

REDACTED DECISION – DK# 15-133 P-M

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON JANUARY 3, 2018
ISSUED ON NOVEMBER 15, 2019**

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On February 20, 2015, the Taxpayer Services Division of the West Virginia State Tax Commissioner’s Office (hereinafter the “Tax Commissioner” or “Respondent”) issued a Notice of Assessment, against the Petitioners, (hereinafter the “Petitioners”). 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 personal income tax for the period of January 1, 2013, through December 31, 2013, for tax in the amount of \$ _____, interest in the amount of \$ _____, and additions to tax in the amount of \$ _____, for a total assessed tax liability of \$ _____. Written notice of this assessment was served on the Petitioners, as required by law.

Thereafter, on April 20, 2015, the Petitioners 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).

On March 29, 2017, in accordance with the provisions of West Virginia Code Section 11-10A-10 an evidentiary hearing was held.¹ The parties filed post-hearing briefs, and the matter became ripe for decision at the conclusion of the briefing schedule.

¹The evidentiary hearing was conducted by Chief Administrative Law Judge Heather Harlan. Since the date of the hearing, Judge Harlan has resigned her position, and this decision was written by Chief Administrative Law Judge A.M. “Fenway” Pollack.

FINDINGS OF FACT

1. The Petitioners are Resident Individuals, as that term is defined in West Virginia Code Section 11-21-7. As such, they pay West Virginia income taxes.
2. For the entirety of tax year 2013, Petitioner was a recruiter for the Virginia National Guard. Tr. P10 at 3-19.
3. For tax year 2013, Mr. Petitioner and his wife sought the modification contained in West Virginia Code Section 11-21-12(e). This modification allows certain members of the National Guard or armed forces reserve to modify downward their federal adjusted gross income. The Tax Commissioner did not agree that the Petitioners were entitled to this downward modification.

DISCUSSION

The modification sought by the Petitioners states:

(a) For taxable years beginning after December 31, 2000, in addition to amounts authorized to be subtracted from federal adjusted gross income pursuant to subsection (c), section twelve of this article, active duty military pay received for the period of time an individual is on active duty as a member of the National Guard or armed forces reserve called to active duty pursuant to an Executive Order of the President of the United States for duty in Operation Enduring Freedom or for domestic security duty is an authorized modification reducing federal adjusted gross income, but only to the extent the active duty military pay is included in federal adjusted gross income for the taxable year in which it is received.

West Virginia Code Section 11-21-12e(a) (West 2018).

Some brief history is necessary. Beginning in 2015 and 2016, this Tribunal received dozens of appeals from members of the national guard, all of whom were denied the modification in Subsection 12e(a). In the first two cases that proceeded to a final decision this Tribunal ruled for the Petitioners. One of those cases was overturned by the Circuit Court of Kanawha County.²

² The other is pending a decision in the Circuit Court of Kanawha County.

Thereafter, this Tribunal issued a final decision in another case, in which we ruled for the Tax Commissioner. That case has been appealed and is currently pending a decision in the Circuit Court of Cabell County. The reason this history is necessary is because the Petitioners in this matter ask us to simply rule as we did in the first two cases. However, as stated, one of those decisions has been overruled, and this Tribunal has since ruled for the Tax Commissioner in another case. Additionally, even if we did not have the Circuit Court reversal, and the subsequent decision where we ruled for the Tax Commissioner, we would be unable to rule in the Petitioner's favor here. The reason we are unable to rule for the Petitioners in this matter is because Petitioner was a recruiter in the Virginia National Guard. As such, it cannot be said that in tax year 2013 he served in Operation Enduring Freedom, or that he was engaged in domestic security duty, and the Petitioners do not argue as such. In fact, the Petitioners' post hearing brief is silent on this point, as is the Tax Commissioner's. Therefore, we have no choice but to rule that the Petitioners have not met their burden of proof in this matter.

