

**REDACTED DECISION – DK#S 10-370 CU, 10-371 C, 10-3720 U –
BY – MATTHEW R. IRBY, ADMINISTRATIVE LAW JUDGE –
SUBMITTED FOR DECISION on JULY 24, 2012 –
DECISION ISSUED ON MARCH 25, 2013**

SYNOPSIS POINTS

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).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- "For the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected 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 or article fifteen-b of this chapter." W. Va. Code Ann. § 11-15-3(a) (West 2010).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- "The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the state for all tax paid by the purchaser." W. Va. Code Ann. § 11-15-4 (West 2010).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- "Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price." W. Va. Code R. § 110-15-4.1 (1993).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- "'Sales price' means the measure subject to the tax levied under article fifteen or fifteen-a of this chapter and includes the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for . . . service cost." W. Va. Code Ann. § 11-15B-2(b)(48)(A) (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- The Supreme Court of West Virginia's ruling in B.B. Enterprises, Inc. v. Palmer, 214 W. Va. 571 (2003), does not authorize a gentleman's club to deduct the cost of services from the "sales price" for purposes of calculating the sales tax due, but only exempts the purchase of the service by the club for resale to the patron as a purchase for resale.

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- "If records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information." W. Va. Code R. § 110-15-14bA. (1993).

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- The Petitioner failed to meet its burden with regard to whether the auditors used the "best information available" in determining the incorrectly reported sales of alcohol and specialty dances.

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- The Petitioner has met its burden with regard to whether the auditor used the "best information available" in determining the amount of sales attributable to the correctly reported amount of cover charges, by showing that five percent of gross sales, as reported on the sales tax returns were properly accounted for in its sales tax returns.

TAXATION -- USE TAX -- "An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article." W. Va. Code Ann. § 11-15A-2(a) (West 2010).

TAXATION -- PROCEDURE AND ADMINISTRATION -- "The Petitioner failed to meet its burden by failing to provide evidence to show the actual amount of its purchases that were subject to either the sales tax or the use tax.

TAXATION -- PROCEDURE AND ADMINISTRATION -- "The amount of any tax, 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 shall be assessed within three years after the date the return was filed (whether or not such return was filed on or after the date prescribed for filing): *Provided*, That in the case of a false or fraudulent return filed with the intent to evade tax, or in case no return was filed, the assessment may be made at any time:" . . . W. Va. Code Ann. § 11-10-15(a) (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS - CONCLUSION OF LAW -- Where, as here, the Petitioner fails to file a return to remit use tax on purchases, the Tax Commissioner is authorized to make an assessment at any time without regard to the three year statute of limitations.

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- "The taxpayer shall, on or before the twentieth day of each month, make out and mail to the Tax Commissioner a return for the preceding month, . . ." W. Va. Code Ann. § 11-15-16(c) (West 2010).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- "On or before thirty days after the end of the tax year, each person liable for the payment of any tax due under this article shall make and file an annual return in such form as may be required by the tax commissioner" W. Va. Code Ann. § 11-15-21(a) (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- Where, as here, the Petitioner files a monthly sales and use tax return, along with an annual sales and use tax return, as required by law, the Tax Commissioner is authorized to issue an assessment within three years of the date any annual return was filed for the entire time period covered by that return.

FINAL DECISION

On July 7, 2010, the Auditing Division of the West Virginia State Tax Commissioner's Office (the Tax Department and/or the Respondent) issued an Audit Notice of Assessment, for consumers sales and service tax against the Petitioner.¹ This assessment was 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 assessment was for the periods of January 1, 2007 to December 31, 2007; and for January 1, 2008 to June 30, 2008; for tax in the amount of \$____, interest in the amount of \$____, and additions 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 Petitioner on July 12, 2010.

Additionally, on July 7, 2010, the Auditing Division of the West Virginia State Tax Commissioner's Office issued an Audit Notice of Assessment, for combined sales and use tax against the Petitioner. This assessment was also 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 assessment was for the periods of July 1, 2008 to December 31, 2008; for January 1, 2009 to December 31, 2009; and for January 1, 2010 to March 31, 2010, for tax in the amount of \$____, interest in the amount of \$____, and additions 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 Petitioner on July 12, 2010.

