REDACTED DECISION – DK# 12-490 P-M

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON JANUARY 27, 2014
ISSUED ON DECEMBER 9, 2014

NOTE: DECISION DELAYED WAITING ON PETITIONER AND TAX DEPARTMENT TO SETTLE CALCULATIONS

SYNOPSIS

TAXATION
SUPERVISION
GENERAL DUTIES AND POWERS OF COMMISSIONER; APPRAISERS

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).

TAXATION
ALTERNATIVE-FUEL MOTOR VEHICLES TAX CREDIT
ELIGIBILITY FOR CREDIT

"A taxpayer is eligible to claim the credit against tax provided in this article if he or she: (c) Constructs or purchases and installs qualified alternative fuel vehicle refueling infrastructure or qualified alternative fuel vehicle home refueling infrastructure that is capable of dispensing alternative fuel for alternative-fuel motor vehicles." *See* W. Va. Code Ann. §11-6D-4(c) (West 2012).

TAXATION
ALTERNATIVE-FUEL MOTOR VEHICLES TAX CREDIT
AMOUNT OF CREDIT FOR QUALIFIED ALTERNATIVE FUEL VEHICLE REFUELING INFRASTRUCTURE AND QUALIFIED ALTERNATIVE FUEL VEHICLE HOME REFUELING INFRASTRUCTURE

The amount of the credit for the purchase and installation of qualified alternative fuel vehicle home refueling infrastructure is equal to an amount of fifty percent of the total costs directly associated with the purchase and installation of the infrastructure. *See* W. Va. Code Ann. §11-6D-6(d) (West 2012).

TAXATION
ALTERNATIVE-FUEL MOTOR VEHICLES TAX CREDIT
DEFINITIONS

""Qualified alternative fuel vehicle home refueling infrastructure" means property owned by the applicant for the tax credit located on a private residence or private home and used for storing alternative fuels and for dispensing such alternative fuels into fuel tanks of motor vehicles, including, but not limited to, compression equipment, storage tanks and dispensing units for alternative fuel at the point where the fuel is delivered or for providing electricity to plug-in

hybrid electric vehicles or electric vehicles: *Provided*, That the property is installed and located in this state." W. Va. Code Ann. §11-6D-2(f) (West 2012).

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The definition of qualified alternative fuel vehicle home refueling infrastructure contained in West Virginia Code Section 11-6D-2(f) is clear and unambiguous.

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

Solar panels do not "store" electricity, nor do they "dispense" or provide electricity to electric vehicles, as those terms are used in West Virginia Code Section 11-6D-2(f).

WEST VIRGINIA SUPREME COURT OF APPEALS
CASE LAW

The Legislature is presumed to be familiar with all the laws it has created. *See e.g.* Charleston Gazette v. Smithers, 232 W. Va. 449, 752 S.E.2d 603, 621 (2013).

TAXATION
RESIDENTIAL SOLAR ENERGY TAX CREDIT

West Virginia law provides a tax credit for the installation of solar panels in residential homes. *See* W. Va. Code Ann. §11-13Z-1 *et seq* (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

Based upon the existence of the tax credit for solar panels in Article 13Z, and the plain ordinary meaning of the words "store" and "dispense", solar panels are not qualified alternative fuel vehicle home refueling infrastructure. Therefore, their installation does not qualify for the tax credit contained in West Virginia Code Section 11-6D-4(c).

WEST VIRGINIA SUPREME COURT OF APPEALS
CASE LAW

"In recognition of the heavy burden bourne by one seeking to estop the government, courts have held that the doctrine of estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent." Hudkins v. State Consol. Pub. Ret. Bd., 220 W. Va. 275, 280, 647 S.E.2d 711, 716 (2007).

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The Petitioners have not shown affirmative misconduct or wrongful conduct on the part of any Tax Department employee.

WEST VIRGINIA OFFICE OF TAX APPEALS
HEARING PROCEDURES

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).

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The Petitioners have not met their burden of showing that the Tax Commissioner should be equitably estopped from denying the Alternative-Fuel Motor Vehicle Tax Credit they requested.

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The Petitioners have met their burden of showing that the Tax Commissioner's denial of that portion of the requested tax credit relating to property that provides electricity to plug in hybrid electric vehicles or electric vehicles was contrary to West Virginia law, clearly wrong or arbitrary and capricious.

FINAL DECISION

On October 22, 2012, the Compliance Division of the West Virginia State Tax Commissioner's Office (hereinafter the Tax Commissioner or Respondent) issued a Notice of Assessment, against 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, 2011, through December 31, 2011, 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.

