

REDACTED DECISION – DK# 16-056 CU-C

BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON June 18, 2018
ISSUED ON OCTOBER 4, 2018

NOTE: THIS ADMINISTRATIVE DECISION WAS APPEALED BEYOND THE
OFFICE OF TAX APPEALS

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On December 21, 2015, the Auditing Division of the West Virginia State Tax Department (the Tax Commissioner or Respondent) issued an Audit Notice of Assessment against the Petitioner. 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 combined sales and use tax for the period January 1, 2011, through September 30, 2015, for tax in the amount of \$_____ and interest in the amount of \$_____, for a total assessed tax liability of \$_____.

Thereafter, on February 5, 2016, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010). After the parties were unable to settle the matter without the need for an evidentiary hearing, they agreed that there were no questions of material fact, and that the matter could be resolved by the filing of legal briefs. Pursuant to a briefing schedule, the last brief was filed on June 18, 2018, and the matter became ripe for a decision at that time

FINDINGS OF FACT

1. The Petitioner is a single member LLC. ¹ *See* Affidavit of Xxx Xxx, April 4, 2018.
2. The main business activity of the Petitioner is home inspection services. Id.
3. The Petitioner's sole member is Xxx Xxx. Id.
4. During the time periods in question in this matter, Mr. Xxx was a home inspector, certified by the West Virginia State Fire Marshal's Office. Id.
5. During the time periods in question in this matter, it was illegal to perform home inspections for compensation in West Virginia, unless an individual obtained a certification from the State Fire Marshal. *See* West Virginia Code Section 29-3-5b (2018) & West Virginia Code of State Rules 87-5-1 *et seq* (2006).
6. In order to obtain certification as a home inspector in West Virginia, an individual must have 1) obtained a high school diploma or its equivalent; 2) passed the National Home Inspector Examination, or a comparable examination, as determined by the Fire Marshal; 3) either conducted business as a home inspector for three years prior to the promulgation of Series 5, Title 87, or prove satisfactory completion of at least eighty (80) hours of instruction directly related to the performance of home instruction, as determined by the State Fire Marshal; and 4) maintain and present proof of general liability insurance.²
7. In order to maintain certification as a home inspector in West Virginia, an individual must complete sixteen (16) hours of continuing education annually.

¹ The Petitioner's sole member signed an affidavit on April 4, 2018, which establishes the key relevant facts in this matter.

² In 2014, the Legislative Rules regarding certification of home inspectors were amended, to include, among other things, a new certification requirement regarding fingerprinting of applicants. That amendment is not germane to this decision.

DISCUSSION

The Petitioner in this matter claims that the portion of the assessment against it regarding the collection of sales taxes for the home inspection services it provides is in error, because it is providing a professional service.

The law of this case starts with West Virginia Code Section 11-15-8. Article 15 relates to West Virginia's consumers sales and service tax and Section 8 states that sales tax must be collected when providing services, but it also provides an exception for professional and personal services. "The provisions of this article apply not only to selling tangible personal property and custom software, but also to the furnishing of all services, except professional and personal services" W. Va. Code Ann. §11-15-8 (West 2010). Professional services is not defined in Chapter 11, so we must turn to Title 110, Series 15 of the West Virginia Code of State Rules which contains the legislative rules for combined consumers sales and service and use tax. There, professional service is defined as: "'Professional service' means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in West Virginia Code Section 11-15-1 et seq., to be professional. See Section 8.1.1 of these regulations." W. Va. Code R. §110-15-2.65 (1993). Section 8.1.1 of Series 15, Title 110 of the Code of State rules provides further guidance.

