REDACTED DECISION – DOCKET # 07-610 C – BY MICHELE DUNCAN BISHOP, CALJ – SUBMITTED FOR DECISION on OCTOBER 26, 2008 – ISSUED on MAY 14, 2009.

FINAL DECISION

SYNOPSIS

A physical fitness facility deriving its income from monthly membership fees is not in the business of providing "personalized fitness programs" where the evidence shows only that the owner or facility employees talked with customers about customers' physical fitness goals with no apparent regularity and as part of no practice. The facility is therefore not exempt from the requirement that it collect consumers sales and service tax and remit the tax to the State Tax Commissioner.

HISTORY

On September 20, 2007, Respondent State Tax Commissioner ("Respondent") issued taxpayer ("Petitioner") a notice of assessment for tax years 2004 through 2006 and the first quarter of 2007 ("the assessment") in the amount of $____, including $____ for unpaid consumers sales tax, $____ in interest, and $____ in additions to tax.[1] Petitioner filed a petition for reassessment with the Office of Tax Appeals, which petition was received November 21, 2007, asserting that it is in the business of providing "personalized fitness programs" that are exempt from the collection of West Virginia consumers sales and service tax.

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[1] Though the notice of assessment indicates that it was issued on July 19, 2007, it was not signed by Respondent's Director of the Auditing Division until more than two months later, on September 20, 2007.

A prehearing conference was conducted by a presiding administrative law judge on March 4, 2008. Counsel appeared on behalf of each party, but both failed to comply with Office of Tax Appeals requirements. The parties likewise failed to comply with the tribunal's Order Summarizing Prehearing Conference, entered March 5, 2008, and directing the parties to provide copies of evidentiary hearing exhibits, among other things, until receiving a reminder from the presiding administrative law judge by electronic mail dated March 24, 2008.

A hearing was conducted by a presiding administrative law judge on April 3, 2008, at which hearing both parties appeared, represented by counsel. A briefing schedule was entered, after preparation and delivery of a transcript to the parties, on June 11, 2008, but Petitioner failed to comply. A second briefing schedule was entered on July 31, 2008. Petitioner's brief was received by the Office of Tax Appeals on September 19, 2008, approximately two weeks after the deadline established by the presiding administrative law judge.

On April 17, 2009, the Office of Tax Appeals received from Respondent a responsive brief, together with a letter from Respondent's counsel indicating that the prior presiding administrative law judge had granted an extension of time but failed to enter a revised briefing schedule. Inasmuch as more than seven months had passed since the filing of Petitioner's brief, the presiding administrative law judge declined to consider the brief of Respondent, as fully set forth in the Office of Tax Appeals order also entered this day.

All deadlines established by this tribunal having now passed, this matter is hereby submitted for decision on the record.

FINDINGS OF FACT

1. Petitioner was incorporated under the laws of the State of West Virginia in September 2000. Petitioner operates in Oak Hill, West Virginia. Mr. A and Mrs. B act as the president and secretary, respectively, of the corporation.

2. Petitioner is a physical fitness facility located on the ground level of a hotel. There is on-site cardiovascular and strength-training equipment, such as treadmills, bikes, and free weights, as well as an adjacent racquetball court. As a condition of Petitioner's lease agreement with the hotel, hotel guests are permitted to use the facilities without having to become members.

3. At the time of the hearing, approximately 120 individuals had memberships with Petitioner, which memberships were maintained through the payment of monthly dues. Mr. A testified that the total number of memberships at various times through the period covered by the assessment ranged from about 100 to 200. Memberships were available at a variety of rates, beginning at $____ per month. Petitioner did not collect or remit the consumers sales and service tax on the fees associated with these memberships during the period covered by the assessment.

4. Mr. A testified that he and his wife, as well as some Petitioner's staff members, were available "the majority of the time" to provide personal training services to club members. The cost of these services was included in the cost of membership, he said.

5. Mr. A testified that, in providing this personal service, he "would just spend a little time talking with [the customer] and finding out what [the] goals and what [the customers] want[] to accomplish and go from there. . . . So I'd really just try to sit down and talk with them and find out what their goals are, and what they want to accomplish, and then I'll direct them in the path, what they need to do over the next several, several months to accomplish that."

6. Mr. A's monitoring of his customers' progress consisted of "basically talking with them every so often and seeing how they're progressing, and seeing what I can do to help and to further them along."

7. Mrs. B testified that she and the Petitioner's staff also assist members with personal physical fitness issues, but she did not provide further detail.

