

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**ICA EFiled: Oct 23 2023
04:23PM EDT
Transaction ID 71168420**

J.F. ALLEN COMPANY,

Petitioner,

v.

No. 23-ICA-327

**MATHEW IRBY, WEST VIRGINIA STATE
TAX COMMISSIONER,**

Respondent.

**PETITIONER'S BRIEF IN SUPPORT OF
APPEAL OF ADMINISTRATIVE DECISION**

Floyd M. Sayre, III, Esq.
WVSB #4342
Bowles Rice LLP
101 South Queen Street
Post Office Drawer 1419
Martinsburg, West Virginia 25402-1419
(304) 264-4226

Counsel for Petitioner

TABLE OF CONTENTS

I. STATEMENT OF THE CASE.....1

II. STATEMENT OF FACTS3

III. SUMMARY OF POINTS AND AUTHORITIES.....5

IV. POINTS AND AUTHORITIES6

A. THE ADMINISTRATIVE DECISION IS ERRONEOUS AND APPLIED AN INCORRECT LEGAL STANDARD IN CONCLUDING THAT THE PETITIONER FAILED TO COLLECT AND/OR REMIT CONSUMERS SALES AND SERVICE AND OR USE TAX DUE ON ALL PURCHASES SUBJECT TO TAX BECAUSE THE PETITIONER’S PURCHASES INCLUDED IN THE ASSESSMENT WERE FOR SERVICES TO A PUBLIC UTILITY SERVICE OR THE OPERATION OF A UTILITY SERVICE OR THE OPERATION OF A UTILITY BUSINESS. W. VA. CODE § 11-15-9(b)(2).6

V. CONCLUSION.....8

CERTIFICATE OF SERVICE**Error! Bookmark not defined.**

TABLE OF AUTHORITIES

Cases

W. Va. Code § 11-15-9(b)(2)..... 6, 7

**PETITIONER’S BRIEF IN SUPPORT OF
APPEAL OF FROM ADMINISTRATIVE DECISION**

I. STATEMENT OF THE CASE

In an assessment directed to J. F. Allen Inc.(referred to herein as “Petitioner”), dated August 25, 2021, the State Tax Commissioner of West Virginia (referred to herein as the “Respondent”) asserted that the Petitioner owed combined consumers sales and service and use tax in the amount of \$131,316.41, together with interest thereon of \$27,814.43 and additions of \$32,829.17, for a total assessed liability of \$191,960.01 (referred to herein as “the Assessment”). (State’s Exhibit No. 1, D.R. 0190).

The Petitioner paid the amount of the Assessment and filed the Petition for refund for taxes associated with (1) \$16,525.03 due to charges on the Elkins Rail Trail, (2) \$5,935.12 due to charges on trucks used in our quarrying/crushing operations, (3) \$7,886.09 due to charges on equipment repairs consumed on non-taxable public service district (“PSD”) jobs, and (4) \$12,954.21 due to an incorrect adjustment of the 2018 asphalt safe-harbor pricing by the on-site auditor. The safe-harbor adjusted assessment for 2018 should be \$6,258.62, and the Additions in the amount of \$32,829.17 (D.R. 0300)

Prior to the hearing, the Petitioner and Respondent reached a settlement on the issues dealing with the Elkins Rail Trail and the adjustment for the 2018 asphalt safe-harbor pricing. (D.R. 0079)

The Assessment covers the period January 1, 2018 through March 31, 2021 (the “Audit Period,” D.R. 0190), and is the result of an audit of the Petitioner’s records by the Tax Commissioner’s Auditing Division (referred to herein as the “Auditing Division”), which generally alleges that during that period, the Petitioner erroneously under-collected and under-remitted use tax due on purchases for repair and services on trucks used in quarrying/crushing

operations (D.R. 0192, D.R. 0313-0317) and on equipment repairs consumed on non-taxable PSD jobs. D.R. 0192, D.R. 0318-0322)

On or about October 14, 2021, the Petitioner timely filed its petition for reassessment/refund (the “Petition”), challenging the Assessment, to which Respondent timely answered. A virtual hearing on the Petitioner’s petition was convened by the Honorable A. M. “Fenway” Pollack, Chief Administrative Law Judge of the Office of Tax Appeals, in Charleston, West Virginia, on September 8, 2022 (the “Hearing”). At the Hearing, the Auditing Division, through its counsel, presented the testimony of one (1) witness and introduced one (1) exhibit into the record. The Petitioner, through its counsel, presented the testimony of two (2) witnesses and introduced three (3) exhibits into the record. Upon receipt of a transcript of the Hearing, Your Honor, by letter, advised counsel of a schedule by which briefs were to be filed.

