

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- BURDEN OF PROOF -- 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 her is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

CONSUMERS' SALES AND SERVICE TAX -- "PROFESSIONAL SERVICES" EXCEPTION -- STATUTORY PROVISION -- Pursuant to the exception set forth in W. Va. Code § 11-15-8 [2003], and the definition set forth in W. Va. Code § 11-15-2(s) [2001], the providers of "professional services" are excepted from the duty of collecting consumers' sales and service tax on the provision of those services.

CONSUMERS' SALES AND SERVICE TAX -- "PROFESSIONAL SERVICES" EXCEPTION -- LEGISLATIVE RULE -- CERTAIN OCCUPATIONS EXPRESSLY IDENTIFIED AS PROFESSIONS -- W. Va. Code St. R. § 110-15-8.1.1.1 (July 15, 1993), expressly identifies certain occupations that are considered professions for purposes of the "professional services" exception contained in W. Va. Code § 11-15-2(s) [2001] and W. Va. Code § 11-15-8 [2003].

CONSUMERS' SALES AND SERVICE TAX -- "PROFESSIONAL SERVICES" EXCEPTION -- LEGISLATIVE RULE -- ELECTRICAL INSPECTION IS NOT AN OCCUPATION EXPRESSLY IDENTIFIED AS A PROFESSION -- Electrical inspection is not an occupation that is expressly identified in W. Va. Code St. R. § 121-1-8.1.1.1 (July 15, 1993), as a professional service that is excepted from the duty of collecting West Virginia consumers' sales and service tax.

CONSUMERS' SALES AND SERVICE TAX -- "PROFESSIONAL SERVICES" EXCEPTION -- LEGISLATIVE RULE -- STANDARD FOR DETERMINING WHETHER OCCUPATIONS NOT EXPRESSLY IDENTIFIED AS PROFESSIONS ARE, IN FACT, PROFESSIONS -- In determining whether or not an occupation qualifies as a profession, so as to be excepted from the requirement of collecting consumers' sales and service tax on the services provided, the State Tax Commissioner must 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.

CONSUMERS' SALES AND SERVICE TAX -- "PROFESSIONAL SERVICES" EXCEPTION -- LEGISLATIVE RULE -- STANDARD FOR DETERMINING WHETHER OCCUPATIONS NOT EXPRESSLY IDENTIFIED AS PROFESSIONS ARE, IN FACT, PROFESSIONS -- 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.

CONSUMERS’ SALES AND SERVICE TAX -- “PROFESSIONAL SERVICES” EXCEPTION -- LEGISLATIVE RULE -- LEGISLATIVE RULE DOES NOT REQUIRE ANY EDUCATION FOR CERTIFICATION OF ELECTRICAL INSPECTORS -- The legislative rule establishing criteria for certification of electrical inspectors does not provide any education requirement necessary to attain certification as an electrical inspector.

CONSUMERS’ SALES AND SERVICE TAX -- “PROFESSIONAL SERVICES” EXCEPTION -- NOT PROVEN TO BE APPLICABLE TO SERVICES OF ELECTRICAL INSPECTOR -- The Petitioner has not satisfied her burden of proving that a four-year college degree in a particular field of study is required in order for her to become a certified electrical inspector.

FINAL DECISION

A tax examiner with the Field Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) conducted an audit of the books and records of the Petitioner. Thereafter, on May 17, 2006, the Director of this Division issued a consumers’ sales and service tax assessment against the Petitioner. The assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of January 1, 2002, through December 31, 2005, for tax in the amount of \$, and interest in the amount of \$, for a total assessed tax liability of \$. No additions to tax were assessed. Written notice of this assessment was served on the Petitioner on May 19, 2006.

Thereafter, by mail postmarked May 31, 2006, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. The Petitioner, an individual, is the owner of a certain business entity under which name she performs her services in question.
2. The Petitioner is a state electrical inspector licensed in West Virginia. She has been in that line of work for approximately ___ years.
3. The Petitioner has also performed electrical inspections in the certain other states.
4. The State Tax Commissioner issued the assessment because he takes the position that the electrical inspection services provided by the taxpayer are not “professional services” and, therefore, are subject to consumers’ sales and service tax.
5. Subsequent to the filing of the petition for reassessment and prior to commencement of the hearing, the parties agreed that the assessment should be amended to remove the gross receipts from jobs in which the Petitioner provided services to other contractors as a subcontractor. *See State’s Exhibit No. 2.*
6. The amended assessment was for tax in the amount of \$, and interest in the amount of \$, for a total tax liability of \$. *See State’s Exhibit No. 2.*
7. When the Petitioner obtained her business license she inquired as to her duty to collect consumers’ sales and service tax. She understood that she was considered to be providing a professional service, and that she was not required to collect consumers’ sales and service tax on capital improvements, but that she would have to collect sales tax on new construction.
8. The Petitioner testified that the assessment, State’s Exhibit No. 1, was the first written notification to her that the State Tax Commissioner expected her to collect consumers’ sales and service tax on the services performed by her.

