REDACTED DECISION – DK# 14-187 AFTC

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON OCTOBER 10, 2017
ISSUED ON MAY 29, 2018

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

In May of 2014, the Taxpayer Services Division of the West Virginia State Tax Department issued two return change letters to the Petitioners. These letters informed the Petitioners that the Alternative Fuel Tax Credit (hereinafter "AFTC") that they had claimed for tax years 2012 and 2013 had been denied. Thereafter, on June 23, 2014, the Taxpayer Services Division issued an assessment against the Petitioners for personal income tax for tax year 2012. The assessment was for tax in the amount of $_____, penalties and additions in the amount of $_____, and interest in the amount of $_____, for a total assessed liability of $_____. On August 20, 2014, the Taxpayer Services Division issued a second assessment against the Petitioners for personal income tax for tax year 2013. This assessment was for tax in the amount of $_____, penalties and additions in the amount of $_____, and interest in the amount of $_____, for a total assessed liability of $_____.

On June 23, 2014, the Petitioners timely filed with this Tribunal, a petition for reassessment.[1] An evidentiary hearing was held in this matter on November 3, 2016, at the

[1] The Petitioners filed their appeal upon receiving a "Statement of Account" in May of 2014. The Tax Commissioner immediately filed a motion to dismiss. Prior to this Tribunal's ruling, the Petitioners received the

conclusion of which, the parties filed legal briefs[2]. The matter became ripe for a decision at the conclusion of the briefing schedule.

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. In June of 2012, the Petitioners purchased a 2012 Chevrolet Suburban from Enterprise Car Sales. *See* State's Exhibit 3 and Petitioners' Exhibit 1. Petitioner testified that this vehicle is a "flex fuel" vehicle although aside from her testimony there is no other evidence in the record showing that this is so. TR P 10 at 8.

3. At the time of the purchase by the Petitioners, it had been previously owned as a rental car and had 20,444 miles on the odometer. Respondent's Exhibit 1.

4. In their 2012 and 2013 West Virginia tax filings, the Petitioners applied for the AFTC credit. The Petitioners were granted the credit after their 2012 filing. Shortly after their 2013 filing they received a letter from the Tax Department stating that the credits for both tax years had been disallowed. *See* State's Exhibit 2. It was this disallowance that ultimately led to the issuance of the two assessments that form the basis of this matter.

DISCUSSION

The Petitioners in this matter are *pro se*, and argue that they are entitled to the AFTC credit. Specifically, they argue that they purchased a new car, not a used car. The Tax Commissioner argues that under West Virginia law, in order to obtain the credit, a person must have either

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first assessment, rendering the motion to dismiss moot. Thereafter, the August assessment also became a subject of their appeal without objection from the Tax Commissioner.

[2] The evidentiary hearing in this matter was conducted by Administrative Law Judge Crystal Flanigan.

purchased a new alternative fuel vehicle or taken an existing vehicle and converted it to make it credit eligible. The Tax Commissioner further argues that the Petitioners purchased a used car.

The law creating the tax credit is fairly straightforward and neither party argues that it is ambiguous.

> A taxpayer is eligible to claim the credit against tax provided in this article if the taxpayer:
> (a) Converts a motor vehicle that is presently registered in West Virginia to operate exclusively on an alternative fuel as defined in this article or to operate as a bi-fueled alternative-fuel motor vehicle; or
> (b) Purchases from an original equipment manufacturer or an after-market conversion facility or any other automobile retailer, a new dedicated alternative-fuel motor vehicle or bi-fueled alternative-fuel motor vehicle for which the taxpayer then obtains a valid West Virginia registration;

W. Va. Code Ann. § 11-6D-4 (West 2013).

The West Virginia Legislature clearly made this particular tax credit unavailable to purchasers of used alternative fuel vehicles. A review of the legislative purpose bears this out when the Legislature states that "However, because the cost of motor vehicles which utilize alternative-fuel technologies remains high . . . citizens of this state who might otherwise choose an alternatively-fueled motor vehicle are forced by economic necessity to continue using motor vehicles that are fueled by more conventional means." W. Va. Code Ann. § 11-6D-1 (West 2013). It certainly appears that the Legislature was trying to promote a new and emerging industry and was not concerned with or thinking about advocating for the purchase of used alternative fuel vehicles.

At hearing, and in their post hearing briefs the Petitioners argue that they purchased a new car from a dealership. They attempt to explain the 20,444 miles on the odometer at the time of purchase as being mileage put on "through the car dealership".

> PETITIONER: Where we looked at the mileage, you know, you made a point that it was 20,000-some odd miles. I'm not quite sure

> if that's a direction of whether it ---. I'm not quite sure, but it was --- those miles were put on through the car dealership. To our understanding, it was put on through them.
>
> ATTORNEY BREECE: Uh-huh (yes).
>
> JUDGE FLANIGAN: I just have a quick question. I don't mean to interrupt you. So you're saying that when you bought the car, that the car dealership --- through demos and that sort of thing, that people driving it have put the 20,000 miles on it?
>
> PETITIONER: Yes, ma'am. We bought it through Enterprise Rental.

TR P 15 at 3-11.

The Office of Tax Appeals is not bound by the rules of evidence. *See* W. Va. Code Ann. § 11-10A-10(c) (West 2018) (The office of tax appeals may admit and give probative effect to evidence of a type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs). This Tribunal has traditionally ruled that Section 10(c) directs us to use common sense when it comes to questions regarding the evidence presented in a matter. Even if the OTA was bound by the rules of evidence, Rule 201 of the West Virginia Rules of Evidence also allows for a sort of procedural/evidentiary form of common sense. "(b) Kinds of Facts That May Be Judicially Noticed**.** The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction". W. Va. R. Evid. 201. Finally, the West Virginia Supreme Court of Appeals has also stated, in dicta, that courts should not abandon their common sense at the courthouse door. "Although a court may not read into a statute language purposefully omitted, courts of this state are not required to **"insulate themselves from all knowledge of happenings and events in the world about them, and pretend ignorance to that which among the mass of citizens is common knowledge, . ."** State v. Blatt, 235 W. Va. 489, 500, 774 S.E.2d 570, 581 (2015) (internal citations omitted).

Except for the Petitioners' Vehicle Buyer Order, there was no evidence presented in this matter regarding the nature of Enterprise Car Sales' business. Nonetheless, common sense and general knowledge within this Tribunal's jurisdiction tells us that Enterprise Car Sales is not a car dealership and that the Petitioners purchased a used rental car. We find the Petitioners' claim that the twenty thousand miles on the odometer at the time of purchase was put on by the "dealership" to be particularly troubling. The Petitioners assert that those miles were put on the car by test drives and, presumably, dealership employees driving the vehicle home in the evenings. Even if we give the Petitioners the benefit of the doubt, and call the place of purchase a dealership, the math involved does not even pass the straight face test. Again, there was no evidence presented regarding the history of the purchased vehicle. The Petitioners purchased the vehicle on June 14, 2012. Being generous, let us assume the vehicle was delivered new to Enterprise on September 1, 2011.[3] There are 196 working days between September 1, 2011 and June 14, 2012. Dividing 20,444 (the mileage at time of purchase) by 196 give us 104 miles put on the car every work day. To suggest that the Petitioners' vehicle had 104 miles put on it five days out of every week, by test drives and dealership employee use is disingenuous at best, and an argument that we find unavailing. The Petitioners purchased a used rental car, and as such, it was ineligible for the AFTC credit.

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).

[3] We do not know when Model Year 2012 vehicles began to leave the factory for sale to the public.

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, pay West Virginia taxes.

5. Article 6D of Chapter 11 of the West Virginia Code provides various tax credits, including one for taxpayers who purchase "from an original equipment manufacturer or an after-market conversion facility or any other automobile retailer, a new dedicated alternative-fuel motor vehicle or bi-fueled alternative-fuel motor vehicle for which the taxpayer then obtains a valid West Virginia registration". W. Va. Code Ann. § 11-6D-4 (West 2013).

6. The Petitioners are ineligible for the tax credit provided to purchasers of alternative fuel motor vehicles because they purchased a used vehicle.

7. 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).

8. The Petitioners in this matter have not carried their burden of proving that the June 23, 2014, and the August 20, 2014, assessments were erroneous, unlawful, void or otherwise invalid.

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 June 23, 2014, in the total amount of $_____, and the assessment issued on August 20, 2014, in the total amount of $_____ are hereby **AFFIRMED.**

Interest continues to accrue on the unpaid tax until this liability is fully paid pursuant to the West Virginia Code Section 11-10-17(a).

WEST VIRGINIA OFFICE OF TAX APPEALS

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

_____
Date Entered

REDACTED DECISION – DK# 14-251 AFTC

BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON JANUARY 16, 2018
ISSUED ON JUNE 5, 2018

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On July 28, 2014, the Taxpayer Services Division of the West Virginia Tax Department issued return change letters for tax years 2011, 2012, and 2013 to the Petitioner. These letters informed the Petitioner that the Alternative Fuel Tax Credit (hereinafter "AFTC") that he had claimed for 2011 and 2012 had been denied.

On August 20, 2014, the Petitioner received a statement of account for tax in the amount of $_____, penalties and additions in the amount of $_____ and interest in the amount of $_____ for tax year 2011. The Statement of Account also included for tax year 2012, tax in the amount of $_____, penalties and additions in the amount of $_____, and interest in the amount of $_____. The Statement finally included tax for tax year 2013 in the amount of $_____, penalties and additions in the amount of $_____, and interest in the amount of $_____, for a total of $_____.

On August 14, 2014, the Petitioner timely filed with this Tribunal, a petition for reassessment. On September 3, 2014, the Petitioner paid the West Virginia State Tax Department $_____ under protest. An evidentiary hearing was held in this matter on January 26, 2017, and a supplemental hearing was held on September 27, 2017, at the conclusion of which, the parties filed legal briefs. The matter became ripe for a decision at the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Petitioner is a Resident Individual, as that term is defined in West Virginia Code Section 11-21-7. As such, he pays West Virginia income taxes.

2. On December 31, 2010, the Petitioner purchased a new 2011 Chevrolet Silverado from a West Virginia Auto Dealer. *See* State's Exhibit 4, and Petitioner's Exhibit B, Motor Vehicle Purchase Agreement.

3. In the 2011, 2012 and 2013 West Virginia tax filings, the Petitioner applied for the AFTC. The Petitioner was granted the credit after his 2011 filing. Shortly after his 2013 filing he received a credit denial from the Tax Department denying the credits for the tax years at issue. *See* State's Exhibit 2.

4. On September 3, 2014, the Petitioner paid, under protest, $_____, to the West Virginia State Tax Department.

DISCUSSION

The only issue in this matter is the date of purchase of the vehicle discussed above. In 1996 the Legislature passed Senate Bill 363, which created an alternative fuel motor vehicle tax credit. However, the Legislature clearly stated in Section 7 that the credit would only be available for ten years. "The tax credit provided in this article shall expire by operation of law ten years after the effective date of this article," TAXATION—ALTERNATIVE-FUEL MOTOR VEHICLE TAX CREDIT, 1996 West Virginia Laws Ch. 234 (S.B. 363).

In 2011 the West Virginia Legislature passed Senate Bill 465, titled the Marcellus Gas and Manufacturing Development Act. TAX CREDITS-NATURAL GAS-ALTERNATIVE FUELS, 2011 West Virginia Law Ch. 161 (S.B. 465). The legislation contained various provisions, including reenacting the alternative fuel motor vehicle tax credit which had expired in 2006.

The controlling provision for this matter is West Virginia Code Section 11-6D-3 which states:

> The tax credits for the **purchase of alternative-fuel motor vehicles or conversion to alternative-fuel motor vehicles**, qualified alternative-fuel vehicle refueling infrastructure and qualified alternative-fuel vehicle home refueling infrastructure provided in this article may be applied against the tax liability of a taxpayer imposed by the provisions of either article twenty-one, article twenty-three or article twenty-four of this chapter, but in no case may more than one tax credit be granted under this article or any combination of articles set forth in this chapter for purchase of an alternative-fuel motor vehicle or for costs relating to conversion to an alternative-fuel motor vehicle, or for costs associated with alternative-fuel vehicle refueling infrastructure or for costs associated with alternative-fuel home refueling infrastructure as defined in this article. **This credit shall be available for those tax years beginning on or after January 1, 2011**, but shall not be available for, or with relation to, any purchase, expenditure, investment, installation, construction or conversion made in any tax year beginning after the termination dates specified in this article, as applicable to specified purchases, expenditures, investments, installations, construction or conversions.