Following the preparation of a transcript and the filing of briefs, the matter was then submitted for an administrative decision on January 31, 2023. On June 22, 2023, Chief Administrative Law Judge Pollack issued an administrative decision, here being appealed from, which granted the refund for the portion of the Assessment against it for repairs and maintenance to its equipment on its quarry site and the portion of the penalties associated with that portion of the Assessment (D.R. 0016-0017), and denied the refund for the portion of the Assessment against it for repairs and maintenance to its equipment while performing contractual work for PSDs and municipalities assessment in the amount of \$7,886.09. (D.R. 0016)

On July 24, 2023, the Petitioner timely filed a Petition for Appeal of Administrative Decision with this Court. By Order dated August 2, 2023, this Court advised the parties of a schedule by which briefs were to be filed. Pursuant to that schedule, the Petitioner now respectfully submits its initial brief.

II. STATEMENT OF FACTS

1. The Petitioner is a corporation incorporated in 1946, with its principal office located in Buckhannon, West Virginia. (D.R. 0107)

2. The Petitioner has operations located in Elkins, Buckhannon, and Saltwell, West Virginia. (D.R. 0107)

3. The Petitioner's principal business is an aggregate and asphalt supplier and also does heavy highway commercial construction and site development for the oil and gas industry, as well as a utility division that focuses on municipalities and PSD work. (D.R. 0107)

4. Mr. Darren Glover prepared a schedule of all repairs made to equipment used on non-taxable PSD utility jobs and, pursuant to the agreement from the 2014 audit, prepared an allocation of those purchases, based upon use on the non-taxable versus taxable jobs. Said schedule was attached to the Petition for Reassessment as Schedule 3 . (Petitioner's Exhibit 2, D.R. 0184)

5. All of the purchases contained in Petitioner's Exhibit 2 were purchases of consumable equipment, supplies and materials used on jobs for the PSD. (D.R. 0088)

6. The allocations were tracked on the hours of use of the equipment, based on job location. (D.R. 0089)

7. The entire purchase was considered exempt if the equipment was used for the entire year at a tax-exempt PSD job. (D.R. 0090)

8. If the equipment was used for a portion of the year at a tax-exempt PSD job, the purchase was allocated between the exempt use and taxable use, and tax would be paid on the allocated portion. (D.R. 0090)

9. The allocation methodology was based upon the settlement of the 2014 appeal of the prior audit by J.F. Allen. (D.R. 0090)

10. The information contained in Exhibit 2 is the apportionment of consumable products purchased by J.F. Allen and used on a non-taxable PSD utility job. (D.R. 0090)

11. The projects are water line or sewer jobs that are contracted by a municipality such as the City of Barracksville or Fairmont, Bridgeport, Charleston, etc., or rural PSDs like Putnamville Public Service District or Adrian Public Service District. (D.R. 0105)

12. All projects are bid projects and as part of the bid projects, the Petitioner received tax-exempt certificates from these utilities. (D.R. 0105)

13. Once the owner lets the bid, the equipment to be used on the project is identified. (D.R. 0108)

14. If the Petitioner is successful, that equipment is mobilized to that job and used through the course of the job. (D.R. 0109)

15. Most of the jobs are six months to a year; at times, they exceed a year. Then, oftentimes, the equipment will be transported at the completion of one job to the next successful PSD or municipal job that the Petitioner is able to win. (D.R. 0109).

16. The Petitioner breaks the job down by labor, by materials, by equipment used, fuel and by repair parts that, from historical knowledge, are anticipated will be needed. (D.R. 0110)

17. For example, the equipment is serviced every 500 hours, so there are fuel filters, oil filters and things of that nature. They know how many bucket teeth we will need throughout the use or maybe cutting edges or hard-facing welding wire. (D.R. 0110)

18. The system allows the Petitioner to track each piece of equipment by hour on the job, so the Petitioner knows how many hours that equipment is used on that particular job what consumables were used with it, and that all gets tracked to the job. (D.R. 0110)

19. The tax-exempt repairs are like a blown hose that may occur on the job or some hard-facing on the bucket because the bucket is getting worn, or a replaced tooth that might have been damaged at the job. (D.R. 0113)

20. Other tax-exempt purchases are for consumables like oil and filters for the equipment that stays with the PSD and the municipality until the project is complete. (D.R. 0113)

21. In 2014, the Petitioner was audited concerning the same issue. (D.R. 0119)

22. The Petitioner and Tax Department agreed on an apportionment percentage based upon the use of the equipment on non-taxable PSD jobs and taxable jobs. (D.R. 0120)

23. Tax Department, based on the hours of usage where the PSD equipment was being used, a recalculation was done of the amounts that were assessed and determined an apportionment percentage. (D.R. 0133).