9. As an electrical inspector, the Petitioner is required to enforce the National Electrical Code by the state fire marshal and the utility companies. The Petitioner is also required to enforce any requirements imposed by utility companies that are more stringent than those imposed by the National Electrical Code.

10. The Petitioner reviews installations made by electricians on both residential and commercial properties.

11. A utility requires certification by a certified electrical inspector before it will turn on the electricity.

12. The Petitioner does not do work that an electrician performs.

13. The Petitioner possesses a master electrician's license issued by the Fire marshal of the State of West Virginia. *See* Petitioner's Exhibit No. 1-A. A master electrician's license is a predicate to becoming licensed as a certified electrical inspector. *See* W. Va. Code St. R. § 103-1-5 (April 1, 2004).

14. A master electrician's license requires 2500 hours.

15. The Petitioner is not aware of any requirement that a master electrician have a high school diploma.

16. The Petitioner testified that she "knows" that there is no requirement that a master electrician have a four-year college degree.

17. The Petitioner has been certified as a Class B State certified electrical inspector, which entitles her to conduct inspections with respect to both residential and commercial structures. *See* Petitioner's Exhibit No. 1-B.

18. According to the testimony of the Petitioner, to become a Class B certified electrical inspector, an individual is required to take two (2) separate tests as required by the West Virginia state fire marshal.

19. The Petitioner testified that there is no requirement that a certified electrical inspector have a high school diploma.

20. The Petitioner also testified that she “agrees” that there is no requirement that a certified electrical inspector have a four-year college degree.

21. Annually the Petitioner is certified as a certified electrical inspector by the International Association of Electrical Inspectors (the “IAEI”). At the present time she is certified to inspect residential and commercial buildings. *See* Petitioner’s Exhibit No. 1-D.

22. In order to maintain certification with the IAEI, the Petitioner must complete 2.4 CEUs (24 hours) of electrical training recognized by the IAEI, or accredited by the International Association of Continuing Education and Training. *See* Petitioner’s Exhibit No. 1-E.

23. The Petitioner has passed a national certification test that certifies her to perform inspections of both residential and commercial properties. *See* Petitioner’s Exhibits Nos. 1-F & 1-G.

24. The Petitioner presented documentary evidence showing completion of a substantial number of hours of CEU over a period of several years. *See* Petitioner’s Exhibits Nos. 1-H.

25. The Petitioner received a “Board of Regents, Bachelor of Arts” degree from a certain college located in this State, in the year 19___. *See* Petitioner’s Exhibits Nos. 1-I.

26. The Petitioner received two “Associate in Arts Degree” from a certain community college in May, 19___. *See* Petitioner’s Exhibits Nos. 1-I.

27. The Petitioner maintains the various certifications set forth in Petitioner's Exhibit No. 1-J.

28. The Petitioner is required to carry liability insurance by the State of West Virginia, and by two electrical power companies for whom she performs services.

29. _____, a certified electrical inspector, testified on behalf of the Petitioner.

30. He, that witness, is a certified electrical inspector licensed by the State of West Virginia.

31. In order to become certified in West Virginia, that witness provided the state fire marshal a "CV" (curriculum vitae), paid the requisite fee and took the test qualifying him as a master electrician.

32. That witness does professional services plans review, surveying and consulting, and electrical inspections.

33. That witness performs electrical inspections in certain surrounding states several electrical power companies.

34. That witness heard the Petitioner's testimony in its entirety, and testified that her testimony was "factual and accurate" respecting the requirements to become a certified electrical inspector in the State of West Virginia.

35. That witness testified that there are nationally accepted standards for the performance of electrical inspections.

36. That witness testified that the "bible" is the National Electric Code, which is revised every three years.

37. Many municipalities follow the National Electric Code, and specify the version to which they adhere at any given time (e.g. "2005 NEC").