Professional services, as defined in Section 2 of these regulations, are rendered by physicians, dentists, lawyers, certified public accountants, public accountants, optometrists, architects, professional engineers, registered professional nurses, veterinarians, licensed physical therapists, ophthalmologists, chiropractors, podiatrists, embalmers, osteopathic physicians and surgeons, registered sanitarians, pharmacists, psychiatrists, psychoanalysts, psychologists, landscape architects, registered professional court reporters, licensed social workers, enrolled agents, professional foresters, licensed real estate appraisers and certified real estate appraisers licensed in accordance with W. Va. Code '37-14-1 et seq.,

nursing home administrators, licensed professional counselors and licensed real estate brokers The determination as to whether other activities are "professional" in nature will be determined by the State Tax Division on a case-by-case basis unless the Legislature amends W. Va. Code '11-15-1 et seq. to provide that a specified activity is "professional." When making a determination as to whether other activities fall within the "professional" classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements.

W. Va. Code R. §110-15-8.1.1.1 (1993).

Obviously, home inspectors are not listed as providing a professional service in Section 8.1.1.1. Nor does the Petitioner argue that they were recognized as such under the common law.³ As stated above, the West Virginia Legislature has not determined any activity to be professional in Article 15 of Chapter 11. It should be noted that the only place the Legislature has determined what professions are professional is in Section 8.1.1.1, which, as a properly promulgated legislative rule, has the force and effect of law. *See e.g. Appalachian Power Company v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995). As a result, we are left with the last two sentences of Section 8.1.1.1. and the Legislature's grant to the Tax Commissioner of the discretionary authority to determine whether other activities are professional.

As one might expect, the Petitioner argues that the services it provides by and through Mr. Xxx meet the four part "test" contained in Section 8.1.1.1. The Petitioner argues as such because Mr. Xxx is certified as a home inspector by the State Fire Marshal.

³ Interestingly, the Petitioner's Reply Brief contains a section with the heading "Petitioner's Services are Recognized as Professional Services in Common Law". However, it does not argue as such, but rather argues that other states have recognized home inspectors as professional by case law. To the extent the Petitioner is arguing that case law from other jurisdictions constitutes a "natural and logical derivative" of the common law, as that term is used in Section 2.65 of Series 15 of Title 110, we are unpersuaded.

In order to obtain certification as a home inspector in West Virginia, an individual must have 1) obtained a high school diploma or its equivalent; 2) passed the National Home Inspector Examination, or a comparable examination, as determined by the Fire Marshal; 3) either conducted business as a home inspector for three years prior to the promulgation of Series 5, Title 87, or prove satisfactory completion of at least eighty (80) hours of instruction directly related to the performance of home instruction, as determined by the State Fire Marshal; and 4) maintain and present proof of general liability insurance. *See* W. Va. Code R. § 87-5-4 (August 1, 2006).

In its initial brief, the Petitioner argues that the regulatory requirements contained in Section 4 of Series 5, Title 87 of the Code of State Rules dovetail perfectly with our purported four-part test contained in Section 8.1.1.1. Specifically, it argues that Mr. Xxx has met the minimum educational requirements, is subject to a nationally recognized standard of performance, by the necessity of having to pass a national examination, he must be licensed, at the state level, and he is subject to continuing educational requirements.

Conversely, the Tax Commissioner argues that this is not the case. In fact, the Tax Commissioner argues that in order for an activity to be considered professional, it must be done by someone with a four-year college degree. In making this argument, the Tax Commissioner relies on a decision issued by this Tribunal in 2006. The Tax Commissioner is correct in this regard. In Docket No. 06-340 C, this Tribunal stated:

In determining the level of education required for an occupation to be considered professional for purposes of the exception contained in W. Va. Code § 11-15-8, it must be proven by a taxpayer claiming the benefit of the exception that a four-year college degree is required for the practice of said occupation.

West Virginia Office of Tax Appeals Final Decision Docket No. 06-340 C Conclusion of Law No.

6. In its initial brief, the Petitioner also directs us to a previous decision from this Tribunal, where again, we characterized the discretionary authority granted to the Tax Commissioner in Section

8.1.1.1. as a “mandatory four-part test”. *See* West Virginia Office of Tax Appeals Final Decision Docket Nos. 03-418 C & 03-487 RC.