24. After this agreement was reached, the Petitioner adopted the apportion of the percentage of these repairs based on this agreement. (D.R. 0135)

25. The Auditor was aware of any agreement reached between the Petitioner and the State Tax Department concerning the purchases and the apportionment factor. (D.R. 0137)

26. The Auditor received the documentation concerning the agreement and the apportionment; however, the supervisor determined that the State Tax Department would change how they would treat these repairs and determined they were all taxable, without prior notification to the Petitioner. (D.R. 0137)

III. SUMMARY OF POINTS AND AUTHORITIES

A. THE ADMINISTRATIVE DECISION IS ERRONEOUS AND APPLIED AN INCORRECT LEGAL STANDARD IN CONCLUDING THAT THE PETITIONER FAILED TO COLLECT AND/OR REMIT CONSUMERS SALES AND SERVICE AND OR USE TAX DUE ON ALL PURCHASES SUBJECT TO TAX BECAUSE THE PETITIONER'S PURCHASES INCLUDED IN THE ASSESSMENT WERE FOR

SERVICES TO A PUBLIC UTILITY SERVICE OR THE OPERATION OF A UTILITY SERVICE OR THE OPERATION OF A UTILITY BUSINESS. W. VA. CODE § 11-15-9(b)(2).

IV. POINTS AND AUTHORITIES

- A. **THE ADMINISTRATIVE DECISION IS ERRONEOUS AND APPLIED AN INCORRECT LEGAL STANDARD IN CONCLUDING THAT THE PETITIONER FAILED TO COLLECT AND/OR REMIT CONSUMERS SALES AND SERVICE AND OR USE TAX DUE ON ALL PURCHASES SUBJECT TO TAX BECAUSE THE PETITIONER'S PURCHASES INCLUDED IN THE ASSESSMENT WERE FOR SERVICES TO A PUBLIC UTILITY SERVICE OR THE OPERATION OF A UTILITY SERVICE OR THE OPERATION OF A UTILITY BUSINESS. W. VA. CODE § 11-15-9(b)(2).**

The Respondent's witness testified that she was not aware of the agreement reached with the Petitioner and the Respondent concerning the allocation of the taxability of consumables and repairs made on equipment that the Petitioner used on tax-exempt public utility jobs. However, without prior notice to the Petitioner, the Respondent reversed the prior agreement and determined that all of the purchases were taxable.

The allocation that the Petitioner and Respondent agreed to was set forth in Petitioner's Exhibit 2 (D.R. 0184):

The tax department assessed tax on repairs made to equipment used on non-taxable PSD utility jobs. Their contention is that these materials are not entitled to the same exemption as other materials purchased for the non-taxable jobs because the materials are not left with the job, per Title 110 Interpretive Rule, Series 151. JFA's contention is that these purchases are non-taxable because they are supplies and services used to keep equipment running to perform the work for the tax-exempt job. Section 110-15j-5.1.1 exempts a rental piece of equipment from use tax if it is used on a non-taxable PSD job even though it too does not become part of the completed project. Maintaining a contractor-owned piece of equipment with consumable supplies and repairs on a tax-exempt job should follow the same standard. We filed a similar appeal to a 2014 tax assessment. Prior to a ruling from the Office of Tax Appeals, the tax department agreed with JFA's contention and simply asked their auditor to verify that the equipment that had been repaired was actually assigned to non-taxable jobs based on company records. Once that process was complete, the tax

department refunded a substantial sum, plus interest, of what had been previously assessed. Based on JFA's understanding of section 110-151-5.1.1 and the fact that the tax department relented to JFA's appeal of the 2014 audit, JFA continued to treat applicable repairs as non-taxable. JFA requests a refund of the assessment related to these types of repairs and would also like a formal determination made so that future situations such as this do not continue to arise."