W. Va. Code Ann. § 11-6D-3 (West)(Emphasis added.)

The Tax Commissioner argues that when the Petitioner purchased the 2011 Chevrolet Silverado, the credit was not in effect. The Petitioner is *pro se* and argues that he purchased the vehicle on January 3, 2011 and relies on a service invoice from a West Virginia Auto Dealer dated September 1, 2016, which refers to a delivery date of January 3, 2011. *See* Petitioner's Exhibit No. C. The vehicle purchase agreement shows that the Chevrolet Silverado was purchased from a West Virginia Auto Dealer., on December 31, 2010. The Petitioner claims that this date is incorrect because the car dealership backdated the purchase date so that sale would become part of 2010's sales tax year. The Petitioner did not bring a witness from the car dealership to testify to the date of the purchase. *See* Petitioner's Exhibit C. The date of purchase is on the purchase agreement as December 31, 2010, and it is the purchase agreement that is controlling.

Furthermore, the Petitioner put December 31, 2010, as the date of purchase on his West Virginia Schedule AFTC-1 credit worksheet that was attached to his amended 2011 West Virginia State Income Tax Return. *See* State's Ex. 4.

Neither party argues that this statute is ambiguous and its effective date of January 31, 2011 is quite clear. We find Petitioner's argument regarding the delivery date on the Auto Dealer Service invoice unpersuasive. Unfortunately for the Petitioner, the purchase was made on December 31, 2010, just one day prior to the effective date. However, this statutory requirement could not be clearer. Therefore, the Petitioner did not meet the statutory qualifications to receive the Alternative Fuel Tax Credit for the vehicle at issue.

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 Petitioner is a resident individual, as that term is defined in West Virginia Code Section 11-21-7, and as such, pays West Virginia taxes.

5. Article 6D of Chapter 11 of the West Virginia Code provides various tax credits, including one for taxpayers who purchase "alternative-fuel motor vehicle or conversion to an alternative-fuel motor vehicle...on or before January 1, 2011." W. Va. Code Ann. § 11-6D-3 (West 2011).

6. The Petitioner is ineligible for the tax credit provided to purchasers of alternative fuel motor vehicles because he purchased a vehicle prior to the statute's effective date.

7. 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).

8. The Petitioner in this matter has not carried his burden of proving that the assessment was erroneous, unlawful, void or otherwise invalid.

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the ATFC credit denial issued July 28, 2014, in the total amount of $_____, is **AFFIRMED.**

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Crystal S. Flanigan
Administrative Law Judge

_____
Date Entered

REDACTED DECISION – DOCKET NUMBERS 15-040 CU, 15-041 CU, CONS # 15-0006

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON OCTOBER 17, 2016
ISSUED ON APRIL 3, 2018

NOTE: THIS ADMINISTRATIVE DECISION WAS APPEALED BEYOND THE OFFICE OF TAX APPEALS

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On December 19, 2014, the Auditing Division of the West Virginia State Tax Commissioner's Office (Tax Commissioner or Respondent) issued two Notices of Assessment, one against Petitioner for Company A and another Company B.[1] These assessments were 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 against Company A was for combined sales and use tax for the period January 1, 2011, through December 31, 2013, for tax in the amount of $_____ and interest in the amount of $_____ for a total assessed liability of $_____. The assessment against Company B was for combined sales and use tax for the period, January 1, 2011, through December 31, 2013, for tax in the amount of $_____ and interest in the amount of $_____, for a total assessed liability of $_____. Thereafter, February 11, 2015, the Petitioners timely filed with this Tribunal, two petitions for reassessment, one for Company A and one for Company B. An evidentiary hearing

[1] Between the issuance of the assessments in this matter and the evidentiary hearing, Company B was merged with Company A. This Tribunal consolidated the two matters by an Order entered on May 18, 2015.

was held in this matter on May 5, 2016, at the conclusion of which, the parties filed legal briefs.[2] The matter became ripe for a decision at the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Petitioner is a C corporation with its corporate offices in another State. TR P9 at 17-18.
2. The Petitioner's business consists of what it characterizes as "drilling for minerals". It conducts these drilling operations in numerous states, including West Virginia.
3. A typical drilling site of Petitioner's will consist of the "drilling rig" and various pieces of supporting equipment. Included among this equipment are machines to generate electricity, provide potable water, provide sanitation, and treat sewage. A typical site also contains what Petitioner calls "skid houses", or crew quarters, which are modular buildings to provide temporary housing and office space.
4. In a typical drilling operation of Petitioner's, it will not own any of the equipment on site, but rather will rent it all. TR P27 at 6-22.
5. The actual drilling takes place on what Petitioner calls a "pad". A pad can contain anywhere from two (2) to eight (8) wells (a well being the actual hole drilled into the ground) TR P11 at 6-7. These wells can be as close as ten feet apart. TR P18 at 8.
6. Petitioner's Exhibit 19 is a photograph of a typical drilling site operated by Petitioner.
7. A typical well pad will have thirty (30) to forty (40) people working at any one time. TR P19 at 5-6. Virtually all of those people will be employed by the company from which

[2] The evidentiary hearing in this matter 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.

Petitioner rents the drilling rig. TR P33 at 3-5. The drilling rig rental company will have a person in charge at the pad site, and that person's job title is "tool pusher". TR P34-35 at 18-5.

8. The Petitioner will typically have one person on the pad site who is their direct representative, and their job title is "company man". TR P20 at 6-12. However, even the company man is a subcontracted employee of a specialized consulting firm, and is not employed by Petitioner. TR P50 at 1-5.

9. Due to the close proximity between the well holes, it is imperative to Petitioner that each well travel in a straight line, to ensure that the drill bit does not stray and break a pipe in a nearby well hole. TR P37 at 1-6. To that end, Petitioner subcontracts with specialists called "directional drillers", whose main job function is to prevent that scenario from happening.

10. There are two directional drillers on the well pad at all times. Typically, each works a twelve (12) hour shift while the other is off. However, at certain times, both directional drillers have to independently, but contemporaneously, program coordinates into a computer regarding the current and future location of the drill bit. At those times, the directional driller who is "off duty" will be summoned, even if he or she is asleep, to perform this function. TR P35-37, P48 at 11-22. Both the company man and the tool pusher are also required to participate in the drill bit location programming. TR P37 at 4-12.

11. The company man works on the well pad site for twelve hours and then is housed in a hotel when he or she is not at the well site. TR P47 at 14-19.

12. The tool pusher is on the well pad 24 hours a day, 7 days a week, for 2 weeks at a time. TR P50 at 6-17. When he or she is not working they stay in a trailer that is part of the drilling rig rental package. TR P35 at 1-5.
13. The Petitioner is contractually bound to provide housing on the well pad for the directional drillers. TR P38 at 11-15.
14. During the audit in this matter the auditor found some of the rentals utilized by Petitioner to be subject to use tax, some to be partially subject to use tax and some to be exempt from use tax. All of these calculations were based upon whether the rented items were directly or indirectly used in the mineral extraction process.
15. Specifically, the auditor found that a percentage of the skid house/crew quarters were directly used in extraction, because a portion of them had "office space" that housed the computers that controlled the drilling. Conversely, the auditor found that the parts of the quarters that were used for "living" ie; the bedrooms, restrooms, kitchen and living area were subject to use taxes. TR P61 at 8-11.
16. The auditor also found that a portion of the equipment that supports the crew quarters, equipment such as generators was subject to use tax, because a percentage of those rentals was used to support the living quarters. TR P72 at 6-8.
17. The auditor found certain rentals to be entirely subject to use tax, those items being porta-potties, all equipment for portable sewage/sanitation systems, and all trash/waste dumpsters/bins.

DISCUSSION

The dispute in this matter centers on whether certain items rented by Petitioner are directly or indirectly used in its drilling operations.

Generally, if a business in West Virginia were to buy a case of glass cleaner from ABC Cleaning Supplies in Anytown, U.S.A., one of two things would happen. Either ABC would charge the business West Virginia sales tax or the business would later remit use tax to the Tax Commissioner pursuant to West Virginia Code Section 11-15A-2, which states:

> 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) (West 2010). However, there are exemptions from the use tax, and one of those exemptions is if the property or service is exempt from sales tax, pursuant to Article 15 of Chapter 11. *See* W. Va. Code Ann. § 11-15A-3 (West 2013). Section 9 of Article 15, Chapter 11 contains the sales tax exemptions and subsection (b)(2) of Section 9 provides an exemption for:

> The following sales of tangible personal property and services are exempt from tax as provided in this subsection: . . . (2) Sales of services, machinery, supplies and materials directly used or consumed in the activities of manufacturing, transportation, transmission, communication, production of natural resources, gas storage, generation or production or selling electric power, provision of a public utility service or the operation of a utility service or the operation of a utility business, in the businesses or organizations named in this subdivision and does not apply to purchases of gasoline or special fuel;

W. Va. Code Ann. § 11-15-9(b)(2) (West 2018)

Additional guidance regarding what the phrase "directly used" means is contained in West Virginia Code Section 11-15-2 which states:

> "Directly used or consumed" in the activities of manufacturing, transportation, transmission, communication or the production of natural resources means used or consumed in those activities or operations which constitute an integral and essential part of the activities, as contrasted with and distinguished from those activities

> or operations which are simply incidental, convenient or remote to the activities.

W. Va. Code Ann. §11-15-2(b)(4) (West 2018).[3]

Based upon the language in both subdivision 4 and subparagraph xiv, we find the question to be answered in this case to be: were the items rented by Petitioner "integral and essential" or "incidental, convenient or remote", as those terms are used in Section 2(b)(4), to the drilling operations. Neither party argues that any of the statutory provisions at issue are ambiguous. Petitioner argues that we must give the terms "integral and essential" and "incidental, convenient or remote" their plain and ordinary meaning and we are in agreement.

The rentals at issue in this matter are:

1. The skid houses/crew quarters.
2. Generators, transformers, and related water and electrical equipment and connectors to service the skid houses/crew quarters.
3. Porta-a-Potties.
4. Portable water and sewage systems, including specialized boxes to protect the same from the elements.
5. Trash trailers and bins.

We will address each category of rental in turn, starting with the skid houses because they, and much of the equipment supporting them, form the bulk of the assessment at issue.

We should state at the outset that the record in this case regarding the skid houses and the various personnel on the well pad site is a bit muddled. Petitioner presented exhibits and testimony regarding three groups of employees, "company men", "tool pushers" and "directional drillers". A close reading of the testimony shows that the skid houses are at the well site for only one of

[3] We find the remainder of subdivision 4 to be somewhat confusing. Paragraph A of Subdivision 4 offers a list of fourteen (14) uses of property or services that purports to be the entire list of uses that are direct. "(A) Uses of property or consumption of services which constitute direct use or consumption in the activities of manufacturing, transportation, transmission, communication or the production of natural resources include **only**: . . . ." *Id* at (b)(4)(A) (emphasis added). Interestingly, subparagraph xiv of paragraph A then has a catchall that mirrors the same language as subdivision 4. "Otherwise using as an integral and essential part of transportation, communication, transmission, manufacturing production or production of natural resources." *Id* at (b)(4)(A)(xiv). As such, subparagraph xiv seems to render the specificity in the subparagraphs above it moot.

these groups, the directional drillers. The company men stay in a hotel when they are not on site. The tool pushers stay in housing that is part of the daily rental package that includes the drilling rig itself and virtually all of the equipment on the pad site. It is the directional drillers who stay in the skid houses and they, (the skid houses) are there because Petitioner is contractually bound to provide them.

> **ATTORNEY GRIFFITH**: And you mentioned that they're there 24/7. Do they use Petitioner-rented crew quarters or ---?
>
> **MR. A**: We do rent crew quarters for them. As part of their bill is they ---. Basically, we have a day rate, and then we're required to provide them crew quarters for their people to be at.

See Transcript P38 at 11-15. Petitioner's witness testified that two directional drillers are on site at all times. Their primary job seems to be to ensure that everyone knows where the drill bit is, and more importantly, where it is going. As testified to, in a situation with up to eight wells on a pad, each separated by only ten feet, it is obviously critical to make sure that the drill bit does not stray into a nearby already dug well hole. Therefore, while only one directional driller is "working" at any given time, the other directional driller needs to be constantly available for consultation and concurrence regarding computer programing of where the drill bit may be going next. To underscore the importance of these calculations, both the company man and the tool pusher are also involved in this computer programing.