Unfortunately, all the Office of Tax Appeals decisions relied upon by the parties in this matter incorrectly state the law. In no way, shape or form does Section 8.1.1.1 state that in order for an activity to be considered professional it must be performed by someone with a four-year degree. Therefore, Conclusion of Law 6, in Docket No. 06-340 C is **expressly overruled**. Additionally, Section 8.1.1.1 cannot correctly be characterized as a mandatory four-part test. So again, to the extent that the final decisions in Docket Nos. 03-418 C & 03-487 RC stand for that proposition, they too are **expressly overruled**.

Having hopefully cleared up that issue, we must still decide who prevails in this matter, and we believe it is the Tax Commissioner. We rule as such because the Petitioner has not argued, let alone shown, that the Tax Commissioner has abused the discretion granted to him by Section 8.1.1.1. As a properly promulgated Legislative Rule, in Section 8.1.1.1 **the Legislature**⁴ does three things. First, it identifies thirty-two (32) professions that are providing professional services. Second, it states the obvious, namely that, as it is its prerogative, the Legislature may add other professions to the list anytime it sees fit. And finally, it gives the Tax Commissioner the ability to add other professions to the list. And it is in this grant of discretion that a critical point must be highlighted. This Tribunal is of the opinion that Section 8.1.1.1 is a clear grant of discretion to the Tax Commissioner. The Legislature could have given the Tax Commissioner the discretion to add other activities to the list, but at the same time controlled the conditions. To do this it could have said:

⁴ While it may be obvious to some, it bears repeating that legislative rules, that have gone through legislative rule making, are an act of the Legislature, no matter to what extent they were drafted by the executive branch. *See Appalachian Power Company v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995)(being an act of the West Virginia Legislature, legislatively approved rules are entitled to more than deference, they are entitled to controlling weight.)

The determination as to whether other activities are "professional" in nature **shall** be determined by the State Tax Division on a case-by-case basis. When making a determination as to whether other activities fall within the "professional" classification, the Tax Department **shall** consider

- 1) _____
- 2) _____
- 3) _____
- 4) _____

To be clear, even if Section 8.1.1.1 contained the language above, it still would be a grant of discretion to the Tax Commissioner, but we would have a true four-part test. However, by its use of the phrase “the Tax Department will consider such things as” the Legislature has not created a true set of factors that **must** be considered by the Tax Commissioner. This Tribunal is of the opinion that such phrasing gives the Tax Commissioner broader discretion, and that the question before us is, has the Tax Commissioner abused the discretion he has been granted?⁵

While we were unable to find any syllabus points from the West Virginia Supreme Court of Appeals on this topic, it has, on many occasions since 1995, discussed what constitutes an abuse of discretion. “In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.” Gentry v. Mangum, 195 W. Va. 512, 520, 466 S.E.2d 171, 179 (1995). This dicta is quite similar to the discussion regarding an abuse of discretion which is found in secondary sources such as treatises.

In determining whether agency action constitutes an abuse of discretion, the court must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment. In so doing, the court must engage in a

⁵ Because the Tax Commissioner is not interpreting Section 8.1.1.1., the question of whether the Tax Commissioner’s actions should be afforded any deference will not arise.

substantial searching and careful inquiry into the facts. An agency abuses its discretion in reaching a decision if it omits from its consideration factors that the legislature intended the agency to consider, includes in its consideration irrelevant factors, or reaches a completely unreasonable result after weighing only relevant factors.

73A C.J.S. Public Administrative Law and Procedure § 503.