Also, on July 7, 2010, the Auditing Division of the West Virginia State Tax Commissioner's Office issued an Audit Notice of Assessment, for use tax against the Petitioner. This assessment was also issued pursuant to the authority of the State Tax Commissioner,

¹ While the assessment was issued against Petitioner, the company does business as Company A (hereinafter Petitioner; or Company A).

granted to him by the provisions of Chapter 11, Article 10 *et seq.* of the West Virginia Code. The assessment was for the periods of July 1, 2005 to December 31, 2005, for January 1, 2006 to December 31, 2006; for January 1, 2007 to December 31, 2007; and for January 1, 2008 to June 30, 2008, for tax in the amount of \$____ and interest 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 Petitioner on July 12, 2010.

Thereafter, on September 8, 2010, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. Subsequently, notice of a hearing on the petition was sent to Petitioner, and in accordance with the provisions of West Virginia Code § 11-10A-10 (2010) an evidentiary hearing was held on August 15, 2011. At the beginning of the August 2011 hearing, the Petitioner indicated that a key witness was unavailable for the hearing and that another evidentiary hearing may need to be scheduled. Evidence was adduced at the August 2011 hearing, but at the conclusion of the hearing the record was kept open to allow the parties to confer and determine if an additional evidentiary hearing was necessary.

After an agreement of the parties, a second evidentiary hearing was held on January 18, 2012. Again, due to the disjointed nature of the hearings already held on the record, at the conclusion of the hearing the record was kept open to allow the parties to confer and determine if any additional evidence was necessary. Upon a request by the Petitioner, a final evidentiary hearing was scheduled for July 24, 2012, at 11:00 a.m. At the appointed date and time the Petitioner came, by Petitioner's Counsel, and proffered that the Petitioner intends to offer no additional evidence and requested that the matter be submitted for a decision on the record. There being no objection from the Respondent, the case became ripe for decision on that day.

FINDINGS OF FACT

1. The Petitioner is in the business of operating an exotic show bar in a West Virginia City, in a West Virginia County.

2. Upon a customer entering the establishment, the Petitioner charges a cover charge of five dollars, Monday through Friday, and a cover charge of seven dollars on Saturday and Sunday. Sales tax is remitted on this cover charge and may account for five percent of gross Sales.²

3. The Petitioner also sells alcoholic beverages and specialty dances with the performers. According to Mr. A, the manager of the club, approximately sixty percent of the business is the sale of alcoholic beverages, and approximately forty percent is specialty dances with the performers.

4. When a customer purchases a specialty dance, the customer pays for the dance through an employee of the club. The employee will then generate a receipt to give to the dancer as proof a specialty dance was purchased and performed. At the end of the night, the club will pay the dancer fifty percent of the total sales of specialty dances performed by the dancer.

5. When a customer purchases an alcoholic beverage through a dancer, the customer pays for the beverage through an employee of the club. The employee will then generate a receipt to give to the dancer as proof the drink was purchased. At the end of the night, the club

²There was no reliable testimony on what portion of total sales was attributable to this cover charge. However, Mr. A stated that total alcohol sales were sixty percent, then later stated that alcohol and cover charges were sixty-five to seventy percent. This five percent number is the difference between the sixty percent of alcohol and the sixty-five percent of alcohol plus cover charges.

will pay the dancer fifty percent of the total sales of alcoholic beverages attributable to her in cash.³

6. Thereafter, the club would deposit total receipts, less the amounts paid to the dancers, into a bank account. Deposit slips would be totaled by their accountant, Mr. B., and sales tax would be remitted by the Petitioner based solely on the gross receipts less the amount paid to the dancers.

7. During the audit, the auditor received federal income tax returns from the Respondent, along with bank deposit records, but they received no cash register tapes, sales receipts, or any reliable backup information.

8. Due to the lack of information, and the knowledge that up to fifty percent of the sales of alcohol and specialty dances were being removed from the gross sales prior to being reported, the auditors determined that the gross sales, as reported on the federal income tax return, should be doubled.

9. Additionally, the Petitioner made a number of recurring and nonrecurring purchases during the period covered by the audit, but failed to pay sales or use tax on those purchases.

10. Without sufficient records to accurately determine the amount of purchases wherein the Petitioner failed to pay sales or use tax, the auditors used a sample period from 2002 and projected those purchases to 2005, 2006, 2007, and part of 2008 as a part of the Use tax assessment, and for the remainder of 2008, 2009, and part of 2010 in the Combined Sales and Use tax assessment.

