

REDACTED DECISION – DK# 16-269 AFTC

**BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON MARCH 27, 2017
ISSUED ON OCTOBER 25, 2018**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

By a letter issued on April 20, 2016, the Taxpayer Services Division of the West Virginia State Tax Department informed the Petitioner that an assessment had been made against him in the amount of \$_____ for the Alternative Fuel Tax Credit (hereinafter “AFTC”) that he had claimed for tax years 2013 and 2014 had been denied. On the same day, a statement of account was also sent the Petitioner allocating the tax amounts, interest, penalties, and additions. The assessment for tax year 2013 was in the amount of \$_____, penalties and additions in the amount of \$_____ and interest in the amount of \$_____. This assessment also included tax year 2014, where he was assessed for tax in the amount of \$_____, penalties and additions in the amount of \$_____ and interest in the amount of \$_____.

Thereafter, the Petitioner timely filed with this Tribunal, a petition for reassessment. An evidentiary hearing was held in this matter on November 4, 2016, 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 April 14, 2013, Petitioner purchased a flex fuel 2012 Buick Verano, at a car dealer in West Virginia. Petitioner's Exhibit 6.
3. At the time of the purchase, the vehicle had 10,762 miles on it and it was marked as a used vehicle. *Id.*
4. In his 2013 and 2014 West Virginia tax filings, the Petitioner was granted the AFTC. In 2016, the Petitioner was notified from the Tax Department stating that credits for both years had been disallowed due to the vehicle being preowned. Respondent's Exhibit 1.
5. The discovery by the Tax Department that the Petitioner was not entitled to the AFTC led to the April 20, 2016 assessment of \$_____ for tax years 2013 and 2014 that forms the basis of this appeal. Respondent's Exhibit 4.

DISCUSSION

The Petitioner in this matter is *pro se*, and argues, as one might expect, that it is patently unfair for him to have been granted the tax credit and then to have it taken away. The Tax Commissioner argues that under West Virginia law, in order to obtain the credit, a person must have either purchased a new alternative fuel vehicle or taken an existing vehicle and converted it to make it credit eligible.

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.

In his post hearing brief, the Petitioner argues that it is unfair for the Tax Department to give him credits and then, later, take them away, with additions and penalties. The Petitioner’s argument is essentially equity based, and as such the Tax Commissioner should be estopped from denying his credit, because of a general sense of fair play. However, based upon the uncontroverted facts in this matter, and the laws of West Virginia, the Petitioner’s arguments are unavailing. The Petitioner even testified that the vehicle he purchased was a used car:

JUDGE FLANIGAN: So, you're saying that the car dealership told you that you would get a rebate back; right?

PETITIONER: Yes. That was my understanding of that.

JUDGE FLANIGAN: Although whatever it says on here --- you disagree with what it says on this document. Is that what you're saying?

PETITIONER: Right. The car had 10,000 miles on it.

JUDGE FLANIGAN: So you agree with that?

PETITIONER: Yeah. It was used, and it had 10,000 miles on it. I agree with that 100 percent. That's the truth.

Most importantly, the West Virginia Legislature has contemplated the scenario before us and given the Tax Commissioner the statutory authority to correct mistakes such as were made in this case.

If the tax commissioner believes that an erroneous refund has been made or an erroneous credit has been established, he or he may proceed to investigate and make an assessment or institute civil action to recover the amount of the refund or credit, within two years from the date the erroneous refund was paid or the erroneous credit was established

W. Va. Code Ann. § 11-10-14(k) (West).

The purpose of this statutory provision is obvious, to prevent Taxpayers from receiving windfall benefits to which they are unentitled, due to occasional mistakes made by the myriad number of employees at the Tax Department.

To the extent Petitioner is arguing that despite the clear statutory provisions above, the Tax Commissioner should be estopped from taking back a credit already granted, that argument too is not borne out by existing law. Twice in the last decade the West Virginia Supreme Court of Appeals has addressed the issue of estopping a government agency. Interestingly, in both instances it was the West Virginia Consolidated Public Retirement Board.

The general rule governing the doctrine of equitable estoppel is that, in order to constitute equitable estoppel or estoppel in pais, there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.

Syl. Pt. 3, W. Virginia Consol. Pub. Ret. Bd. v. Jones, 233 W. Va. 681, 760 S.E.2d 495 (West 2014).

Seven years prior to the Jones case, the Court had added an extra burden on those seeking to estop the government.

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

Hudkins v. State Consol. Pub. Ret. Bd., 220 W. Va. 275, 280 647 S.E.2d 711, 716 (2007).

Both the Hudkins and Jones cases were *per curiam* decisions and in one, Hudkins, the Court did estop the government. However, the Court took pains to point out that its decision was limited to the specific facts of the case and was to prevent a manifest and grave injustice. Id. at 282, 718.