> **MR. A.** But we have this halo of safety that says --- if we think we know where our bit is, and we have a ten-percent margin of error to where we think it is, then that means the bit could be anywhere in this circle.
>
> And so, what happens is that if anytime this circle, which is an imaginary circle around where we really think it is, is within X number of feet --- comes within X number of feet or our existing wellbore or another wellbore, everything stops, because you never

> want that thing to hit. So what we have to do is they have to go get the other directional driller and the company man and the tool pusher. The tool pusher's invested because his people are going to die if they screw up.
>
> And they all have to get together and they have to independently ---. Because they all decide, okay, which way do we go, if we go the wrong way, we hit a well, if we go ---. And so everybody has to agree on the orientation that the motor has to go, and they have to put in the codes that make it go that way, and the two directional drillers have to enter that independently of each other to make sure that it got in there right; right? You do not want a mistake at that point.
>
> And so the directional driller will go get the guy that's asleep. It doesn't matter what time of day or night it is. Go get the guy that's asleep. And they have to go independently. Everybody has to sign off. The company man, the tool pusher and both directional drillers have to sign off on that orientation of where that mud motor's going to go and how it's going to direct the rig.
>
> And they basically do that through the whole drilling process. They're onsite 7 by 24, 365 days, as long as that drilling process is going on, because you also have --- you don't want to wander onto the other guy's minerals.

See Transcript P35-37. For his part, the Tax Commissioner's auditor testified that while she understood the necessity of the directional drillers being on site at all times, nonetheless, a portion of the skid houses were not essential because those portions, (those for sleeping and eating, etc.) were not used directly in the drilling process.

> **ATTORNEY GRIFFITH**: And so if they're essential employees and best industry practice is to keep them onsite for two weeks on and two weeks off, why would that living space not be considered directly used in the production process?
>
> **MS. B**: Well, we would have considered that it wasn't a direct part of the drilling process, that it was --- you know, that the additional space was used for other things like sleeping, eating, breaks, things along that line that we wouldn't consider --- even though they were required to be there, we didn't consider that to be directly involved in the drilling process.

See Transcript P73 at 7-14.

While the auditor testified that her considerations and analysis involved what was "directly" used in the natural gas extraction, she makes no mention of the more nuanced part of the question before us, to wit, are the skid houses an integral and essential part of the drilling, or merely incidental, convenient or remote? To be fair, we believe that the Tax Commissioner's argument can be fairly characterized as standing for the proposition that the sleeping quarters, kitchen, living room and bathrooms are not necessary to drill for natural gas. Rather, they are there to make life cushier for the workers; a warm place to hang out and watch TV or get a snack when time allows. In other words, they are there for the convenience of the workers. We believe that the evidence in this matter does not bear this out. The record is clear and unrebutted that every minute of every day while there is drilling going on, there is a directional driller who, while not technically "on the clock", is required to be there. Petitioner has, as part of contracting for these directional drillers services, agreed to provide housing for them during these periods of required availability. Obviously, Petitioner thinks having two directional drillers on site at all times is essential, otherwise they would not be spending the money required to make that happen. We agree with the Tax Commissioner, to the extent that if we were talking about a typical factory or manufacturing facility that had a killer break room with a cappuccino machine, foosball table and comfy sofas, our conclusion would be different. However, the situation before us is quite different. In fact, Petitioner's witness testified as to the spartan nature of the skid houses.

> **MR. A.** And what these are, these are offices for the most part, sleeping quarters for some part for some of these people. But the reason that they're on there full-time in these areas ---. Even your worst hotel is --- this is worse than your worst hotel. This is a very loud operation. This is not a hotel setup. It's a singlewide trailer that has sleeping quarters, a small kitchenette and an office space in it, and they're there for safety reasons.

See Transcript P17 at 1-5. As a result, we rule that the rental of skid houses/crew quarters by Petitioner is critical and essential to its production of natural resources. To be clear, we rule as

such because the evidence shows that the directional drillers are on site for safety reasons. We do not mean to quantify what is too cushy versus what would be spartan enough to not be considered for convenience. That is an argument for another day.

Our ruling involving the skid houses implicates other portions of the assessment, because the auditor found that the rental of certain other services associated with the skid houses also needed to be apportioned, to the extent that a portion of these services went to support the living areas of the skid houses, versus the small portion the auditor found to be utilized for drilling. These rentals are for the items to provide water and electricity to the skid houses, such as generators, transformers, and water hook up hardware. For the reasons stated above, we rule that these items are also critical and essential to Petitioner's drilling operations.

Next is Petitioner's rental of various sized trash receptacles, which the auditor found to be entirely taxable, because the waste on site was not directly from the drilling operations. The auditor testified that in discussions with employees of Petitioner, she learned that no waste from the actual well hole was put into the various dumpsters and rollouts located on the well pad. In his post hearing brief, the Tax Commissioner continues this theme, that in order to qualify for the direct use exemption, the trash receptacles must contain waste that is the direct result of the drilling. The Tax Commissioner relies on Section 123.3.1.12 of Title 110, Series 15 of the West Virginia Code of State Rules, which states:

> 123.3.1. Uses of Property or Services Constituting Direct Use. - Uses of property or services which will constitute direct use when used by a person engaged in the business of manufacturing, transportation, transmission, communication or the production of natural resources, thereby making its purchase exempt from sales and use tax shall include only the following:
>
> 123.3.1.12. Tangible personal property or services used in the storage, removal or transportation of economic waste directly resulting from the activities of transportation, communication,

> transmission, manufacturing production, production of natural resources, or in contracting activity during the period July 1, 1987 to February 28, 1989. For example, trash bins used to store waste directly resulting from manufacturing are directly used in manufacturing.

W. Va. Code R. §110-15-123.3.1 (1993). The problem with the Tax Commissioner's reliance on Section 123.3.1.12 is that it impermissibly expands West Virginia Code Section 11-15-2. As discussed above, Section 2 contains subdivision 4, which contains a list of fourteen uses that are considered direct. Included in subdivision 4 is subparagraph xii, which states that direct use includes: "Storing, removal or transportation of economic waste resulting from the activities of manufacturing, transportation, communication, transmission or the production of natural resources". W. Va. Code Ann. § 11-15 2(b)(4)(A)(xii) (West 2018). Section 123.3.1.12 states that in order to be considered directly used, the waste must be the **direct** result of the activity in question, but subparagraph xii contains no such directive. In fact, the language of the two provisions is virtually identical, except for the usage of the word direct in Section 123.3.1.12. It is the inclusion of this one word that causes the section to run afoul of West Virginia law.

The primer on the relationship between statutes and rules in West Virginia is the case of Appalachian Power Co. v. State Tax Dep't of W. Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995). In Appalachian Power, the Court clearly states, more than once, that despite the fact that a legislative rule may have been properly promulgated, through legislative rule making, it is still impermissible for a rule to expand or contract the statute that gave it life. "'Rules and Regulations of ... [an agency] must faithfully reflect the intention of the legislature . . .' Appalachian Power at 587, 438. "As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or it is arbitrary or capricious." *Id.* at 585, 436. Here, Section 123.3.1.12 clearly exceeds its statutory authority and it is precisely this excess

that the Tax Commissioner is seeking to utilize, by his insistence that the only waste that is subject to the exemption is waste from the well hole. However, if the word "directly" is removed, as in subparagraph xii, then all the waste from the well pad would be considered subject to the exemption, because it all obviously is the result of the activity going on there, namely drilling for natural gas.

Additionally, our analysis must include a discussion of the general direct use exemption language contained in Section 2. Again, the list of fourteen (14) uses of property or services contained in subdivision 4 contains a catchall that mirrors the general language and reiterates that any service that is an integral and essential part of drilling for natural gas is considered direct use. It is hard to argue that the activity of collecting and removing the trash from the well pad is not integral and essential, particularly when the contrasting statutory language is "incidental, convenient or remote". Obviously removing the trash is essential, and, as Petitioner points out in its post hearing briefs, not doing so would cause it to run afoul of the environmental laws and potentially subject it to federal and state fines for pollution.

Finally, we come to the rentals that the auditor found to be entirely taxable pursuant to the general statutory language regarding direct use. These are the Port-a-potties, and the water and sewage systems for the skid houses. During the hearing in this matter the auditor, when asked how Port-a-potties were not an absolute necessity at a well site, stated:

> **ATTORNEY GRIFFITH**: How would it be possible to operate one of these well sites without porta potties onsite?
>
> **MS. B**: Again, we would look ---. I think they would be required, but I think that things would be required for other similar type of indirect/direct use businesses, which we would still normally not consider this to be a direct use of those facilities, even though they're required to be there.

Transcript P76 at 10-15. In his post hearing briefs, the Tax Commissioner switched tacks, arguing that the water and sewage was associated with the skid houses, and therefore was not exempt because it was impossible to apportion usage between the workers in them for "office" use versus sleeping, and eating etc. As for the Port-a-potties, the Tax Commissioner again argued that it is impossible to apportion their usage between the employees who are actually working and those on a break or spending time in the skid houses. Petitioner argues that OSHA regulations require it to provide bathrooms for the workers.[4]

We find the Tax Commissioner's arguments regarding these rentals to be unpersuasive, and rule that it would be critical and essential to have proper sanitation facilities for an outdoor workplace such as Petitioner's.

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. "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

[4] The record is not entirely clear regarding what type of bathroom facilities are in the skid houses or why there is a need for Port-a-potties at all. We presume that the skid houses have bathrooms to satisfy OSHA requirements and that the Port-a-potties are there because the well pad site is so large that for certain workers traveling to the skid house to use the bathroom is not practical. Whatever the case, this omission does not affect our ruling.

property or taxable services, except as otherwise provided in this article." W. Va. Code Ann. §11-15A-2(a) (West 2010).

4. The use in this state of the following tangible personal property, custom software and services is hereby specifically exempted from the tax imposed by this article to the extent specified: (2) Tangible personal property, custom software or services, the gross receipts from the sale of which are exempt from the sales tax by the terms of article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, and the property or services are being used for the purpose for which it was exempted." W. Va. Code Ann. §11-15A-3(a)(2) (West 2013).

5. West Virginia Code Section 11-15-9(b)(2) provides an exemption from the consumers sales and service tax for sales of services, machinery, supplies and materials directly used or consumed in the activities of manufacturing, transportation, transmission, communication, production of natural resources.

6. Directly used or consumed is defined as "used or consumed in those activities or operations which constitute an integral and essential part of the activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the activities." W. Va. Code Ann. §11-15-2(b)(4) (West 2018).

7. The Petitioner's rental of the following services is integral and essential to its natural gas drilling operations, as those terms are used in West Virginia Code Section 11-15-2(b)(4):

a. Skid houses/crew quarters

b. Generators and other equipment to supply electricity to the skid houses

c. The equipment to supply potable water to the skid houses

d. All equipment to provide sanitation and sewage to the well pad site

8. It is impermissible for a properly promulgated legislative rule to expand or contract the statute that gave it life and the rules and regulations of an agency must faithfully reflect the intention of the legislature. *See* Appalachian Power Co. v. State Tax Dep't of W. Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995).

9. Section 123.3.1.12 of Title 110, Series 15 of the West Virginia Code of State Rules impermissibly expands West Virginia Code Section 11-15 2(b)(4)(A)(xii), by its requirement that only the storage and removal of waste that is the **direct** result of Petitioner's activities is direct use, as opposed to merely being the result of its activities.

10. Petitioner's rental of equipment and services to remove all waste from the well pad site is direct use, and thus exempt from use tax because such rentals are to remove economic waste that is the result of its activities at the site, and these rentals are integral and essential to its operations. *See* W. Va. Code Ann. § 11-15A-2(b)(4)(A)(xii) and (xiv) (West 2018)

FINAL DECISION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the two assessments issued against the Petitioner on December 19, 2014, are hereby **MODIFIED** in a manner consistent with this decision and now reflect the amounts due as follows:

The combined sales and use tax assessment for the period January 1, 2011 through December 31, 2013 for tax of $_____, and interest of $_____ for a total liability of $_____. Additionally, interest on the Petitioner's overpayment will continue to run, pursuant to West Virginia Code Section 11-10-17(d).