8. Each customer tracked his or her own progress, and retained possession of any documentation of that progress. Petitioner provided forms for that purpose. It is not clear from the record how often, if ever, a Petitioner's employee reviewed the documentation of the customers' progress.

9. Mr. A is not a licensed or certified personal trainer, nor are any of the employees at Petitioner's. To keep abreast of developments in exercise and fitness, Mr. A reviews magazines and journals.

10. An unspecified number of customers has declined personal attention from the Petitioner's staff.

11. Petitioner received a notice of assessment from the West Virginia State Tax Department around September 20, 2007, in the amount of $____ for unpaid consumers sales and service tax, together with interest of $____ and additions of $____, for a total amount due of $____. A petition for reassessment subsequently was timely filed.

DISCUSSION

The West Virginia Legislature has imposed a general consumers sales and service tax which should "wherever possible be construed and applied to accomplish [its] intent as to the imposition, administration and collection of these taxes." West Virginia Code § 11-15-1 and 1a. In the absence of a direct pay permit by a purchaser, a vendor claiming exemption bears the burden of proving that a sale or service is exempt from the consumers sales and service tax. West Virginia Code § 11-15-6.

Petitioner claims that it had no obligation to collect the consumers sales and service tax based on the statutory exemption for "[c]harges for memberships or services provided by health and fitness organizations relating to personalized fitness programs." See West Virginia Code § 11-15-9(a)(34). Petitioner argues that it "is a garden-variety health and fitness club that provides services to its members, including personalized fitness and training, as part of its membership dues[,]" thus falling squarely within the statutory exemption for personalized fitness programs. It further suggests that Respondent would argue that Petitioner is not entitled to the exemption based on a lack of certification of Petitioner's staff. The presiding

administrative law judge does not reach the issue of credentials, however, because it appears that Petitioner cannot overcome the most basic hurdle in this inquiry.

Petitioner has failed to show that it provides personalized fitness programs to its customers. It is noted that Petitioner did not offer into evidence any standard contract of membership used by it. The omission is telling, inasmuch as the contents of a contract would show precisely the item bargained for between Vincent's and its customers. In the absence of such a document, the presiding administrative law judge cannot presume that customers agreed to purchase anything beyond the common and ordinary use of the exercise equipment at Petitioner's. Petitioner's representative Mr. A testified that there are customers who do not welcome assistance, further suggesting that it is the use of the equipment that is central to the transaction. Having not offered the written agreement or more precise testimony on the transaction, Petitioner has left the question open.

If, however, Petitioner chose to not submit a copy of a standard membership agreement because one does not exist, then Petitioner has failed to show that customers purchasing memberships at Petitioner's were informed that they were, in fact, purchasing a personalized fitness regimen. There is no evidence of signage on Petitioner's premises stating as much, there is no evidence of consumers having been explained the nature of the purchase, and there is no indication whatsoever that Petitioner's customers knew at the time of the transaction, or in some cases any time thereafter, that personalized service was available to them.

The fact that Petitioner's customers appear not to have intended to purchase personalized attention seems sufficiently dispositive of the question before the Office of Tax

Appeals. Additional important information appears lacking, though. There is no evidence, for example, of the approximate number of customers for whom Petitioner's staff purports to develop programs, nor is there any evidence to show how often the staff reassesses the needs of its customers. In fact, while Petitioner's supplies forms for customers to track their own progress, it does not appear that staff members ever review those forms. Furthermore, Mr. A testified that he directs customers about what they need to do over "the next several. . . months" to accomplish their goals, indicating the absence of personal attention after the initial contact.

It does appear from the record that Mr. A Mrs. B are approachable and willing to offer Petitioner's customers suggestions about their fitness routines when asked. But Petitioner cannot transform this limited, though probably helpful, interaction into an exemption, where there simply is no evidence that its customers knowingly purchased or were aware of the availability of personalized fitness programs, or even that personalized attention has been provided with any regularity.

CONCLUSIONS

It is accordingly HELD:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment related to uncollected consumers sales and service tax, the burden of proving entitlement to an exemption is on the petitioner.

2. Petitioner has not carried the burden of proof in this matter.

3. A physical fitness facility deriving its income from monthly membership fees is not in the business of providing “personalized fitness programs” where the evidence shows only that the owner or facility employees talked with customers about customers’ physical fitness goals with no apparent regularity and as part of no practice. The facility is therefore not exempt from the requirement that it collect consumers sales and service tax and remit the tax to the State Tax Commissioner.

4. The assessment at issue in this matter is AFFIRMED.