38. That witness testified that there are national certifications that must be obtained in order to become licensed as a certified electrical inspector in the State of West Virginia. He testified that the same entity that administers the SAT, GRE and LSAT tests administers the tests for the national certification of electrical inspectors.

39. These are the tests that are used by the IAEI and the West Virginia state fire marshal for the certification of electrical inspectors.

40. Electrical inspectors are required to satisfy certain minimum continuing education requirements in order to maintain certification by utility companies, certification organizations and the state fire marshal.

41. That witness testified that he believed there was a significant distinction to be made between “licensed” electricians and “certified” electrical inspectors.

DISCUSSION

The issue presented by this matter is whether or not the services provided by a certified electrical inspector are professional services. W. Va. Code § 11-15-8 [2003] provides, in relevant part, “The provisions of this article shall apply not only to selling tangible personal property, but also to the furnishing of all services, except professional . . . services[.]” Pursuant to the provisions of this section, if the services provided by certified electrical inspectors are professional services then they are excepted from the general requirement of the collection of consumers’ sales and service tax.

What constitutes professional services is not expressly addressed by any provision of the W. Va. Code. W. Va. Code § 11-15-2(17) [2003] provides the following definition, “Service” or “selected service” includes all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible

personal property . . .” What constitutes professional services is addressed by the Code of State Rules, which provides, in relevant part:

8.1.1. Professional Services.

8.1.1.1. 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. Persons who provide services classified as nonprofessional for consumers sales and service tax purposes include interior decorators, private detectives/investigators, security guards, bookkeepers, foresters [sic], truck driving schools, hearing aid dealers/fitters, contractors, electricians, musicians, and hospital administrators; the foregoing listing is not all-inclusive but intended as containing examples of trades and occupations. 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.

See W. Va. Code St. R. § 110-15-8.1.1.1 (July 15, 1993).

As can be seen from a reading of the quoted legislative rule, there are occupations expressly identified as professions that are excepted from the duty of collecting consumers' sales and service tax by W. Va. Code § 11-15-8. Certified electrical inspectors are not one of the professions expressly identified in Code St. R. § 110-15-8.1.1.1.

There are also occupations listed in the legislative rule that are expressly identified as not being professions. Certified electrical inspection is not one of those. However, electricians are

one occupation expressly identified as not being a profession. The Petitioner contends that although electricians are identified in Code St. R. § 110-15-8.1.1.1 as an occupation not providing professional services, certified electrical inspectors are required to have a higher level of education and provide a greater level of service, which causes that occupation to rise to the level of a profession.

Certified electrical inspectors are not one of the professions expressly identified in Code St. R. § 110-15-8.1.1.1, as being either professional or nonprofessional. Therefore, in order for the Petitioner to satisfy her burden of showing that as a certified electrical inspector she provides professional services, she must demonstrate that she meets the factors set out in the last two sentences of Code St. R. § 110-15-8.1.1.1. Specifically, the State Tax Commissioner is required to consider 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. As can be seen from a reading of the last two sentences, they are hardly a model of clarity and guidance.

W. Va. Code § 29-3C-1, *et seq.*, provides for the certification of electrical inspectors. W. Va. Code § 29-3C-3 requires all certified electrical inspectors be licensed in the State of West Virginia. W. Va. Code § 29-3C-4 requires the state fire marshal to propose legislative rules to establish a program for the certification of electrical inspectors in the State of West Virginia. Pursuant to the mandate of § 29-3C-4, the state fire marshal proposed and the Legislature adopted W. Va. Code St. R. § 103-1-1, *et seq.*, which provide specific requirements for certification of electrical inspectors.

In order to become a certified electrical inspector, an applicant must meet the following qualifications:

§ 103-1-4. Qualifications for Certification.

4.1. An applicant for an "Electrical Inspector's Certification" shall possess a valid and current Master's Electrician License issued by the state fire marshal. An applicant shall also provide proof that he or she passed the respective tests offered by the National Certification Program for Construction Code Inspectors and administered by Experior, Inc. 2100 NW 53rd Avenue, Gainesville [sic], FL 32653, or its equivalent as determined by the state fire marshal.

4.1.1. For a "Class A Electrical Inspector Certification", in addition to the electrical licensure requirement, an applicant shall provide proof that he or she passed "Test 2A Electrical One and Two Family Dwelling" of the National Certification Program for Construction Code Inspectors, or its equivalent as determined by the state fire marshal.

