

REDACTED DECISION – DOCKET # 08-044 U – BY ROBERT W. KIEFER, JR., ALJ – SUBMITTED FOR DECISION on AUGUST 5, 2009 – ISSUED on FEBRUARY 5, 2010.

SYNOPSIS

PURCHASERS USE TAX – CONTRACTING – The Petitioner is engaged in the business of “contracting” because he provided both materials and work in the fulfillment of a contract for the construction of a new building. W. Va. Code § 11-15-2(b)(3)(A).

PURCHASERS USE TAX – CONTRACTING – The Petitioner is required to pay the purchasers use tax on all of his purchases of tangible property and taxable services used or consumed in the provision of contracting services, including the concrete incorporated in the foundation and the manufactured buildings. W. Va. Code § 11-15-8a(a).

PURCHASERS USE TAX – ADDITIONS TO TAX – The Petitioner, having been previously audited by the same auditor and assessed the same tax for the same issue, is not entitled to a waiver of additions to tax since he was on notice that he was subject to pay the purchasers use tax and his failure to comply with the law does not constitute reasonable cause and is due to willful neglect. W. Va. Code § 11-10-18.

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 February 29, 2008, the Director of this Division issued a purchasers use tax assessment against the Petitioner. The assessment was issued pursuant to the authorization of the Commissioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code. The assessment was for the period of January 1, 2005, through December 31, 2007, for tax in the amount of \$____, interest in the amount of \$____, computed through March 17, 2008, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked March 11, 2008, received on March 18, 2008, 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].

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

FINDINGS OF FACT

1. The Petitioner is an individual who is engaged in the construction business.
2. As it relates to the assessment, the Petitioner is engaged in the business of constructing manufactured buildings for his customers on property owned by the customers.
3. The Petitioner provides the manufactured buildings, constructs the foundation on which the manufactured building is to be erected and then erects the building on the foundation, all as part of a single contract.
4. The Petitioner concedes that those items highlighted in the audit work papers are taxable. *See* Petitioner's Exhibit No. 1.
5. The Petitioner contends that the remaining items in the audit work paper are exempt from taxation because they are resold to the customer.
6. As represented by the only written contract in the record, which appears to exemplify all but one of the contracts performed by the Petitioner, the Petitioner charged a single price for providing and erecting manufactured buildings for his customers, although he billed the customers in installments, based upon the completion of certain activities. *See* Petitioner's Exhibit No. 1.
7. Petitioner's Exhibit No. 8 is a sample of a job performed by the Petitioner for one of his customers.

8. Petitioner's Exhibit No. 8 shows that the Petitioner provides the manufactured building, other materials, such as concrete, and the construction and installation of all materials as part of single job.

9. On the only contract in which the Petitioner did not both supply and erect the manufactured building was one performed for the federal government, in which the Petitioner was a subcontractor and provided all of the materials for the foundation and some materials used in erecting the building, which was supplied by the prime contractor, a Virginia corporation.

10. The Petitioner provided several direct pay permits and several exemption certificates to him by some customers. *See* Petitioner's Exhibit No. 7.

11. The direct pay permits were presented to show why the Petitioner did not collect consumers sales and service tax from those customers.

DISCUSSION

As it relates to the assessment, the Petitioner is engaged in the business of constructing manufactured buildings for his customers on property owned by the customer. The Petitioner provides the building, does the necessary work to construct the foundation and then constructs or otherwise places the building on and attaches it to the foundation. It appears that the Petitioner charges for the work on a lump sum basis, although the exemplary contract provided by the Petitioner does break the lump sum down into certain component parts. However, the breakdown of the lump sum into component parts does not lend itself to a clear distinction between what charges are for construction and what charges are for the buildings, structures, supplies and other tangible property.