WEST VIRGINIA OFFICE OF TAX APPEALS

A.M. “Fenway” Pollack
Chief Administrative Law Judge

Entered

REDACTED DECISION – DK# 15-104 RP-C

BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON DECEMBER 19, 2016
ISSUED ON FEBRUARY 20, 2018

BEFORE THE OFFICE OF TAX APPEALS

FINAL DECISION

On February 12, 2015, the Tax Accounting Administration of the West Virginia State Tax Commissioner's Office (hereinafter "Tax Department" or "Respondent") issued a refund denial letter (Letter Id #____) to the Petitioners in Personal Income Account Number _____. This refund denial 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 refund denial stated that the Respondent was unable to accept the amendments to the Petitioners' 2012 and 2013 returns due to them having West Virginia source income.

The Petitioners timely filed their Petition for Refund with this Tribunal on March 30, 2015. Subsequently, notice of a hearing on the petition was sent to the parties and in accordance with the provisions of West Virginia Code Section 11-10A-10, a hearing was held on September 29, 2015, in Clarksburg, West Virginia, and the matter became ripe for decision at the conclusion of the same.

FINDINGS OF FACT

1. Petitioners are the sole shareholders and employees of Company A (Tran. 12, Respondent's Ex. 4).

2. Company A., is a West Virginia corporation with its principal place of business in a West Virginia location, which primarily handled repossession work for bank-leased commercial assets between 1996-2010 (Respondent's Ex. 4 & 5).

3. In 2010, a portion of Company A., the repossession business, was sold as an owner financed sale, and the installment payments from that sale make up part of Company A's current income[1] (Tran. 13-14, 22).

4. Upon the sale of the repossession business, the Petitioners structured the remaining portion of Company A, so that they could be considered employees receiving an annual salary for income and withholding purposes (Tran. 35).

5. The revenues currently received by Company A., consist of installment payments from the repossession sale, and the purchase and sale of real estate[2] (Tran. 12-14).

6. The Petitioners received W-2s for their salaries from their employer Company A, for tax years 2012 and 2013 (Petitioners' Ex. 1).

7. On January 9, 2015, the Petitioners filed amended West Virginia personal income tax returns for tax years 2012 and 2013 based on their belief that they are entitled to a refund due to being nonresidents. The returns reported no West Virginia income and the Petitioners are seeking a refund for the 2012 tax year in the amount of $_____, and for 2013 tax year in the amount of $_____ (Petitioners' Ex. 1).

[1] Although not elicited during the Evidentiary Hearing, the Petitioners state in their Memorandum of Law that they sold their repossession business to Company B., and later converted this sale into an installment purchase agreement secured by a Deed of Trust dated December 12, 2014, recorded in the Office of the Clerk office of a West Virginia County Commission.

[2] The Petitioners' Memorandum of Law further describes deed of trust payments received from two tracts of land sold and secured by deeds of trust dated November 2, 2009, and September 13, 2013, in the original principal amounts of $_____ and $_____.

8. On February 12, 2015, the Respondent denied the Petitioners' refund regardless of their residency status for tax years 2012 and 2013 due to their West Virginia source income (Respondent's Ex. 1).

9. The State of Florida imposes no personal state income tax, and judicial notice was taken of this fact during the Evidentiary Hearing with the agreement of the parties (Tran. 46).

DISCUSSION

The Petitioners are the sole owners and employees of Company A, a West Virginia corporation with its principal place of business in a West Virginia location. Company A's income is derived from installment payments from the sale of the repossession business of Company A, the installment payments from the sale of two tracts of land, and the sale of real estate, in West Virginia.

In 2012, the Petitioners each received W-2's for salaried income from Company A, in the amount of $_____. In 2013, the Petitioners each received W-2's for salaried income from Company A., in the amount of $_____. These amounts are accurately reflected on their 2012 and 2013 West Virginia State Income Tax Returns. It is undisputed that the Petitioners received income from Company A, a West Virginia corporation, for wages earned.[3] Furthermore, the Petitioners strongly argue that they are residents of Florida and nonresidents of West Virginia.[4]

West Virginia source income of a nonresident is discussed in West Virginia Code § 11-21-32 and states "[T]he West Virginia source income of a nonresident individual shall be the sum of the net amount of income, gain, loss and deduction entering into his or her federal adjusted gross

[3] The Petitioners relied on the advice of their accountant to have the lease payments paid to them in the form of wages, instead of capital gains (Trans. 35).

[4] This Tribunal recognizes that the parties spent a good deal of time litigating the issue of residency during the pendency of this case. However, the determinative issue in this matter concerns West Virginia source income.

income….derived or connected with West Virginia sources." W. Va. Code Ann. § 11-21-32(a) (West 2010). This section further defines income and deductions from West Virginia sources in subsection (b):

> (1) Items of income, gain, loss, and deduction derived from or connected with West Virginia sources shall be those items attributed to:
>
> (A) The ownership of any interest in real or tangible personal property in this state; or
>
> (B) A business, trade, profession, or occupation carried on in this state; or
>
> (C) In the case of a shareholder of an S corporation, the ownership of shares issued by such corporation, to the extent determined under section thirty-seven.
>
> (2) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from West Virginia sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state.

W.Va. Code Ann. § 11-21-32 (b) (West 2010).

Under W.Va. Code § 11-21-32(b)(1)(A), income attributed to… "[t]he ownership of any interest in real or tangible personal property in this state" is defined as West Virginia source income. Additionally, Legislative Rule 32.2.1.1 defines rental, installment sales, and other income derived from ownership interests in real property in West Virginia as follows:

> The West Virginia adjusted gross income of a nonresident individual includes items of income, gain, loss and deduction entering into his or her federal adjusted gross income which are attributable to the ownership interest in real or tangible personal property in this State. Thus, West Virginia adjusted gross income includes rental income from real or tangible personal property in this State after deducting ordinary and necessary expenses attributable to the ownership, operation or maintenance of such property. Income and deductions available to a lease-hold interest in property in this State are included, as well as income and deductions attributable to ownership in fee.

West Virginia Code R. §110-21-32.

The Petitioners contend that they do not derive income from typical business activities such as, the sale of goods or rendering of personal activities. Furthermore, the Petitioners argue

they do not earn wages or income for services and work performed in West Virginia., but instead are realizing income from a prior owner-financed sale of both personal property and real estate.

Income derived from or connected with West Virginia sources shall be those items attributed to "[a] business, trade, profession, or occupation carried on in this state." The Petitioners seek to narrow the definition of income when the statute is devoid of any requirement of a sale of goods or personal services. Furthermore, the Petitioners contend that they do not earn wage income for services or work performed, although they have W-2s for this very reason. This Tribunal finds that the Petitioners' characterization of income and their wages earned are without merit.

The Petitioners' ownership in real estate installment payments and real estate ownership specifically meets the statutory language in West Virginia Code § 11-21-32(b)(1)(A) and Legislative Rule 32.2.1.1 for West Virginia source income. Company A, receives installment payments from an asset sale of the previous repossession business which is recorded in the a West Virginia county courthouse. Company A, also receives installment payments from the sale of two tracts of land, and from other various real estate income. Therefore, Petitioners' nonresident income is subject to West Virginia State income tax under West Virginia. Code § 11-21-32(b)(1)(A) as it is attributable to West Virginia sources. Under West Virginia Code § 11-21-32(b)(1)(B), income attributed to a "[b]usiness, trade, profession, or occupation carried on in this state" is also defined as source income to Company A., because it is 1) a West Virginia corporation; and 2) the business derives its income from a business carried on in West Virginia. As the statute is clear and unambiguous, the Petitioners' income meets the requirements of nonresident West Virginia sourced income. Therefore, Petitioners' income is subject to West Virginia income tax, and the Petitioners have failed to meet their burden on this issue.

The Petitioners finally argue that any West Virginia income tax applicable to them violates the "internal consistency" test of the Dormant Commerce Clause.

The Commerce Clause of the United States Constitution gives Congress the power to regulate commerce. However, the courts, in particular the United States Supreme Court, have created a body of law regarding the flip side of Congress' power to regulate commerce, namely the limitations on the individual states ability to regulate/hamper interstate commerce. This body of law is referred to as the dormant Commerce Clause. One of the standard bearer cases on the dormant Commerce Clause is *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). The *Complete Auto* Court created a four part test to ascertain if a state taxing scheme violates the Clause. The Court ruled that a tax that: (1) applies to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) is not discriminatory towards interstate or foreign commerce; and (4) is fairly related to the services provided by the State, will pass muster under the dormant Commerce Clause. *Id*, at 279.

The Petitioners allege that if the internal consistency test is applied to the Petitioners, then they are suffering from the double taxation of the same income from the State of West Virginia and in the State of Florida, violating their Due Process and Dormant Commerce Clause of the Constitution.[5]

The Tax Commissioner contends that the Petitioners' internal consistency argument fails as Florida does not impose a state income tax and because West Virginia both apportions the

[5] A "[c]omponent of fairness in an apportionment formula is what might be called internal consistency-that is the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed" as discussed in *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983). Internal consistency has further been described in that it "[h]elps courts identify tax schemes that discriminate against interstate commerce, assumes that every State has the same tax structure. *Comptroller of Treasury of Maryland v. Wynne*, 135 S.Ct. 177, 191 L.Ed2d 813, 83 USLW 4309 (2015). The internal consistency test appears to be an offshoot of prongs two and three of the four part test in *Complete Auto Transit Inc., v. Brady*, 430 U.S. 274, 97 S. Ct 1076, 51 LEd2d 326 (1977), which assists courts in ascertaining whether a tax is discriminatory towards interstate or foreign commerce.

income of nonresidents so that it only taxes income attributable to West Virginia sources and provides a credit for income taxes paid to other states under West Virginia Code § 11-21-30 (2005)[6] and West Virginia Code § 11-21-30 (2005).[7]

The Petitioners are complaining that they are somehow being double taxed on their personal income taxes because they are paying taxes in both West Virginia and Florida under a discriminatory tax scheme. However, upon close inspection, this Tribunal finds that the State of Florida does not even impose a state personal income tax,[8] and we cannot see how the risk of double taxation can even exist, much less cause a double taxation to the Petitioners. This Tribunal finds the Petitioners' argument less than availing, and further finds that they have clearly failed to meet their burden of proof on this issue.

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. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the Petitioner to show that he is entitled to the refund claimed by him. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

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[6] "[A] taxpayer shall first calculate tax liability... as if it were a resident of the state whether an individual, estate, or trust for an entire taxable year."

[7] "[A]nonresident shall be allowed a credit against the tax otherwise due under this article for any income tax imposed for the taxable year by another state of the United States or by District of Columbia, of which the taxpayer is a resident."

[8] During the evidentiary hearing held in this matter, Administrative Law Judge Piper took judicial notice of Florida not having a state income tax (Tran. 46).

3. Each year a tax is imposed, based upon a rate set by the legislature, on the West Virginia taxable income of every individual, estate and trust. *See* W. Va. Code Ann. § 11-21-3 (West 2010).

4. The West Virginia source income of a nonresident individual shall be the sum of the net income, gain, loss, and deduction entering into his or her federal adjusted gross income, as defined by the laws of the United States and section nine of this article, for the taxable year, deprived from or connected with West Virginia sources. *See* W.Va. Code Ann. § 11-21-32(a) (West 2010).

5. Items of income, gain, loss, and deduction derived from or connected with West Virginia sources shall be those items attributable to (A) the ownership of any interest in real or tangible personal property in this state; or (B) a business, trade, profession, or occupation carried on in this state; or (C) in the case of a shareholder of an S corporation, the ownership of shares issued by such corporation, to the extent determined under section thirty-seven. *See* W.Va. Code § 11-21-32(b) (West 2010).

6. The United States Supreme Court has created a four part test to ascertain if a state taxing scheme violates the dormant Commerce Clause. The Court ruled that a tax that: (1) applies to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) is not discriminatory towards interstate or foreign commerce; (4) is fairly related to the services provided by the State, will pass muster. *Complete Auto Transit, Inc., v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L.Ed.2d 326 (1977).

7. A taxpayer shall first calculate tax liability…as if it were a resident of the state whether an individual, estate, or trust for an entire taxable year. The taxpayer shall receive the

same deductions, exemptions, and credits that would be allowable if he were a resident individual, estate, or trust for the entire taxable year. W.Va. Code § 11-21-30.

8. A nonresident shall be allowed a credit against the tax otherwise due for income due for any income tax imposed for the taxable year by another state. *See* W.Va. Code § 11-11-40.

