

REDACTED DECISION – DK# 17-274 XX

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON AUGUST 16, 2018
ISSUED ON JANUARY 28, 2019**

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

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On November 6, 2017, the Taxpayer Services Division of the West Virginia State Tax Department (the “Tax Commissioner” or “Respondent”) 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 the provisions of Chapter 11, Article 10 *et seq.*, of the West Virginia Code. The assessment was for tobacco products tax, for the months of July through October of 2016, for tax in the amount of \$_____, penalties and additions in the amount of \$_____, and interest in the amount of \$_____, for a total assessed tax liability of \$_____.

Thereafter, on November 27, 2017, 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 May 14, 2018, after which the parties filed legal briefs. The matter became ripe for a decision upon the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Petitioner is a West Virginia limited liability company formed in 2015. Tr. P43 at 6-13.
2. The Petitioner's business is located in a city in West Virginia. Tr. P43 at 22-23.
3. The Petitioner manufactures what is commonly called e-cigarette liquid. Tr. P46 at 1-14. This product is a liquid that is used as an alternative to cigarettes and is placed in special devices to create a vapor that is inhaled.
4. The Petitioner sells this liquid as both a retailer (via the internet) and as a wholesaler. Tr. P46-47 at 21-11.
5. During a 2016 special Legislative session in West Virginia, a new tax was passed in relation to the product manufactured by the Petitioner. Tr. P63 at 9-10. This new tax went into effect on July 1, 2016.
6. Due to the timing of the special session, and the implementation date of the new tax, the Tax Department had approximately two weeks to work out all the details. Tr. P80 at 11-13 & Tr. P63 at 19-21.
7. The Tax Department implemented the new law in such a way that it became a tax on the wholesale of e-cigarette liquid and that the wholesaler was responsible for collection. Tr. P63-64 at 22-8 & Tr. P74 at 7-11.
8. Because it was a new tax, the Petitioner was unsure about implementation. It began to communicate with the Tax Department regarding the logistics of compliance. Tr. P16-17 at 17-7.

9. The culmination of these communications was an email from the Petitioner to the Tax Department dated June 24, 2016. In this email was a series of specific questions regarding implementation of the new law. *See* Petitioner's Ex. 3. Included among the questions was the following "None of the merchandise I have on the premises and in stock as of June 30 is subject to the tax, correct?" Specifically, the tax does not apply to the current stock according to the FAQ".
10. Sometime prior to implementation of the new tax the Tax Department posted answers to frequently asked questions on the web.
11. Regarding the question about the new tax's application to current stock, the website stated "Am I required to remit the tax on all of my floor stock of e-cigarette liquid on that date?"
"No. There is no floor stock tax on the possession of e-cigarette liquid on that date. Any liquid sold by a registered WV wholesale dealer or received by a retail dealer with tax not paid on or after July 1, 2016 is subject to the tax." *See* State's Exhibit 7.
12. The Tax Department responded to the Petitioner's June 24th email with a response email dated June 27, 2016. This email answered the Petitioner's questions. *See* Petitioner's Ex. 1. Specifically, it answered the question in finding of fact number 9 above as follows:
"There is no floor stock tax on e-cigarette liquid. Any e-cigarette liquid in stock on June 30 is not subject to the tax. However, component parts not yet manufactured will be subject to the tax if mixed after June 30 and sold or used in this state."
13. Based upon the response in this June 27th email, the Petitioner did not collect the new tax on certain wholesales made after the July 1, 2016 implementation date of the new tax. Tr. P21-22 at 13-2.
14. It was this failure to collect that led to the assessment that forms the basis of this matter.

15. Due to what both parties agree was some confusion in the information provided to the Petitioner, the Tax Commissioner is willing to waive the \$2,126.83 in penalties and or additions assessed in this matter. Tr. P11 at 9-11.

DISCUSSION

The statute at issue in this matter is contained in Section 4b of Chapter 11, Article 17 of the West Virginia Code. It states “[O]n and after July 1, 2016, an excise tax is levied and imposed on sales of e-cigarette liquid at the rate of 7.5 cents per milliliter or fraction thereof, or if not sold, then at the same rate upon the use by the wholesaler or dealer.” W. Va. Code Ann. § 11-17-4b(b)(1) (West 2018).