4.1.2. For a "Class B Electrical Inspector Certification", in addition to the electrical licensure requirement, an applicant shall provide proof that he or she passed "Test 2A Electrical One and Two Family Dwelling" and "Test 2B Electrical General" of the National Certification Program for Construction Code Inspectors, or its equivalent as determined by the state fire marshal.

4.1.3. For a "Class C Electrical Inspector Certification", in addition to the electrical licensure requirement, an applicant shall provide proof that he or she passed "Test 2C Electrical Plan Review", "Test 2A Electrical One and Two Family Dwelling" and "Test 2B Electrical General" of the National Certification Program for Construction Code Inspectors, or its equivalent as determined by the state fire marshal.

W. Va. Code St. R. § 103-1-4. The provisions of this legislative rule require that the applicant be licensed as a master electrician. The legislative rule also requires that the applicant have passed at least one of the three examinations identified therein. There is nothing in the legislative rule that speaks to some minimum educational requirement that must be satisfied in order for the applicant to become a certified electrical inspector.

As set forth in the legislative rule, an applicant for the position of certified electrical inspector is required to be a master electrician. Because licensure as a master electrician is a requirement underlying certification as a certified electrical inspector, the requirements for licensure as a master electrician factor into an applicant's certification as an electrical inspector.

Therefore, any educational requirements for licensure as a master electrician are necessarily educational requirements for certification as an electrical inspector.

Licensure of electricians is governed by W. Va. Code § 29-3B-1, *et seq.* W. Va. Code § 29-3B-2 provides the following relevant definitions (taken out of the order in which they are set forth in the statute):

(f) "Master electrician" means a person with at least five years of electrical work experience, including experience in all phases of electrical wiring and installation, who is competent to design electrical systems, and to instruct and supervise the electrical work of journeyman electricians, apprentice electricians, and other related workers.

* * * *

(d) "Journeyman electrician" means a person qualified by at least four years of electrical work experience to do any work installing wires, conduits, apparatus, equipment, fixtures and other appliances, provided that this classification is not authorized to design electrical systems.

* * * *

a) "Apprentice electrician" means a person with interest in and an aptitude for performing electrical work but who alone is not capable of performing electrical work unless directly supervised by a higher license classification.

The state fire marshal promulgated W. Va. Code St. R. § 87-2-2 (July 1, 1993), which provides a slightly more detailed definition of each of the types of electricians established by statute. Those definitions are:

2.1. "Master Electrician" - means a person with at least five (5) years of electrical work experience, including experience in all phases of electrical wiring and installation, who is competent to instruct and supervise the electrical work of Journeyman and Apprentice Electricians. A master electrician must have a comprehensive knowledge and understanding of the National Electrical Code, and the ability to read electrical plans, drawings and designs to calculate demand loads in compliance with the National Electrical Code.

2.2. "Journeyman Electrician" - means a person qualified by at least four (4) years of electrical work experience to do any work installing wires, conduits, apparatus, equipment, fixtures, and other appliances subject to supervision by a

master electrician. A journeyman electrician shall have a knowledge and understanding of the National Electric Code as it pertains to the installation of wires, conduits, apparatus, equipment, fixtures and other appliances. A journeyman electrician cannot design electrical systems.

2.3. "Apprentice Electrician" - means a person with interest in and an aptitude for performing electrical work. The Apprentice is not capable of installing wires, conduits, apparatus, equipment, fixtures and other appliances by himself.

The state fire marshal also promulgated W. Va. Code St. R. § 87-2-4 (July 1, 1993), which establishes the qualifications that an applicant must have to become each type of electrician. Those qualifications are:

4.1. "Master License": To apply for a "master electrician license" a person must have five (5) years of experience in electrical work of such breadth, independence and quality that such work indicates that the applicant is competent to perform all types of electrical work and can direct and instruct journeyman electricians and apprentice electricians in the performance of electrical work.

4.2. "Journeyman License": To apply for a "journeyman electrician's license", a person must have at least four (4) years of experience in performing electrical work under the direction or instruction of a master electrician or must have completed a United States Department of Labor/Bureau of Apprenticeship and training registered electrical apprenticeship program, or an electrical vocational education program of at least one thousand eighty hours in length approved by the state board of education.

