

**REDACTED DECISION – DK# 16-461 RPD-M**

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE  
SUBMITTED FOR DECISION ON APRIL 1, 2019  
ISSUED ON OCTOBER 31, 2019**

**FILED**

2020 FEB 27 P 2:30

WEST VIRGINIA  
DEPARTMENT OF STATE

**BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS**

**FINAL DECISION**

This matter is one of over twenty matters pending before this Tribunal regarding Taxpayers who seek the downward modification contained in West Virginia Code Section 11-21-12(c)(6). Due to the number of cases, and the length of time they have been on the Docket of this Tribunal, brief telephonic evidentiary hearings were held in each, during which, with the agreement of both parties, the details of what actions the Tax Commissioner took in denying the requested modification were offered by proffer. Those details are contained in the findings of fact below.

**FINDINGS OF FACT**

1. The Petitioner is a Resident Individual, as that term is defined in West Virginia Code Section 11-21-7. As such, he pays West Virginia income taxes.
2. During his working career, Petitioner had various jobs in law enforcement. Specifically:
  - a. City Police officer, City in West Virginia, 1983-1991
  - b. Officer with the West Virginia Division of Natural Resources, Law Enforcement Section, 1991-1994
  - c. Police Officer, Town in West Virginia, 1994-2000
  - d. Chief of Police, City in West Virginia, 2000-2008

3. All of the pension monies Petitioner receives from the jobs above come from the West Virginia Public Employees Retirement System (PERS).<sup>1</sup>

4. The Petitioner filed his West Virginia income taxes for tax year 2015 in such a way as to subtract from his federal adjusted gross income the entirety of the pension Petitioner received from PERS.

5. This tax filing led the Tax Commissioner to issue an assessment against the Petitioner on August 22, 2016, for tax in the amount of \$\_\_\_\_\_, penalties of \$\_\_\_\_\_, and interest in the amount of \$\_\_\_\_\_, for a total assessed liability of \$\_\_\_\_\_.

6. During the evidentiary hearing, counsel for the Respondent stated that the Tax Commissioner is willing to waive any penalty of \$\_\_\_\_\_.

## DISCUSSION

This matter concerns a provision in West Virginia law which allows certain West Virginia residents to deduct from their federal adjusted gross income, all of the retirement income they receive from certain sources. Specifically, residents who receive retirement income from any West Virginia police or fireman's retirement system, one of two state police retirement funds or the deputy sheriff retirement system. *See* W. Va. Code Ann. § 11-21-12(c)(6) (West 2018). Save for the monies mentioned in footnote 1, Petitioner does not receive retirement income from any of those sources.

Some history is necessary for clarity. In tax years 2010 and 2011 a retired federal marshal named James Dawson sought the same modification that Petitioner seeks. He too, received no

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<sup>1</sup> At the end of his work career Petitioner was a deputy sheriff and he receives a pension from that job that is not PERS. However, the parties agree that this matter does not involve that job or those pension monies.

retirement income from any of the sources mentioned in West Virginia Code Section 11-21-12(c)(6), and the Tax Commissioner also denied his request. His case proceeded from this Tribunal all the way to the United States Supreme Court of Appeals, which issued a decision in February of 2019. Without belaboring the point, the legal arguments in the Dawson case involve whether West Virginia Code Section 11-21-12(c)(6) violates the doctrine of intergovernmental immunity, as codified in 4 U.S.C. 111, because it is alleged that subdivision (6) allegedly discriminates against certain federal employees. This Tribunal has many cases in abeyance, awaiting an answer to that question. As stated above, Petitioner is not a retired federal employee, therefore, the question answered by the U.S. Supreme Court does not concern him.

That brings us to the issue before this Tribunal, which, at its essence, is that it is unfair that Petitioner, a retired West Virginia law enforcement officer does not get the same modification to his retirement income that certain retired West Virginia law enforcement officers get.

