

**REDACTED DECISION – DK#S 12-192 RSW, 12-193 RSW BY – A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED DECISION on MARCH 1, 2013 – ISSUED on JUNE 5, 2013**

**SYNOPSIS**

**ENVIRONMENTAL RESOURCES -- SOLID WASTE LANDFILL CLOSURE ASSISTANCE** -- “A solid waste assessment fee is levied and imposed upon the disposal of solid waste at any solid waste disposal facility in this state in the amount of three dollars and fifty cents per ton or like ratio on any part of a ton of solid waste, except as provided in subsection (e) of this section: *Provided*, That any solid waste disposal facility may deduct from this assessment fee an amount, not to exceed the fee, equal to the amount that the facility is required by the public service commission to set aside for the purpose of closure of that portion of the facility required to close by article fifteen of this chapter.” W. Va. Code Ann. §22-16-4(a) (West 2013).

**ENVIRONMENTAL RESOURCES -- SOLID WASTE LANDFILL CLOSURE ASSISTANCE** -- The operators of solid waste disposal facilities shall remit the fee imposed by West Virginia Code Section 22-16-4(a) to the West Virginia Tax Commissioner. *See* W. Va. Code Ann. §22-16-4(b)(2) (West 2010).

**WEST VIRGINIA OFFICE OF TAX APPEALS -- 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 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).

**WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW** -- The Petitioners have not met their burden of showing that the monies sought to be refunded were amounts that they are required by the public service commission to set aside for the purpose of closure of that portion of their facilities required to close by Article 15 of Chapter 22.

**FINAL DECISION**

In February of 2012, the Petitioners in these consolidated matters<sup>1</sup> filed amended quarterly solid waste returns for the periods January 2009 through January 2012. The purpose of the filings was to obtain a refund of monies put into escrow accounts for landfill closure costs.

Petitioner A sought a total refund of \$\_\_\_\_\_. Petitioner B sought a total refund of \$\_\_\_\_\_. By letter dated March 23, 2012, the Tax Account Administration Division of the West Virginia State

<sup>1</sup> The parties agreed to consolidate these matters and have one Final Decision control because both Petitioners are owned by the same parent company.

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Tax Commissioner's Office (the Tax Department or the Respondent) informed the Petitioners that their amended returns would not be accepted because the deduction they sought did not apply to them.

Thereafter, on May 18, 2012, the Petitioners each 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 petitions was sent to the Petitioners, and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

### **FINDINGS OF FACT**

1. The Petitioner, Petitioner A, operates a landfill near a city in a West Virginia County.
2. The Petitioner, Petitioner B, operates a landfill in a city in a West Virginia County.
3. The rates charged by both Petitioners are set by the West Virginia Public Service Commission.
4. On February 11, 2007, the West Virginia Public Service Commission issued a Final Decision regarding Petitioner A. This Decision allowed Petitioner A a rate increase and mandated that it place sixty cents (\$0.60) per ton in a landfill closure escrow account and twenty-one cents (\$0.21) per ton in a post-closure escrow account.
5. On July 20, 1995, the West Virginia Public Service Commission issued a Final Decision regarding Petitioner B. This Decision allowed Petitioner B a rate increase and mandated that it place four dollars and nineteen cents (\$4.19) per ton in a landfill post-closure escrow account.

6. Petitioner A seeks to deduct the entire eighty-one cents (\$0.81) from the taxes it pays. Petitioner B seeks to deduct three dollars and fifty cents (\$3.50) from the taxes it pays.

### DISCUSSION

The parties in this matter do not dispute the dollar figures involved. They agree on how much the Petitioners charge per ton, and they agree on how much the Petitioners are required to set aside for closure and post-closure costs. The parties also agree that this matter is controlled by West Virginia Code Section 22-16-4(a), which states:

A solid waste assessment fee is levied and imposed upon the disposal of solid waste at any solid waste disposal facility in this state in the amount of three dollars and fifty cents per ton or like ratio on any part of a ton of solid waste, except as provided in subsection (e) of this section: *Provided*, That any solid waste disposal facility may deduct from this assessment fee an amount, not to exceed the fee, equal to the amount that the facility is required by the public service commission to set aside for the purpose of closure of that portion of the facility required to close by article fifteen of this chapter.

