

REDACTED DECISION – DOCKET # 07-502 C – BY ROBERT W. KIEFER, JR., ALJ – SUBMITTED FOR DECISION on OCTOBER 13, 2008 – ISSUED on APRIL 13, 2009.

SYNOPSIS

CONSUMERS SALES AND SERVICE TAX – VEHICLE SERVICE CONTRACTS -- The Petitioner was required to collect consumers sales and service tax on vehicle service (warranty) contracts it sold to purchasers of automobiles because said contracts are for the provision of services, and are not insurance policies.

CONSUMERS SALES AND SERVICE TAX – EQUITABLE ESTOPPEL -- The West Virginia Office of Tax Appeals, as an agency of the executive branch of the government, has no jurisdiction to determine whether or not the State Tax Commissioner should be equitably estopped to assess and collect tax as required by law.

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 September 11, 2007, the Director of this Division issued a consumers sales and service tax assessment against the Petitioner. The assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of January 1, 2006, through June 30, 2007, for tax in the amount of \$____, and interest in the amount of \$____, computed through August 15, 2007, for a total assessed tax liability of \$____. No additions to tax were assessed. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked September 13, 2007, received on September 17, 2007, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9 [2005].

The evidentiary hearing in this matter was scheduled for a day in September. At the request of the Petitioner, the matter was scheduled to be heard in a city in West Virginia. At the time scheduled for the hearing, the Petitioner's representative, Mr. A, who identified himself as the former owner, did not appear. Instead, without prior notification to this Office or counsel for the State Tax Commissioner, Mr. A called by telephone at or shortly after the time the hearing was scheduled to commence.

Because Mr. A failed to appear in person and did not notify this Office that he intended to call, and because of the limitations of this Office's recording equipment, Mr. A's call was not recorded. Accordingly, an evidentiary hearing was not conducted. Instead, Mr. A repeated the assertions previously made in the petition for reassessment. Mr. A was also given the opportunity to submit documents to support the Petitioner's position. On October 13, 2008, this Office received documents from Mr. A in support of the Petitioner's position. Those documents will be referred to collectively as Petitioner's Exhibit No. 1.

FINDINGS OF FACT

1. As relevant to this matter, the Petitioner is in the business of selling used automobiles to its customers.

2. In some instances, attendant to the sale of automobiles, the Petitioner sold "Warrant(ies)," which appear to provide for repairs to the automobiles where equipment failures occur after the expiration of any warranty that comes with the automobile at the time of the sale.

3. The sole basis of the State Tax Commissioner's assessment is the failure of the Petitioner to collect consumers sales and service tax on "Warrant(ies)" sold by the Petitioner to its customers. *See* State's Exhibit No. 1.

4. Subsequent to the time scheduled for the evidentiary hearing in this matter, the Petitioner provided two copies of "Warrant(ies)" or, as they are denominated therein, "Vehicle Service Contracts." *See* Petitioner's Exhibit No. 1.

DISCUSSION

The Petitioner maintains that the extended warranty contracts that it sells to certain of its customers constitute "insurance related products." It maintains that, as such, the contracts are not taxable.

W. Va. Code St. R. § 110-15-105 provides, in relevant part:

§ 110-15-105. Insurance Agencies.

105.1. Sales tax does not apply to sales of insurance by insurance agencies. The sale of insurance is a sale of an intangible and, thus, is not subject to the consumers sales and service tax and use tax.

105.2. All purchases for use in business made by insurance agencies are subject to consumers sales and service tax and use tax unless specifically exempt.

From this, it is clear that sales of insurance are exempt.

The Petitioner contends that its sales of "insurance related products" are exempt from the consumers sales and service tax. It has provided two exemplary contracts which it contends demonstrate that the contracts sold to the customers are insurance contracts. The first contract is entitled "Wynn's Plus Used Vehicle Service Contract/Application" issued by Wynn's Extended Care, Inc., P. O. Box 2470, Brea, CA 92822. At the top of the contract, above the "Customer Information" and "Selling Dealer" information, relevant language in the contract provides, "This document is an **Application** for a **Vehicle Service Contract.**" (Bold in original.) Below the

signature lines for the customer and the authorized representative of the selling dealer, the contract states:

THIS SERVICE CONTRACT IS INSURED FOR ITS LIABILITY UNDER A SERVICE CONTRACT REIMBURSEMENT INSURANCE POLICY ISSUED BY NATIONAL CASUALTY COMPANY, A MEMBER COMPANY OF THE Nationwide® Insurance group. IF WE DO NOT SETTLE YOUR CLAIM(S), AS ADMINSTRATOR WITHIN SIXTY (60) DAYS (THIRTY (30) DAYS IN ARIZONA) OF OUR RECEIPT OF YOUR PROOF OF LOSS, YOU MAY MAKE A CLAIM DIRECTLY AGAINST: NATIONAL CASUALTY COMPANY, P.O. BOX 4110, SCOTTSDALE, AZ 85261-4110 (800) 423-7675. (Bold in original, signifying terms defined by the contract.)

The second contract is entitled “Vehicle OneSM Vehicle Service Contract/Registration Page.” The contract states, “The Administrator and Provider of the Contract is Universal Warranty Corporation, P. O. Box 542050, Omaha, NE 68154, 1-866-215-7080. California Provider license #0C97550.” The contract further states:

THIS CONTACT IS INSURED – Our obligations under this Contract are guaranteed by an insurance policy issued by MIC General Insurance Corporation[Policy No. LCL 2000 (7/00)], 300 Galleria Officentre, Suite 200, Southfield, MI 48034. If a covered claim is not paid within sixty (60) days after proof of loss has been filed, You may file a claim directly with the Insurance Company. Please call 1-866-215-7080 for instructions. (Bold in original.)