What is missing from the Petitioner's argument is any mention of what errors the Tax Commissioner has made in regard to the Petitioner. The reason for this is because the Tax Commissioner has not made any errors. West Virginia Code Section 11-21-12(c)(6) allows certain individuals a tax break on their retirement income; Petitioner is not one of those individuals. Therefore, when the Tax Commissioner informs the Petitioner that he is not entitled to that modification, he is simply following the law as written. What is also missing from the Petitioner's argument, is any citation to any legal authority that would allow the Tax Commissioner, when confronted with a situation such as this to say to the Taxpayer "you're right, this tax statute gives you a raw deal, so I'm going to fix things for you." The Petitioner cites no such authority, because obviously none exists. The Tax Commissioner cannot rewrite the tax laws on a whim, based upon some vague standard of fairness.

We do not seek to minimize the Petitioner's constitutional arguments, but it is well settled that, as part of the executive branch, neither the Tax Commissioner nor this Tribunal can declare a statute unconstitutional. Actually, two concepts are well settled. The first is the separation of powers doctrine. In West Virginia, as in many states, it is more than a doctrine and is actually an article of our State Constitution.

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature

W. Va. Const. art. V, § 1. The West Virginia Supreme Court of Appeals has elaborated on this constitutional provision on many occasions, including mere weeks prior to the issuance of this decision. "The separation of powers doctrine works six ways. The Courts may not be involved in legislative or executive acts. The Executive may not interfere with judicial or legislative acts." State ex rel. Workman v. Carmichael, 819 S.E.2d 251, 261 (W. Va. 2018).

Next we must ask, is declaring a statute unconstitutional a purely judicial act? The short answer is yes, and virtually every state court in the nation has, at some time in the past, clearly and cogently stated as such. *See e.g.* Gordon v. State by & through Capitol Bldg. Rehab., 2018 WY 32, 413 P.3d 1093 (Wyo. 2018) (Declaring the validity of statutes in relation to the constitution is a power vested in the courts); Gannon v. State, 305 Kan. 850, 390 P.3d 461 (2017) (the judiciary has the sole authority to determine whether an act of the legislature conforms to their supreme will, *i.e.*, is constitutional); Gen. Engines Co. v. Dir., Div. of Taxation, 23 N.J. Tax 515 (2007) (Division of Taxation, as an administrative agency, has neither the responsibility, the authority, nor the jurisdiction to declare statutes unconstitutional).

The West Virginia Supreme Court of Appeals has never answered the precise question before us, namely can an executive branch agency declare a statute unconstitutional. What the

Court has said is that the mere fact that an executive branch agency performs quasi-judicial functions does not make it a court, and that it is the duty of the courts to declare statutes unconstitutional. *See e.g. State ex rel. State Bldg. Comm'n v. Bailey*, 151 W. Va. 79, 150 S.E.2d 449 (1966) (it is the duty of a court to declare a statute invalid if its unconstitutionality is clear); *Rice v. Underwood*, 205 W. Va. 274, 517 S.E.2d 751 (1998) (the deciding of contested cases by a board or regulatory body is a recognized administrative function and does not transform the administrative agency into a court). We do not think the fact that the Bailey Court failed to say that it is “solely” the duty of a court to declare a statute unconstitutional is determinative. This Tribunal is quite certain that the concept is as equally well settled in West Virginia as elsewhere.

In summation, regarding the issue before us, Petitioner does not receive retirement income from any of the sources mentioned in West Virginia Code Section 11-21-12(c)(6). Therefore, the Tax Commissioner cannot have committed an error when he informed the Petitioner that he was not entitled to the requested modification. Nor can the Tax Commissioner or this Tribunal declare Section 11-21-12(c)(6) unconstitutional. Therefore, the Petitioner has not met his burden of showing that the Tax Commissioner’s actions in this matter were contrary to West Virginia law, clearly wrong or arbitrary and capricious.

