

REDACTED DECISION -DK# 16-416 CU-C

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON OCTOBER 17, 2018
ISSUED ON MARCH 22, 2019**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On June 21, 2016, 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 December 31, 2015, for tax in the amount of \$_____, and interest in the amount of \$_____, for a total assessed tax liability of \$_____.

Thereafter, on August 25, 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).

Subsequently, notice of a hearing on the petition was sent to the Petitioner, and, in accordance with the provisions of West Virginia Code Section 11-10A-10, a hearing was held on July 26, 2018, after which the parties filed legal briefs. The matter became ripe for decision at the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Petitioner is Xxx, a sole member West Virginia LLC. Tr. P3-32 at 20-5.
2. The Petitioner's business is tax preparation, for entities in West Virginia and elsewhere. Tr. P32-33 at 22-10.
3. The vast majority of the work done by the Petitioner is preparation of state and federal tax returns. Tr. P44-45 at 22-16.
4. At an unknown date in the past, the West Virginia Tax Department became aware that the Petitioner was not collecting sales tax on its service of tax preparation. The failure to collect was due to the Petitioner's belief that its activities were professional. Eventually, the Petitioner was selected for an audit. Tr. P49 at 19-23. That audit led to the assessment that forms the basis of this matter.
5. The Petitioner's sole witness testified that in order to prepare federal tax returns, a preparer must comply with certain Internal Revenue Service (IRS) rules/guidelines/standards, and that those guidelines are contained in an IRS document called Circular 230. Tr. P34 at 1-8. *See also* Petitioner's Ex. 1. However, at hearing the witness never referred to any specific page in the Circular. Instead, the testimony consisted of the witness stating that, contained somewhere in the circular were requirements regarding testing of tax preparers, standards of competence, registration and continuing education requirement.
6. The testimony further revealed that many of the requirements regarding tax preparers contained in the Circular had been repealed, as the result of the IRS being sued. As of the date of the evidentiary hearing, both the testing and registration requirements had been repealed. Tr. P40-41 at 22-16 and Tr. P41 at 21-23.

7. There was testimony regarding the amount of continuing education required to prepare federal tax returns, but again, it was not clearly stated when that requirement began, or if it was a current requirement at the time of the hearing in this matter. Tr. P44 at 7-12.

8. The Respondent's sole witness was the audit supervisor of the audit in this matter. Tr. P49 at 4-7. This witness testified that she did not have any direct knowledge of who made the determination that the Petitioner's activities were not professional, or why such determination was made. Tr. P56-57.

DISCUSSION

The Petitioner, in this matter, claims that the portion of the assessment against it regarding the collection of sales taxes for the tax preparation 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, tax preparers 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. 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 meet the four part “test” contained in Section 8.1.1.1. For his part, the Tax Commissioner argues that the activities conducted by the Petitioner, accounting, bookkeeping, tax preparation are not professional and that there are decades worth of precedent ruling as such. Moreover, the Tax Commissioner argues that the requirements set upon tax preparers by the IRS were nullified by the lawsuit discussed in finding of fact number 6 above. As a result, currently a tax preparer filing federal returns with the IRS has no minimum educational requirements, no standards for performance, no recognized standards (because there is no testing requirement) and no continuing education requirements.

We rule for the Tax Commissioner in this matter, for a variety of reasons, including the Petitioner’s failure to file a reply brief. This is determinative because of the way this matter unfolded. The Petitioner called one witness, its sole member. Xxx testified that in order to do tax return preparation before the IRS there were, in fact, nationally recognized standards, licensing requirements and continuing education requirements. However, the IRS Circular relied on by the Petitioner to prove these facts was not quoted from, nor was any specific page cited to. Additionally, the witness testified that the testing requirement had been done away with as a result of a lawsuit. Finally, the Circular introduced as Petitioner’s Exhibit 1 was dated in 2014. There was no testimony indicating when this Circular was first drafted, how often it is revised, or most importantly, what the Circular currently calls for, in light of the aforementioned lawsuit. As a result, we are left only with the witnesses testimony that there are requirements to prepare federal tax returns, but with no understanding of exactly what those requirements are, when they began and most importantly, were they in existence during the relevant time periods in this matter?