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).

Subsequently, notice of a hearing on the petition 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 Petitioners reside in a West Virginia county.

2. For tax year 2011, the Petitioners filed for an alternative fuel tax credit in the amount of $_____. This filing was based upon the installation in their home of a solar energy system in 2011. Specifically, they installed a 10.3 kilowatt solar array consisting of 44 solar panels with individual micro inverters and an electric vehicle charging station.

3. The Tax Commissioner denied the requested tax credit, and that denial led to the assessment that forms the basis of this matter.

DISCUSSION

Before we apply the controlling law to the facts in this matter, we need to discuss another argument raised by the Petitioners. The Petitioners in this matter are part of a group of 10 individuals and businesses who all had their solar installations done by the same company. That company was working in conjunction with an accounting firm to ascertain if the alternative fuel tax credit would apply to what they proposed to do, namely, install a system like the one in this case. It appears from the record that there were two main questions to be answered. First, whether the solar panels would be considered part of "qualified alternative fuel vehicle home refueling infrastructure" as that term is defined in West Virginia Code Section 11-6D-2.[1] The second concern was, could the electricity gathered by the solar panels be stored in "the grid" as opposed to in the home of the applicants.

Both an accountant from the firm and representatives of the solar energy company communicated with representatives of the Tax Department over a period of months beginning in August of 2011 and on into 2012. The point of these communications was, as discussed above, to

[1] The solar panels are far and away the most expensive part of the installations at issue. However, the record is clear that the discussions involved the entirety of the systems that were to be installed.

understand how the tax credit would or could apply to customers of the accounting firm/solar energy company. The key fact regarding these discussions is that they were one way, meaning the record in this case is replete with documents and testimony as to how the accountant and employees from the solar energy company met with, called and emailed the Tax Department regarding clarification. On the other hand, the record contains only one writing received from the Tax Department, an email dated March 19, 2012. Attached to this email were proposed interpretive rules regarding the fuel tax credits. These rules had not been released for public comment; however, they did indicate that solar panels would be considered part of the eligible infrastructure and that the electricity gathered could be stored in "the grid" as opposed to in the home of the applicant.[2] These Petitioners and the other nine argue that the upshot of this back and forth with the Tax Department led them to believe that their solar installations would qualify for the requested credit. At hearing, the vast majority of the testimony and the documents introduced revolved around the Petitioners' attempts to show the origins of their mistaken belief, and that the Tax Commissioner should consequently be equitably estopped from denying the requested tax credits.

The Petitioners rely on one case in their estoppel argument, Hudkins v. State Consol. Pub. Ret. Bd., 220 W. Va. 275, 647 S.E.2d 711, (2007). However, their reliance on Hudkins, is puzzling because it states

> In recognition of the heavy burden bourne by one seeking to estop the government, courts have held that the doctrine of estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent

Id, at 280, 716.

[2] It appears from the record that the rules in question were never released for public comment let alone adopted.

In this matter, the Petitioners do not even meet the elements of regular equitable estoppel, let alone the more rigorous standard laid out by the Hudkins Court.[3] In their briefs, the Petitioners do not even attempt to argue that, in the discussions back and forth, the Tax Department officials committed affirmative misconduct or wrongful conduct. The absence of this argument is, presumably, because the Tax Department employees were doing what one would expect, having polite discussions with people seeking guidance about how to interpret West Virginia's tax laws. Therefore, we cannot rule that the Petitioners have met their burden of showing that the Tax Commissioner should be equitably estopped from denying their requested tax credit.

As for the actual law of this matter, it is found in West Virginia Code Section 11-6D-1 *et seq.* "A taxpayer is eligible to claim the credit against tax provided in this article if he or she: (c) Constructs or purchases and installs qualified alternative fuel vehicle refueling infrastructure or qualified alternative fuel vehicle home refueling infrastructure that is capable of dispensing alternative fuel for alternative-fuel motor vehicles." W. Va. Code Ann. §11-6D-4(c) (West 2012).

As discussed above, the conflict in this matter involves the definition of "qualified alternative fuel vehicle home refueling infrastructure" contained in West Virginia Code Section 11-6D-2.

> "Qualified alternative fuel vehicle home refueling infrastructure" means property owned by the applicant for the tax credit located on a private residence or private home and used for storing alternative fuels and for dispensing such alternative fuels into fuel tanks of motor vehicles, including, but not limited to, compression equipment, storage tanks and dispensing units for alternative fuel at the point where the fuel is delivered or for providing electricity to plug-in hybrid electric vehicles or electric vehicles: Provided, That the property is installed and located in this state.