4.3. "Apprentice License": To apply for an "apprentice electrician license", a person must have an interest in and an aptitude for performing electrical work. The apprentice is not capable of installing wires, conduits, apparatus, equipment, fixtures and other appliances by himself.

With respect to the education factor set out in W. Va. Code St. R. § 110-15-8.1.1.1, the Petitioner argues that the State Tax Commissioner's questions were designed to demonstrate that a certified electrical inspector is not required to have a college degree or high school diploma. The Petitioner readily admits this. However, she contends that neither do the statutes nor the legislative rules expressly provide that individuals who do not have high school diplomas or college degrees are not professionals. She maintains that certified electrical inspectors are

required to have a substantial amount of education, but not necessarily from a high school or college. She contends that many professionals can receive an informal education or a formal education through unions; that it is possible to receive a “high” education other than through high school or college.

The Petitioner further argues that the level of education required for certification as an electrical inspector, while not as formal as that leading to a high school diploma or college degree, is arguably as high a level as that required for other occupations that are recognized as professional.

The Petitioner also points out that certified electrical inspection is an important occupation in that certified electrical inspectors discover errors made by electricians, thereby preventing fires and preventing personal injuries and death resulting from faulty design or installation of electrical systems. She argues that her fee schedule is an important indicator of her professional status, as it is consistent with the fee schedules of doctors, lawyers, dentists and other providers of professional services.

The Tax Commissioner argues that the Petitioner is not a professional based on the legislative rule. There are three standards in the legislative rule. There is a list of occupations that are professions. If an occupation is on the list, it is a profession regardless of any requirements respecting education, performance or licensure. There is a list of occupations that are not considered professional. If an occupation is on that list, it is not a profession. By implication, the Tax Commissioner argues that this is so even if there are substantial requirements respecting education or performance, or if licensure is required. The Legislature has declared that these occupations are not professions.

Lastly, the Commissioner argues that an occupation that is neither expressly included nor expressly excluded may be considered a profession if it meets the standards of the last sentence of the quoted rule. With respect to the education standard, the State Tax Commissioner argues that the West Virginia Office of Tax Appeals and its predecessor, the Tax Commissioner's Office of Hearings and Appeals, have held that, at a minimum, a four-year college degree is required for those occupations not explicitly designated as "professional" by the legislative regulation. Certification as an electrical inspector requires neither a four-year college degree nor a high school diploma. Therefore, he contends, for purposes of the consumers' sales and service tax, certified electrical inspection more properly can be classified as a building construction trade or occupation, not a profession.

The Petitioner replies to the Tax Commissioner by arguing that if the legislative rule required a college degree for an occupation to be considered a profession, that requirement would be expressly set forth therein. She contends that the level of education required of the Petitioner is of a high level, perhaps as high as the level of a four-year college degree.

The statute and the legislative rule under consideration in this matter are both silent as to what constitutes professional services. It is not clear and unambiguous. Because it is ambiguous, it is subject to the rules of statutory construction. This very statute has been previously construed by the West Virginia Supreme Court of Appeals:

Generally, tax laws are strictly construed, and when there is doubt regarding the meaning of such laws they should be construed in favor of the taxpayer. *See, State ex rel. Battle v. Baltimore and Ohio Railway Co.*, 149 W. Va. 810, 143 S.E.2d 331 (1965), cert. denied, 384 U.S. 970, 16 L. Ed. 2d 681 (1966); and *State v. Carman, supra*. However, a tax law under which a person claims an exemption is strictly construed against the person claiming the exemption. *Owens-Illinois Glass Co. v. Battle*, 151 W. Va. 655, 154 S.E.2d 854 (1967); *Tax Comm'r. v. Veterans of Fgn. Wars, supra*; and *State v. Carman, supra*.

* * * *

A legislative enactment which uses an undefined term referring generally to professions or professional services will and should be considered as having been used in its broadest modern technical and general sense. We consider the expression "professional services" to have been so used in the taxing statute involved in this case. Thus, we do not limit "professional services" merely to services performed in the practice of law, theology or medicine or in pursuit of occupations specifically recognized as professions by statute. Other professions are plainly contemplated by the taxing statute here involved. However, *any such other profession must be clearly established as a profession by the one who asserts that services rendered by him in connection therewith are "exempt" or "excepted" and hence not taxable.* (Emphasis added.)

Wooddell v. Dailey, 160 W. Va. 65, 68-70; 230 S.E.2d 466, 469-70 (1976).

