

REDACTED DECISION – DK#S 11-371 C, 11-372 CU – BY – A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED DECISION on MAY 18, 2012 – ISSUED ON NOVEMBER 16, 2012

SYNOPSIS POINTS

TAXATION -- PROCEDURE AND ADMINISTRATION -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

TAXATION -- PROCEDURE AND ADMINISTRATION -- “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.” W. Va. Code Ann. § 11-15-3(a) (West 2010).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- There is an exemption from the consumers sales and service tax for the dispensing of services performed by one corporation, partnership or limited liability company for another corporation, partnership or limited liability company when the entities are members of the same controlled group taxpayers as defined in Section 267 of the Internal Revenue Code. *See* W. Va. Code Ann. § 11-15-9(a)(23) (West 2010).

INTERNAL REVENUE CODE -- LOSSES, EXPENSES AND INTEREST WITH RESPECT TO TRANSACTIONS BETWEEN RELATED TAXPAYERS -- Section 267 of the Internal Revenue Code defines controlled group by reference to Section 1563 of the Internal Revenue Code but modifies the definition in Section 1563 to substitute 50 percent for 80 percent. *See* I.R.C. § 267(f) (2012).

INTERNAL REVENUE CODE -- CERTAIN CONTROLLED CORPORATIONS -- Section 1563 of the Internal Revenue Code defines “controlled group of corporations” as: the term “controlled group of corporations” means any group of—

- (1) Parent-subsidiary controlled group. One or more chains of corporations connected through stock ownership with a common parent corporation if—
 - (A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d)(1)) by one or more of the other corporations; and

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(B) the common parent corporation owns (within the meaning of subsection (d)(1)) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations

I.R.C. §1563(a) (2012).

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- A controlled group can consist of a parent corporation and a single subsidiary corporation, with all stock ownership being in the hands of the parent. See Treas. Reg. § 1.1563-1(a)(2)(ii) (2012). See also Tribune Publishing Company v. Commissioner, 79 T.C. 1029 (1982).

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- The stock in this matter is voting stock in the subsidiary corporation, Company A.

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- The Petitioner owns at least 50 percent of the voting stock of Company A and, as such, is a member of a controlled group of corporations as that term is used in Internal Revenue Code Section 1563(a).

WEST VIRGINIA OFFICE OF TAX APPEALS -- 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 petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. See W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF MET -- The Petitioner has met its burden of showing that it is entitled to the exemption from West Virginia's consumers sales and service taxes contained in West Virginia Code Section 11-15-9(a)(23).

FINAL DECISION

On or about September 20, 2011, the Auditing Division of the West Virginia State Tax Commissioner's Office (the Tax Department or the Respondent) issued two Audit Notices of Assessment against the Petitioner, for uncollected sales tax. These assessments were issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq.*, of the West Virginia Code. The first assessment was for

consumers sales tax for the period January 1, 2008, through June 30, 2008, for tax in the amount of \$_____ and interest in the amount of \$_____, for a total assessed tax liability of \$_____. The second assessment was for combined sales and use tax for the period July 1, 2008 through June 30, 2011, for tax in the amount of \$_____and interest in the amount of \$_____, for a total assessed liability of \$_____. According to the petitions for reassessment, written notice of these assessments were served on the Petitioner on September 23, 2011. Thereafter, on November 17, 2011, the Petitioner timely filed with this Tribunal, two petitions for reassessment. An evidentiary hearing was held in this matter on February 8, 2012, at the conclusion of which the parties filed legal briefs. The matter became ripe for a decision at the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Petitioner is a West Virginia corporation formed in 1971 for the purpose of real estate development. The corporation operates in a West Virginia County.

2. At some point the Petitioner purchased approximately five thousand acres in a West Virginia County and developed approximately one thousand of those acres. As part of this development, the Petitioner divided certain acreage into "territories" some of which were purposed for and sold as private home lots and some of which were purposed for and sold as lots for camping. The Petitioner also owns and controls common areas of the development.

3. In 1979 Company A (hereinafter "Company A") was formed as a West Virginia non-profit corporation. The purpose of Company A was to work for the welfare and benefit of the property owners in the territories developed by the Petitioner. Specifically, Company A was to operate and maintain the common areas of the territories. Company A was to be operated by a board of directors.

