REDACTED DECISION – DK# 12-042 RB
BY – A. M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION on JANUARY 25, 2013
DECISION ISSUED ON MAY 20, 2013

FINAL DECISION

On December 8, 2011, the Tax Account Administration Division of the West Virginia State Tax Commissioner's Office (the Tax Department or the Respondent) issued a refund denial letter to the Petitioner. This letter denied the Petitioner's request for an $89,501.15 refund of business and occupation taxes for tax years 2009 through 2011. Written notice of this refund denial was served on the Petitioner.

Thereafter, February 2, 2011, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition of appeal. *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 an evidentiary hearing was held on October 25, 2012, 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 nonprofit corporation which provides water and sewage services to its members in and around the Xxx housing development in _______, Preston County, West Virginia.

2. The corporation was formed in 1973 and is called the Xxx Public Utilities Company (hereinafter ZZZ).

3. According to the Petitioner's Agreement of Incorporation, at the time of formation, the purpose of the corporation was to:

> III. The objects for which this Corporation is formed are as follows:
>
> To buy, sell, own, construct and operate all kinds and all types of public utility systems and services including but not limited to sewage systems, water processing and distribution systems, oil and gas distribution systems, electrical generating and distribution systems, television antenna systems, all types of communication systems and all other types of public utility systems and services.
>
> To buy, sell, and/or distribute the above services and/or commodities at wholesale and/or at retail to all persons, firms, corporations and to the public generally.
>
> To buy, sell, own, improve, maintain, lease, mortgage, operate, and otherwise deal in real estate and interests in real estate.
>
> To buy, sell, improve, own, exchange or otherwise deal in tangible and intangible personal property either on a wholesale or retail basis.
>
> To do any and all other acts in the furtherance of the above powers which are necessary to the enjoyment thereof.

4. In 1990, the Petitioner filed a Restated Certificate of Incorporation with the West Virginia Secretary of State's Office. The purpose of this restatement was to split the Petitioner off from the homeowner's association of the development. The 1990 restated certificate again identified the purposes of the corporation, and they were strikingly similar to the 1973 purposes:

> III. The purpose for which this Company is formed are as follows:
>
> (a) To buy, sell, own, construct and operate all kinds and all types of public utility systems and services including but not limited to sewerage systems, water processing and distribution systems, oil and gas distribution systems, electrical generating and distribution systems, television antenna systems, all types of communication systems and all other types of public utility systems and services;

> (b) To buy, sell and/or distribute the above services and /or commodities at retail to all members as defined in Section V hereof;
>
> (c) To buy, sell, own , improve, maintain, lease, mortgage, operate and otherwise deal in real estate and interests in real estate;
>
> (d) To buy, sell, improve, own, exchange or otherwise deal in tangible and intangible personal property either on a wholesale or retail basis; and
>
> (e) To transact any and all lawful business for which corporations may be incorporated under the corporation laws of the State of West Virginia.

5. In July of 2010, the Petitioner obtained an exemption from federal income tax pursuant to Internal Revenue Code Section 501(c)(12)(A), which pertains to cooperative companies, or like organizations, when eighty-five percent or more of their income consists of amounts collected from members for the sole purpose of meeting losses and expenses.

6. The members of ZZZ are those people and entities that received water and sewage service from the corporation. As of the date of the hearing, ZZZ had 504 members; 501 residential and 3 commercial.

7. In order to receive services from ZZZ, a person or business must become a member. It is not possible to reside at Xxx without receiving services from ZZZ.

8. ZZZ's rates are set by the West Virginia Public Service Commission (hereinafter PSC). Due to the Petitioner's 501(c)(12)(A) status, the PSC sets ZZZ's rates so that the utility breaks even or does not make a profit.

9. According to the Petitioner's articles of incorporation, any surplus funds at the end of a fiscal year can either be distributed to the members or used by ZZZ to retire debt, expand services or maintain reserves.

10. Due to the PSC's rate making structure, the Petitioner rarely has significant surpluses at the end of its fiscal year. During the last fiscal year prior to the evidentiary hearing in this matter the Petitioner had approximately $7,000.00 in net income. This money was put into ZZZ's reserve and repair account to be used for system upkeep.

11. The Petitioner paid West Virginia Business and Occupation taxes during the years of the refund request and apparently had been paying them since the formation of the corporation.

12. The refund request that forms the basis of this matter came about as the result of research the Petitioner did regarding its tax liabilities and what taxes were being paid by similarly situated corporations.

