

REDACTED DECISION – DK# 17-207 MFE-W

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON MARCH 29, 2018
ISSUED ON JULY 25, 2018**

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

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

On June 8, 2017, the Petitioner, a Board of Education in a West Virginia County, (hereafter “the Board”) filed a claim for refund totaling \$_____, for a refund of motor fuel excise taxes it had paid for the tax period ending June 30, 2016. By a letter dated June 15, 2017, the Tax Account Administration Division (“The Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”), denied the refund claim. The reason stated for the denial was that a refund of fuel purchased for the period ending on June 30th of 2016, must be filed with a postmark date of no later than August 31, 2016, and therefore, Petitioner’s claim for refund filed on June 8, 2017, was untimely filed in violation of West Virginia Code Section 11-14C-31(c)(3)(2010).

Thereafter, on August 25, 2017, the Petitioner timely filed a petition for refund with this Tribunal. *See* W. Va. Code §§11-10A-8(2) and 11-10A-9(a)-(b)(West 2010). This matter did not proceed to an evidentiary hearing. Instead, the parties agreed to stipulated facts, (filed with this Tribunal on April 11, 2018) and filed legal briefs. The matter became ripe for decision upon the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Board is a West Virginia Public Corporation, created pursuant to the provisions of Article 5, Chapter 18 of the West Virginia Code. It is charged with the responsibility of

administering the public schools and the public school property in a West Virginia County.
Stipulation No. 6.

2. As part of its administrative duties, the Board accepts bids from motor fuel providers to provide fuel for its school buses. As part of its contractual relationship with these providers, the Board also pays West Virginia's Motor Fuel Excise Tax. Stipulation No. 13.
3. Despite its requirement to pay West Virginia Motor Fuel Excise Taxes, there is also a statutory provision which allows the Board to obtain a refund of these taxes. There is a statutory deadline to file these refund requests.
4. An employee of the Board was tasked with filing these refund requests. However, that employee left the Board's workplace on November 19, 2015, and did not return. That same employee resigned from her employment on February 24, 2016. That employee was not replaced. Stipulation No's 20-22.
5. The Board did not discover that the refund request for motor fuel taxes paid for the tax period ending June 30, 2016, had not been filed until sometime in June of 2017. Stipulation No. 25.

DISCUSSION

The law of this matter is clear and unambiguous. That being said, it is not contained in one section of the code, nor for that matter in one article. Therefore, a roadmap would be helpful.

- ❖ There is an excise tax levied on all motor fuel, with both a flat rate and a variable component. *See* W. Va. Code Ann. § 11-14C-5 (West 2010).
- ❖ Some motor fuel is per se exempt from the tax, such as any that is exported from this state to another state or nation, and some is exempt by refund, such as that used

by a county board of education. *See* W. Va. Code Ann. § 11-14C-9(b), (c) & (d) (West 2010).

- ❖ Sections 9(c) & (d) direct entities such as county boards of education to first pay the tax, and then apply to the Tax Commissioner for a refund.
- ❖ Both Article 10 and Article 14C of Chapter 10 contain statutory language regarding the refunds available to county boards of education as discussed in Sections 9(c) & (d).
- ❖ Section 14 of Article 10 (the West Virginia Tax Procedure and Administration Act) contains the more general language regarding refunds in general and some reference to the refunds at issue here.

(b) Refunds or credits of gasoline and special fuel excise tax or motor carrier road tax. -- Any person who seeks a refund or credit of gasoline and special fuel excise taxes under the provisions . . . of motor fuel excise tax under section nine, article fourteen-c of this chapter shall file his or her claim for refund or credit in accordance with the provisions of the applicable sections. W. Va. Code Ann. § 11-10-14(b) (West)

- ❖ However, Section 14 of Article 10 goes on to state: “No refund or credit shall be made unless the taxpayer has **timely** filed a claim for refund or credit with the tax commissioner.” W. Va. Code Ann. § 11-10-14(c) (West 2018)(emphasis added).
- ❖ Finally, we come to the specific statutory language in Article 14C, relied on by the Tax Commissioner in denying the refund.