4. Company A drafted bylaws, which, among other things, established the mechanism for the election of the board of directors. They provided for two classes of voting rights, A and B and stated:

ARTICLE IV. VOTING RIGHTS

Section 1. The Association shall have two classes of voting membership:

Class A. Class A members shall be all those owners as defined in Article III, Section I with the exception of the Declarant. Class A members shall be entitled to one vote for each Lot in which they hold the interests required for membership by Article III, Section 1. When more than one person holds such interest or interests in any Lot all such persons shall be members, and the vote for such Lot shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any such Lot. No Class A member shall be entitled to vote unless at the time of the meeting at which vote will be taken, all dues, assessments and other charges then due to the Association shall have been paid, including the initiation fee, as provided in Article III.

Class B. The Class B members shall be the Declarant. Pursuant to Paragraph Number 5 of the Declaration of Restrictions and Covenants for Class A Territory, the class B member shall be entitled to three votes for each Lot in Class A Territory in which it holds the interest required for membership by Article III, Section I.

Pursuant to Section 2 (g) of the Supplemental Declaration of Restrictions and Covenants, the Class B member shall be entitled to one vote for each Lot in Class B xxxxx, xxxxx, xxxxx, xxxxx, xxxxx, xxxxx, xxxxx, xxxxx, and xxxxx Territories, in which it holds the interest required for membership by Article III, Section 1.

The Class B member shall be entitled to three votes for each lot to which it holds title in any annexed property. In the case of property which contains undivided interests, the Class B member shall be entitled to three votes for each unsold undivided interest.

5. The "declarant" in Article IV is the Petitioner.
6. There are 5,981 lots in the territories. Of those 5,981 lots, 988 are in Class A Territory and 549 are in Class B Territory, the voting rights of which all reside with the

Petitioner. The Petitioner also has voting rights regarding ownership in 378 other properties. Lastly, four of the Petitioner's stockholders have ten votes pursuant to their personal ownership of lots in the territories.¹

7. In 2008, the Petitioner and Company A entered into a management agreement, providing that the Petitioner would, for a fee, provide various management functions to Company A.

8. The Petitioner did not collect consumers sales and service taxes on the management fees it charged to Company A.

9. The audit in this matter also revealed certain purchases made by the Petitioner for which West Virginia Consumers Sales and Service and Use taxes were not remitted. During the evidentiary hearing in this matter, the Petitioner agreed that the unremitted taxes are due and owed. The amount of tax at issue is \$_____, plus interest in the amount of \$_____, for a total tax due of \$_____.

DISCUSSION

West Virginia law makes it clear that, "For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser, the tax as provided under this article, and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article."² W. Va. Code Ann. § 11-15-3(a) (West 2010).

¹ Finding of fact number 6 is based upon Petitioner's Exhibit 8 which is a breakdown of the territories and how many lots/votes are associated with each. The exhibit reflects the three votes the Petitioner has for each lot owned in Class a Territory as called for in Petitioner's Exhibit 4, the Company A's Bylaws. The Exhibit was prepared by Petitioner's Accountant, an accountant in the employ of the Petitioner. At the evidentiary hearing in this matter Petitioner's Accountant testified at length regarding Petitioner's Exhibit 8.

² Vendor means "any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property." W. Va. Code Ann. § 11-15-2(z) (West 2010). The amount of consumers sales and service tax is "six cents on the dollar of sales or services, excluding gasoline and special fuels, which remain taxable at the rate of five cents on the dollar of sales." W. Va. Code Ann. § 11-15-3(b) (West 2010).

However, there are exceptions to Section 3(a), and it is one of those exceptions that we are concerned with in this matter.

The following sales of tangible personal property and services are exempt as provided in this subsection . . . (23) Dispensing of services performed by one corporation, partnership or limited liability company for another corporation, partnership or limited liability company when the entities are members of the same controlled group or are related taxpayers as defined in Section 267 of the Internal Revenue Code.

W. Va. Code Ann. §11-15-9(a)(23) (West 2010).³ Once we enter the Internal Revenue Code, our interpretation requires further and closer review. First, Section 267 does not contain a definition of controlled group. Rather it refers readers to Section 1563 of the Internal Revenue Code.

(f) Controlled group defined; special rules applicable to controlled groups.