13. There are three other 501(c)(12)(A) organizations in the state that are similarly situated to the Petitioner and that do not pay West Virginia's B&O Tax.

DISCUSSION

The Petitioner seeks a refund for three years' worth of business and occupation taxes, based upon its belief that it has wrongfully been paying the same. West Virginia's B&O Tax is a tax, for the privilege of doing business in the state.

> There is hereby levied and shall be collected annual privilege taxes against the persons, on account of their business and other activities, and in the amount to be determined by the application of rates against the measures of tax as set forth in sections two-d, two-e, two-f, two-m, two-n and two-o of this article.

W. Va. Code Ann. §11-13-2(a) (West 2010). Section 13 defines business as:

> "Business" shall include all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect. "Business" shall include the rendering of gas storage service by any person for the gain or economic benefit of any person, including, but not limited to, the storage operator, whether or not incident to any other business activity.

W. Va. Code Ann. §11-13-1(b)(6) (West 2010). The Tax Commissioner has promulgated regulations which further explain what is and is not doing business in West Virginia. "In determining whether a business is engaged in for direct or indirect economic gain or benefit, the lack of profit suffered in the activity is not relevant; nor is it material that the business was engaged without profit as the primary motivation." W. Va. Code R. §110-13-1a.2.2.2. (1996).

The Petitioner first argues that it is not engaged in "business" as the term is defined in West Virginia Code Section 11-13-1(b)(6). In its brief to this Tribunal, the Petitioner states that the fact that it provides water and sewer service at cost, with no eye towards gain or economic benefit is determinative. It should also be noted that the Petitioner, in its initial brief, argues at length that all taxing statutes, including West Virginia Code Section 11-13-2 must be strictly construed against the Tax Commissioner and in favor of the Taxpayer. The Petitioner argues that Section 2 needs to be construed because "the statute is silent with regard to the meaning behind the terms "gain" and "economic benefit as used in the statute." *See* Petitioner's Opening Brief, at p14. The Petitioner's brief then provides a long discussion on the meaning of those two terms, including citation to Black's Law Dictionary and various federal cases. It is fair to say that the general tone and conclusion of the Petitioner's argument in this regard is that gain and economic benefit equals profit, revenue or income.

Despite the Petitioner's arguments to the contrary, we find the law of this matter to be clear and unambiguous. We will use the plain and ordinary meaning of the terms "gain" and "economic benefit". We will also apply, without the need of interpretation, the phrase "the lack of profit suffered in the activity is not relevant; nor is it material that the business was engaged without profit as the primary motivation," *supra*, which the Petitioner fails to discuss in its brief.

As a result, we do not need to resort to the rules of statutory construction, nor do we need to strictly construe the statute in favor of one party over the other.

Therefore, the first question for determination is: was the Petitioner's objective in forming ZZZ to obtain any gain or economic benefit, either direct or indirect? We believe that the Petitioner's objective was gain or economic benefit. Now is a good time to reiterate that the Petitioner is actually all of the homeowners at Xxx. The Petitioner does an admirable job of painting the Petitioner as a nameless faceless corporation that merely provides water and sewage service. However, the question above can be rephrased as: why did the homeowners at Xxx decide, in 1973, to form a corporation to provide (among other things) water and sewage to the residents?

At the evidentiary hearing and in its post hearing briefs the Petitioner's arguments are clear and can be characterized as, "we don't want to make a profit; our goal is to provide service to the members/residents at cost." The "we don't want to make a profit" argument is not determinative to the question before us. The regulatory language in Section 1a.2.2.2 clearly states that making a profit or the desire to make a profit is not determinative of whether an entity is engaged in "business". Rather, as the statute clearly states, the question is one of objective, is the entity's objective any kind of gain or economic benefit, even indirect? Here, the answer seems abundantly clear; the Petitioner's objective had to be financial gain. For what other reason would a developer, building a development, decide to let the homeowners own and operate the water and sewage systems? Every developer has one objective, to sell the lots and fill the homes with homeowners. The objective of the corporation in this matter obviously was to assist in this endeavor. Obviously, the Petitioner corporation was not formed to make potential buyers shun the development.

