

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – ASSESSMENT REVISED IN PART – As a result of Petitioners' business having been operated six (6) days a week rather than seven (7) as found by the tax auditor, the assessment will be revised for the years 2000 and 2001; however, no such revision is applicable for the year 1999 because Petitioners clearly understated sales for that year as reported on the 1999 1040X (amended federal income tax return).

FINAL DECISION

The Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioners.

Thereafter, on August 16, 2002, the Director of this Division of the Commissioner's Office issued a consumers' sales and service tax assessment against Petitioners. This assessment was for the period of January 1, 1999 through April 30, 2002, for tax, interest, through April 30, 2002, and additions to tax, for a total assessed liability.

Thereafter, by mail postmarked October 9, 2002, the Petitioners timely filed a petition for reassessment.

During the course of the hearing, Commissioner's counsel conceded that three (3) consumers' sales and service tax payments remitted by the Petitioners had never been credited, the same having been received on May 5, 2002 and should be applied: January 2002; February 2002 and February, 2002. The same have now been applied in lieu of the estimates for those months.

At the close of the hearing the administrative law judge queried Petitioners' counsel to explain in a post hearing exhibit a certain discrepancy raised by

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Commissioner's counsel concerning the year 1999. No such response was ever received.

FINDINGS OF FACT

1. Petitioners' restaurant was open six (6) days a week during the years 1999, 2000, and 2001, but was open seven (7) days a week in 2002 because a nearby competitor was closed.
2. It was the Petitioners' practice, until advised otherwise by the tax auditor, to write down daily sales figures instead of utilizing cash register tapes.
3. At least for the year 1999 Petitioners' sales figures, as per their accountant, were some several thousand dollars in excess of what they reported on their 1999 1040X (amended federal income tax return.)

DISCUSSION

The sole issue is whether the Petitioners have shown that the assessment is incorrect and contrary to law, in whole or in part, as required by W. Va. Code § 11-10A-10(e) and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

As per Petitioners' testimony, the assessment will be modified to reflect the fact that the restaurant was operated six (6) days a week rather than seven (7) days a week during the years 2000 and 2001. However, no such modification will be applied to tax year 1999 because Petitioners' sales figures were clearly understated for that year, as its 1040X (amended federal income tax return) differed from the sales figures presented at the hearing.

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-taxpayer to show that the assessment is incorrect and contrary to law, in whole or in part. See W. Va. Code § 11-10A-10(e) and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioners-taxpayers in this matter have carried the burden of proof with respect to the issue of whether the restaurant operated fewer days a week than that concluded by the tax auditor, for a portion of the audit period.

3, On the other hand, the Petitioners failed to carry the burden of proof with respect to the issue of whether the sales figures for the year 1999 were inflated because their own calculations presented at hearing were several thousand dollars in excess of what they reported on their 1040X (amended federal income tax return.)

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioners for the period of January 1, 1999 through April 30, 2002, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for tax, interest, on the revised tax, updated through September 30, 2003, and additions to tax, for a total revised liability.