

REDACTED DECISION – DK# 15-368 RPD

**BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON APRIL 19, 2017
ISSUED ON MAY 6, 2019**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On August 20, 2015, the Tax Accounting Administration of the West Virginia State Tax Commissioner's Office (hereinafter "Tax Department" or "Respondent") issued a notice of assessment to the Petitioner¹. 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. On September 10, 2015, the Tax Department further issued the Petitioner a denial letter of the Schedule M modification. On September 15, 2015, the Petitioner paid, under protest, the assessed amount of \$ _____ to the Respondent.

The Petitioner timely filed his Petition for Refund with this Tribunal on October 27, 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 December 13, 2016, in Charleston, West Virginia, at conclusion of which, the Petitioner filed a position statement. The matter became ripe for a decision at the conclusion of the briefing schedule.²

FINDINGS OF FACT

¹ The Notice of Assessment was issued to both Mr. and Mrs. Petitioner. The Denial of Refund was issued to only Mr. Petitioner. The Petition for Refund was filed only by Mr. Petitioner who has been designated as the Petitioner throughout this opinion for purposes of clarity.

² The evidentiary hearing in this matter was held by Chief Administrative Law Judge Heather Harlan. Since the date of the hearing, Judge Harlan has resigned her position, and this decision is being written by Administrative Law Judge Crystal S. Flanigan.

1. The Petitioner was a resident of West Virginia during the 2013 and 2014 tax years, and therefore, is required to pay West Virginia personal income tax.

2. During his working career, the Petitioner was a West Virginia Natural Resources Police Officer (hereinafter “NRPO”) where he had 32 years of service. TR P2, Petitioner’s Brief, P 1.

3. Pursuant to West Virginia Code Section 20-7-4, NRPO are law enforcement officers.

4. After the Petitioner retired, he received a pension from the Public Employees Retirement System (PERS). TR P 4-9.

5. The Petitioner filed his West Virginia income taxes for tax years 2013-2014 in such a way as to subtract from their federal adjusted gross income the entirety of the pension he received.

6. These tax filings lead the Tax Commissioner to issue a notice of assessment on August 20, 2015 in the amount of \$ _____. Of that amount, \$ _____ was penalties/additions. The Tax Commissioner has generally agreed to waive the penalties and additions in other cases involving similarly situated Petitioners.

DISCUSSION

This matter concerns a provision in West Virginia law which allows certain West Virginia residents to deduct from their federal adjusted gross income, all of the retirement income they receive from certain sources. Specifically, residents who receive retirement income from any West Virginia police or fireman’s retirement system, one of two state police retirement funds or the deputy sheriff retirement system. *See* W. Va. Code Ann. § 11-21-12(c)(6) (West 2018). Petitioner does not receive retirement income from any of those sources.

Some history is necessary for clarity. In tax years 2010 and 2011 a retired federal marshal named James Dawson sought the same modification that Petitioner seeks. He too, received no retirement income from any of the sources mentioned in West Virginia Code Section 11-21-12(c)(6), and the Tax Commissioner also denied his request. His case proceeded from this Tribunal all the way to the United States Supreme Court of Appeals. Without belaboring the point, the legal arguments in the Dawson case involve whether West Virginia Code Section 11-21-12(c)(6) violates the doctrine of intergovernmental immunity, as codified in 4 U.S.C. 111, because it is alleged that subdivision (6) allegedly discriminates against certain federal employees. The U.S. Supreme Court held that West Virginia Code Section §11-21-12(c)(6) does discriminate against federal employees under the doctrine of intergovernmental immunity. Mr. Dawson did not pursue the issue of discrimination between retirement income for law enforcement officers receiving a modification pursuant to West Virginia Code Section 11-21-12(c)(6) and law enforcement officers receiving retirement income from West Virginia sources not provided in this statute. Accordingly, the U.S. Supreme Court did not provide a ruling to this issue. As stated above, Petitioner is not a retired federal employee, therefore, the Dawson decision does not answer the question before us.

That brings us to the issue before this Tribunal, which, at its essence, is that it is unfair that Petitioner, a retired West Virginia law enforcement officer does not get the same modification to his retirement income that other retired West Virginia law enforcement officers get. Obviously, the Petitioner's arguments, are predicated on a violation of the Petitioner's constitutional rights, specifically their right to equal protection under the laws.

What is missing from the Petitioner's argument is any mention of what errors the Tax Commissioner has made in regard to the Petitioner. The reason for this is because the Tax

Commissioner has not made any errors. West Virginia Code Section 11-21-12(c)(6) allows certain individuals a tax break on their retirement income; Petitioner is not one of those individuals. Therefore, when the Tax Commissioner informs the Petitioner that he is not entitled to that modification, he is simply following the law as written. What is also missing from the Petitioner's post hearing briefs, is any citation to any legal authority that would allow the Tax Commissioner, when confronted with a situation such as this to say to the Taxpayer "you're right, this tax statute gives you a raw deal, so I'm going to fix things for you." The Petitioner cites no such authority, because obviously none exists. The Tax Commissioner cannot rewrite the tax laws on a whim, based upon some vague standard of fairness.