The Petitioner might well argue that its business has changed in the forty (40) some odd years since the formation of the corporation, and that now the objective is no longer to make the development attractive to potential buyers, but rather to provide water and sewage service to the members/residents. In fact, ZZZ's 2010 Bylaws state that very thing: "[T]he Corporation is organized in a cooperative, non-profit basis to provide a mutual benefit to its members at cost, and consequently the Corporation will have no profits available to pay dividends on its capital." *See* Petitioner's Ex 5. This statement in the bylaws begs the question, is this "mutual benefit" that inures to all the homeowners of an economic or financial nature? We conclude that it is. It is difficult to see what other type of benefit the bylaws could be speaking of. It seems clear that the homeowners have chosen a business model for their water and sewage needs that is financially beneficial, particularly when the bylaws go on to state that this mutual benefit is provided at "cost".

Moreover, the Petitioner in this matter, as in all matters before the Office of Tax Appeals, has the burden of proof. *See* W. Va. Code Ann §11-10A-10(e) (2010). Assuming arguendo that there is some question regarding the business objective of the corporation, the Petitioner failed to present any evidence other than what is discussed above, namely that the objective is to provide the services at cost, with no regard for profit. Therefore, we rule that the Petitioner has failed to meet its burden of showing that it is not engaged in business, as that term is used in West Virginia Code Section 11-13-2(a).

The Petitioner next argues that it is entitled to the exemption from the B&O tax that is found in West Virginia Code Section 11-13-3(b)(3).

> (b) *Exemptions from tax.* -- The provisions of this article shall not apply to: (3) Fraternal societies, organizations and associations organized and operated for the exclusive benefit of their members and not for profit: *Provided,* That the exemption shall not extend

> to that part of the gross income arising from the sale of alcoholic liquor, food and related services of fraternal societies, organizations and associations which are licensed as private clubs under the provisions of article seven, chapter sixty of this code;

W. Va. Code Ann. § 11-13-3(b)(3)(West 2013). The Petitioner argues that it is not clear if the word fraternal modifies all three groups: societies, organizations, and associations or just modifies societies. The Petitioner would like this Tribunal to read Section 3(b)(3) so that fraternal just modifies societies, thereby providing an exemption for organizations such as ZZZ, which are operated for the exclusive benefit of their members and not for profit.

There are four problems with this argument. First and foremost, save for acknowledging that the West Virginia Supreme Court of Appeals has not weighed in on the issue, the Petitioner presents no authority for its proposition.[1]

Second, the Petitioner's argument regarding Section 3(b)(3) ignores the *proviso* language. There are two doctrines of statutory construction which defeat this particular argument by the Petitioner. These doctrines are *ejusdem generis* and *noscitur a sociis. Ejusdem generis* translates into "of the same kind" and n*oscitur a sociis* translates into "it is known from its associates". The West Virginia Supreme Court of Appeals has applied these two doctrines many times, and in Change, Inc. v. Westfield Ins. Co., the Court discussed the two together. "The doctrines are similar in nature, and their application holds that in an ambiguous phrase mixing general words with specific words, the general words are not construed broadly but are restricted to a sense analogous to the specific words." Change, Inc. v. Westfield Ins. Co., 208 W.Va. 654, 657-658, 542 S.E.2d 475, 478 - 479 (2000).

[1] While there is no decision on point from the West Virginia Supreme Court of Appeals, the Court has, in dicta, suggested that the word fraternal modifies all three groups. In State ex rel. Hardesty v. Aracoma - Chief Logan No. 4523, Veterans of Foreign Wars of U.S., Inc., 147 W.Va. 645, 129 S.E.2d 921 (W.Va.1963) the Court was analyzing the exemption as it would apply to a V.F.W. lodge. Twice in that decision the Court referred to the lodge as a "fraternal organization" and once used the term "fraternal association".

Here, the supposedly ambiguous phrase is "fraternal societies, organizations and associations" and, according to the Petitioner's argument, the general words would be organizations and associations. If the Petitioner is correct, then the *proviso* language in Section 3(b)(3) should read: "*Provided,* That the exemption shall not extend to that part of the gross income arising from the sale of alcoholic liquor, food and related services of fraternal societies, ~~organizations and associations~~ which are licensed as private clubs under the provisions of article seven, chapter sixty of this code". Obviously, the Petitioner's argument here is incorrect. If we follow the directives from the Change, Inc., Court, then we must restrict the phrase "fraternal societies, organizations, and associations," in a way that is analogous with groups that sell liquor and food and are sometimes private clubs. The only way to accomplish that task is to construe fraternal as modifying all three groups, societies, organizations, and associations.