9. The Petitioners have not carried their burden of proving that they do not owe West Virginia State Income Tax for 2012 and 2013. Therefore, the February 12, 2015, refund denial of their 2012 and 2013 amended West Virginia Personal Income Tax Returns was proper.

10. The refund denial does not violate the internal consistency test of the Dormant Commerce Clause under *Container Corp. of American v. Franchise Tax Board, 463 U.S. 169, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983).*

11. Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the personal income refund denial issued against the Petitioners on February 12, 2015, for a refund in the amount of $_____for 2012, and a refund on the amount of $_____ for tax year 2013, is hereby **AFFIRMED**.[9]

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Crystal S. Flanigan
Administrative Law Judge

_____
Date Entered

[9] This decision is being authored by Administrative Law Judge Flanigan although the Evidentiary Hearing was held by Administrative Law Judge Piper on September 29, 2015.

REDACTED DECISION – DK# 15-310 CU

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON APRIL 18, 2018
ISSUED ON MAY 3, 2018

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On July 29, 2015, the Auditing Division of the West Virginia State Tax Department (the Tax Commissioner or Respondent) issued an Audit Notice of Assessment against the Petitioner. 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 combined sales and use tax for the period January 1, 2010, through December 31, 2014, for tax in the amount of $_____ and interest in the amount of $_____, for a total assessed tax liability of $_____.

Thereafter, on September 10, 2015, the Petitioner 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 Petitioner, and, in accordance with the provisions of West Virginia Code Section 11-10A-10, a hearing was held on

July 27, 2016, after which the parties filed legal briefs. A second evidentiary hearing was held on April 18, 2018[1].

FINDINGS OF FACT

1. Petitioner is an out-of-state limited liability company, with its principal place of business in _____.

2. Petitioner provides specialized travel accommodation services to corporate clients throughout the United States. For example, Petitioner may contract with a national tree removal company and provide the lodging when its crews travel to locations to do repairs after a storm. As part of its specialized service, the Petitioner will research room prices, give the client various hotel options, book the rooms, have the billing sent to its corporate offices for review and perform personalized services, depending on the client's needs. These personalized services include things like ensuring that the client's employees don't incur extra room charges or ensuring that if certain employees leave the job location early each hotel room usage is utilized by at least two workers.

3. The President and CEO of the Petitioner is a licensed travel agent.[2] TR P17 20-21.

4. Petitioner's business model provides two income streams. First, as a licensed travel agent they receive a commission on each room booked. This commission comes from the hotel. TR P18-19 3-18. Additionally, they charge their clients two dollars ($2.00) per room per night as a service fee. TR P26 12-13.

[1] The first evidentiary hearing in this matter was conducted by Chief Administrative Law Judge Heather Harlan. Since the date of the hearing, Judge Harlan has resigned her position. The second evidentiary hearing was held by Chief Administrative Law Judge A.M. "Fenway" Pollack, and he authored this decision as well.

[2] Petitioner's Exhibit 2 is an accredited travel agent card that lists both the name of the business and also has a picture and the name of Petitioner's President and CEO. The record is unclear if this card is for the company as a whole or just for its President and CEO as an individual. However, this omission does not affect our decision.

5. When it books rooms for its clients Petitioner will obtain the most favorable rate in one of two ways. It will either book the room at what it calls its "overarching agreement" rate, which is a rate it obtains from national chains, and applies nationwide. TR P42 17-23. Other times, the Petitioner will contact a hotel directly and negotiate a discounted rate. TR P43-44 3-8.

6. Petitioner does not obtain any hotel rooms prior to its clients expressing a specific need. TR P9 4-15.

7. Typically, the Petitioner will not pay the hotel bill for the client. However, it will take the bills and reformat and aggregate them, add its commission and fees, and have the client send the funds to Petitioner. Petitioner will then forward on the monies to the individual hotels. TR P15 8-19. As part of this billing service, Petitioner will ensure that the West Virginia sales tax on the room rental is also paid. TR P25 7-23.

8. The auditor in this matter found that all the room reservations made by Petitioner in West Virginia were subject to sales and use tax. She assessed tax on both the two-dollar ($2.00) service fee and on the commissions earned by the Petitioner. She did so based upon her belief that Petitioner was renting the hotel rooms and re-renting them to its clients. TR P59 2-12, TR P77 14-18.

DISCUSSION

The record in this matter shows that Petitioner earns its money two different ways. First, it charges its clients two dollars ($2.00) per night, for every room it books, nationwide. Second, as a licensed travel agent, it earns a commission from the hotels, when it places guests in those rooms. The question before us is, which, if any, of these financial transactions are subject to West Virginia's combined sales and use tax?

The tax at issue is found in West Virginia Code Section 11-15-3:

> *Vendor to collect.* -- For the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article, the vendor shall collect from the purchaser the tax as provided under this article and article fifteen-b of this chapter, and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article or article fifteen-b of this chapter.

W. Va. Code Ann. §11-15-3(a) (West 2018). Vendor is a defined term in Article 15, "Vendor" means any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property or custom software. "Vendor" and "seller" are used interchangeably in this article." W. Va. Code Ann. §11-15-2(b)(26) (West 2018). Finally, the legislative rules for consumer sales and service and use taxes contains two sections that directly pertain to travel agents and the monies earned by Petitioner. "Charges for services provided by travel agencies (such as arranging for motel accommodations, meal accommodations, reservation of rental cars, booking cruises, reserving airline tickets, arranging bus tours or selling passage on international tours for their clients) are subject to tax" W. Va. Code R. §110-15-81.1 (1993).

> Commissions earned by the travel agency from services provided to various businesses such as hotels, airlines, and bus lines are subject to sales and service or use tax. These persons should either collect and remit the tax due on these commissions or obtain a direct pay permit number from the entity for whom the service was rendered.

W. Va. Code R. §110-15-81.3 (1993).

Petitioner advances numerous legal arguments regarding why it has no duty to collect and pay sales tax on the services it provides.

- ❖ It is not "renting rooms" as that term is used in the sales and service and use tax regulations.[3]

[3] "Persons engaged in renting rooms in hotels, motels, tourist homes and rooming houses on a daily basis shall compute the consumers sales and service tax upon the daily charge." W. Va. Code R. §110-15-38.1 (1993)

- ❖ It is not a vendor engaged in providing services in West Virginia.
- ❖ That by West Virginia's adoption of the Streamlined Sales and Use Tax Administration Act, it cannot source to West Virginia, the Petitioner's services to its clients.
- ❖ That taxing its services violates the Due Process Clause of the U.S. Constitution and the Dormant Commerce Clause, specifically prongs one and three of the Complete Auto test.

First, we address the two-dollar ($2.00) service fee Petitioner charges to its clients. During the audit and in post hearing briefs the Tax Commissioner takes the position that because the Petitioner is renting the rooms, and then re-renting them to its clients, all the monies it earns from these activities is taxable as a furnished service in West Virginia. However, the record is clear that unlike certain online travel companies, such as Hotels.com, Petitioner never obtains control of an inventory of rooms, which it then re-rents, as the need arises. Therefore, when Petitioner contracts with XYZ Tree Removal, a (fictional) national corporation, based in Dallas, the two-dollar fee it is charging per night per room is for a host of services that are being provided, in Texas, by another out-of-state LLC. At that moment, the Petitioner is not a vendor, engaged in this state in furnishing services, as those terms are used in West Virginia Code Section 11-15-2(b)(26).

Turning now to the commissions Petitioner earns when it books hotel rooms, there are two questions. First, when Petitioner calls a West Virginia hotel directly to book rooms and negotiate a rate, is it a vendor engaged in furnishing a service in this state, and if so, does it have sufficient nexus with West Virginia, such that taxing it as a service provider would not violate the Dormant Commerce Clause.

During the first evidentiary hearing it was unclear if Petitioner's calls to West Virginia hotels directly versus booking rooms under its overarching agreement, changed the circumstances of the commissions it received. This Tribunal was unsure if those direct calls could have established sufficient nexus. However, according to the Tax Commissioner's witnesses, they do not. During the first hearing the auditor who actually performed the audit on Petitioner was asked: "ATTORNEY A: So would you agree that if it's not determined that Petitioner is a renter of these rooms that their services would not be subject to sales tax in West Virginia? MS. MILLS: If the Court decides that, yes, it'd be true." TR P 75 at 18-21. During the second evidentiary hearing the Tax Commissioner's Director of Field Auditing testified, a woman with 30 years' experience with the Tax Department. She was given a fictional scenario by the presiding administrative law judge:

> JUDGE POLLACK: I'm a travel agent in Kansas City. People come in office and say we're going to a wedding in Charleston, West Virginia next week. Can you hook us up?
>
> MS. ANGELL: Uh-huh
>
> JUDGE POLLACK: They call up the Hampton Inn here in Charleston, they make their reservation, they send him here. They get a commission. Is that --- who's supposed to collect that service tax on that commission? The Hampton Inn here in Charleston or the travel agent in Kansas City?
>
> MS. ANGELL: If the travel agent is located outside of West Virginia, so the commission wouldn't be subject to tax. Correct?
>
> JUDGE POLLACK: You tell me . . .
>
> MS. ANGELL: So, the company that we're addressing right now, we consider online travel companies, so we're auditing a different way. If we're auditing an online travel company, those issues that apparently were brought up in this audit are subject to tax. Travel agent however, located outside of West Virginia, the only time we would actually go physically audit that travel agent is if there were activities within the scope of their business that brought them into

> West Virginia. If they had representatives here at present. Some of them do, some of them don't. So just to arbitrarily say all online --- or I'm sorry, all travel agents located outside of West Virginia, they would have to have some activity that would make them have presence here in order to conduct that audit. We do have out-of-state travel agents that are registered in West Virginia and paying their taxes.

TR #2 P21 at 2-11 & P22 at 13-23. Director Angell's testimony reveals two crucial facts. First, that she, like Auditor Mills, still considered Petitioner to be no different from an online travel company such as Hotels.com. Secondly, and most importantly, without a physical presence or a representative here in West Virginia, the Tax Department would not consider a traditional travel agent located outside of West Virginia to be performing a taxable service in this state, when they place travelers in hotel rooms here.

In summation, the Tax Commissioner's position in this matter has consistently been that Petitioner is akin to an online travel company that buys up an inventory of rooms and then resells them. It is puzzling that the Tax Commissioner continues to insist as such, because two times the Petitioner's President and CEO offered unrebutted testimony that they do not do that. Nor has the Tax Commissioner presented any evidence to the contrary. The evidence in this matter clearly shows that Petitioner is a travel agency, albeit one with a unique business model, but a travel agency nonetheless. If that fact, that the Petitioner is a travel agency, is taken as established, then both of the Tax Commissioner's witnesses testified that it would not be considered a vendor providing a taxable service in West Virginia.

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. "Vendor" means any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property or custom software. "Vendor" and "seller" are used interchangeably in this article." W. Va. Code Ann. §11-15-2(b)(26) (West 2018).

4. Petitioner is not a "person engaged in this state in furnishing services", as those terms are used in West Virginia Code Section 11-15-2(b)(26).

5. As such, it does not have the duty to collect West Virginia consumer sales and service and use taxes from its customers. *See* W. Va. Code Ann. §11-15-3(a) (West 2018).

6. 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 or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010) and W. Va. Code R. §121-1-63.1 (2003).

7. The Petitioner has met its burden of showing that the assessment issued against it was erroneous, unlawful, void or otherwise invalid.

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the combined consumer sales, service and use tax assessment, issued against the Petitioner on July 29, 2015, for a total tax due of $_____, is hereby **VACATED.**

WEST VIRGINIA OFFICE OF TAX APPEALS

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

_____
Date Entered

F I L E D
WV SECRETARY OF STATE
SEPTEMBER 16, 2019 02:31 PM

REDACTED DECISION – DK# 15-348 CU

BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON MARCH 23, 2018
ISSUED ON AUGUST 23, 2018
CORRECTED DECISION ISSUED ON NOVEMBER 5, 2018

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

CORRECTED FINAL DECISION

On August 14, 2015, the Auditing Division of the West Virginia State Tax Commissioner's Office (hereinafter "Respondent" or "Tax Department") issued a Notice of Assessment, against the Petitioner. This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by Chapter 11, Article 10 *et seq*., of the West Virginia Code. The assessment was for combined sales and use tax for the period of January 1, 2010, through December 31, 2014, for tax in the amount of $_____, interest in the amount of $_____, and no additions to tax, for a total assessed tax liability of $_____. Written notice of this was served on the Petitioner as required by law.[1]

Thereafter, on October 8, 2015, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W.Va. Code Ann. §§ 11-10A-8(l); 11-10A-9 (West 2010).