Before we discuss the legal arguments advanced by the parties, a simplified and clarified discussion of what transpired between the parties would be helpful. While the Petitioner had various questions regarding how this new tax would be implemented, this matter hinges on only one of those questions, namely, did the Petitioner have to pay tax when it sold the e-cigarette liquid it had already manufactured by midnight on June 30, 2016? Or, as the Petitioner put it in its emailed questions to the Tax Department, is there a tax on the “floor stock”? The reason we put floor stock in quotes is because the meaning of that phrase is what led to the confusion in this matter. As stated above, in both its answers to the frequently asked questions, and its email response to the Petitioner, the Tax Department indicated that there was not a tax on floor stock. By the time this matter had proceeded to hearing, the Tax Department realized that those statements were only partially correct.¹ As will be discussed in greater detail below, as the Tax

¹ During the evidentiary hearing in this matter, both counsel for the Tax Commissioner and the Tax Commissioner’s only witness conceded that the Tax Department’s statements regarding a tax on floor stock were somewhat confusing. As such, counsel for the Tax Commissioner indicated that the Tax Commissioner is willing to waive the additions/penalties in this matter.

Department was rushing to implement this new tax it considered the “floor stock” of e-cigarette liquid to be any liquid already on hand in a retailer’s stock prior to July 1, 2016.

The tax created by the Legislature in Subdivision 4(b)(1) is an excise tax based upon how many milliliters sold. Typically, an excise tax is a tax placed upon specific products, like gasoline or tobacco. A sales tax on the other hand, is not based upon what you buy, but the total price of what you purchase, either goods or services. Section 4b contains language regarding how the tax is to be collected and this language is, as one might expect, in keeping with an excise tax. “The tax imposed in this section on e-cigarette liquid shall be paid using an invoice method prescribed by the Tax Commissioner.” *Id.* at (c)(1). At hearing the Tax Commissioner’s witness testified about how this invoice method would be implemented.

ATTORNEY IRBY: The wholesaler is actually responsible for the tax, but they do it on an invoice method and they can add the tax onto the invoice. And they were supposed to show it on the invoice. And as a result, technically the retailer is paying it on that invoice. But it's the wholesaler's responsibility to pay the tax whether or not they collect it from the retailer or not.

See Transcript of May 14, 2018, evidentiary hearing at P. 74.

Attorney Irby did not testify regarding the actual discussions held at the Tax Department about implementation of this tax. However, it seems obvious that an excise tax on milliliters of e-cigarette liquid paid by an invoice method would not be collected at the cash register of retail establishments. Having the wholesaler submit an invoice for a thousand milliliters sold to Joe’s Tobacco Shop would be administratively easier than having the owner of Joe’s figure out the tax on 100 ten-milliliter sales. Once the Tax Department concluded the logistics of how this tax would be collected, it realized that all of the e-cigarette liquid Joe had on his shelves on June 30, 2016, (his “floor stock”) would not be taxable, because he obviously purchased it from a wholesaler before the tax went into effect.

The reason this discussion above is important is because the Petitioner in this case was both a retailer and a wholesaler. And when the Tax Department sent that June 27th email, stating: “There is no floor stock tax on e-cigarette liquid. Any e-cigarette liquid in stock on June 30 is not subject to the tax. However, component parts not yet manufactured will be subject to the tax if mixed after June 30 and sold or used in this state.”, what it really meant to say was “There is no floor stock tax on e-cigarette liquid **to be sold at retail**”. Whomever answered the Petitioner’s written questions presumably forgot that they were also a wholesaler and gave it incomplete information.