³ The testimony in this matter indicated that only three dollars of the thirteen dollars and seventy-five cent drink was paid to the dancers. However, a letter from Petitioner's Counsel, to the auditors who performed the audit in this matter indicated that fifty percent of the sales of alcohol were paid to the dancers.

DISCUSSION

I. Sales Tax

The West Virginia Code provides that "[f]or the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected 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). "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).

Likewise, the Code provides that "The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the state for all tax paid by the purchaser." W. Va. Code Ann. § 11-15-4(a) (West 2010).

The consumers sales and service tax regulations provide that "[e]ach vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price." W. Va. Code R. § 110-15-4.1. (1993). To that end, the West Virginia Code provides:

"Sales price" means the measure subject to the tax levied under article fifteen or fifteen-a of this chapter and includes the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for the following:

- (i) The seller's cost of the property sold;
- (ii) The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller and any other expense of the seller;
- (iii) Charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (iv) Delivery charges; and
- (v) Installation charges.

W. Va. Code Ann. § 11-15B-2(b)(48)(A) (West 2010) (Emphasis added).

In the instant case, it is uncontested that the Petitioner sold specialty dances and alcoholic beverages to consumers, and that it reduced the amount it collected in that sale by the amount it paid to the dancers as subcontractors of that service. Despite the clear definition of "sales price", the Petitioner reduced the total amount of the sales price by their cost of the service rendered.

Still, the Petitioner relies heavily on the West Virginia Supreme Court decision in B.B. Enterprises, Inc. v. Palmer, 214 W.Va. 571 (2003). Such reliance is misplaced. Similar to the instant case, in B.B. Enterprises the taxpayers were owners and operators of exotic show bars that employed dancers on an independent contract basis. *Id.* at 573. Patrons of these establishments could purchase a special drink or a private dance from the show bar which would entitle them to special attention or a private performance from one of the dancers. *Id.* When those purchases were made the establishment charged the patrons the requisite tax of six percent on each sale. *Id.* The show bar then tendered a portion of the money from the transaction to the dancer who provided the services to the patron. *Id.*

The Tax Department in that case argued that the transaction between the show bar and the dancer was taxable. *Id.* at 574. The Supreme Court of Appeals agreed with the taxpayers and held that the services of the dancers were purchased by the show bar for resale to the patrons as the ultimate consumers of the services. *Id.* at 577. However, the Court did not address the issue of whether sales tax was to be paid on the total amount charged to the ultimate consumer, because in that matter the seller collected and remitted sales tax on the entire purchase price without deduction for the seller's cost of services.

Thus, in that matter, the club calculated sales price without any deduction for the cost of the property (or services) sold. As noted above, in the instant matter, the Petitioner improperly deducted the amount paid to the dancers from the sales price when determining gross sales. Thus, gross sales were underreported for the period covered by the audit.

Nevertheless, the Petitioner also argues that the Tax Department did not properly account for sales that were fully reported on the federal income tax return. The Petitioner contends that the sale of some of the alcoholic beverages and the cover charge is fully accounted for in their sales tax returns, and that the sale of alcoholic beverages by the dancers only account for three dollars of the thirteen dollars and seventy-five cents charged for the drink. However, the letter from Petitioner's Counsel to the auditors at the time of the audit clearly indicated that fifty percent of the sale of specialty dances and alcoholic beverages are paid to the dancers at the end of the night, and not accounted for in the determination of gross sales.

The Respondent argues that in the instant case, insufficient records were provided to determine the precise amount of gross sales, and they used the "best information available" to arrive at the assessed amount. The Tax Commissioner's regulations provide some guidance to this principle, by stating, in pertinent part:

If records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.

W. Va. Code R. § 11 0-15-14a.1 (1993).

In this matter, the auditor testified that insufficient information was available to determine the sales tax liability of the Petitioner, so they used the best information available by doubling the total sales, as reported on their federal income tax returns. While this methodology is sufficient as to the sale of drinks and private dances, it is insufficient to determine the amount of sales attributable to the cover charge. The auditors clearly questioned the Petitioner in this matter regarding the way in which the sales of alcohol and specialty dances were accounted, and took the Petitioner at its word that fifty percent of such sales were paid to the dancers. However, the auditors appeared to make no attempt to quantify the amount of sales attributable to cover charges, or to ask about them in any way. To this end, the auditors did not use the "best information available."