(1) Controlled group defined. For purposes of this section, the term "controlled group" has the meaning given to such term by section 1563(a) [26 USCS § 1563(a)], except that--
(A) "more than 50 percent" shall be substituted for "at least 80 percent" each place it appears in section 1563(a) [26 USCS § 1563(a)],

I.R.C. §267(f) (2012). Section 1563 does contain a definition of a "controlled group of corporations"

the term "controlled group of corporations" means any group of--
(1) Parent-subsidiary controlled group. One or more chains of corporations connected through stock ownership with a common parent corporation if--

(A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d)(1)) by one or more of the other corporations; and

³ Interestingly, Section 9(a) (23) goes on to define the word "control" even though that word is not used in the exemption. The parties in this matter have relied on the definition of a controlled group contained in the Internal Revenue Code.

(B) the common parent corporation owns (within the meaning of subsection (d) (1)) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations

I.R.C. §1563(a) (2012).⁴ Putting Section 1563(a) into outline form is helpful.

A control group is

1. one (or more) corporations
2. connected through stock ownership
3. with a parent corporation
4. if
 - a. at least 50 percent⁵ of the total value of shares of all classes of stock of each corporation
 - b. except stock of the parent corporation
 - c. is owned
 - d. by one or more of the other corporations
5. And
 - a. the common parent corporation owns
 - b. at least 50 percent of the total value of shares of all classes of stock of
 - c. at least one of the other corporations
 - d. excluding
 - e. stock owned directly by such other corporations

Further clarity is provided by taking this outline and substituting the facts of this case, including the fact of the Petitioner being the parent corporation and Company A being the other member of the group.

1. Company A is
2. connected through stock ownership
3. with the Petitioner
4. and
 - a. at least 50 percent of the total value of shares of all classes of stock of Company A
 - b. except stock of the parent corporation
 - c. is owned
 - d. by the Petitioner

⁴ The class of stock we are concerned with in this matter is voting stock in Company A. See Black's Law Dictionary 1430 (7th ed. 1999) (voting stock is stock that entitles the holder to vote in the corporations election of officers and on other matters put to a vote).

⁵ Pursuant to I.R.C. §267(f), 50 percent has been substituted for 80 percent.

5. And

- a. The Petitioner owns
- b. at least 50 percent of the total value of shares of all classes of stock of
- c. Company A
- d. excluding
- e. stock owned directly by Company A.

Even after an attempt to convert Section 1563(a) into plain English, it is still less than clear. This confusion is the result of having, as in the situation before this Tribunal, a controlled group that consists of only two corporations, a parent and a subsidiary. In such a situation, sections 4 & 5 above become redundant, both seeming to say that the parent must own at least 50 percent of the subsidiary. The only other way to interpret section 4 of the outline above would be for Section 1563(a) to require controlled groups to have more than two corporations. In that case, section 4 of our outline could be taken at its (somewhat) plain language that one of the subsidiaries must own at least 50 percent of one of the other subsidiaries and section 5 of our outline would explain what the ownership requirements are for the parent corporation.

This Tribunal would be inclined to interpret Section 1563(a) as requiring more than two corporations in order to have a controlled group, were it not for two citations relied upon by the Petitioner in its post-evidentiary hearing brief. First, the Petitioner directs us to Treasury Regulation Section 1.1563 which provides examples of parent-subsidiary controlled groups.

Example 1. P Corporation owns stock possessing 80 percent of the total combined voting power of all classes of stock entitled to vote of S Corporation. P is the common parent of a parent-subsidiary controlled group consisting of member corporations P and S.

Example 2. Assume the same facts as in Example 1. Assume further that S owns stock possessing 80 percent of the total value of shares of all classes of stock of X Corporation. P is the common parent of a parent-subsidiary controlled group consisting of member corporations P, S, and X. The result would be the same if P, rather than S, owned the X stock.