This was memorialized in the letter dated June 9, 2016 from the legal division of the State Tax Department (Petitioner's Exhibit 3, D.R. 0189)

West Virginia Code § 11-15-9(b)2 "specifically exempts all sales of services, machinery, supplies, and materials directly used or consumed in the activities ... of a public utility service or the operation of a utility service or the operation of a utility business, in the businesses or organizations named in this subdivision" The uncontroverted testimony of the Petitioner was that they were providing services to a PSD, that the service was bid, and that the equipment used was identified in the bid.

The purchases were purchased at the time the equipment was on the tax-exempt worksite and, if not completely consumed on the site, were allocated by the agreement reached with the Respondent in the settlement of the 2014 audit. Further, the evidence showed the allocation was based on the actual time the equipment was on the tax-exempt job site versus a taxable site. (D.R. 0091)

The Petitioner testified that the repair parts and materials were included in the bids to the PSD/Municipal clients (D.R. 0110) "We break the job down by labor, by materials, by equipment used, by fuel and by repair parts that we anticipate from historical knowledge what that equipment will need." As the filters, belts, and bucket teeth are used, they are tracked and charged by equipment type to the job. The consumables that are used gets tracked to the job and are purchased by the exempt entity.

JUDGE POLLACK: So, the layman's version then would be if I'm Smithfield PSD soliciting bids to fix my sewage system in Smithfield, I am going to get a bid from J.F. Allen that's going to have all of this broken out in great detail?

MR. HADJIS: They ask for it to be broken out by the line items of the bid. So, they'll ask for it by linear feet, what is your price for linear feet for say ten-inch pipe. What is your price to set a manhole eight feet deep however the plans dictate it. It's up to us as the contractor to determine the cost of those materials and the cost of the equipment used and the labor required to install that pipe. That gets aggregated into a pipe price, a manhole price, etc.

JUDGE POLLACK: So, here's what I'm asking, Mr. Hadjis. The exemption—direct use exemption, that we're talking about, is for—I'm going to read directly from the statute. Sales of services, machinery, supplies and materials directly used or consumed, etc. So, are you selling—? So, here's my question. As those terms are used in West Virginia law, are you—when you're doing this PSD work, are you selling them services, machinery, supplies or materials or all—any combination of the same?

MR. HADJIS: All of that is sold to the municipality....

JUDGE POLLACK: Okay. Well, all right. One other quick question before we let you resume your life. When you do the bids on these PSD jobs or municipality jobs, you are in your bid package—I know you said this but I want to make sure I understood it. In your bid package, part of the bid is these repairs—anticipated repairs.

MR. HADJIS: Yes.

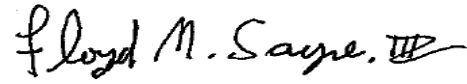
JUDGE POLLACK: To these pieces of equipment. (D.R. 0117)

V. CONCLUSION

Based on the evidence in the record and on the foregoing points and authorities, it is respectfully submitted that the administrative decision is in error and should be reversed and the assessment be abated in its entirety.

J.F. ALLEN COMPANY

Petitioner
By Counsel

A handwritten signature in black ink that reads "Floyd M. Sayre, III". The signature is written in a cursive style with a horizontal line underneath it.

Floyd M. Sayre, III, Esquire
West Virginia Bar No. 4342
Bowles Rice LLP
101 South Queen Street
Post Office Drawer 1419
Martinsburg, West Virginia 25402
(304) 264-4226

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

J.F. ALLEN COMPANY,

Petitioner,

v.

No. 23-ICA-327

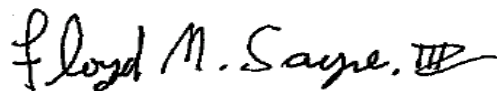
**MATHEW IRBY, WEST VIRGINIA STATE
TAX COMMISSIONER,**

Respondent.

CERTIFICATE OF SERVICE

I, Floyd M. Sayre, III, Esquire, do hereby certify that a true and exact copy of the foregoing *Petitioner's Brief In Support Of Appeal Of Administrative Decision* has been served, October 23, 2023, upon the following, via efile, on the following:

Sean M. Whelan (WVSB#12067)
Deputy Attorney General
Kevin C. Kidd (WVSB# 13642)
Assistant Attorney General
1900 Kanawha Boulevard,
East Building 1, Room W-435
Charleston, West Virginia 25305
Tel: 304-558-2522
Email: Sean.M.Whelan@wvago.gov
Kevin.C.Kidd@wvago.gov



Floyd M. Sayre, III