*(c)*The Commissioner shall cause a refund to be made under the authority of this section **only when** the claim for refund is filed with the Commissioner within the following time periods: . . . all persons authorized to claim a refundable exemption under the authority of subdivisions (1) through (6), inclusive, subsection (c), section nine of this article and subdivisions (1) through (6), inclusive, subsection (d) of said section shall do so no later than the thirty-first day of August for the purchases of motor fuel made during the preceding fiscal year ending the thirtieth day of June. W. Va. Code Ann. § 11-14C-31(c)(3) (West 2018)(emphasis added).

At the outset, we should note that over the years this Tribunal has received many appeals with facts identical to those before us in this matter, including many from state agencies and other political subdivisions of the state. People make mistakes, and the refund claims are not filed timely. Traditionally, we have always advised Petitioners in these matters that, while they are entitled to a hearing, if they have acknowledged missing the statutory deadline we will be unable to rule in their favor. The undersigned can only recall one time where such a Petitioner requested an evidentiary hearing. That Petitioner did not appeal their adverse ruling to the Circuit Court. We are of the opinion that we cannot rule in the Board's favor in this matter as well. Nonetheless, we will address the arguments made by the Board in the same order as laid out in its initial brief.

The Board first argues that the West Virginia Supreme Court of Appeals has created a common law exception call the "Substantial Compliance Doctrine", the purpose of which is to relieve parties, such as the Board from the "harshness of strict compliance with statutory requirements". See "Petitioner's Brief in Support of Petition for Appeal" at p 4. The Board relies on the case of Bone v. W. Virginia Dep't of Corr., 163 W. Va. 253, 255 S.E.2d 919 (1979). In Bone, a West Virginia correctional officer was terminated for gross misconduct without receiving the statutory written reasons for discharge until three days after termination. The Court discussed the circumstances of the discharge and noted that while Mr. Bone did not receive the written reasons for discharge prior to his termination, he did receive them, and was given an opportunity to respond in writing. Ultimately, the Court found the deviation from the statutory requirements to be *de minimus*, stating "[we] hold that, **in the circumstances of this case**, there was substantial compliance with the requirements of the above quoted statute." Id. at 259, 922 (emphasis added).

We are unsure if this holding can be characterized as a doctrine. In fact, the only time that term is used in the decision is in Justice McGraw's dissent. Moreover, the Court plainly states that

its holding is limited to the facts of the case before it. Nor does the Court explain or discuss what the elements of this doctrine would be. Our misgivings about ruling for the Board based upon this doctrine are bolstered after reading the Court's decision in Butcher v. Miller, 212 W. Va. 13, 569 S.E.2d 89 (2002), where again, the issue was substantial compliance with statutory directives. In Butcher, the issue was an arresting officer's warning concerning the ramifications of a driver's refusal to take a chemical breath test. By statute, the officer was required to inform the driver that such refusal would lead to the revocation of his driver's license. In this instance the officer told the driver that the refusal "may" lead to revocation. The DMV Commissioner argued that there had been substantial compliance with the statutory requirements, such that the revocation of Mr. Butcher's license should be affirmed. The Court was not convinced, stating:

We are not persuaded by the "substantial" compliance authorities cited by the Commissioner. The pertinent language of W.Va.Code § 17C-5-7(a) is clear and unambiguous. "[A] statute which is clear and unambiguous should be applied by the courts and not construed or interpreted." *Carper v. Kanawha Banking & Trust Co.*, 157 W.Va. 477, 517, 207 S.E.2d 897, 921 (1974) (citation omitted). Under the statute, an officer making a DUI arrest must inform the arrestee that a refusal to submit to a chemical breath test "will" result in a license suspension.

Id., at 17, 93.

In her dissent, Chief Justice Davis pointed the majority to at least eight other decisions where the Court had applied what she called the "concept" of substantial compliance.

This Tribunal is hesitant to wade too far into these waters, particularly when the Butcher, Court seems to repudiate the "doctrine", at least in a situation where there is a clear and unambiguous statute. The language quoted above from the Butcher, Court is in keeping with what this Tribunal has always strived to do, if we have a clear and unambiguous statute we apply it as written. If not, we attempt, to the best of our abilities, to apply the rules of statutory construction. In this matter, we find the statutes to be clear and unambiguous, in their establishment of a clear

deadline to file the refund requests at issue, and their requirements that the Tax Commissioner can only provide a refund to those Taxpayers who have met the deadline.