The manager of the club testified that sixty percent of the total sales were attributable to alcohol. He later testified that sixty-five to seventy percent of total sales were attributable to alcoholic beverages and cover charges. Thus, this Tribunal finds that the cover charges amount to five percent of gross sales as the difference between the total sales of alcoholic beverages and the total sales of alcoholic beverages and cover charges. This Tribunal additionally finds that those charges were fully accounted for in the gross sales as shown on the Petitioner's federal income tax return. Thus, the audit notice of assessment should be recomputed to account for this five percent of gross sales.

II. Use Tax

Generally, if a business in West Virginia were to buy a case of glass cleaner from ABC Cleaning Supplies in Anytown, U.S.A., one of two things would happen. Either ABC would charge the business West Virginia sales tax or the business would later remit use tax to the Tax Commissioner pursuant to West Virginia Code Section 11-15A-2, which states:

"An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article."

W. Va. Code Ann. § 11-15A-2(a) (West 2010). In the instant case, the auditors determined that the Petitioner purchased a number of recurring and nonrecurring purchases during the period covered by the audit, but failed to pay sales or use tax on those purchases.

Without sufficient records to accurately reflect the purchases upon which the Petitioner failed to pay sales or use tax, the auditors used a sample period from 2009 due to a lack of records and projected those purchases to 2005, 2006, 2007, and part of 2008 as a part of the Use tax assessment, and for the remainder of 2008, 2009, and part of 2010 in the Combined Sales and Use tax assessment. As indicated above:

If records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.

W. Va. Code R. §110-15-14a.1 (1993).

The Petitioner offered no evidence to contradict the use tax assessment, or the use tax portion of the combined sales and use tax assessment.

III. Statute of Limitations

The Petitioner raised the statute of limitations on two grounds. First, on the use tax assessment, the Petitioner argued that the assessment was outside of the three years prescribed by W. Va. Code §11-10-15(a). That section provides, in pertinent part:

"The amount of any tax, 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 shall be assessed within three years after the date the return was filed (whether or not such return was filed on or after the date prescribed for filing): *Provided*, That in the case of a false or fraudulent return filed with the intent to evade tax, or in case no return was filed, the assessment may be made at any time "

W. Va. Code Ann. § 11-10-15(a) (West 2010).

In the instant case, the State Tax Department proffered that no use tax returns were filed by the taxpayer during the years indicated in the use tax assessment. The Petitioner offered no evidence that it filed use tax returns in the instant case. Therefore, it seems clear that in this matter no return was filed, and the assessment could be made at any time.

Similarly, the Petitioner argues that a portion of the sales tax assessment, from January 1, 2007 through June 30, 2007, was outside the three year statute of limitations on assessment. The Respondent proffered that with regard to sales tax returns, such returns were timely filed, but that the statute of limitations does not begin to run until the filing of the annual return.

As indicated above, "[t]he amount of any tax, 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 shall be assessed within three years after the date the return was filed" . . . W. Va. Code Ann. § 11-10-15(a) (West 2010). In the instant matter, the Petitioner seemingly filed its monthly returns pursuant to West. Virginia. Code Section 11-15-16(c), which provides, in pertinent part:

"The taxpayer shall, on or before the twentieth day of each month, make out and mail to the Tax Commissioner a return for the preceding month, in the form prescribed by the Tax Commissioner, showing:

- (1) The total gross proceeds of the vendor's business for the preceding month;
- (2) The gross proceeds of the vendor's business upon which the tax is based;
- (3) The amount of the tax for which the vendor is liable; and
- (4) Any further information necessary in the computation and collection of the tax which the Tax Commissioner may require, except as otherwise provided in this article or article fifteen-b of this chapter."

W. Va. Code Ann. § 11-15-16(c) (West 2010). However, as the Respondent points out, an additional return was required by the Legislature to account for the payment of sales and use tax.

The relevant section provides, in pertinent part:

"On or before thirty days after the end of the tax year, each person liable for the payment of any tax due under this article shall make and file an annual return in such form as may be required by the tax commissioner, showing:

- (1) Total gross proceeds of his business for preceding tax year
- (2) Gross proceeds upon which the tax for that year was computed, and
- (3) Any other information necessary in the computation or collection of the tax that the tax commissioner may require."