In the case before us, we rule that Petitioner has not made the requisite showing necessary to estop the Tax Commissioner. First, Petitioner did have the means of obtaining knowledge of the real facts regarding his entitlement to the credit, he simply needed to read West Virginia Code Section 11-6D-4. Additionally, we do not believe (nor do we think the West Virginia Supreme Court of Appeals would believe) that a Tax Department employee mistakenly failing to ascertain whether a vehicle is new or used (for tax credit purposes) would rise to the level of “wrongful

conduct” as that term is used in Hudkins. Finally, ruling that every mistake made by a Tax Department employee that leads to an erroneous credit being issued was, in fact, wrongful conduct would appear to contravene West Virginia Code Section 11-10-14(k). As stated above, by its enactment of Section 14(k), the Legislature has given the Tax Commissioner the ability to correct mistakes that lead to erroneous refunds or credits. However, Section 14(k), by its plain language, does not limit itself to mistakes only by Taxpayers. Therefore, when a credit is granted due to an error by a Tax Department employee, it would be nonsensical to allow the Tax Commissioner to correct the error, and then rule that the Tax Commissioner is estopped from correcting the error.¹

Finally, there is the issue of the additions that the Tax Commissioner has added to the assessments.² While there was no testimony or specific evidence introduced at the evidentiary

¹ This Tribunal also considered whether Petitioner’s arguments could be construed to allege an *ultra vires* act on the part of the Tax Department employee who erroneously granted the credit. However, allegations of errors will not suffice to bring such a claim. *See e.g. Robinson v. Salazar*, 885 F. Supp. 2d 1002 (E.D. Cal. 2012) (A federal officer acts *ultra vires* when the officer is doing the business which the sovereign has empowered him to do in a way which the sovereign has forbidden; a claim of error in the exercise of that power is therefore not sufficient).

² (a) *Failure to file tax return or pay tax due.* --

(1) In the case of failure to file a required return of any tax administered under this article on or before the date prescribed for filing such return (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: *Provided*, That this addition to tax shall be imposed only on the net amount of tax due;

(2) In the case of failure to pay the amount shown as tax, on any required return of any tax administered under this article on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return one half of one percent of the amount of such tax if the failure is for not more than one month, with an additional one half of one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: *Provided*, That the addition to tax shall be imposed only on the net amount of tax due;

(3) In the case of failure to pay any amount in respect to any tax required to be shown on a return specified in paragraph (1) which is not so shown within fifteen days of the date of notice and demand therefore, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand one half of one percent of the amount of each tax if the failure is for not more than one month, with an additional one half of one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: *Provided*, That this addition to tax shall be imposed only on the net amount of tax due. . . .

(c) *Negligence or intentional disregard of rules and regulations.* -- If any part of any underpayment of any tax administered under this article is due to negligence or intentional disregard of rules (but without intent to defraud), there shall be added to the amount of tax due five percent of the amount of such tax if the underpayment due to

hearing regarding this topic, a review of the relevant statutory provision does not show that the Tax Commissioner was statutorily authorized to assess additions to tax in this matter. Petitioner did not fail to file a return, as discussed in Subdivision 1; he did not fail to pay an amount shown, as discussed in Subdivision 2; he did not fail to pay within fifteen days of notice and demand, as discussed in Subdivision 3; and he did not negligently or intentionally disregard a rule thus leading to an underpayment of a tax, as discussed in Subsection (c). We are unable to find any statutory authority for additions being added when, as such, a Taxpayer receives the credit, and it is later determined that the credit was granted in error.

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).

negligence or intentional disregard of rules is for not more than one month, with an additional five percent for each additional month or fraction of the time during which such underpayment continues, not exceeding twenty-five percent in the aggregate: *Provided*, That these additions to tax shall be imposed only on the net amount of tax due and shall be in lieu of the additions to tax provided in subsection (a), and the Tax Commissioner shall state in his or her notice of assessment the reason or reasons for imposing this addition to tax with sufficient particularity to put the taxpayer on notice regarding why it was assessed. W. Va. Code Ann. § 11-10-18 (West 2018)

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 “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. Petitioner is ineligible for the tax credit provided to purchasers of alternative fuel motor vehicles because he purchased a used vehicle.

7. The general rule governing the doctrine of equitable estoppel is that, in order to constitute equitable estoppel or estoppel in pais, there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice. Syl. Pt. 4, W. Virginia Consol. Pub. Ret. Bd. v. Jones, 233 W. Va. 681, 760 S.E.2d 495 (West 2014).

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

9. The Tax Commissioner should not be estopped from denying the tax credit to Petitioner, despite having previously granted it to him, because West Virginia Code Section 11-

10-14(k) allows the Tax Commissioner three years after the grant of an erroneous refund to investigate and correct the mistake.

10. Nor should the Tax Commissioner be estopped, because after the erroneous grant of the credit, Petitioner had the means to ascertain that he was not entitled to the credit. *See* Syl. Pt. 4, W. Virginia Consol. Pub. Ret. Bd. v. Jones, 233 W. Va. 681, 760 S.E.2d 495 (West 2014) (estoppel will not lie when the party to whom a false representation has been made has the means of obtaining the real facts).

11. West Virginia Code Section 11-10-18 does not provide for additions to tax when a Taxpayer has erroneously been granted a tax credit.

12. 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)

13. Save for the issue of additions to tax discussed above, the Petitioner in this matter has not carried his burden of proving that the April 14, 2016 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 assessment issued against the Petitioner for tax years 2013 and 2014, in the total amount of \$ _____ is hereby **MODIFIED** to remove additions to tax in the amount of \$ _____ for tax year 2013 and \$ _____ for tax year 2014, for a new assessment of \$ _____.³

³ The assessment for tax years 2013 and 2014 was for total of \$ _____. The penalties and additions for 2013 were \$ _____ and for 2014 were \$ _____ for a total of \$ _____ (\$ _____ - \$ _____ = \$ _____), making the modified total assessment \$ _____.

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: _____
Crystal S. Flanigan
Administrative Law Judge

Date Entered