

BY: HEATHER G. HARLAN, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON MARCH 11, 2016
ISSUED ON SEPTEMBER 7, 2016

SYNOPSIS AND CONCLUSIONS OF LAW

TAXATION; CASE LAW; WEST VIRGINIA SUPREME COURT OF APPEALS

"The same standard set out in the State Administrative Procedures Act, W.Va. Code, 29A-1-1, *et seq.*, is the standard of review applicable to review of the Tax Commissioner's decisions under W.Va. Code, 11-10-10(e) (1986)." *Preston Memorial Hosp. v. Palmer*, 2003, 578 S.E.2d 383, 213 W.Va. 189 (2003) "An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article." W. Va. Code Ann. § 11-15A-2(a).

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The West Virginia Supreme Court of Appeals has upheld as constitutional the placing of the burden of proof on petitioners who challenge actions by a taxing authority. *Bayer Material Science, LLC. v. State Tax Com'r.*, 223 W.Va. 38, 672 S.E.2d 174 (2008); *Woodell v. Dailey*, 230 S.E.2d 466 (W. Va. 1976).

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It is well-established that one charged with enforcing a statute may not, under the guise of interpretation, modify the plain language of a statute he is obligated to enforce. *See Syncor Intl. Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001).

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Within the past decade, the West Virginia Supreme Court of Appeals has reiterated this long standing position, stating that "[a]n examination of that section of the code reveals that the 'language used requires interpretation because of ambiguity which renders it susceptible of two or more construction'" and that the provision is 'of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.'" *Davis Memorial Hospital v. West Virginia State Tax Com'r*, 222 W. Va 688, 671 S.E.2d 682 at 682-83 (2008).

FINAL DECISION

I. Findings of Fact.

1. On November 26, 2014, a Consumers Sales and Use Tax Assessment (the "Sales Tax Assessment") was issued by the Taxpayer Services Division of the West Virginia State Tax Department (the "Respondent") to Petitioner A.
2. Personal Income Tax Assessments were issued against Petitioner B (the "First Personal Assessment") and Petitioner C (the "Second Personal Assessment"). The Sales Tax Assessment, the First Personal Assessment and the Second Personal Assessment shall be collectively referred to herein as the "Assessments". Further, Petitioners A, B and C shall be referred to herein collectively as the "Petitioners."
3. The Assessments were issued by Dana K. Angell, Director of the Auditing Division of the West Virginia State Tax Department, acting under the authorization of the Tax Commissioner of the State of West Virginia.
4. The Sales Tax Assessment was issued according to the provisions of Chapter 11, Articles 14 and 15A of the West Virginia Code and covers the tax period beginning January 1, 2009, through June 30, 2014, in the amount of \$ _____, including tax of \$ _____ and interest of \$ _____.
5. The First Personal Assessment and the Second Personal Assessment were issued according to the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. The First Personal Assessment covers the tax period beginning January 1, 2012, and ending December 31, 2013, in the amount of \$ _____, including tax of \$ _____ and interest of \$ _____. The Second Personal Assessment covers the

tax period beginning January 1, 2012, and ending December 31, 2013, in the amount of \$ _____, including tax of \$ _____ and interest of \$ _____.

6. The Petitioners filed their respective petitions (the "Petitions"), on or about January 23, 2015.
7. The Assessments allege that there exists additional gross sales from underreporting of gross sales in the car wash business operated by Petitioner A, a limited liability company which is owned fifty percent by Petitioner B, and fifty percent by Petitioner C.
8. The additional sales resulted in assessments for consumer sales and service tax on the additional gross sales against Petitioner A, and the additional gross sales income determined in the consumer sales tax assessments resulted in assessments against the owners, Petitioners B and C, for personal income tax deficiencies on the additional gross income generated from the additional gross sales.
9. This case was heard on October 25, 2015, resulting in 235 transcript pages of testimony.
10. Inasmuch as each party cited in his or her brief only the facts from the transcript favorable to his or her case, the facts elicited during the evidentiary hearing appear to be fully and accurately represented by each party and as such, are adopted herein.