Subsequently, notice of hearing on the petition was sent to the Petitioner, and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

[1] This Corrected Final Decision corrects a typographical error in the decision issued on August 23, 2018.

FINDINGS OF FACT

1. The Petitioner is doing business as a sole proprietorship, in a West Virginia County. Tr. 5.

2. The Petitioner started as a sole proprietor in 1972 and has owned and operated it for 46 years. Tr. 5.

3. Petitioner does approximately $_____ in sales per year. Tr. 5.

4. Petitioner is a distribution outlet of aftermarket parts (and not a manufacturer) for the coal industry and keeps an inventory of approximately 24,000 parts. Tr. 7-8.

5. Petitioner pays the manufacturer for the parts it orders and places them into its inventory or sells directly to the customer. Tr. 15.

6. Aftermarket parts can be, but usually are not, made by the original equipment manufacturer and tend to cost less than replacement parts produced by the manufacturer. Tr. 17.

7. Petitioner has a staff of three individuals whose job duties include: shipping and receiving products; invoicing; taking and placing orders; maintaining a customer database; customer contact and service; and all other duties as needed. Tr. 8, 45.

8. The staff consists of the following individuals: Mr. A, Ms. B, and Mr. C. Tr. 7.

9. The staff take orders for only Thunderbird, which is a distributor selling aftermarket parts (manufactured by others) that aid in hydraulics. Tr. 6, 7, 36, 76.

10. The staff are responsible for paying their own federal and state income taxes, have little to no supervision; have no guaranteed income and are paid by weekly draws and commissions from sales. Tr. 9-11, 59.

11. The Petitioner admits that his staff are independent contractors. Pet'r. Br. 12.

DISCUSSION

The issue in this matter is whether the individuals who work for the Petitioner qualify for the exemption from sales and use tax as manufacturer's representatives, pursuant to West Virginia Code Section 11-15-9(37). This Code Section provides that taxpayers who qualify as manufacturer's representatives are exempt from sales and use tax as follows:

> *Exemptions for which exemption certificate may be issued.* -- A person having a right or claim to any exemption set forth in this subsection may, in lieu of paying the tax imposed by this article and filing a claim for refund, execute a certificate of exemption, in the form required by the Tax Commissioner, and deliver it to the vendor of the property or service in the manner required by the Tax Commissioner. However, the Tax Commissioner may, by rule, specify those exemptions authorized in this subsection for which exemption certificates are not required. The following sales of tangible personal property and services are exempt as provided in this subsection:
> (37) Commissions received by a manufacturer's representative;

W. Va. Code Ann. § 11-15-9 (West)

The Petitioner founded the company as a sole proprietor in 1972 and has been in continual operation for approximately forty-six (46) years. Petitioner purchases parts from approximately forty (40) suppliers and then, sells the parts to end users who use hydraulics in the coal industry. Petitioner distributes aftermarket parts used for coal hydraulics and maintains an inventory of 24,000 parts.

In addition to the Petitioner, three other individuals work for him as independent contractors, Ms. B, Mr. A., and Mr. C. Their job functions include shipping and receiving, order taking, customer service, answering the phone, invoicing, and maintaining a database. Each independent contractor gets paid a weekly draw that does not change from week to week, and a

percentage amount of gross sales does not change.[2] They have each signed an agreement with the Petitioner to pay all of their respective federal and state taxes, and insurance because he does not withhold it from their payroll checks.

The Petitioner testified that the staff are independent contractors and not employees. The Petitioner further takes the position that they are not only independent contractors, but they are manufacturer's representatives and as such, their services are exempt from sales and use taxes pursuant to West Virginia Code Section 11-12-9(37), which exempts "[C]ommissions received by a manufacturer's representative."

The Petitioner likens his staff as brokers due to acquiring aftermarket hydraulic equipment seals that are then resold. The "aftermarket parts are components that are manufactured by some entity other than the original manufacturer." *See,* Petitioner's Brief, p.12. He further argues that in "the ordinary course of business, an owner of hydraulic equipment requiring repair will contact petitioner or his colleagues and place an order for components to repair the seals on its hydraulic equipment." *Id.*

The West Virginia Code, Legislative Rules, West Virginia Supreme Court opinions, West Virginia Office of Tax Appeals decisions, and Black's Law Dictionary do not have a definition of the term, manufacturer's representative. The Petitioner concedes this and further argues that the term manufacturer's representative should be given its ordinary meaning.

The Tax Commissioner argues that there has been no showing that the independent contractors fall within any exemption or exception from sales and use tax for their services. West Virginia Code Regulation § 110-15-60.1 states that "services rendered by independent contractors

[2] Ms. B receives a $_____ weekly draw and a bonus of 4% of quarterly group gross sales. Mr. A, receives a weekly draw of $_____ and a bonus of 2% of quarterly group gross sales. Mr. C receives a $_____ weekly draw and bonus of 1.7%.

are subject to the consumer sales and service tax and the use tax unless some other exemption provision in Section 9 of the regulation applies." West Virginia Code R. § 110-15-60.1.

Petitioner's independent contractors are providing services as a distributor of aftermarket parts as there was no evidence that the independent contractors directly represent any manufacturer. Instead, the Petitioner testified that the company distributes parts used for coal hydraulics by purchasing parts from approximately 40 suppliers and reselling them to end users in the coal industry. Tr, p. 15. The independent contractors take orders only for the Petitioner and maintain approximately $_____ of inventory at his warehouse. The Petitioner did not provide any contracts or agreements between the company and any manufacturers indicating that it had the authority to represent the manufacturer or solicit sales of the manufacturer's products on the manufacturer's behalf within a defined territory. Tr. p. 15-16. The Respondent further relies on the Petitioner's testimony that the company purchases parts from the manufacturers and then marks-up the price of the part to resell it. Tr. p. 35-36. The Respondent takes the position that these activities are not those of a manufacturer's representative under its common meaning, but instead are that of a classic re-seller or distributor.

Both parties agree that the common, ordinary, and accepted meaning of manufacturer's representative should be applied. However, they each assign a different meaning to the term. The Petitioner interprets the term manufacturer's representative as that of a broker who distributes aftermarket parts from multiple manufacturers. However, the Respondent takes the position of a manufacturer's representative as being an individual who represents the original manufacturer and not a distributor.

Courts do not interpret statutory language when it can be clearly applied as written under rules of statutory interpretation.[3] The disagreement about a statute does not render it ambiguous.[4] Likewise, the lack of a definition does not create an ambiguity.[5] As a manufacturer's representative is undefined, we must give the word "its common, ordinary and accepted meaning" as held in syllabus point 6 of *Apollo Civic Theatre, Inc., v. State Tax Com'r,* 223 W.Va. 79, 81, 672 S.E.2d 215, 217 "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 1, *Miners in General Group v. Hix,* 123 W.Va. 637, 17 S.E.2d 810 (1941), overruled on other grounds by *Lee–Norse Co. v. Rutledge,* 170 W.Va. 162, 291 S.E.2d 477 (1982). Syl Pt. 6, *Apollo Civic Theatre, Inc. v. State Tax Com'r,* 223 W. Va. 79, 81, 672 S.E.2d 215, 217 (2008).

An undefined term is first reviewed under a plain meaning analysis. In other words, does the term manufacturer's representative have a common, ordinary and accepted meaning? The term

---

[3] "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus point 2, *State v. Elder,* 152 W.Va. 571, 165 S.E.2d 108 (1968). *Griffith v. Frontier W. Virginia, Inc.,* 228 W. Va. 277, 279, 719 S.E.2d 747, 749 (2011).

[4] "Although Davis Memorial and the Tax Commissioner both argue that the language of W.Va. Code 11–15–9(a)(6)(f)(i)(II) is plain, they each assign a different meaning to the statute. This disagreement is not dispositive of the question of whether the statute is plain or ambiguous; we have repeatedly explained that "[t]he fact that parties disagree about the meaning of a statute does not itself create ambiguity or obscure meaning." (internal citations omitted). *Davis Memorial Hosp., v. West Virginia State Tax Com'r.*, 222 W.Va. 677, 671 S.E.2d 682 (2008).

[5] "legislative silence does not constitute statutory ambiguity." *E.g., Sniffin v. Cline,* 193 W.Va. 370, 374, 456 S.E.2d 451, 455 (1995) (distinguishing between silence and ambiguity of statute interpreted by agency (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984))); *Consolidation Coal Co. v. Krupica,* 163 W.Va. 74, 80, 254 S.E.2d 813, 816–17 (1979) (noting distinction between statute that is silent as opposed to statute that is ambiguous (citations omitted)). *See also DeLong v. Farmers Bldg. & Loan Ass'n,* 148 W.Va. 625, 634, 137 S.E.2d 11, 17 (1964) (differentiating between silence and ambiguity in instrument creating joint estate). *Griffith v. Frontier W. Virginia, Inc.*, 228 W. Va. 277, 285, 719 S.E.2d 747, 755 (2011).

manufacturer's representative is not commonly defined, but the words are defined separately. [6] The Petitioner does not create or produce anything in order to fall within the definition of manufacturer. Because the Petitioner does not represent a manufacturer, but instead purchases parts to resell, then there is no representation. As the company is not a manufacturer, then it could not logically have a manufacturer's representative under its common, ordinary, and accepted meaning.

Therefore, and for the above discussed reasons, the term manufacturer's representative has not been met in accordance with the plain meaning rule under West Virginia Code Section 11-15-9 (37). Accordingly, we find that the Petitioner is not entitled to receive the exemption at issue.

CONCLUSIONS OF LAW

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment or refund, the burden of proof is on the Petitioners to show that any assessment of tax or penalty is erroneous, unlawful, void, or otherwise invalid. See W.Va. Code § 11-10A-10(e)(2002), and W.Va. Code R. § 121-1-63.1 (2003).

2. "It shall be the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies, whether of the State or of any county, district or municipal corporation, thereof, are faithfully enforced." W.Va. Code § 11-1-2.

[6]Dictionary.com defines manufacturer as "a person, group, or company that manufactures." http://www.dictionary.com. Manufacturer is defined as "the making or producing of anything." http://www.dictionary.com.
Merriam Webster's Dictionary defines manufacturer as "one that manufacturers." https://www.merriam-webster.com. Manufacture is defined as "the act or process of producing something." https://www.merriam-webster.com

3. The West Virginia Consumer Sales and Service Tax is imposed on sales of intangible personal property and selected services in this State. *See,* W.Va. Code § 11-15-1 *et seq.* The West Virginia Use Tax is a complementary tax which mirrors the West Virginia Sales and Service Tax. *See,* W.Va. Code § 11-15A-1a.

4. "It is presumed that all sales and services are subject to the tax until the contrary is established." W.Va. Code § 11-15-6(b).

5. "Where a person claims an exemption from a law imposing a license or tax, such law is strictly construed against the person claiming the exemption." Syl. pt. 2, *State ex rel. Lambert v. Carman, State Tax Comm'r,* 145 W.Va. 635, 116 S.E.2d 265 (1960), Syl. pt. 5, *Pennsylvania & West Virginia Supply Corp. v. Rose,* 179 W.Va. 317, 368 S.E.2d 101 (1988), Syl. pt. 2, Tony P. Sellitti., Co., v. Caryl, 185 W.Va. 584, 408 S.E.2d 336 (1991).

6. The term "manufacturer's representative" is devoid in the West Virginia Code, the West Virginia Legislative Rules, and or West Virginia case law.

5. Disagreement about the meaning of a statute does not itself create ambiguity or obscure meaning." *Davis Memorial Hosp., v. West Virginia State Tax Com'r.*, 222 W.Va. 677, 671 S.E.2d 682, 688, 693, n.8. (2008).

6. "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 1, *Miners in General Group v. Hix,* 123 W.Va. 637, 17 S.E.2d 810 (1941), overruled on other grounds by *Lee–Norse Co. v. Rutledge,* 170 W.Va. 162, 291 S.E.2d 477 (1982). Syl Pt. 6, *Apollo Civic Theatre, Inc. v. State Tax Com'r,* 223 W. Va. 79, 81, 672 S.E.2d 215, 217 (2008).