We do not seek to minimize the Petitioner's constitutional arguments, but it is well settled that, as part of the executive branch, neither the Tax Commissioner nor this Tribunal can declare a statute unconstitutional. Actually, two concepts are well settled. The first is the separation of powers doctrine. In West Virginia, as in many states, it is more than a doctrine and is actually an article of our State Constitution.

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature

W. Va. Const. art. V, § 1. The West Virginia Supreme Court of Appeals has elaborated on this constitutional provision on many occasions, including mere weeks prior to the issuance of this decision. "The separation of powers doctrine works six ways. The Courts may not be involved in legislative or executive acts. The Executive may not interfere with judicial or legislative acts." State ex rel. Workman v. Carmichael, 819 S.E.2d 251, 261 (W. Va. 2018).

Next we must ask, is declaring a statute unconstitutional a purely judicial act? The short answer is yes, and virtually every state court in the nation has, at some time in the past, clearly and

cogently stated as such. *See e.g. Gordon v. State by & through Capitol Bldg. Rehab.*, 2018 WY 32, 413 P.3d 1093 (Wyo. 2018) (Declaring the validity of statutes in relation to the constitution is a power vested in the courts); *Gannon v. State*, 305 Kan. 850, 390 P.3d 461 (2017) (the judiciary has the sole authority to determine whether an act of the legislature conforms to their supreme will, *i.e.*, is constitutional); *Gen. Engines Co. v. Dir., Div. of Taxation*, 23 N.J. Tax 515 (2007) (Division of Taxation, as an administrative agency, has neither the responsibility, the authority, nor the jurisdiction to declare statutes unconstitutional).

The West Virginia Supreme Court of Appeals has never answered the precise question before us, namely can an executive branch agency declare a statute unconstitutional. What the Court has said is that the mere fact that an executive branch agency performs quasi-judicial functions does not make it a court, and that it is the duty of the courts to declare statutes unconstitutional. *See e.g. State ex rel. State Bldg. Comm'n v. Bailey*, 151 W. Va. 79, 150 S.E.2d 449 (1966) (it is the duty of a court to declare a statute invalid if its unconstitutionality is clear); *Rice v. Underwood*, 205 W. Va. 274, 517 S.E.2d 751 (1998) (the deciding of contested cases by a board or regulatory body is a recognized administrative function and does not transform the administrative agency into a court). We do not think the fact that the *Bailey* Court failed to say that it is “solely” the duty of a court to declare a statute unconstitutional is determinative. This Tribunal is quite certain that the concept is as equally well settled in West Virginia as elsewhere.

In summation, Petitioner does not receive retirement income from any of the sources mentioned in West Virginia Code Section 11-21-12(c)(6). Therefore, the Tax Commissioner cannot have committed an error when he informed the Petitioner that he was not entitled to the requested modification. Nor can the Tax Commissioner or this Tribunal declare Section 11-21-12(c)(6) unconstitutional. Therefore, the Petitioner has not met his burden of showing that the Tax

Commissioner's actions in this matter were contrary to West Virginia law, clearly wrong or arbitrary and capricious.

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, he pays West Virginia taxes.

5. The Petitioner is a DNR officer and as such, is considered law enforcement with the usual powers to make arrests, carry a weapon, execute warrants, and other various duties. W. Va. Code § 20-7-4.

6. There shall be subtracted from federal adjusted gross income to the extent included therein: . . .(6) Retirement income received in the form of pensions and annuities after December

31, 1979, under any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System, including any survivorship annuities derived from any of these programs, to the extent includable in gross income for federal income tax purposes. W. Va. Code Ann. § 11-21-12(c)(6) (West 2018).

7. The Tax Commissioner did not commit an error in denying the modification contained in West Virginia Code Section 11-21-12(c)(6) to the Petitioners, because the Petitioners do not receive retirement income from any of the sources discussed in the subdivision.

8. The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature. W. Va. Const. art. V, § 1.

9. As a part of the executive branch, neither the Tax Commissioner nor this Tribunal may perform a judicial act, and declaring a statute unconstitutional is a judicial act. *See e.g. State ex rel. State Bldg. Comm'n v. Bailey*, 151 W. Va. 79, 150 S.E.2d 449 (1966); *Rice v. Underwood*, 205 W. Va. 274, 517 S.E.2d 751 (1998). *See also Gordon v. State by & through Capitol Bldg. Rehab.*, 2018 WY 32, 413 P.3d 1093 (Wyo. 2018); *Gannon v. State*, 305 Kan. 850, 390 P.3d 461 (2017); *Gen. Engines Co. v. Dir., Div. of Taxation*, 23 N.J. Tax 515 (2007).

10. 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 the actions taken by the Tax Commissioner are 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).

11. In this matter, the Petitioner has not met his burden of showing that the refund denial and assessment issued against him for tax years 2013 and 2014, was contrary to West Virginia law, clearly wrong or arbitrary and capricious.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the assessment issued to the Petitioner should be and hereby is **MODIFIED** downward to remove the penalties/additions in the amount of \$_____. In all other respects, the assessment is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Crystal S. Flanigan
Administrative Law Judge

Date Entered