[3] Even under the less rigorous standard of equitable estoppel, the Petitioners fail on numerous fronts. For example, they called no witnesses from the Tax Department. Therefore, their testimony about the purported misrepresentations is hearsay. They also offer no citation to any authority as to whether oral misrepresentations made to a third party can be an element of equitable estoppel (The Petitioners never spoke directly to anyone at the Tax Department). Lastly, by their failure to establish if the installations occurred before or after the initial contact between the accountant and the Tax Department in August of 2011, the Petitioners never established that they acted upon these purported misrepresentations.

W. Va. Code Ann. §11-6D-2(f) (West 2012).

The Tax Commissioner denied the Petitioners' entire tax credit, but in his brief he acknowledges that some of the infrastructure installed by the Petitioners does, in fact, provide electricity to electric vehicles, as those terms are used in the definition.

> Only infrastructure that *stores* or *dispenses* the electricity into a plug-in-hybrid electric or electric vehicle is eligible for the credit. By its very nature, an entire system that is designed to provide electricity to the entire house, cannot be eligible for the credit. Parts or components of such a system may be eligible, but the entire system does not meet the requirements of the statute.

Respondent's Reply Brief at pgs. 6-7.

In their initial and reply briefs, the Petitioners never really get to the heart of the matter, namely, are the solar panels which make up the bulk of the installation costs, part of the requested tax credit? The closest the Petitioners come is this paragraph:

> The assertion that only the car charging station and part of the distribution panel is required to charge an electric vehicle is absurd. If the Taxpayer was installing a car charging system from the current electric grid then maybe this is true. SB465 defined what is alternative fuels to include, Electricity, including electricity from solar energy. How can you generate and dispense electricity from a solar source without the rest of the installation.

Petitioner's Reply Brief at pg. 2.

We are inclined to agree with the Tax Commissioner. Neither party argues that the definition of qualified alternative fuel vehicle home refueling infrastructure is ambiguous. Therefore, if we follow our mandate, and give the words in Section 2 their common ordinary meaning,[4] we must rule that the Section makes no mention of property that gathers alternative

[4] "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary, and accepted meaning in the connection in which they are used." Syllabus Point 5, Weimer v. Sanders, 232 W. Va. 367, 752 S.E.2d 398 (2013).

fuels as being eligible for the credit. The evidence in this matter (and common knowledge) tells us that solar panels on roofs gather sunlight for the purpose of turning that sunlight into energy. Our ruling is bolstered by the fact that after the Alternative-Fuel Motor Vehicle Tax Credit was created, the Legislature then created a tax credit for the installation of solar panels. *See* W. Va. Code Ann. §11-13Z-1 *et seq* (West 2010). The Legislature is presumed to be familiar with all the laws it has created. *See e.g.* Charleston Gazette v. Smithers, 232 W. Va. 449, 752 S.E.2d 603, 621 (2013) (it is a settled principle of statutory construction that courts presume the Legislature drafts and passes statutes with full knowledge of existing law). If the Alternative-Fuel Motor Vehicle Tax Credit included a credit for the installation of solar panels, the Legislature would have had no need to create such a credit by its passage of Section 13Z.[5]

In summation, we rule that the Petitioners have not proven that the Tax Commissioner should be equitably estopped from denying their requested tax credit. We further rule that the plain and ordinary meaning of the definition of qualified alternative fuel vehicle home refueling infrastructure entitles the Petitioners to a credit for any property they installed in 2011 that provides electricity to plug in hybrid electric vehicles or electric vehicles. It is undisputed that the Petitioners did not install any equipment to store alternative fuels. Therefore, the only property installed by the Petitioners that meets this definition is that portion of the installation contained in their garage that dispenses electricity into a car. The Petitioners have proven that the Tax Commissioner committed an error in denying that portion of their requested credit.

[5] The Alternative-Fuel Motor Vehicle Tax Credit was first established in 1996 but it has been modified over the years. The Residential Solar Energy Tax Credit was established in 2009. We have not researched whether the infrastructure portion of the alternative fuel credit came before or after the solar energy credit, but the logic remains the same. If the Legislature created the infrastructure portion of the fuel credit after the solar energy credit, it presumably left solar energy gathering out of the definition because such a credit already existed.