7. The Petitioner has not met its burden of proving that it's independent contractors qualify as manufacturer's representatives under its common, ordinary, and accepted meaning.

8. The Petitioner does not qualify for the exemption of "[C]ommissions received by a manufacturer's representative," under West Virginia Code Section 11-15-9 (37).

FINAL DISPOSITION

Based on the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the combined sales and use tax assessments, issued against the Petitioner on February 21, 2013, be **AFFIRMED** in its entirety.

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: _____
Crystal S. Flanigan
Administrative Law Judge

_____
Date Entered

REDACTED DECISION – DK# 15-406 RAFTC

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON MARCH 3, 2017
ISSUED ON MAY 17, 2018

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

By a letter issued on November 24, 2015, the Tax Account Administration Division of the West Virginia Tax Department informed the Petitioners that the Alternative Fuel Tax Credit that they had claimed for tax years 2008 and 2013 had been denied.

Thereafter, on November 30, 2015, the Petitioners timely filed with this Tribunal, a petition for reassessment. An evidentiary hearing was held in this matter on October 7, 2016, at the conclusion of which, the parties filed legal briefs[1]. The matter became ripe for a decision at the conclusion of the briefing schedule.

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. In December of 2008, the Petitioners bought a used 2007 Chevy Silverado truck, that may or may not have been a flex fuel vehicle. TR P 16-17 & State's Ex. 2, P 3.

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[1] The evidentiary hearing in this matter 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.

3. In August of 2013, the Petitioners bought a new 2013 GMC Sierra truck, which also may or may not have been a flex fuel vehicle. TR P 19-20 & State's Ex. 2 P 12.

4. On November 16, 2015 the Petitioners filed two West Virginia Schedule AFTC-1, which are the forms the Tax Commissioner has created to obtain the alternative fuel tax credits (AFTC) that are the subject of this matter. State's Ex. 2 P 1-2 & 5-7. One of the schedules was for tax year 2008 and the other for tax year 2013, and both requested the AFTC, for the Chevy Silverado and the GMC Sierra, respectively.

5. It was these filings that led to the November 24, 2015, letter from the Tax Account Administration Division, denying the requested tax credits.

DISCUSSION

At the outset it should be noted that at the hearing Petitioner testified that both vehicles were flex fuel vehicles, and as such were eligible for the AFTC. However, no independent documentary evidence was introduced to corroborate her testimony. Due to the fact that we are ruling against the Petitioners on other grounds, this potential question of fact is not determinative.

The only issue in this matter is the date of purchase of both vehicles discussed above. The Tax Commissioner argues that when the Petitioners purchased the used 2007 truck the credit they seek had expired. Regarding the 2013 truck, the Tax Commissioner argues that at the time of purchase, August of 2013, the definition of alternative fuel had changed to exclude the type of vehicle the Petitioners bought. The Petitioners are *pro se*. At the hearing, they explained that they did not understand why they were not entitled to the AFTC, when on two different occasions they purchased alternative fuel vehicles. In post hearing briefs they advanced two arguments, both regarding their August 2014 purchase of the GMC truck, (seemingly conceding any argument regarding their 2008 used truck purchase). First, the Petitioners argue that Title 110, Series 6D of

the West Virginia Code of State Rules gave them a deadline of November 8, 2013, to have purchased the 2013 truck. Alternatively, they argue that West Virginia's fiscal year, July 1 to June 30 is somehow controlling in this matter. We will address the arguments of the parties in chronological order, taking the older truck purchase first.

In 1996 the Legislature passed Senate Bill 363, which created an alternative fuel motor vehicle tax credit. However, the Legislature clearly stated in Section 7 that the credit would only be available for ten years. "The tax credit provided in this article shall expire by operation of law ten years after the effective date of this article," TAXATION—ALTERNATIVE-FUEL MOTOR VEHICLE TAX CREDIT, 1996 West Virginia Laws Ch. 234 (S.B. 363). Moreover, the credit only applied to new or converted vehicles.

> A taxpayer is eligible to claim the credit against tax provided in this article if he or she:
> (a) Converts a motor vehicle that is presently registered in West Virginia to operate:
> (1) Exclusively on an alternative fuel . . .
> (b) Purchases from an original equipment manufacturer or an after-market conversion facility a new dedicated or dually fueled alternative-fuel motor vehicle for which the taxpayer then obtains a valid West Virginia registration. . . .

Id. Therefore, the Petitioners purchase of the 2007 Silverado is ineligible on two fronts, there was no AFTC in existence when they bought the truck, and even if the credit had not expired, it did not apply to used vehicle purchases.

Turning now to the Petitioner's purchase of the new Sierra truck in 2013, again, **at the time of the Petitioner's purchase** West Virginia law did not provide for a tax credit. In 2011 the West Virginia Legislature passed Senate Bill 465, titled the Marcellus Gas and Manufacturing Development Act. The legislation contained various provisions, including reenacting the alternative fuel motor vehicle tax credit which had expired in 2006. Unfortunately for the

Petitioners, in 2013, just four months before they purchased the Sierra truck, the Legislature passed Senate Bill 185. One of the provisions of the Bill was to modify the availability of the credit, stating: "No person is eligible to receive a tax credit under this article for: . . . (5) Purchases of motor vehicles that operate on fuels other than compressed natural gas, liquefied natural gas or liquefied petroleum gas, occurring on or after April 15, 2013 . . . ." W. Va. Code Ann. § 11-6D-7 (West 2018). This statutory provision could not be clearer. When the Petitioners bought their Sierra truck in August of 2013, it was not eligible for a tax credit, because it did not operate on compressed natural gas, liquefied natural gas or liquefied petroleum gas.

The Petitioners vehemently argue two points, first that the State's fiscal year should somehow control the April 15, 2013 date in Section 7. Moreover, they rely on an interpretive rule filed by the Tax Department with the Secretary of State's office on November 8, 2013. They argue that this interpretive rule filing also controls the deadlines contained in Section 7. However, neither of these arguments are correct. The Legislature clearly spoke during its 2013 session and changed the Alternative Fuel Tax Credit to make it available only for natural gas vehicles, and clearly stated that the date of the change was April 15, 2013.

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, pay West Virginia taxes.

5. The Alternative Fuel Motor Vehicle Tax Credit, created by the Legislature in 1996, by its own terms, expired in 2006. Moreover, the credit was only available to newly purchased or converted vehicles. *See* TAXATION—ALTERNATIVE-FUEL MOTOR VEHICLE TAX CREDIT, 1996 West Virginia Laws Ch. 234 (S.B. 363).

6. The Petitioners 2008 purchase of a flex fuel vehicle was not eligible for the alternative fuel credit because there was no credit available at the time of the purchase and because they purchased a used vehicle.

7. The Marcellus Gas and Manufacturing Development Act, which passed in 2011 reenacted the alternative fuel tax credits; however, in 2013 the Legislature amended the tax credit portion of the Act to modify which types of vehicles were eligible for the credit. The amendment mandated that after April 15, 2013, only vehicles that operated on compressed natural gas, liquefied natural gas or liquefied petroleum gas would be eligible for the credit. *See* W. Va. Code Ann. § 11-6D-7 (West 2018).

8. The Petitioners purchased their GMC Sierra truck in August of 2013, and that vehicle did not operate on compressed natural gas, liquefied natural gas or liquefied petroleum gas. As such, the Petitioners were not eligible to receive a tax credit for that vehicle purchase.

9. In a hearing before the West Virginia Office of Tax Appeals, the burden of proof is upon the Petitioner to show that any denial of a tax credit 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)

10. The Petitioners in this matter have not carried their burden of proving that the November 24, 2015 denial of their alternative fuel tax credit was erroneous, unlawful, void or otherwise invalid.

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the November 24, 2015 denial of an Alternative Fuel Tax Credit to the Petitioners is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

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

_____
Date Entered

F I L E D
WV SECRETARY OF STATE
SEPTEMBER 16, 2019 02:31 PM

REDACTED DECISION – DK# 16-020 CU-M

BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON DECEMBER 21, 2017
ISSUED ON DECEMBER MARCH 12, 2018

FINAL DECISION

On November 13, 2015, the Tax Accounting Administration of the West Virginia State Respondent's Office (hereinafter "Tax Commissioner " or "Respondent") issued an Officer Assessment letter (Letter Id#____) to Petitioner in Account Number _____. This officer assessment was issued pursuant to the authority of the State Respondent, granted to him by the provisions of Chapter 11, Article 10 *et seq.,* of the West Virginia Code. The officer assessment stated that an assessment had been made personally against the Petitioner as an officer of Company A, for combined sales and use tax.

The Petitioner timely filed his Petition for Reassessment with this Tribunal on January 11, 2016. Subsequently, a notice of hearing on the petition was sent to the parties and in accordance with the provisions of West Virginia Code Section 11-10A-10, a hearing was held on March 28, 2017, in Martinsburg, West Virginia, and the matter became ripe for decision after post hearing briefs.

FINDINGS OF FACT

1. The Petitioner is the Vice-President of Company A[1] (Tran.13, L.13-16).

[1] Company A was started in the 1960s by the Petitioner's father.

2. The Petitioner oversaw production in a plant in a West Virginia County (Tran.5, L.3-11).

3. The Petitioner's older brother, Mr. A., is the President of Company A., (Tran.6, L.1-11).

4. The Petitioner's older sister, Ms. B, is the Treasurer of Company A (Tran.6, L.15-20).

5. The President and Treasurer had offices beside each other in the back of the show room of Company A, but the Petitioner had an office in the back of the plant, which was across the road from the show room (Tran.6, L.21-22; Tran.7, L.1-7).

6. The Petitioner testified that he was never responsible for filing tax returns, collecting and remitting sales or use tax, or payroll (Tran.7, L.11-19; Tran.8, L.1-2).

7. The Petitioner testified that he never signed payroll checks or checks for the payment of taxes (Tran.7, L.20-23).

8. The Petitioner believes that at one time he was a shareholder of the corporation and believes that there may have been one shareholder meeting but he was never in attendance of any shareholder's meetings (Tran.8, L.6-22; Tran.9, L.1-2).

9. The Petitioner is unaware of being on the Board of Directors or any Board of Directors' meetings that may have been held (Tran.9, L.3-7).

10. The Petitioner's siblings, Mr. A., and Ms. B were in charge of the financial operations of the business (Tran.9, L.8-11).

11. The Petitioner was unaware of any tax issues until he attempted to refinance his mortgage on or about the Fall of 2013 (Tran.12, L.18-22).

12. The Petitioner attempted to get complete corporate documents from the President and an attorney for Company A., to provide them to the mortgage company, but had to get them from Ms. C, a new accountant at the company (Tran.13, L.1-8).

13. The Petitioner believes that he was denied a mortgage by the mortgage company due to the taxes owed by the company (Tran.13, L.8-10).

14. The Petitioner asked the accountant, Ms. C, to send him the current taxes owed once she received them. However, he never received anything from her regarding taxes and believes that it was because the President and Treasurer informed her not to release them to him (Tran.13, L.11-12).

15. The Petitioner was terminated "as an employee" by his brother, Mr. A., President of Company A, on March 19, 2014 (Petitioner's Ex. No.1).

16. Mr. B provided the requested documents on March 27, 2014, after the Petitioner's termination (Petitioner's Ex. No 2).

17. The Petitioner was fired because he would not release his retirement funds to the President and Treasurer for them to use to pay outstanding taxes (Tran.10, L.18-21).

18. After his termination, the Petitioner received unemployment compensation for six months[2] (Tran.11, L.10-19).

19. On or about November 2013, the Petitioner attempted to remove himself as an officer with the Secretary of State's office, but could not be removed due to outstanding taxes (Tran.12, L.1-13).

20. The Petitioner did not become aware of the outstanding taxes until he was denied a mortgage (Tran.13, L.7-10).

[2] Although not admitted into evidence, the Petitioner attached to his Petition for Appeal, a Deputy's Decision from Workforce West Virginia dated April 3, 2014, authorizing unemployment compensation.

21. The Petitioner did not sign official documents as Vice-President of the corporation and did not exercise any official capacity as Vice-President (Tran.13, L.17-22).

22. The President and Treasurer did not consult the Petitioner as an officer of the corporation (Tran.14, L.1-3).

23. The Petitioner was contacted by authorities regarding a criminal investigation involving the President and Treasurer, who had allegedly signed the Petitioner's name on bank notes at a County Bank for $_____ (Tran.14, L.4-20).