Interestingly, while the Board never uses the phrase “ambiguous” in its post hearing briefs it does advance various arguments that dance around that topic. First, it acknowledges the language in Article 14C, Section 31, cited above “The Commissioner shall cause a refund to be made under the authority of this section **only when** the claim for refund is filed with the Commissioner within the following time periods” W. Va. Code Ann. § 11-14C-31(c) (West 2018). However, in the same paragraph, the Board states “[T]hat statute itself, again, however, does not legally prohibit the Commissioner from paying a tax refund when the refund is filed later.” See “Petitioner’s Brief in Support of Petition for Appeal” at p 6. We find that statement to be incorrect. Yes, the Board is correct, in that Section 31 does not say “the Tax Commissioner is legally prohibited from paying a refund that is untimely filed”. But this statement, as a legal argument, is disingenuous, because the statute does, in fact, prohibit the Tax Commissioner from paying such a refund claim, and it does so clearly and unambiguously.

Next, the Board relies on Section 32 of Article 14C, “[W]henver it appears to the satisfaction of the commissioner that any person is entitled to a refund for taxes paid pursuant to section five of this article, the commissioner shall forthwith certify the amount of the refund.” W. Va. Code Ann. § 11-14C-32 (West 2018). The Board asks us to read Section 32 in *pari materia* with Section 31, and to recognize that Section 32 gives the Tax Commissioner discretion to pay a refund claim that has not met the statutory deadlines in Section 31. However, we cannot do as the Board has requested, because Sections 31 and 32, while both part of Article 14C, cannot be read in *pari materia*, because they are inconsistent. While the general rule of statutory construction regarding reading similar statutes in *pari materia* is well settled, there are exceptions. Of particular

interest in this matter is the West Virginia Supreme Court of Appeals admonition that “a related statute cannot be utilized to create doubt in an otherwise clear statute.” Manchin v. Dunfee, 174 W. Va. 532, 536, 327 S.E.2d 710, 714 (1984). Earlier, the Court stated, “[I]t is well established in West Virginia that statutes **which are not inconsistent with one another**, and which relate to the same subject matter, are in pari materia.” State ex rel. Miller v. Locke, 162 W. Va. 946, 947, 253 S.E.2d 540, 542 (1979)(emphasis added). We must again state that Section 31, (along with all the other statutory provisions informing this matter) is clear and unambiguous. Therefore, the Board’s arguments are attempting to convince us to do exactly what the Court has cautioned against. Obviously, a statute that directs the Tax Commissioner not to provide a refund if the request misses the August 31st deadline is inconsistent with a statute that purports to give him or her the discretion to do that very thing.

The Board also argues that this Tribunal must not construe West Virginia Code Section 11-14C-31 in a manner that results in an absurd or unjust result. Let us again state, West Virginia Code Sections 11-14C-31 and 11-10-14c clearly state that refunds requests that are untimely shall not be granted, and that motor fuel excise tax refunds claims by boards of education must be filed by August 31st. Thus, we are not construing these code sections, we are reading their plain language and apply them as written. It is well settled, black letter law that statutes are only construed if they are ambiguous. In fact, the Board, in its initial brief, cites Taylor-Hurley v. Mingo Cty. Bd. of Educ., 209 W. Va. 780, 551 S.E.2d 702 (2001) one of the many decisions stating that well settled point of law. The Taylor-Hurley Court goes on to state:

Although courts should not ordinarily stray beyond the plain language of unambiguous statutes, we recognize the need to depart from the statutory language in exceptional circumstances. Courts, therefore, may venture beyond the plain meaning of a statute in the rare instances in which there is a clearly expressed legislative intent to the contrary

Id. at 787, 709.

The Board, in its brief, does not explicitly discuss the language cited above, however, it clearly wishes for this Tribunal to depart from the plain language of Section 31. What the Board fails to do, is to direct this Tribunal to any clearly expressed legislative intent that we are to ignore the plain language of Section 31, and so, we are unwilling to do so.

The Board next discusses three statutory provisions regarding tax exemptions for county boards of education. The first of which is West Virginia Code Section 11-14C-9, which as discussed above, provides a **refundable** exemption for the Board, as opposed to a *per se* exemption. The Board next mentions West Virginia Code Section 11-3-9, which, as the Board correctly points out, exempts all property belonging to it from taxation, as long as that property is used for educational purposes.