W. Va. Code Ann. §22-16-4(a) (West 2013).<sup>2</sup>

The Petitioners seek to deduct (and obtain a refund of) the monies they set aside for closure costs. Specifically, Petitioner A wants to deduct the entire eighty-one cents (\$0.81) it puts aside for future closure, and Petitioner B wants to deduct three dollars and fifty cents (\$3.50) of the four dollars and nineteen cents (\$4.19) it puts aside for future closure costs. During the evidentiary hearing and in their post hearing briefs, the Petitioners present the matter in axiomatic terms; “Section 4(a) says we can deduct up to \$3.50 of our set aside closure costs, and that is what we want to do.” In their initial post-hearing brief the Petitioners quote Section 4(a), but then fail to mention the language in the section that is fatal to their case. That language is, “of that portion of the facility required to close by article fifteen of this chapter.” *Id.* By

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<sup>2</sup> This solid waste assessment fee is remitted to the Tax Commissioner pursuant to Section 4(b)(2) of Article 16, Chapter 22.

ignoring this language the Petitioners seem to want this Tribunal to rewrite Section 4(a) so that it now reads: “*Provided*, That any solid waste disposal facility may deduct from this assessment fee an amount, not to exceed the fee, equal to the amount that the facility is required by the public service commission to set aside for the purpose of closure ~~of that portion~~ of the facility ~~required to close by article fifteen of this chapter.~~” The Petitioners never presented any evidence, nor do they discuss or analyze the language that is struck through above. What Section 4(a) says is that certain closure costs may be deducted, those costs relating to portions of landfills that must close pursuant to Article 15 of Chapter 22. Section 4(a), by its plain language, does not allow operators such as the Petitioners to just deduct the first three dollars and fifty cents (\$3.50) of their escrowed closure monies.

In proceedings before the West Virginia Office of Tax Appeals the burden of proof is upon the Petitioner. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010). In order to meet their burden in this matter the Petitioners needed to show that the monies they seek to have refunded were being set aside pursuant to West Virginia Code Section 22-15-1 *et seq.* However, as stated above, the Petitioners never even mention Article 15, let alone connect the dots for this Tribunal as to the relationship between a portion of their landfills required to close and the monies sought to be deducted and refunded. As a result, the Petitioners have not met their burden of proof .

### CONCLUSIONS OF LAW

1. “A solid waste assessment fee is levied and imposed upon the disposal of solid waste at any solid waste disposal facility in this state in the amount of three dollars and fifty cents per ton or like ratio on any part of a ton of solid waste, except as provided in subsection (e) of this section: *Provided*, That any solid waste disposal facility may deduct from this assessment fee an amount, not to exceed the fee, equal to the amount that the facility is required by the

public service commission to set aside for the purpose of closure of that portion of the facility required to close by article fifteen of this chapter.” W. Va. Code Ann. §22-16-4(a) (West 2013).

2. The operators of solid waste disposal facilities shall remit the fee imposed by West Virginia Code Section 22-16-4(a) to the West Virginia Tax Commissioner. *See* W. Va. Code Ann. §22-16-4(b)(2) (West 2010).

3. 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).

4. The Petitioners have not met their burden of showing that the monies sought to be refunded were amounts that they are required to set aside for closure of that portion of their facilities required to close by Article 15 of Chapter 22.

#### FINAL DISPOSITION

**WHEREFORE**, it is the final decision of the West Virginia Office of Tax Appeals that Petitioner A’s refund request of \$\_\_\_\_\_ and Petitioner B’s refund request of \$\_\_\_\_\_, should be and hereby are **DENIED**.

#### WEST VIRGINIA OFFICE OF TAX APPEALS

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

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Date Entered