24. The Petitioner had a named Bank checkbook approximately 15-20 years ago for miscellaneous items (Tran.16, L.13-23).

25. The Petitioner signed for one SBA loan regarding the business approximately 30 years ago, but no other loans (Tran.19, L.6-13).

26. The Petitioner could hire and fire employees in the manufacturing plant, but had no authority to hire any corporate employee, salesperson, or accountant (Tran.19, L.21-23; Tran.20, L.1-5).

27. The Petitioner had to get approval and payment from the Treasurer to pay for general business costs for the plant (Tran.21, L.3-17).

28. The Petitioner's testimony is unrebutted.

DISCUSSION

The Petitioner is the Vice-President of Company A., which is a family owned business that was started by his father in the late 1960's. The Petitioner's older brother, Mr. A., is the President, and his older sister, Ms. B is the Treasurer of Company A., and they ran the corporate aspect of the business. To the Petitioner's recollection and unrebutted testimony, Ms. B was responsible for

accounts payable, the collection and remittance of sales and use taxes, signing payroll checks, and the payment of taxes. The Petitioner oversaw manufacturing in the plant, but had no other authority in the corporation. The Petitioner testified to not knowing what was going on with financial matters as his brother and sister handled that aspect of the business. The Petitioner was never responsible for the filing of tax returns, the collection and remittance of sales tax, signing any official documents, exercising any official capacity as Vice-President of the corporation, or ever being consulted as an officer of the corporation. The corporation operated in this manner during the time the Petitioner was an officer.

The Petitioner had signed a few checks from a Bank approximately fifteen (15) to twenty (20) years ago for insignificant amounts. The Petitioner testified that the other officers of the corporation signed for several loans, but he only signed for one SBA loan approximately thirty (30) years ago, which has been paid off. Although as an officer of Company A., the Petitioner testified to having only the authority to fire and hire employees in the plant. Moreover, any expenditure for the manufacturing facility had to be approved and paid by the Treasurer.

The Petitioner's unrebutted testimony was that he was unaware of any tax issues until he attempted to refinance his home[3], which would have been approximately November 2013.[4] The mortgage company wanted corporate tax returns and his brother, President of Company A., had given him the Articles of Incorporation, but it was missing the critical page regarding the Petitioner's ownership in the corporation. The Petitioner went to Mr. B, attorney for the corporation, and requested the corporate documents, but Mr. B did not release them to the

[3] The Petitioner's mortgage was with a financial institution that did not require additional documents to refinance. However, he was seeking a loan on the secondary mortgage market, and the mortgage company required documentation regarding the Petitioner's ownership in the company.

[4] Although the exact date was not admitted into evidence during the evidentiary hearing, the Petitioner testified that it was within a year of attempting to remove his name as a corporate officer.

Petitioner. The new accountant, Ms. C, gave the Petitioner what she had and he then, gave them to the mortgage company.

The Petitioner testified that the Treasurer had wanted him to release his retirement account valued at $_____to her to pay their tax bills. She had given him an ultimatum to release his retirement money or be terminated. The Petitioner further testified that on March 18, 2014, the President and the Treasurer had a private meeting with a consultant, Mr. C, in the back office. After this meeting, the President, the Treasurer, and the Petitioner had a meeting in the parking lot where he was given the ultimatum of releasing his retirement funds to them or being fired. As the Petitioner refused to release his retirement funds to the President and the Treasurer to pay outstanding taxes, he was terminated as an employee on March 19, 2014. As he could not previously obtain the proper corporate documents from the company President, he sent two certified letters to Mr. B, attorney for the company, and received them from him on March 27, 2014.

The Respondent asserts that the Petitioner's level of managerial duties and responsibilities were such that he should be held personally liable for the combined sales and use tax liabilities of the corporation. To support his argument, the Respondent points to the Petitioner having access to, and signatory power on, one checking account at a bank used by Company A, where he had signed a few checks about fifteen (15) years ago, and was still a signatory. The Respondent further argues that because the Petitioner admitted that he was the Vice-President, had been aware that he was the Vice-President, that he signed for an SBA loan for the business approximately thirty (30) years ago, and his signature was necessary to obtain corporate financing although it had been allegedly forged by his siblings that he should be held personally liable for the company's outstanding taxes.

The Respondent also relies upon the Petitioner having the ability to hire and fire employees in the manufacturing plant, and that he could expend funds on the company's behalf. The Respondent points to the transcript as follows:

PETITIONER: I did some hard, dirty, nasty work. I mean, at one point we had,

I guess, a 60 horsepower compressor that was very critical. And I mean, it broke down.

ATTORNEY WAGGONER: Well, okay. When it broke down, how did you get it fixed?

PETITIONER: I went to the local rental place and rented a compressor, and plugged it in.

I mean ---.

ATTORNEY WAGGONER: Okay. So ---.

PETITIONER: When it come down to it, I'd do whatever to try to keep the manufacturing

going.

(Respondent's Supplemental Brief, p. 8, Evidentiary Hearing Transcript, P. 20, L.16-22, P. 21, L.1-2).

The Respondent further argues that the above testimony supports the proposition that the Petitioner could (and would) purchase or rent equipment on the company's behalf to keep the manufacturing operation running, and that he was charged with handling issues that arose from OSHA and DEP for the company. The remaining portion of the transcript states the following regarding the Petitioner's involvement in the company:

ATTORNEY WAGGONER: Okay. So when you went and rented this equipment to get it back up and running, how did you pay for it?

PETITIONER: Well, my sister would have paid for it. I mean, there are certain things that's necessary to keep the business going. I mean, generally, any big-ticket item, I wouldn't just go out and get. I'd always get approval, ---

ATTORNEY WAGGONER: Right.

PETITIONER: --- as far as something like that breaking down and shutting the whole plant down.

ATTORNEY WAGGONER: Okay. But little stuff. How would you pay for that?

PETITIONER: I guess she would. I mean, I don't know that I ever personally paid for any of that.

ATTORNEY WAGGONER: Okay.

PETITIONER: Even the little to the bigger stuff, I generally get approval. Basically, they gave me what they didn't want to deal with. As far as dealing with OSHA, DEP, all that, I got all that fun stuff.

(Evidentiary Hearing Transcript, P.21, L.3-17).

The issue in this case is whether the Petitioner is personally liable for combined consumer sales and use tax that was not remitted to the State of West Virginia for Company A. A vendor such as Company A., that sells tangible goods, such as product, is required to pay a six (6) percent sales tax[5] on those goods to the State of West Virginia. Pursuant to West Virginia Code Section 11-15-3(a), "for the privilege of selling tangible personal property and of dispensing of certain

[5] The amount of consumer sales and service tax is "six cents on the dollar of sales or services, excluding gasoline and special fuels, which remain taxable at the rate of five cents on the dollar of sales." W.Va. Code Ann. §11-15-3(b) (West 2010).

select services…the vendor[6] shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article." W. Va. Code § 11-15-3(a). (West 2010). Under West Virginia. Code Section 11-15-4, "the Purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser." W.Va. Code §11-15-4 (West 2010).

Corporation officers are personally liable for the payment of taxes pursuant to West Virginia Code Section 11-15-17, which provides in relevant part:

> If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly, and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties, and interest thereon imposed by article ten of this chapter may be enforced against them as against the association or corporation which they represent.

W.Va. Code § 11-15-17 (West 2010).

Although the statute may appear to impose strict liability to corporate officers as being personally liable for corporate taxes, the West Virginia Supreme Court relaxed this statute in syllabus point 3 of *Schmehl v. Helton*, 222 W.Va. 98, 662 S.E. 697 (2008):

> Under the due process clause protections of the West Virginia Constitution, Article III, Section 10, in the absence of statutory or regulatory language setting forth standards for the imposition of personal liability for unpaid and unremitted sales taxes on individual corporate officers pursuant to W.Va. Code § 11-15-17[1978]; such liability may be imposed only when such imposition is in an individual case not arbitrary and capricious or unreasonable, and such imposition is subject to a fundamental fairness test. The burden is on the person seeking to avoid such liability to show with clear and convincing, giving due deference to the statute's general authorization for the imposition of such liability.

Schmehl, at Syl. pt. 3.

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[6] A vendor is defined as "any person engaged in the state in furnishing services taxed by this article or making sales of tangible personal property." W.Va. Code Ann. §11-15-2(z) (West 2010).

Upon review and consideration of West Virginia. Code Section 11-15-17 and syllabus point 3 of *Schmehl*, the evidentiary hearing, and the parties' arguments and briefs, this Tribunal finds that it would be fundamentally unfair to impose personal liability for the company's taxes on the Petitioner.

Although the Petitioner was the Vice-President of the company, he was only in charge of the plant, he could only hire and fire employees in the plant, and he dealt with governmental agencies for the plant because his brother and sister didn't want that job duty. He had no true corporate or decision-making authority, and instead, was treated like an employee as opposed to an officer of a corporation. In fact, the Petitioner had so little power that he was fired as an employee in the parking lot by his older brother and sister, and provided a letter by the President stating that he was fired as an employee. The Petitioner did not have financial control over the company, he never wrote any checks to the State of West Virginia for sales and use tax, he did not write checks on behalf of the corporation, his name was allegedly forged on a bank loan by the President and Treasurer, he even had to get approval and payment for a compressor for the very manufacturing plant that he managed, and whose only control in the corporation was much like a supervisor or a shop foreman. The very purpose of syllabus point 3 in *Schmehl* would be abrogated by holding the Petitioner liable for the outstanding taxes under these unrebutted facts. Therefore, this Tribunal finds the Petitioner has met his burden to prevail in the instant matter and holds that he is not personally responsible for combined sales and use taxes on behalf of Company A.

CONCLUSIONS OF LAW

1. It is the duty of the Respondent 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. "For the privilege of selling tangible personal property and of dispensing of certain select services…the vendor[7] shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article." W. Va. Code § 11-15-3(a). (West 2010).

3. "The Purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser." W.Va. Code § 11-15-4 (West 2010).

4. "If a taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed…may be enforced against them as against the association or corporation which they represent." W.Va. Code Ann. § 11-15-17 (West 2010).

5. Liability upon a corporate officer for the default of his or her corporation, for unpaid taxes, "may be imposed only when such imposition is in an individual case not arbitrary and capricious or unreasonable, and such imposition is subject to a fundamental fairness test." *Schmehl v. Helton*, Syl. Pt. 3, 222 W.Va. 98, 662 S.E.2d 697 (2008).

6. Applying the test in *Schmehl*, it would be fundamentally unfair, arbitrary and capricious, and unreasonable to impose liability on a corporate officer who held a nominal officer title, who did not have any financial or tax responsibility, did not make collection of or remit consumer sales and use tax for the corporation, who was required to get approval and payment

[7] A vendor is defined as "any person engaged in the state in furnishing services taxed by this article or making sales of tangible personal property." W.Va. Code Ann. §11-15-2(z) (West 2010).

from the Treasurer for any business expense, and only managed the manufacturing facility, while the President and Treasurer managed the financial and business operations of the corporation.

7. An individual who is a corporate officer who had signed for a SBA loan thirty (30) years ago, which has been long paid off, had check writing ability at a company bank fifteen (15) to twenty (20) years ago, but not since, did not actively participate in the day to day business or financial operations of the business, and where the other officers withheld financial and shareholder information, should not be held personally accountable for consumer sales and use taxes.

8. 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. §§ 121.1-1-63.1 and 69.2 (2003).

9. Petitioner in this matter has carried his burden of proving that the assessment of taxes against him is erroneous, unlawful, void or otherwise invalid.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the combined consumer sales and use tax assessment issued against the Petitioner in his capacity as an officer of the corporation for the period of November 30, 2012, through April 30, 2015, for the tax in the amount of $_____, interest in the amount of $_____, and additions to tax in the amount of $_____; for the period of May 31, 2015, for the tax amount of $_____, interest in the amount of $_____, and additions to tax in the amount of $_____; for the period of June 30, 2015, for the tax amount $_____, interest in the amount of

$_____, and additions to tax in the amount of $_____; for the period of July 31, 2015, for the tax amount of $_____, interest in the amount of $_____, and additions to tax in the amount of $_____; for the period of August 31, 2015, for the tax amount of $_____, interest in the amount of $_____, and additions to tax in the amount of $_____ for a final total of $_____, should be and is hereby **VACATED** in its entirety.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Crystal S. Flanigan
Administrative Law Judge

_____
Date Entered