DISCUSSION

A. Standard of Review

In issuing decisions as Chief Judge for this Tribunal, the undersigned is mindful of the legal errors that would subject it to reversal on appeal. In this regard, the relevant statute provides:

- (g) The court may affirm the order or decision of the agency or remand the case for further

proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4. Importantly, Syllabus Point one of *Griffith v. ConAgra Brands, Inc.*, 229 W.Va. 190, 28 S.E.2d 74 (2012), the West Virginia Supreme Court of Appeals held that:

In an administrative appeal from the decision of the West Virginia Office of Tax Appeals, this Court will review the final order of the circuit court pursuant to the standards of review in the State Administrative Procedures Act set forth in *W.Va. Code, 29A-5-4(g)* [1988]. Findings of fact of the administrative law judge will not be set aside or vacated unless clearly wrong, and, although administrative interpretation of State tax provisions will be afforded sound consideration, this Court will review questions of law *de novo*.

Further, the West Virginia Supreme Court of Appeals stated that: “[t]he same standard set out in the State Administrative Procedures Act, W.Va. Code, 29A-1-1, *et seq.*, is the standard of review applicable to review of the Tax Commissioner’s decisions under W.Va. Code, 11-10-10(e) (1986).” *Preston Memorial Hosp. v. Palmer*, 2003, 578 S.E.2d 383, 213 W.Va. 189 (2003) (quoting Syl. Pt. 3, in part, *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995)).

B. Burden of Proof

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. West Virginia Code § 11-1-2. Here, Petitioner bears the burden of proof in challenging the presumptive correctness of

Respondent's action. See West Virginia Code § 11-10A-10(e), ("[e]xcept as otherwise provided by this code or legislative rules, the taxpayer or Petitioner has the burden of proof"). See also *Woodell v. Dailey*, 230 S.E.2d 466 (W. Va. 1976).

The West Virginia Supreme Court of Appeals has upheld as constitutional the placing of this burden on Petitioner. See *Bayer MaterialScience, LLC. v. State Tax Com'r.*, 223 W.Va. 38, 672 S.E.2d 174 (2008). Specifically, the Court noted that:

For its second assignment of error, Bayer complains that it also was denied due process by the onerous burden of proof imposed upon taxpayers challenging allegedly erroneous tax assessments. Bayer first contends that a taxpayer's burden of proof before a Board of Equalization and Review is by a preponderance of the evidence; thus, Bayer argues that requiring it to sustain its claims for relief before the Board by clear and convincing evidence was wrong. Additionally, Bayer asserts that requiring taxpayers to prove by clear and convincing evidence the erroneousousness of their tax assessments is unconstitutional because the Tax Commissioner is not held to a corresponding standard. In response, the Tax Commissioner and the Commission reply that a taxpayer challenging the correctness of a tax assessment must prove his/her claim for relief by clear and convincing evidence. Such a standard, which the appellees respond is often used in other types of cases, is not unconstitutional and does not deny appealing taxpayers of due process.

56 At the outset, we note that Bayer's assignment of error on this point challenges both its burden of proof, *i.e.*, by clear and convincing evidence, and its burden of persuasion insofar as neither the Tax Commissioner nor the Assessor are required to prove the correctness of their assessments. We have repeatedly recognized, though, that it is customary to require the party seeking relief to carry the burden of persuasion: "[i]t is a well-established rule of law that in civil actions the party seeking relief must prove his right thereto." *Boury v. Hamm*, 156 W.Va. 44, 52, 190 S.E.2d 13, 18 (1972). Accordingly, when a plaintiff comes into court in a civil action he must, to justify a verdict in his favor, establish his case The burden of proof, meaning the duty to establish the truth of the claim ..., rests upon him from the beginning, and does not shift, as does the duty of presenting all the evidence bearing on the issue as the case progresses.