The Tax Commissioner's sole witness was also unable to provide any evidence on these topics, or why the Tax Commissioner had determined that the Petitioner's activities were not professional.

At the post hearing briefing stage, the Petitioner again stated that its member must be licensed, operate under nationally recognized standards and complete continuing education. Additionally, the Petitioner argued that the deficiencies in the testimony of the Tax Commissioner's witness proved that the Respondent had failed to exercise the discretion called for in Section 8.1.1.1. As a result, the Petitioner requested a remand for additional fact finding regarding how the Tax Commissioner reached his determination in this case. However, counsel for the Petitioner later withdrew this request for a remand. The Tax Commissioner argued that the Petitioner was simply incorrect regarding the purported standards for tax preparation before the IRS. He further argued that it is well settled, based upon various precedents, that accountants, bookkeepers, tax preparers and other similarly situated have been determined to not be performing professional activities. Despite being afforded the opportunity to do so, the Petitioner failed to file a reply brief. Therefore, the last word in this matter is from the Tax Commissioner.

The Tax Commissioner cites and extensively discusses the aforementioned lawsuit, which by the Petitioner's own testimony, did away with a testing requirement in order to prepare federal tax returns. In Loving v. Internal Revenue Service, 742 F.3d 1013 (2014), the IRS was sued by tax preparers who objected to the Service's attempts to regulate them. The District of Columbia Court of Appeals examined 31 U.S.C. § 330, which is the federal statute, originally enacted in 1884, that allows the Service to regulate the practice of representatives of persons before the Department of Treasury. The Loving Court stated "[I]n the first 125 years after the statute's enactment, the Executive Branch never interpreted the statute to authorize regulation of tax-return

preparers.” *Id.* at 1014. The Loving Court ultimately held that 31 U.S.C. § 330 did not give the IRS the authority to regulate tax preparers. Therefore, as of this writing, it is unclear to what extent tax preparers are regulated by the IRS.¹ However, it is clear that the Petitioner was incorrect when it asserted, both at hearing and in post hearing briefs, that “she (1) is required by the IRS to maintain a yearly license to prepare returns; (2) she has an extensive education, undergraduate and graduate degrees; (3) the Treasury Circular No. 230 sets forth nationally recognized standards of performance; and (4) she is required to participate in continuing education.” *See* Petitioner’s Brief at P. 10.² At hearing, the Petitioner’s witness testified that she was aware of the Loving suit. Given that fact, and the fact that the Loving Court clearly stated that tax preparers had traditionally not been regulated, and would not be in the future, we find the Petitioner’s testimony and post-hearing brief to be somewhat disingenuous.

We should add that even if the Petitioner had proven that its activities were subject to nationally recognized standards, licensing requirements, and continuing education requirements, we would still find its arguments to be unavailing. Recently, this Tribunal issued a decision regarding a licensed home inspector who sought the professional services exemption contained in West Virginia Code Section 11-15-8. In that case, the Petitioner proved that the activity was licensed by the West Virginia Fire Marshall, and also subject to continuing education requirements. This Tribunal ruled against the Petitioner, in large part because the activity had no minimum educational requirements. We stated that, “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.” *See* Final Decision, Docket No. 16-056 at P. 9. We would apply the same

¹ We use the term “unclear” because the Tax Commissioner’s brief discusses a voluntary regulatory program for tax preparers, currently in effect at the IRS. However, it is unclear if the Petitioner’s member is participating in this program.

² The Petitioner’s brief did not contain a heading. It was filed on September 19, 2018.

logic here, because, like licensed home inspectors, tax preparation can apparently be done by anyone who can meet the IRS's currently undefined standards, regardless of their level of education.

In summation, the Petitioner's theory of this case has consistently been that its activities meets the four part "test" of Section 8.1.1.1 of Title 110, Series 15 of the West Virginia Code of State Rules. However, it failed to adequately prove as such.

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. In this matter, the Petitioner has failed to prove that the activity it is engaged in, the preparation of federal tax returns, has nationally recognized standards, has state and national licensing requirements, or a certain level of continuing education requirements.

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 against

it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

11. The Petitioner in this matter has not carried its burden of proving that the June 21, 2016, assessment issued against it was erroneous, unlawful, void or otherwise invalid.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner on June 21, 2016, in the amount of \$ _____ is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

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

Date Entered