

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(1); 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.

⁶Dictionary.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 manufactures." <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