Treas. Reg. § 1.1563-1(a)(2)(ii) (2012). The Petitioner relies on example 1, which clearly describes the circumstances of this matter. However, example 2 is in some ways more illuminative, at least of the concerns of this Tribunal. The last sentence of example 2 makes clear that even in a situation with more than two corporations; it is still permissible for all ownership to be in the hands of the parent, with no stock ownership by the subsidiary. The Petitioner also relies on dicta from the United States Tax Court to bolster its argument. In Tribune Publishing Company v. Commissioner, 79 T.C. 1029 (1982) the Tax Court was answering the question of whether two corporations were a controlled group under Section 1563. There, as here, there was only one parent and one subsidiary, with the stock ownership being exclusively in the hands of the parent. The Court, in a footnote, noted that a controlled group could consist of just one parent and one subsidiary and relied on example 1 from Treasury Regulations § 1.1563-1(a)(2)(ii) as standing for that proposition. Lastly, it should be noted that while the Tax Commissioner does argue that the Petitioner is not entitled to the requested exemption, he does not, in his brief to this Tribunal, argue that the Petitioner's reliance on example 1 from the Treasury regulations or the Tribune Publishing decision is misplaced.

The Tax Commissioner first argues that the testimony at the evidentiary hearing does not match Petitioner's Exhibit 4. The Tax Commissioner suggests as such because one of the Petitioner's witnesses testified that there were 9,500 votes, while Petitioner's Exhibit 8 shows total votes of 9,055. While it is true that the witness, at issue, testified as such one time, overall his testimony was consistent with Petitioner's Exhibit 8.

MS. VILLANUEVA-MATKOVICH: And with respect to --- because you said there were 9,500 lots; is that correct?

PETITIONER'S ACCOUNTANT: No. Votes.

MS. VILLANUEVA-MATKOVICH: Votes.

PETITIONER'S ACCOUNTANT: Right.

MS. VILLANUEVA-MATKOVICH: Okay.

PETITIONER'S ACCOUNTANT: There are two territories.

MS. VILLANUEVA-MATKOVICH: How many lots are there?

PETITIONER'S ACCOUNTANT: This is plus or minus 50 or 100 because I'm trying to do quick math based off the schedule that hasn't been admitted yet. There are approximately 6,000 lots.

MS. VILLANUEVA-MATKOVICH: Okay. You're saying there's 6,000 lots?

PETITIONER'S ACCOUNTANT: Uh-huh (yes).

MS. VILLANUEVA-MATKOVICH: And of those 6,000, how many are undeveloped?

PETITIONER'S ACCOUNTANT: The ones that would be considered as undeveloped, not available for sale --- and I wish this would be admitted, but it would be the ones on Class A Territories, which would be around 1,500 lots, ---

MS. VILLANUEVA-MATKOVICH: And those are owned ---.

PETITIONER'S ACCOUNTANT: --- plus or minus.

MS. VILLANUEVA-MATKOVICH: And those are owned by Petitioner?

PETITIONER'S ACCOUNTANT: Yes, all those are owned by Petitioner.

MS. VILLANUEVA-MATKOVICH: Okay. And then the remainder of the properties are developed and owned by other parties; would that be correct?

PETITIONER'S ACCOUNTANT: Within each one of the territories up there, Petitioner has properties that it owns that could be available for sale, which they retain voting rights in. The Class A Territories are where they are considered as Class B, undeveloped. Everything else is just considered as Class A for voting purposes. Okay?

See Transcript P. 46-47.

Petitioner's Accountant's testimony that there are 9,500 total votes is simply a misstatement that is quickly refuted by his follow-up testimony that is consistent with Petitioner's Exhibit 8. This Tribunal finds Petitioner's Exhibit 8 to be reliable and credible evidence regarding both the number of lots and number of votes involved in this matter. Part of our determination in this regard is based upon Petitioner's Accountant's testimony that he provided a copy of Petitioner's Exhibit 8 to the auditor who conducted the audit in this matter.

Despite having possession of Exhibit 8 for months prior to the evidentiary hearing, the Tax Commissioner presented no evidence that the calculations in the exhibit were false or incorrect.

The Tax Commissioner's next argument seems to suggest that because the Petitioner has Class B voting rights, there is some problem with it acquiring Class A properties. Specifically, the Tax Commissioner states:

Petitioner's witness clarified that the ownership of the vote is attached to the property and the type of voting class was unchanged. Therefore, if Petitioner acquired a lot that was designated Class A, the designation would remain. Strict adherence to the definitions contained in the Association's bylaws would require that Petitioner holds only Class B voting power.