The Petitioner first argues that it should prevail under the rules of statutory construction and based upon the Legislature’s intent not to tax floor stock. However, the Petitioner fails to discuss exactly what language in Subdivision 4(b)(1) would make some of its wholesale sales after July 1, 2016 exempt. To be clear, that is what the Petitioner seeks. It wants the e-cigarette liquid it had on hand at midnight on June 30, 2016 to be exempt from the tax. However, Subdivision 4(b)(1) clearly states that all sales on and after July 1, 2016 are subject to the tax. To read the Subdivision as the Petitioner seeks would require rewriting it, something the West Virginia Supreme Court of Appeals has cautioned against on many occasions. *See Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 582 S.E.2d 841, (2003) (it is not for courts arbitrarily to read into a statute that which it does not say). Simply put, Subdivision 4(b)(1) does not say that if the e-cigarette liquid was already manufactured prior to July 1, 2016 it will be exempt from the tax, and this Tribunal cannot rewrite it.² Another part of the Petitioner’s argument in this regard is that the Tax Department knew that the Legislature did not intend on taxing floor stock. Attorney Irby did in

² There is one other point to note on this topic. At hearing, one of the Petitioner’s witnesses discussed Subdivision (c)(1) of Section 4b, which states: “The tax will be paid on any and all e-cigarette liquid coming into the state for the purpose of sale or use in this state on and after July 1, 2016.” W. Va. Code Ann. § 11-17-4b(c)(1) (West 2018). The witness theorized that the language meant that if the e-cigarette liquid was already manufactured and here it should be exempt. The Tax Commissioner’s witness pointed out that this interpretation would create a constitutional equal protection problem with regards to out of state wholesalers. At the post-hearing brief stage the Petitioner did not advance that argument.

fact testify as such, but, as discussed above, the Tax Department thought it was implementing Subdivision 4(b)(1) in that way. The issue in this case is miscommunication about what the definition of “floor stock” is.

As one might expect, the Petitioner also strenuously argues that the Tax Commissioner should be estopped from assessing it, because of the erroneous information it was given. The Petitioner relies on one case in its estoppel argument, Hudkins v. State Consol. Pub. Ret. Bd., 220 W. Va. 275, 647 S.E.2d 711, (2007). However, its reliance on Hudkins, is puzzling, because the decision states:

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.

Id. at 280, 716.

In its brief, the Petitioner argues that the traditional elements of estoppel have been met. However, the Petitioner fails to discuss or argue that anyone at the Tax Department committed affirmative misconduct or wrongful conduct. The absence of this argument is presumably because there is no evidence of either occurring. What did happen is that the Tax Department employees were scrambling to enact a brand new law in a short period of time, and someone sent an email that only addressed a portion of the Petitioner’s business. As stated above, the statement from the Tax Department in the June 27th email was not even incorrect because for retailers the tax did not apply to their floor stock. This Tribunal rules that the statements in the June 27th email, while not entirely correct, as applied to the Petitioner’s situation, were not affirmative misconduct or wrongful conduct. Therefore, we cannot rule that the Petitioner has met its burden of showing that

the Tax Commissioner should be equitably estopped from issuing the assessment that forms the basis of this matter.

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. On and after July 1, 2016, an excise tax is levied and imposed on sales of e-cigarette liquid at the rate of 7.5 cents per milliliter or fraction thereof, or if not sold, then at the same rate upon the use by the wholesaler or dealer. W. Va. Code Ann. § 11-17-4b(b)(1) (West 2018).

3. The tax imposed in this section on e-cigarette liquid shall be paid using an invoice method prescribed by the Tax Commissioner. W. Va. Code Ann. § 11-17-4b(c)(1) (West 2018).

4. It was neither clearly wrong, nor arbitrary and capricious for the Tax Commissioner to implement Section 4b such that retailers did not pay the tax on the floor stock of e-cigarette liquid on hand prior to July 1, 2016, and that all wholesale sales after June 30, 2016 were subject to the tax based upon an invoice method.

5. “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).

6. The Petitioner has not shown affirmative misconduct or wrongful conduct on the part of any Tax Department employee.

7. In proceedings before the West Virginia Office of Tax Appeals, the burden of proof is upon the Petitioner. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010).

8. The Petitioner has not met its burden of proof showing that the Tax Commissioner should be equitably estopped from having issued the November 6, 2017 tobacco products tax assessment that forms the basis of this matter.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner on November 6, 2017, in the amount of \$ _____ is hereby **MODIFIED** to remove the penalties/additions assessed in the amount of \$ _____, for a new total liability of \$ _____.

Interest continues to accrue on this unpaid tax until this liability is fully paid. W. Va. Code Ann. § 11-10-17(a) 2010).

WEST VIRGINIA OFFICE OF TAX APEALS

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

Date Entered