By their own terms, the contracts provided by the Petitioner are service contracts. Each is entitled a “vehicle service contract.” Determining the exact nature of the contracts is somewhat problematic since the Petitioner has not presented complete copies of the vehicle service contracts.¹ Consequently, this Office must determine the nature of the contracts based solely on the information made available to it by the Petitioner.

¹ The fact that the Petitioner has not presented complete copies of the contracts works to its disadvantage. The Petitioner is tasked with the burden of proving its case. W. Va. Code § 11-10A-10(e) [2002] & W. Va. Code St. R. § 121-1-63(a) (Apr. 20, 2003). Unless conclusively proven by the portions of the contracts provided by the Petitioner, its failure to provide the complete contracts requires this Office to presume that the omitted portions of the contracts do not show that they are, as a whole, insurance contracts.

Based on the information provided by the Petitioner, the only conclusion that can be drawn is that the purchaser of the “warranty” is purchasing future repair services if the purchased automobile requires certain repairs. The selling or issuing dealer, or its agent, is contractually bound to provide those repair services to the owner of the purchased vehicle. A review of the audit work papers discloses that the sums paid by the purchasers of automobiles are not insignificant.

The fact that these service or “warranty” contracts are backed by insurance policies does not transform them into insurance policies. The insurance policies referred to in the vehicle service contracts are contracts that are separate and apart from the service contracts. Although the policies have not been presented, the insurance policies have different parties² and that the purchasers of automobiles are, at best, third-party beneficiaries under the policies, if they are referred to at all.³

Based on the evidence presented by the Petitioner, this Office must conclude that the Petitioner has failed to satisfy its burden of proof.

The Petitioner further contends that the State Tax Commissioner previously “reviewed” its business records and determined that sales of the contracts in question were not subject to consumers sales and service tax. It contends that one or more employees of the State Tax Commissioner advised the Petitioner that it was not required to collect consumers sales and service tax on the sale of these contracts. Although not couched in the proper legal terminology, the Petitioner’s argument is that the State Tax Commissioner is estopped from asserting that the

² The vehicle service contracts clearly identify insurers who are not parties to the vehicle service contracts.

³ It is not likely that the automobile purchasers are identified by name in any such insurance policies.

consumers sales and service tax applies to the Petitioner in this instance because the Petitioner relied on the advice given it by one or more of employees of the State Tax Commissioner.

"The doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine against the state.' Syl. Pt. 7, *Samsell v. State Line Development Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970)." Syl. Pt. 3, *Hudkins v. State of West Virginia Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007). The doctrine of estoppel may be applied against the State, even when the State is acting in its governmental capacity, where the elements of estoppel are clearly present and it would be unconscionable to allow the State to revise its earlier opinion. See *Wisconsin Dep't of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 641, 279 N.W.2d 213, 226 (1979) (cited in *Hudkins v. State of West Virginia Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007)). In *Moebius*, the taxpayer had been previously audited and had been issued a letter stating that it was in compliance with the law.

The doctrine of equitable estoppel is, as its name makes clear, an equitable principle. Jurisdiction over matters in equity is constitutionally vested in the courts of this State. W. Va. Const., Art. VIII, § 6. This Office is an agency of the executive branch of the government. As such, it has no jurisdiction to determine whether or not the State Tax Commissioner should be equitably estopped to assess and collect tax as required by law.

Even if this Office had jurisdiction to consider the issue of equitable estoppel against the State Tax Commissioner, in the present matter, the evidence, such as it is, does not justify application of the doctrine of estoppel. In a letter dated July 18, 2007, signed by Mr. A, "Past Owner," Mr. A asserts that the Petitioner had undergone "a review" with the State Tax Department in 2006 and was "in compliance." The Petitioner's evidence in this regard consists

of three letters signed by Mr. A, dated September 6, 2006, June 11, 2007, and July 18, 2007. These letters are self-generated. They contain conclusory statements of the Petitioner's position and assertions respecting purported representations made by State Tax Commissioner employees. These letters, and the assertions contained therein, are not sworn. They are woefully short of facts. They are not corroborated by documents to show the sort of review the Petitioner had undergone. The Tax Commissioner has made no assertion or statement in this matter that could constitute an admission with respect to the Petitioner's assertions. There is no tangible evidence of any prior review of the Petitioner's books and records to show that this was one of the issues raised in the course of such audit. There is nothing to show that the State Tax Commissioner or his representative advised the Petitioner, in writing, that it was complying with the law with respect to this issue.

It is incumbent on the Petitioner to present evidence to satisfy its burden of proving its assertions. The evidence presented by the Petitioner, such as it is, is wholly insufficient to show that the State Tax Commissioner is estopped to assess tax on the vehicle service contracts in question.

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 Petitioner 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 Petitioner was required to collect consumers sales and service tax on vehicle service (warranty) contracts it sold to purchasers of automobiles because said contracts are for the provision of services, and are not insurance policies.

3. The West Virginia Office of Tax Appeals, as an agency of the executive branch of the government, has no jurisdiction to determine whether or not the State Tax Commissioner should be equitably estopped to assess and collect tax as required by law.

4. The Petitioner in this matter has failed to carry its burden of proving that any assessment of taxes against it is erroneous, unlawful, void or otherwise invalid.

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, 2006, through June 30, 2007, for tax in the amount of \$____, and interest in the amount of \$____, computed through August 15, 2007, for a total assessed tax liability of \$____, should be and is hereby **AFFIRMED**.

Interest continues to accrue on this unpaid tax until this liability is fully paid.