All property, real and personal, described in this subsection, and to the extent limited by this section, is exempt from taxation: . . . Property belonging to, or held in trust for, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture.

W. Va. Code Ann. § 11-3-9(a)(9) (West 2018).

We disagree with the Board's contention that Section 9(a)(9) is in conflict with any of the other statutory authorities that inform this matter. As stated above, the motor fuel the Board purchases to fuel its school busses is exempt from taxation. However, again, the Legislature has provided that these fuel purchases are the subject of a refundable exemption. Additionally, it is well settled that the more specific statutory provision, (or in this case provisions) control over the more general. *See e.g. In re Chevie V.*, 226 W. Va. 363, 700 S.E.2d 815 (2010) (a specific statute shall be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled). Even if Section 9(a)(9) was in conflict with 11-14C-9, which it is not, the

more specific statutory provisions regarding motor fuel excise taxes would control. The last statutory provision relied on by the Board is West Virginia Code Section 18-5-5 which states, “[A]ll public school property used for school purposes shall be exempt from execution or other process, and free from lien or distress for taxes or municipal, county or state levies.” W. Va. Code Ann. § 18-5-5 (West 2018). This Section is inapplicable to the issues before us because the Tax Commissioner has not issued a lien or distress warrant on any property of the Board.

Finally, the Board argues that West Virginia Code Section 11-14C-31 is unconstitutional, as it is “being applied” to the Board. While the Board uses the phrase “being applied” it is not making an as applied constitutional argument, in that it is not alleging that other Boards of Education, or other refundable exempt entities are being allowed to ignore the August 31st refund filing deadline. Instead, the Board is simply arguing that Section 31 is unconstitutional, for a variety of reasons, such as that it infringes on public education’s preferred status under West Virginia’s Constitution. This is the one argument advanced by the Board that we are unable to address. While the West Virginia Supreme Court of Appeals has not expressly held as such, it is fairly well settled throughout the United States that administrative agencies, being members of the executive branch, cannot rule on the constitutionality of a statute. What the West Virginia Supreme Court has said is:

[t]he system of “checks and balances” provided for in American state and federal constitutions and secured to each branch of government by 'Separation of Powers' clauses theoretically and practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch

Louk v. Cormier, 218 W. Va. 81, 88, 622 S.E.2d 788, 795 (2005).

In summation, the West Virginia Legislature has given a statutory refundable exemption from the motor fuel excise tax to various entities, including the Board. In doing so, the Legislature

has created a clear and unambiguous scheme for such taxpayers to obtain the exemption, including a clear filing deadline for obtaining refunds. The Board missed that deadline, and this Tribunal is unwilling and unable to rule in its favor by ignoring the clear statutory mandates.

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. Pursuant to West Virginia Code Section 11-14C-9(d)(5), the Petitioner, as a county board of education of the State of West Virginia, may claim an exemption from the motor fuel excise tax by first paying the tax and then applying to the Tax Commissioner for a refund.
3. West Virginia Code Section 11-14C-31(c)(3) provides that any such refund request under subsection (d) of section nine of Article 14C must be filed no later than the thirty-first day of August for all such purchases of motor fuel made during the preceding fiscal year ending the thirtieth of June.
4. West Virginia Code Section 11-14C-31(c)(3) is clear and unambiguous.
5. West Virginia Code Section 11-14C-31(d) provides that untimely refund requests are not to be construed as a moral obligation of the State of West Virginia for payment.
6. West Virginia Code Section 11-14C-32 and West Virginia Code Section 11-14C-31(c)(3) cannot be read in *pari materia* because they are inconsistent, in that the more specific Section 31(c)(3) provides a clear and unambiguous, mandatory deadline to file refund claims, while the more general Section 32, according to the Board's interpretation, would allow that deadline to be ignored.

7. Applying the plain and ordinary meaning of West Virginia Code Section 11-14C-31(c)(3) does not create an absurd or unjust result.
8. West Virginia Code Section 11-3-9(a)(9) is not in conflict with West Virginia Code Section 11-14C-9. Moreover, regarding this matter, Section 11-14C-9 is the more specific statute, and thus would control.
9. The responsibility to declare any specific West Virginia statutory provision unconstitutional is that of the judicial branch. As a part of the executive branch, the West Virginia Office of Tax Appeals is unable to do so.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the June 15, 2017 refund denial is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

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