After the decisions in this and the related matters were written, we sent a copy to the parties with an accompanying letter. The letter summarized the decision and directed the parties to consult and, if possible, arrive at a recalculated number, under this Tribunal's procedural rules. The letter clearly advised the parties that the credit would only be for "refueling infrastructure", and that based upon the testimony of one witness, that infrastructure cost approximately $_____ to install. Despite our clear instructions to the parties, the Petitioners failed to consult with the Tax Commissioner to arrive at an exact amount spent on this "refueling infrastructure". Instead, in two different letters, the Petitioners argued that the price of the solar panels should be the only portion of the installation that was not entitled to the requested credit. However, that is not what this Tribunal has ruled and this fact was communicated to counsel for the parties. Nonetheless, no agreement could be reached on a recalculated amount. By letter dated *October 6, 2014*, we directed counsel for the Tax Commissioner to provide us with recalculated amounts in these matters based upon $_____ in installation costs, and he did so.[6]

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. "A taxpayer is eligible to claim the credit against tax provided in this article if he or she: (c) Constructs or purchases and installs qualified alternative fuel vehicle refueling infrastructure or qualified alternative fuel vehicle home refueling infrastructure that is capable of

[6] While we ruled that the Petitioners were entitled to a credit for $_____ of qualified alternative-fuel vehicle refueling infrastructure, West Virginia Code Section 11-6D-6 only provides a credit for 50% of the total costs directly associated with the purchase and installation of the infrastructure. The Tax Commissioner performed the recalculation under the provisions of Section 6 and this decision reflects that recalculated amount.

dispensing alternative fuel for alternative-fuel motor vehicles." W. Va. Code Ann. §11-6D-4(c) (West 2012).

3. The amount of the credit for the purchase and installation of qualified alternative fuel vehicle home refueling infrastructure is equal to an amount of fifty percent of the total costs directly associated with the purchase and installation of the infrastructure. *See* W. Va. Code Ann. §11-6D-6(d) (West 2012).

4. ""Qualified alternative fuel vehicle home refueling infrastructure" means property owned by the applicant for the tax credit located on a private residence or private home and used for storing alternative fuels and for dispensing such alternative fuels into fuel tanks of motor vehicles, including, but not limited to, compression equipment, storage tanks and dispensing units for alternative fuel at the point where the fuel is delivered or for providing electricity to plug-in hybrid electric vehicles or electric vehicles: *Provided*, That the property is installed and located in this state." W. Va. Code Ann. §11-6D-2(f) (West 2012).

5. The definition of qualified alternative fuel vehicle home refueling infrastructure contained in West Virginia Code Section 11-6D-2(f) is clear and unambiguous.

6. Solar panels do not "store" electricity, nor do they "dispense" or provide electricity to electric vehicles, as those terms are used in West Virginia Code Section 11-6D-2(f).

7. The Legislature is presumed to be familiar with all the laws it has created. *See e.g.* Charleston Gazette v. Smithers, 232 W. Va. 449, 752 S.E.2d 603, 621 (2013).

8. West Virginia law provides a tax credit for the installation of solar panels in residential homes. *See* W. Va. Code Ann. §11-13Z-1 *et seq* (West 2010).

9. Based upon the existence of the tax credit for solar panels in Article 13Z, and the plain ordinary meaning of the words "store" and "dispense", solar panels are not qualified

alternative fuel vehicle home refueling infrastructure. Therefore, their installation does not qualify for the tax credit contained in West Virginia Code Section 11-6D-4(c).

10. "In recognition of the heavy burden bourne by one seeking to estop the government, courts have held that the doctrine of estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent." Hudkins v. State Consol. Pub. Ret. Bd., 220 W. Va. 275, 280, 647 S.E.2d 711, 716 (2007).

11. The Petitioners have not shown affirmative misconduct or wrongful conduct on the part of any Tax Department employee.

12. 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).

13. The Petitioners have not met their burden of showing that the Tax Commissioner should be equitably estopped from denying the Alternative-Fuel Motor Vehicle Tax Credit they requested.

14. The Petitioners have met their burden of showing that the Tax Commissioner's denial of that portion of the requested tax credit relating to property that provides electricity to plug in hybrid electric vehicles or electric vehicles was contrary to West Virginia law, clearly wrong or arbitrary and capricious.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioners on October 22, 2012, in the amount of $_____, is hereby **MODIFIED** to now be a tax liability of $_____ plus penalties and interest.

Interest continues to accrue on this unpaid tax until this liability is fully paid. W. Va. Code Ann. § 11-10-17(a) 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS

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

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Date Entered