W. Va. Code § 11-15-2(b)¹ defines “contracting as:

(3) "Contracting":

(A) In general. -- "Contracting" means and includes *the furnishing of work, or both materials and work, for another* (by a sole contractor, general contractor, prime contractor, subcontractor or construction manager) *in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof,*

(B) Form of contract not controlling. -- An activity that falls within the scope of the definition of contracting constitutes contracting regardless of whether the contract governing the activity is written or verbal and regardless of whether it is in substance or form a lump sum contract, a cost-plus contract, a time and materials contract, whether or not open-ended, or any other kind of construction contract.

(C) Special rules. -- For purposes of this definition:

(i) The term "structure" includes, but is not limited to, everything built up or composed of parts joined together in some definite manner and attached or affixed to real property or which adds utility to real property or any part thereof or which adds utility to a particular parcel of property and is intended to remain there for an indefinite period of time;

(ii) The term "alteration" means, and is limited to, alterations which are capital improvements to a building or structure or to real property;

(iii) The term "repair" means, and is limited to, repairs which are capital improvements to a building or structure or to real property;

(iv) The term "decoration" means, and is limited to, decorations which are capital improvements to a building or structure or to real property;

(v) The term "improvement" means, and is limited to, improvements which are capital improvements to a building or structure or to real property;

(vi) The term "capital improvement" means improvements that are affixed to or attached to and become a part of a building or structure or the real property or

¹ The consumers sales and service tax and the purchasers use tax are complementary taxes and, where possible, are to be construed to accomplish such intent as to the imposition, administration and collection of the two taxes. *See* W. Va. Code § 11-15A-1a. Tangible personal property and services that are exempted by the provisions of the consumers sales and service tax law are exempt from the purchasers use tax. *See* W. Va. Code § 11-15A-3. Consequently, tangible personal property and services taxable under the consumers sales and service tax law are subject to the purchasers use tax. Any person who uses personal property upon which the tax has not been paid is required to make payment to the State Tax Commissioner. *See* W. Va. Code § 11-15A-11. Thus, we must look to the consumers sales and service tax law to determine whether the property upon which the State Tax Commissioner seeks to impose the tax is taxable and whether the Petitioner is required to pay said tax.

which add utility to real property, or any part thereof, and that last or are intended to be relatively permanent. As used herein, "relatively permanent" means lasting at least a year in duration without the necessity for regularly scheduled recurring service to maintain the capital improvement. "Regular recurring service" means regularly scheduled service intervals of less than one year;

(vii) Contracting does not include the furnishing of work, or both materials and work, in the nature of hookup, connection, installation or other services if the service is incidental to the retail sale of tangible personal property from the service provider's inventory: Provided, That the hookup, connection or installation of the foregoing is incidental to the sale of the same and performed by the seller thereof or performed in accordance with arrangements made by the seller thereof. Examples of transactions that are excluded from the definition of contracting pursuant to this subdivision include, but are not limited to, the sale of wall-to-wall carpeting and the installation of wall-to-wall carpeting, the sale, hookup and connection of mobile homes, window air conditioning units, dishwashers, clothing washing machines or dryers, other household appliances, drapery rods, window shades, venetian blinds, canvas awnings, free-standing industrial or commercial equipment and other similar items of tangible personal property. Repairs made to the foregoing are within the definition of contracting if the repairs involve permanently affixing to or improving real property or something attached thereto which extends the life of the real property or something affixed thereto or allows or intends to allow the real property or thing permanently attached thereto to remain in service for a year or longer; (Emphasis added.)

The Petitioner furnishes "both materials and work, for another . . . in fulfillment of a contract for the construction . . . of a new or existing building or structure, . . ." The fact that contract is a lump sum contract, where the lump sum may be broken down into its component parts, is not controlling. The nature of the work performed by the Petitioner is not of the character described in W. Va. Code § 11-15-2(b)(3)(C)(vii), which might take it out of the definition of "contracting." Given the nature of the work performed by the Petitioner, it is clear that the Petitioner is engaged in the business of "contracting," as defined by W. Va. Code § 11-15-2(b)(3).