Assuming *arguendo* that we can call the four areas mentioned in Section 8.1.1.1. “factors,” not one of the four is more deserving of significant weight than another. Nor has the Tax Commissioner considered an improper factor. Ultimately, the question for this Tribunal is, has the Tax Commissioner made a “serious mistake” or reached “a completely unreasonable result?” We believe he has not done so. The Tax Commissioner argues that he has looked at the activities conducted by Mr. Xxx and has found them not meriting the designation “professional” despite the necessity of certification by the State Fire Marshal. Specifically, the Tax Commissioner argues that a home inspector in West Virginia does not need to be licensed on a national level. The Tax Commissioner also expressed concerns about the form and substance of the test that home inspectors must take. Finally, while the Tax Commissioner’s reliance on this Tribunal’s erroneous previous decision establishing an educational requirement may have been misplaced, his concerns regarding the level of education one needs to be a home inspector is noted. We would not call it a serious mistake or unreasonable result to determine that an activity that can be done by someone with a GED degree is not professional.

We take note of the Petitioner’s argument that some of the other professions already listed in Section 8.1.1.1 do not require a four-year degree. Again, Section 8.1.1.1 is a properly promulgated legislative rule, which has gone through legislative rule making. While a certain portion of the rule, or perhaps all of it, may have been drafted by Tax Department employees, it is ultimately an act of the Legislature. Therefore, while the Legislature may have included

professions on the list that do not require a four-year degree, it has also clearly and unambiguously directed the Tax Commissioner to consider education before he or she adds an activity to the list. And in this case the Tax Commissioner has done so.

In summation, the Petitioner has not shown that the Tax Commissioner ignored a material factor deserving significant weight, relied upon an improper factor, or made a serious mistake when reviewing the standards to become a certified home inspector in West Virginia. Therefore, the Petitioner has not met its burden of showing that the Tax Commissioner abused the discretion granted to him in Section 8.1.1.1.

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. “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).
4. Article 15A goes on to explain that services which are not subject to West Virginia consumers sales tax are also specifically exempted from use tax. *See* W. Va. Code Ann. §11-15A-3(a)(4) (West 2010).

5. One type of service that is excepted from West Virginia's consumers sales tax is professional services. *See* W. Va. Code Ann. §11-15-8 (West 2010).
6. Professional services is not defined in Chapter 11 of the West Virginia Code.
7. The Tax Commissioner has promulgated rules which do define professional service. "Professional service' means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in W. Va. Code '11-15-1 et seq. to be professional. See Section 8.1.1 of these regulations." W. Va. Code R. §110-15-2.65 (1993).
8. The determination as to whether other activities are "professional" in nature will be determined by the State Tax Division on a case-by-case basis unless the Legislature amends W. Va. Code '11-15-1 et seq. to provide that a specified activity is "professional." When making a determination as to whether other activities fall within the "professional" classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements. W. Va. Code R. §110-15-8.1.1.1 (1993).
9. Section 8.1.1.1. of Series 15, Title 110 of the West Virginia Code of State Rules clearly and unambiguously gives the Tax Commissioner the discretionary authority to determine if other activities should be considered professional, for the purposes of the exemption from collecting sales taxes on the service.
10. "In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no

improper factors are assessed but the circuit court makes a serious mistake in weighing them.” Gentry v. Mangum, 195 W. Va. 512, 520, 466 S.E.2d 171, 179 (1995).

11. In this matter the Tax Commissioner has not ignored a material factor deserving of significant weight, because in Section 8.1.1.1 the Legislature has not designated any factor as such. Nor has the Tax Commissioner relied on any improper factors.
12. The Tax Commissioner has not made a serious mistake by his determination that the activity of home inspection, as certified by the West Virginia Fire Marshal, is not professional, in that it can be performed by someone with as little as a GED degree, that they need not be nationally licensed, and there is uncertainty regarding the national standards required of the activity.
13. The Tax Commissioner has not abused the discretion granted to him, by his decision that the activity of home inspection is not a professional activity.
14. As a result, the Petitioner has not met its burden of showing that the assessment issued against it was contrary to West Virginia law, clearly wrong or arbitrary and capricious.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner for combined sales and use tax for the period January 1, 2011, through September 30, 2015, for tax in the amount of \$_____ and interest in the amount of \$_____, for a total assessed tax liability of \$_____ should be and hereby is **AFFIRMED**.

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