We should note that even if Petitioner's job duties in the Guard could be characterized as domestic security duty, we would still be unable to rule in the Petitioners' favor. For the purposes of judicial economy, we will not re-state all of the discussion in our most recent decision where we ruled for the Tax Commissioner on this topic. Suffice to say that this Tribunal ruled that Subsection 12e(a) was ambiguous. We further ruled that both legislative intent and the Tax Commissioner's interpretation of the subsection required a ruling for the Tax Commissioner. Due to the fact that federal law contains two definitions of "active duty," one for the regular military, and one for the national guard³, we ruled that the modification is only available to those national guard members who are called to regular military duty, for either Operation Enduring Freedom or

³ See 32 U.S.C.A. § 101(12) & 32 U.S.C.A. § 101(19) (West).

domestic security duty. Here, even if Petitioner had been performing domestic security duty, we would still be unable to rule in the Petitioners' favor, because during tax year 2013 he was on national guard active duty, as defined under federal law.

Finally, we note that by letter dated November 6, 2019, the Tax Commissioner agreed to waive the penalties/additions that were assessed against the Petitioners in this matter.

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).
4. The Petitioners are resident individuals, as that term is defined in West Virginia Code Section 11-21-7, and as such, they pay West Virginia taxes.
5. For taxable years beginning after December 31, 2000, in addition to amounts authorized to be subtracted from federal adjusted gross income pursuant to subsection (c), section twelve of this article, active duty military pay received for the period of time an individual is on active duty as a member of the National Guard or armed forces reserve called to active duty

pursuant to an Executive Order of the President of the United States for duty in Operation Enduring Freedom or for domestic security duty is an authorized modification reducing federal adjusted gross income, but only to the extent the active duty military pay is included in federal adjusted gross income for the taxable year in which it is received. West Virginia Code Section 11-21-12e(a) (West 2018).

6. For tax year 2013 Petitioner was not performing domestic security duty.

7. West Virginia Code Section 11-21-12e(a) is ambiguous because a plain and ordinary meaning cannot be attributed to the phrase “called to active duty pursuant to an Executive Order of the President of the United States.” Additionally, “active duty” and “Executive Order of the President of the United States” are undefined terms.

8. One of the primary objectives of statutory construction is to ascertain and give effect to the intent of the Legislature. *See e.g. Smith v. State Workmen’s Comp. Com’r*, 159 W.Va. 108, 219 S.E.2d 361 (1975); *State ex rel. Fetters v. Hott*, 173 W. Va. 502, 318 S.E.2d 446 (1984); *State ex rel. Hechler v. Christian Action Network*, 201 W. Va. 71, 491 S.E.2d 618 (1997); *In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d 138, (2005); *Reed v. Exel Logistics, Inc.*, 240 W. Va. 700, 815 S.E.2d 511 (2018).

9. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous. *See Security National Bank & Trust Company v. First W.Va. Bancorp [.] Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981); *Appalachian Power Co. v. State Tax Dep’t of W. Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995); *W. Virginia Consol. Pub. Ret. Bd. v. Wood*, 233 W. Va. 222, 757 S.E.2d 752 (2014).

10. This Tribunal gives deference to the Tax Commissioner’s interpretation of Subsection (a), insofar as that interpretation requires a guardsman to be on active duty, as that term is defined in 32 U.S.C.A. § 101(12), and be federalized (ie; called to duty) pursuant to Title 10,

Chapter 1209 of the United States Code, before he or she may obtain the modification in Subsection (a).

11. The Tax Commissioner's interpretation of Subsection (a) is not clearly erroneous.

12. During the time period in question in this matter, tax year 2013, Petitioner was on Full Time National Guard Duty, as that term is defined in 32 U.S.C.A. § 101(19).

13. Petitioner's service as a recruiter, during tax year 2013, was not pursuant to a call to active duty pursuant to an Executive Order of the President of the United States, as those terms are used in West Virginia Code Section 11-21-12e(a).

14. 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).

15. The Petitioners have failed to meet their burden of showing that the Tax Commissioner was clearly wrong, or unlawful when he issued the February 20, 2015, personal income tax assessment against them.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the February 20, 2015 assessment issued against the Petitioners for tax in the amount of \$_____, interest in the amount of \$_____, and additions to tax in the amount of \$_____, for a total assessed tax liability of \$_____ should be and hereby is **AFFIRMED**.

It is further **ORDERED** that pursuant to the Tax Commissioner's wishes, the additions to tax of \$_____ are hereby **WAIVED**.

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