W. Va. Code Ann. § 11-15-21(a)(West 2010).

Since the Petitioner was required by statute to file an annual return, and in fact did file such a return in January of 2008, the Tax Commissioner is authorized to assess the Petitioner for the sales tax within three years of the date the annual return was filed for the entire time period covered by that return. Since the assessment of sales tax was clearly made within three years of January of 2008, it was within the statute of limitations on assessment.

CONCLUSIONS OF LAW

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 or

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

2. "For the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected 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 or article fifteen-b of this chapter." W. Va. Code Ann. § 11-15-3(a) (West 2010).

3. "The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the state for all tax paid by the purchaser." W. Va. Code Ann. § 11-15-4 (West 2010).

4. "Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price." W. Va. Code R. § 110-15-4.1. (1993).

5. "'Sales price' means the measure subject to the tax levied under article fifteen or fifteen-a of this chapter and includes the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for . . . service cost." W. Va. Code Ann. § 11-15B-2(b)(48)(A) (West 010).

6. The Supreme Court of West Virginia's ruling in B.B. Enterprises, Inc. v. Palmer, 214 W.Va. 571 (2003), does not authorize a gentleman's club to deduct the cost of services from

the "sales price" for purposes of calculating the sales tax due, but only exempts the purchase of the service by the club for resale to the patron as a purchase for resale.

7. "If records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information." W. Va. Code R. § 110-15-14b.4. (1993).

8. The Petitioner failed to meet its burden with regard to whether the auditors used the "best information available" in determining the incorrectly reported sales of alcohol and specialty dances.

9. The Petitioner has met its burden with regard to whether the auditor used the "best information available" in determining the amount of sales attributable to the correctly reported amount of cover charges, by showing that five percent of gross sales as reported on the sales tax returns were properly accounted for in its sales tax returns.

10. "An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software, or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article." W. Va. Code Ann. § 11-15A-2(a) (West 2010).

11. The Petitioner failed to meet its burden by failing to provide evidence to show the actual amount of its purchases that were subject to either the sales tax or the use tax.

12. "The amount of any tax, 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 shall be assessed within three years after the date the return was filed (whether or not such return was filed on or after the date prescribed for filing): *Provided*, That in the case of a false or fraudulent

return filed with the intent to evade tax, or in case no return was filed, the assessment may be made at any time." W. Va. Code Ann. § 11-10-15(a) (West 2010).

13. Where, as here, the Petitioner fails to file a return to remit use tax on purchases, the Tax Commissioner is authorized to make an assessment at any time without regard to the three year statute of limitations.

14. "The taxpayer shall, on or before the twentieth day of each month, make out and mail to the Tax Commissioner a return for the preceding month" W. Va. Code Ann. § 11-15-16(c) (West 2010).

15. "On or before thirty days after the end of the tax year, each person liable for the payment of any tax due under this article shall make and file an annual return in such form as may be required by the tax commissioner" W. Va. Code Ann. § 11-15-21(a) (West 2010).

16. Where, as here, the Petitioner files a monthly sale and use tax return, along with an annual sales and use tax return, as required by law, the Tax Commissioner is authorized to issue an assessment within three years of the date any annual return was filed for the entire time period covered by that return.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the sales tax assessment, issued against the Petitioner on July 12, 2010, for a total tax, plus interest and additions due of \$____ is hereby **MODIFIED** to reflect as of January 31, 2013, a tax due of \$____, and interest due of approximately \$____; and additions to tax of \$____, for a total assessed liability of \$____; the combined sales and use tax assessment, issued against the Petitioner on July 12, 2010, for a total tax, plus interest and additions due of \$____ is hereby **MODIFIED** to reflect as of January 31, 2013, a tax due of \$____, interest due of \$____,

and additions to tax of \$____, for a total assessed liability of \$____; and the use tax assessment, issued against the Petitioner on July 12, 2010, for a total tax, plus interest and additions due of \$____, is hereby **AFFIRMED**; bringing the total assessed liability, as found in this Final Decision, to \$____.

Interest continues to accrue on this unpaid tax until this liability is fully paid. W. Va. Code Ann. § 11-10-17(a) 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS

By:

A. M. "Fenway" Pollack⁴
Chief Administrative Law Judge

Date Entered

⁴ Administrative Law Judge, Matthew R. Irby, heard this matter and wrote this decision; however, Judge Irby is no longer employed with the West Virginia Office of Tax Appeals. Therefore, this decision was signed by Chief Administrative Law Judge A. M. "Fenway" Pollack