The legislative rule respecting certification of electrical inspectors does not specify any educational requirement that is required to achieve or attain certification. One need only be a master electrician and pass one or more of the tests identified in the legislative rule. There is no apparent educational requirement. To satisfy the underlying requirement of licensure as a master electrician, the applicant is only required to show that he or she has the experience specified by the statute. To satisfy the underlying requirement of licensure as a journeyman electrician, the applicant must demonstrate that he or she has the requisite experience, and that he or she has completed an approved apprenticeship program or an electrical vocational education program. The vocational education program is not required, it is merely one option available to a journeyman electrician candidate. Thus, one may become a journeyman electrician, then a master electrician and then a certified electrical inspector without the necessity of satisfying any apparent, specific educational requirement to achieve or attain licensure (as opposed to continuing education necessary to maintain licensure or certification). Consequently, the Petitioner has failed to show that there is some educational requirement necessary to attaining certification as an electrical inspector, as established by W. Va. Code St. R. § 110-15-8.1.1.

Having failed to satisfy that requirement, the Petitioner has not satisfied her burden of showing that she provides professional services.

Both the Petitioner and her witness speak to the substantial amount of education they have received in their lives, a substantial portion of which is germane to electrical inspection, but a portion of which is not. Part of the problem, as stated above, is that it has not been clearly proven that the education that they have received is required for certification as an electrical inspector.

Another problem with the Petitioner's argument is that the legislative rule speaks to two separate educational requirements. The first is the level of education required for the activity. This speaks to the level of education necessary to achieve or attain the licensure, certification or other requirement necessary to practice a given profession. The second is the continuing education requirement. This speaks to the level of education necessary to maintain the licensure, certification or other requirement necessary to practice a given profession. Much of the Petitioner's evidence respecting education relevant to her occupation demonstrates that it is continuing education necessary to maintain certification. This satisfies the fourth condition set out in the legislative rule, which the Tax Commissioner apparently does not dispute. However, it does not satisfy the first condition. It does not prove that the education she acquired was required to attain certification.

Applying the standard set out in *Wooddell*, it is clear that the Petitioner has not clearly established that certified electrical inspectors are entitled to the exception from collection of consumers' sales and service tax on professional services set out in W. Va. Code § 11-15-8.

Another consideration, one not expressly raised by the parties, is the fact that certified electrical inspectors are more comparable to one of the occupations expressly identified in the

legislative rule as not being a profession, specifically electricians. The relationship between certified electrical inspectors and electrician is inherent in the job and is recognized by the legislative rule requiring certification of electrical inspectors. Certified electrical inspectors are required to be master electricians. W. Va. Code St. R. § 103-1-4.1. In fact, it appears that certified electrical inspectors could do the work of electricians if called upon to do so. Much, if not most, of the work of certified electrical inspectors involves inspecting the work performed electricians in wiring structures for electricity. Certified electrical inspectors are not merely similar to electricians, they are electricians with additional qualifications and greater duties and responsibilities. The relationship of the two professions tends to support the State Tax Commissioner's conclusion that certified electrical inspectors, like inspections, do not provide professional services.

The State Tax Commissioner argues that certified electrical inspectors do not satisfy the portion of the legislative rule respecting "education required for the activity," Specifically he argued that certified electrical inspectors are not required to have a four-year college degrees that is germane to their service as certified electrical inspectors. The requirement of a four-year degree that is germane to the activity is one that has been applied by this Office. The Petitioner argues that the legislative rule does not establish a minimum educational requirement of a college degree. The Petitioner is correct that the legislative rule does not expressly require a college degree. However, the fact that the Petitioner is correct on this point does not entitle her to abatement of the assessment.

The requirement that in order to qualify as a profession an occupation must satisfy the educational requirement of a four-year college degree is one that was established by the State

Tax Commissioner's Office of Hearings and Appeals.¹ This tribunal, the West Virginia Office of Tax Appeals, is independent of the State Tax Commissioner. Decisions issued by the Tax Commissioner's Office of Hearings and Appeals are not precedents that are binding on this Office. However, this Office has chosen to continue to adhere to this educational requirement because it is one that is reasonable in light of the purposes and goals that the Legislature attempted to achieve in enacting the statute and approving the legislative rule. A minimum requirement of a four-year degree that is germane to the activity (plus the other requirements of the legislative rule) is one that tends to divide professions from mere trades or skilled occupations.

