally assessed. Second, there is nothing that would have prevented the corporation from withdrawing its petition for reassessment any time prior to the issuance of this decision and paying \$____, plus interest and additions to tax. If the corporation had done so, it would have either been assessed additional tax by the State Tax Department, the likely result, or it would have escaped further liability. In any event, the State Tax Commissioner has the duty to put a taxpayer on notice when its tax liability is determined to be greater than the amount which has already been assessed.¹

The second issue presented by this matter is whether additions to tax should be waived. The taxpayer, by counsel, represents that the additions to tax should be waived based on two reasons. The first is that the taxpayer received bad advice from prior counsel and a tax relief organization which he states are “tax protesters.” The second reason is that the doctor suffers from severe depression and severe mental illness that resulted in an attempt on their part to take their own life.

Initially, it should be noted that there is no evidence in the record to support the representations of counsel. There is no reason to believe that counsel is misrepresenting the facts. However, representations of counsel are not evidence. The burden of proof is on a

¹ This decision does not prevent the parties from voluntarily resolving the matter for the amounts that they appear to have agreed upon.

taxpayer to come forward with evidence to prove that an assessment against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003). Thus, representations of counsel will not suffice.

Additions to tax may be waived where a taxpayer shows that its failure to comply with the law is due to reasonable cause and not due to willful neglect. Reliance on the advice of counsel that is clearly contrary to the law and is transparently unreasonable does not constitute reasonable cause. If, as counsel represents, the taxpayer relied on the advice of prior counsel and a tax protester organization, then it should seek legal redress from those two entities for providing advice that is, as described by counsel, inadequate and chicanery.

Counsel for the State Tax Department represents that the corporation's failure to pay health care provider tax is "habitual." This appears to be the case. A taxpayer that consistently refuses to file tax returns and pay taxes over an extended period of time is certainly subject to the payment of additions to tax for its failure to comply with the law. *See* W. Va. Code § 11-10-18(a). Further, it appears that by receipt of notices of assessments, liens and distress warrants, the corporation was on notice that the Tax Department did not consider the positions taken by the corporation to be lawful. The corporation should have taken some steps respecting a final resolution of its position some five to six years earlier, when it was first notified of its deficiencies.

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 taxpayer to show that any assessment of tax against

it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. The taxpayer is entitled to be credited with the payment it made in November, 2008 against the tax assessed by the State Tax Department.

3. The taxpayer in this matter has failed to carry its burden of proving that the assessment of additions to tax against it should be waived because its failure to pay tax was due to reasonable cause and not due to willful neglect. W. Va. Code § 11-10-18(a).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the health care provider tax assessment issued against the corporation for the year 2006, for tax in the amount of \$____, interest in the amount of \$____, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for **revised** tax in the amount of \$____, plus interest and additions to tax on the revised tax as may be computed by the parties.