The consumers sales and service tax consequences respecting contractors are set forth in W. Va. Code § 11-15-8a, which provides in relevant part:

(a) The provisions of this article shall not apply to contracting services. However, purchases by a contractor of tangible personal property or taxable services for use or consumption in the providing of a contracting service shall be taxable beginning the first day of March, one thousand nine hundred eighty-nine, except as otherwise provided in this article.

Thus, contracting services are not subject to the consumers sales and service tax. As a consequence, the Petitioner is under no duty to charge and collect consumers sales and service tax on the contracting services provided to his customers. However, the statute does provide that purchases of tangible personal property or taxable services by a contractor that are used or consumed in the provision of contracting services are subject to the consumers sales and service tax.

In this matter, the State Tax Commissioner has assessed the Petitioner for purchasers use tax on his purchases of tangible personal property and taxable services that were used and consumed in the provision of his contracting services. As admitted by the Petitioner when questioned by counsel for the State Tax Commissioner, the Tax Commissioner's auditor did a detailed invoice-by-invoice audit, as opposed to a representative sample. She included only those invoices that related to the Petitioner's contracting business, and excluded those invoices that were related to the Petitioner's repair and service business. Consequently, it must be determined that the audit is correct.

The Petitioner takes the position that his purchases of buildings, concrete and other like items that are incorporated into the buildings and foundations are not taxable purchases because, according to him, they are purchases for resale. However, this position demonstrates a fundamental misconception on the part of the Petitioner. W. Va. Code § 11-15-2(b)(3)(A) clearly provides that "contracting" includes the furnishing of both materials and work in the fulfillment of a contract of the nature performed by the Petitioner. Although the Petitioner seems

to think otherwise, he is not in the business of selling tangible personal property, namely the buildings, concrete and other materials. He is furnishing both materials and work in the fulfillment of a contract for the construction of a new building. This is clearly “contracting.” He is not reselling the materials; he is using and consuming them in the business of contracting. Thus, he owes the tax on his purchases.

The direct pay permits and exemption certificates provided by the Petitioner are irrelevant. They were provided for the purpose of showing that the Petitioner was not required to collect consumers sales and service tax from those customers. However, as a contract, the statute exempts or excludes the provision of those services from the tax. Thus, the Petitioner was not required to collect tax on any of the services provided to his customers identified in the audit.

There remains the issue of the waiver of additions to tax. While the issue presented by this matter is not as conceptually clear as many consumers sales and service tax issues, it is one that is established by statute. Further, this taxpayer was apparently the subject of an audit many years prior to the current audit and was assessed tax for his failure to pay tax on his purchases. Having been subjected to an assessment for the same issue, the Petitioner was on notice that he was required to pay the tax and should have complied with the law. However, the Petitioner did not take any precautions to correct his earlier mistake respecting the payment of tax on his purchases. Consequently, there is no reasonable cause to waive additions to tax and the Petitioner’s underpayment is due to willful neglect.

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 him 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 is engaged in the business of “contracting” because he provided both materials and work in the fulfillment of a contract for the construction of a new building. W. Va. Code § 11-15-2(b)(3)(A).

3. The Petitioner is required to pay the purchasers use tax on all of his purchases of tangible property and taxable services used or consumed in the provision of contracting services, including the concrete incorporated in the foundation and the manufactured buildings. W. Va. Code § 11-15-8a(a).

4. The Petitioner, having been previously audited by the same auditor and assessed the same tax for the same issue, is not entitled to a waiver of additions to tax since he was on notice that he was subject to pay the purchasers use tax and his failure to comply with the law does not constitute reasonable cause and is due to willful neglect. W. Va. Code § 11-10-18.

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

DISPOSITION

WHEREFORE, it is 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, 2005, through December 31, 2007, for tax in the amount of \$____, interest in the amount of \$____, computed through March 17, 2008, and additions to tax in the amount of \$____, 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.