See "Respondent's Brief in Support of State's Position" at p. 9. The Tax Commissioner relies on testimony from Petitioner's Accountant whereby he confuses voting rights by parties, as opposed to voting rights by lots in the territories.

MS. VILLANUEVA-MATKOVICH: Okay. According to the bylaws, it states that Petitioner is a Class B member and not a Class A member.

PETITIONER'S ACCOUNTANT: On certain lots. I mean, lots where we've reacquired lots and that, it's been kept the status that it --- it became a Class A lot. Has it been sold? If we reacquired it, it'd still stay the Class A.

MS. VILLANUEVA-MATKOVICH: Is that contained somewhere in the bylaws, that Petitioner can own Class A voting rights?

PETITIONER'S ACCOUNTANT: You know, I want to say I don't know.

See Transcript p. 50. Petitioner's Accountant's testimony is at odds with Petitioner's exhibits 4, Company A's bylaws and exhibit 8, the breakdown of total votes available to both corporations. However, Petitioner's Accountant's confusion does not change the reality of Petitioner's Exhibits 4 and 8, which are clear and unambiguous. No matter which lot the Petitioner acquires, it is a Class B voting member, which entitles it to a certain number of votes, depending upon

where the lot is located. The bylaws clearly contemplate the Petitioner owning property in territories other than the Class A Territory⁶. The bylaws lists those other territories, and clearly explain that the Petitioner has one vote for each lot in those areas, unless the lot was annexed property, in which case the Petitioner would be entitled to three votes. In fact, Petitioner's Accountant testified that there were certain annexed properties whereby the Petitioner would have three votes; however, in preparing Petitioner's Exhibit 8, he failed to give the Petitioner three votes.

PETITIONER'S ACCOUNTANT: Okay. Then those could be considered as under that third paragraph, being other annexed properties. Without having the proper reference, those came in after these bylaws were written. These areas that were being referred to, except for Class B Territory, those are housing areas. When the initial campground was developed, it was developed as camping, and eventually, they developed some residential lots that were two-acre lots.

PETITIONER'S COUNSEL: So with respect to those, that final paragraph in Article Four says, the Class B members shall be entitled to three votes for each lot in which it holds title to any annexed property. If these constitute annexed property ---.

PETITIONER'S ACCOUNTANT: I did not put the three multiplier to that.

PETITIONER'S COUNSEL: So what you're telling me is that these would actually be three times that, theoretically?

PETITIONER'S ACCOUNTANT: Right. So there should be another, maybe, 250 votes

See Transcript pp. 73-74. Ultimately, the Tax Commissioner's suggestion that Petitioner's Accountant's confusion should lead to a denial of the sought exemption is without merit. Petitioner's Exhibits 4 and 8 speak for themselves and, more importantly, are consistent. In fact, it is apparent that Petitioner's Accountant's confusion eliminated votes that should have been attributed to the Petitioner in Exhibit 8. The Tax Commissioner's argument might carry more

⁶ Petitioner's Exhibit 8 lists certain territories that are not listed in Article IV of the Bylaws. Petitioner's Accountant testified that these territories did not exist at the time the Bylaws were drafted.

weight if there was a suggestion that the Petitioner was getting three votes for Class A property, in a manner inconsistent with the bylaws. However, there is no suggestion, either in the exhibits or in the testimony, that that has happened.

The Tax Commissioner's last argument is that stock owned by the principal stockholders or officers of the Petitioner should be excluded, pursuant to the provisions of Internal Revenue Code Section 1563. The Section relied on by the Tax Commissioner does exclude certain categories of stock ownership, when calculating what constitutes a controlled group.

(c) Certain stock excluded.--

(2) Stock treated as "excluded stock".--

(A) Parent-subsidary controlled group.--For purposes of subsection (a) (1), if a corporation (referred to in this paragraph as "parent corporation") owns (within the meaning of subsections (d)(1) and (e)(4)), 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock in another corporation (referred to in this paragraph as "subsidiary corporation"), the following stock of the subsidiary corporation shall be treated as excluded stock . . . (ii) stock in the subsidiary corporation owned by an individual (within the meaning of subsection (d)(2)) who is a principal stockholder or officer of the parent corporation.