Burk v. Huntington Dev. & Gas Co., 133 W.Va. 817, 830, 58 S.E.2d 574, 581 (1950), *modified on other grounds*, *Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (1997). See also *Mayhew v. Mayhew*, 205 W.Va. 490, 497 n. 15, 519 S.E.2d 188, 195 n. 15 (1999) (explaining differences between burden of proof and burden of persuasion). In order to sustain its burden of persuasion as to its claims for relief, then, Bayer is required to carry the burden of proof.

With these principles in mind regarding the standard of review and burden of proof, we now discuss the proper legal analysis in this matter.

C. Legal Analysis

Although this Tribunal is, as it must be, always cognizant of the statutory burden of proof that these and any petitioners must bear when challenging an assessment issued under the authority of Respondent, the record is replete with evidence that the Petitioners here have met this burden. Conversely, the Respondent's witness was either unprepared, uninformed or otherwise unresponsive during her testimony, despite her many years of experience both as an auditor and in testifying in cases before this Tribunal and its predecessor. As a result, the Respondent's counsel is left with little more to argue in her less than fifteen (15) page brief other than the burden of proof which undoubtedly in many cases is enough. Such is not the case in this instance, however. This matter does not involve interpretation of a statute. Nonetheless, to the extent that the enforcement of a validly existing statute against a particular taxpayer is relevant here, the following analysis is not only instructive but conclusive according to this Tribunal.

1. Principles of Statutory Construction

As set forth herein, there is generally a presumption of correctness of the administrative action being challenged in matters such as the issue at hand and such, the burden of persuasion is placed upon the party raising that challenge. See Cleckley, *Handbook on Evidence for West Virginia Lawyers 4th Ed.*, Vol. II, §§12-1, et seq. Indeed, West Virginia Code 11-10A-10(e) states as much. This burden, however, is satisfied when, as here, the party challenging an administrative action has come forward with prima facie evidence "showing cause" why that action is in error. . In cases involving judicial review of the construction given a statute by an executive agency

charged with administering that statute, the first question for the reviewing court is whether the statute is clear enough to preclude the need for construction. *Appalachian Power Co. v. State Tax Dep't*, *Syl Pt. 3*, 195 W. Va. 573, 466 S.E. 2d 424 (1995). Within the past decade, the West Virginia Supreme Court of Appeals has reiterated this long standing position, stating that “[a]n examination of that section of the code reveals that the “language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions” and that the provision is “of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Davis Memorial Hospital v. West Virginia State Tax Com’r*, 222 W. Va 688, 671 S.E.2d 682 at 682-83 (2008). If a statute is silent or ambiguous with respect to the specific issue, the issue for the court is whether the agency’s answer is based on a permissible construction of the statute. *Appalachian Power Co. v. State Tax Dep’t, Syl Pt. 4*, 195 W. Va. 573, 466 S.E. 2d 424 (1995.)

In the execution and enforcement of statutes enacted by the Legislature, administrative agencies and the courts are bound to follow the express language of those laws. *Appalachian Power, supra*. Only if the meaning of those words is not apparent on their face, or if the words do not address questions that they inherently present, are administrative agencies and the courts authorized to engage in construction of that language to determine the Legislature’s intent. *Id.*

It is axiomatic that legal consequences should not be based on an incorrect interpretation of the applicable law. *See WV Health Care Cost Review Authority v. Boone Memorial Hosp.*, 196 W. Va. 326, 335, 472 S E.2d 420 (1996). In such circumstances or when the Respondent’s interpretation of a tax statute exceeds his statutory authority, this Tribunal is not generally justified upholding Respondent’s actions. By successfully rebutting the presumption of correctness that Responding enjoys as long as a statute is reasonably construed, Petitioner has met his burden of

proof. Failure of this Tribunal to reverse his actions in this circumstance could constitute reversible error. Accordingly, the Petitioners here prevail in this matter.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the Petitioners' petition for refund is **GRANTED** and the Assessments are hereby **VACATATED** and **SET ASIDE** in their entirety for the tax periods of question herein. **IT IS SO ORDERED.**

WEST VIRGINIA OFFICE OF TAX APPEALS

By: /s/ Heather G. Harlan
Heather G. Harlan
Chief Administrative Law Judge

September 7, 2016
Date Entered