This Office recognizes that this requirement of a four-year college degree is, in a very technical sense, "arbitrary." As the Circuit Court of Kanawha County held in *Wideman & Associates, Inc. v. Paige*, Civil Action No. 93-C-5726 (Cir. Ct. Kan. Co. 06/27/95), the legislative rule, on its face, is devoid of any fixed number of respectively weighted standards that can be used for guidance by taxpayers, the Tax Commissioner, the courts and, logically, this Office as the specialized state tax tribunal. In light of the lack of guidance provided by the legislative rule, any standard applied will, of necessity, be arbitrary, whether it be a rule applied to all occupations, as this Office is doing, or whether it establishes some rule respecting the education required (or one of the other standards) for an occupation on a case-by-case basis. The only thing that this Office, a specialized state tax tribunal, and the courts can hope to do when creating some necessarily arbitrary rule is to avoid being capricious at the same time. This Office's goal in establishing the requirement that an occupation must require a four-year college degree in order to be considered a profession is to establish a clear, bright line rule that can

¹ The Office of Hearings and Appeals, the predecessor to this Office, was a part of the State Tax Commissioner's Office. Its decisions were subject to the approval of the State Tax Commissioner.

readily be understood and applied, in advance, by all taxpayers, the State Tax Commissioner and this Office.

The approach taken by this tribunal drastically contrasts with the approach taken by the Circuit Court in *Wideman & Associates, supra*. In *Wideman*, the court held that private investigators do not provide professional services. The Court reviewed the four factors set forth in W. Va. Code St. R. § 110-15-8.1.1.1, and concluded that they contained no concrete, objective, quantitative or qualitative standards, and that there was no requirement that all, or some, or even any of the factors must be present. The Court reviewed the manner in which the Tax Commissioner had applied the standards and determined that they had been applied inconsistently. Accordingly, it held:

Since, as is argued by the tax commissioner, the Legislature reviews all regulations and, therefore, they have the force and effect of law, it should be the province of the Legislature to determine, either by statute or the regulations it reviews, what constitute professional activities for purposes of the consumers sale and service tax [sic]. The Legislature cannot assign this duty to the tax commissioner by prescribing vague, subjective standards which have the effect of vesting the tax commissioner with unfettered discretion. If the Legislature does not set forth concrete objective standards which the tax commissioner can apply, then it must explicitly list each and every occupation which constitutes a profession, listing the forth [sic] either in the statute or in the regulations.

If this Office were to adopt the circuit court's holding in *Wideman*, and it is very persuasive precedent, the assessment would have to be upheld because certified electrical inspectors are not expressly identified in the legislative rule and, therefore, cannot be considered as providers of professional services.

Based on all of the foregoing, this Office is of the opinion that the Petitioner has failed to satisfy her burden of proving that there is a requirement that a certified electrical inspectors provide a professional service that is excepted from the requirement of collecting consumers' sales and service tax on the services provided.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. 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 her is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. Pursuant to the exception set forth in W. Va. Code § 11-15-8 [2003], and the definition set forth in W. Va. Code § 11-15-2(s) [2001], providers of “professional services” are excepted from the duty of collecting consumers’ sales and service tax on the provision of those services.

3. W. Va. Code St. R. § 110-15-8.1.1.1 (July 15, 1993), expressly identifies certain occupations that are considered professions for purposes of the “professional services” exception contained in W. Va. Code § 11-15-2(s) [2001] and W. Va. Code § 11-15-8 [2003].

4. Electrical inspection is not an occupation that is expressly identified in W. Va. Code St. R. § 121-1-8.1.1.1 (July 15, 1993), as a professional service that is excepted from the duty of collecting West Virginia consumers’ sales and service tax.

5. In determining whether or not an occupation qualifies as a profession, so as to be excepted from the requirement of collecting consumers’ sales and service tax on the services provided, the State Tax Commissioner must 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.

6. 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.

7. The legislative rule establishing criteria for certification of electrical inspectors does not provide any education requirement necessary to attain certification as an electrical inspector.

8. The Petitioner has not satisfied her burden of proving that a four-year college degree in a particular field of study is required in order for her to become a certified electrical inspector.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the amended consumers’ sales and service tax assessment issued against the Petitioner for the period of January 1, 2002, through December 31, 2005, for tax of \$, and interest of \$, for a total tax liability of \$, should be and is hereby **AFFIRMED**.