There is one final issue that must be resolved to conclude this matter. The proffer agreed upon by the parties regarding what actions the Tax Commissioner took only addressed the denial of the (c)(6) modification. However, there are two other modifications contained in Subsection (c). Subdivision (5) grants a \$2,000.00 downward modification for retirement monies received from the West Virginia Public Employees Retirement System and Subdivision (8) grants an \$8,000.00 downward modification for income from any source, once a person reaches sixty-five

on or before the last day of the taxable year.<sup>2</sup> There is also the matter of penalties/additions, which were assessed in some of these matters. Whether or not this Petitioner, or one similarly situated was entitled to the (c)(5) or (8) downward modification, or whether they were assessed penalties/additions was not fully addressed during the telephonic evidentiary hearings. As a result, this matter, and the others, were “remanded” back to the Tax Commissioner, for recalculation. The results of that recalculation are contained in the Disposition below.

### 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. Resident individual means an individual: (1) Who is domiciled in this State, unless he maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this State W. Va. Code Ann. § 11-21-7 (West 2013).

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<sup>2</sup> “(c) *Modifications reducing federal adjusted gross income* There shall be subtracted from federal adjusted gross income to the extent included therein:

(5) Annuities, retirement allowances, returns of contributions and any other benefit received under the West Virginia Public Employees Retirement System . . . this modification shall be limited to the first \$2,000 of benefits received . . . (8) Federal adjusted gross income in the amount of \$8,000 received from any source after December 31, 1986, by any person who has attained the age of sixty-five on or before the last day of the taxable year . . .” W. Va. Code Ann. § 11-21-12 (West).

4. The Petitioner is a resident individual, as that term is defined in West Virginia Code Section 11-21-7, and as such, he pays West Virginia taxes.

5. There shall be subtracted from federal adjusted gross income to the extent included therein: . . . (6) Retirement income received in the form of pensions and annuities after December 31, 1979, under any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System, including any survivorship annuities derived from any of these programs, to the extent includable in gross income for federal income tax purposes. W. Va. Code Ann. § 11-21-12(c)(6) (West 2018).

6. The Tax Commissioner did not commit an error in denying the modification contained in West Virginia Code Section 11-21-12(c)(6) to the Petitioner, because the retirement income at issue here, does not come from any of the sources discussed in the subdivision.

7. The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature. W. Va. Const. art. V, § 1.

8. As a part of the executive branch, neither the Tax Commissioner nor this Tribunal may perform a judicial act, and declaring a statute unconstitutional is a judicial act. *See e.g. State ex rel. State Bldg. Comm'n v. Bailey*, 151 W. Va. 79, 150 S.E.2d 449 (1966); *Rice v. Underwood*, 205 W. Va. 274, 517 S.E.2d 751 (1998). *See also Gordon v. State by & through Capitol Bldg. Rehab.*, 2018 WY 32, 413 P.3d 1093 (Wyo. 2018); *Gannon v. State*, 305 Kan. 850, 390 P.3d 461 (2017); *Gen. Engines Co. v. Dir., Div. of Taxation*, 23 N.J. Tax 515 (2007).

9. 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 the actions taken by the Tax

Commissioner are 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).

10. In this matter, the Petitioner has not met his burden of showing that the Tax Commissioner's assessment of August 22, 2016, 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 actions taken by the Tax Commissioner in denying the Petitioner the reducing modification contained in West Virginia Code Section 11-21-12(c)(6) for tax year 2015 was not erroneous, unlawful, void or otherwise invalid, and thus should be and hereby is **AFFIRMED**.

It is further **ORDERED**, that pursuant to the Tax Commissioner's recalculation, the Petitioner's Tax liability for tax year 2015 is \$ \_\_\_\_\_ in tax and \$ \_\_\_\_\_ in interest, with all penalties and additions waived.

Interest continues to accrue on the unpaid tax until this liability is fully paid pursuant to the West Virginia Code Section 11-10-17(a).

### WEST VIRGINIA OFFICE OF TAX APPEALS

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

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Date Entered