I.R.C. §1563(c)(2)(A)(ii) (2012). The Tax Commissioner seeks to have excluded the stock in Company A that is owned by the principal stockholders of the Petitioner. However, that exclusion, while proper under §1563(c)(2)(A)(ii), is mathematically insignificant and does not affect our determination in this matter. As discussed above, the "stock" in this matter is the voting rights associated with ownership of lots in the various territories. According to Petitioner's Exhibit 8, four of the principal stockholders of the Petitioner have a total of ten votes, based upon lot ownership. Removing ten votes, out of a total of over nine thousand does

not put the Petitioner significantly closer to the 50 percent threshold called for in Section 1563. In fact, it only changes the calculation by tenths of a percent.

In summation, this Tribunal finds that the Petitioner is a member of a controlled group and thus the management fees it charged to Company A are exempt from West Virginia's consumers sales and service tax. We so find based upon Petitioner's Exhibits 4 and 8. Exhibit 4 clearly and unambiguously states how many votes the Petitioner gets for each territory in which it has ownership. Exhibit 8 clearly and unambiguously lays out how many lots there are in each territory and who has how many votes for the same. Exhibit 8 shows that the Petitioner has more than 50 percent of the total combined voting power of all classes of Company A stock entitled to vote. This Tribunal does not find Petitioner's Accountant's misstatement that there are 9,500 total votes available to all parties to be determinative. Petitioner's Accountant's testimony, taken in its entirety, coupled with Exhibit 8, clearly shows that he simply misspoke one time. The Tax Commissioner knew for many months, prior to the evidentiary hearing in this matter, that the Petitioner had relied on the calculations contained in Exhibit 8 to ascertain whether it was, in fact, a member of a controlled group. At the evidentiary hearing the Tax Commissioner presented no evidence to rebut or contradict the information contained in Exhibit 8. Therefore, the Petitioner has met its burden of showing that the assessments issued against it were erroneous.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the Tax Commissioner in accordance with the provisions of this article.” W. Va. Code Ann. § 11-15-3(a) (West 2010).

4. There is an exemption from the consumers sales and service tax for the dispensing of services performed by one corporation, partnership or limited liability company for another corporation, partnership or limited liability company when the entities are members of the same controlled group taxpayers as defined in Section 267 of the Internal Revenue Code. *See* W. Va. Code Ann. §11-15-9(a)(23) (West 2010).

5. Section 267 of the Internal Revenue Code defines controlled group by reference to Section 1563 of the Internal Revenue Code but modifies the definition in Section 1563 to substitute 50 percent for 80 percent. *See* I.R.C. §267(f) (2012).

6. Section 1563 of the Internal Revenue Code defines “controlled group of corporations” as:

the term "controlled group of corporations" means any group of--
(1) Parent-subsidary controlled group. One or more chains of corporations connected through stock ownership with a common parent corporation if—
(A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d)(1)) by one or more of the other corporations; and

(B) the common parent corporation owns (within the meaning of subsection (d)(1)) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations

I.R.C. §1563(a) (2012).

7. A controlled group can consist of a parent corporation and a single subsidiary corporation, with all stock ownership being in the hands of the parent. *See* Treas. Reg. § 1.1563-1(a)(2)(ii) (2012). *See also* Tribune Publishing Company v. Commissioner, 79 T.C. 1029 (1982).

8. The stock in this matter is voting stock in the subsidiary corporation, Company A.

9. The Petitioner owns at least 50 percent of the voting stock of Company A and, as such, is a member of a controlled group of corporations as that term is used in Internal Revenue Code Section 1563(a).

10. 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 or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

11. The Petitioner has met its burden of showing that it is entitled to the exemption from West Virginia's consumers sales and service taxes contained in West Virginia Code Section 11-15-9(a)(23).

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the consumers sales and service tax and combined sales and use tax assessments issued against the Petitioner, for a total combined liability of \$_____, an amount which includes interest and

additions, for the period from January 1, 2008, through June 30, 2011, are hereby **MODIFIED** in a manner consistent with this decision. The Petitioner's liability is now confined to the use tax which the parties agree is due and owed, in the amounts of \$_____ plus interest in the amount of \$_____, for a total tax due of \$_____.

Pursuant to West Virginia Law, interest accrues on the assessments until the liabilities are fully paid. See W. Va. Code Ann. § 11-10-17(a) (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack
Chief Administrative Law Judge

Date Entered