Third, to read Section 3(b)(3) as the Petitioner requests, would render part of Section 1a.2.2.2 of Title 110, Series 13 of the West Virginia Code of State Rules a nullity, something the Supreme Court has consistently cautioned against. *See e.g.* Board of Educ. of County of Wood v. Airhart, 212 W.Va. 175, 569 S.E.2d 422 (W.Va.,2002); Dunlap v. Friedman's, Inc., 213 W.Va. 394, 582 S.E.2d 841 (W.Va.,2003); State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (W.Va.,1997). If Section 3(b)(3) exempts **every** non-profit organization, (as opposed to just fraternal) then we render null that portion of Section 1a.2.2.2, which states "nor is it material that the business was engaged without profit as the primary motivation." W. Va. Code R. §110-13-1a.2.2.2 (1996). This Tribunal is unable and unwilling to ignore part of a properly promulgated legislative rule.

Fourth, it is well settled that, "[w]here a person claims an exemption from a law imposing a license or tax, such law is strictly construed against the person claiming the exemption." *See*

Syl. Pt. 5 Davis Memorial Hosp. v. West Virginia State Tax Com'r, 222 W.Va. 677, 671 S.E.2d 682 (2008); Syl. Pt. 1 RGIS Inventory Specialists v. Palmer, 209 W.Va. 152, 544 S.E.2d 79 (2001); Syl. Pt. 4 Shawnee Bank, Inc. v. Paige, 200 W.Va. 20, 488 S.E.2d 20 (1997).

For the reasons discussed above, we rule that the Petitioner is not entitled to the exemption contained in West Virginia Code Section 11-13-3(b)(3).

The Petitioner's final argument is that even if it is engaged in business, for B&O Tax purposes, it is still entitled to the requested refund because the Tax Commissioner is applying West Virginia Code Section 11-13-2(a) in an unconstitutional manner. Specifically, the Petitioner maintains that it is the only 501(c)(12) utility company in the state that pays B&O Taxes. Therefore, the Petitioner claims it is being denied the equal protection provisions of both the United States Constitution and the West Virginia Constitution.

This argument of the Petitioner brings up two questions for analysis. First, can the Office of Tax Appeals hear such an argument, and, if it can, has the Petitioner proven a violation of its constitutional rights?

The first question was addressed, albeit halfheartedly, by the Tax Commissioner. In his reply brief, he states that the Office of Tax Appeals cannot hear and determine "questions of a constitutional nature" and cannot rule on "constitutional issues". *See* Respondent's Brief in Support of State's Position, p.7. The Tax Commissioner claims that West Virginia Code Section 11-10A-8 and Article 5 of the West Virginia Constitution prevents this Tribunal from addressing these arguments; however, his brief fails to offer any legal analysis of why not. Instead we have two simple declarative sentences that do not assist us in determining the issue.

The Petitioner, in its Reply Brief, correctly crystalizes the issue. The Tax Commissioner seems to be suggesting that the Office of Tax Appeals, as part of the executive branch, cannot

declare a statute unconstitutional, because that is obviously the exclusive providence of the judicial branch. The Petitioner then goes on to point out that it is not, at this time, challenging the constitutionality of West Virginia's B&O Tax. Therefore, it is not asking the Office of Tax Appeals to declare Section 11-13-2(a) unconstitutional. Rather, the Petitioner is making an "as applied" constitutional argument, stating that the Tax Commissioner is applying the B&O Tax in a manner that violates the Petitioner's equal protection rights.

We should start out by stating that 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.[2] On the other hand, the question of administrative agencies ruling on an as applied argument is not well settled. The West Virginia Supreme Court of Appeals has not addressed this particular question. The Petitioner directs this Tribunal to authority from both the Federal Courts and various state courts.

Our research shows only one state, Wyoming, that prohibits state agencies from hearing as applied arguments. In 1978 the Supreme Court of Wyoming stated: "[W]e hold that an administrative agency has no authority to determine the constitutionality of a statute. This is so whether the question is the constitutionality of the statute per se or the constitutionality of the statute as applied." Belco Petroleum Corp. v. State Bd. of Equalization, 587 P.2d 204, 214 (Wyo., 1978). The Belco Court offered no analysis of why this prohibition applied equally to both facial and as applied challenges. The Supreme Court of Wyoming has followed this holding at least four or five times since, each time without specific analysis of the as applied portion. This lack of analysis, coupled with the fact that only one of the fifty states has so held, leads this Tribunal to find the Belco decision less than persuasive.

[2] As will be referenced below, at least two states do allow administrative tribunals to rule on the constitutionality of statutes.

At least nine other states have ruled on the issue, and the Petitioner discusses four of those in its Reply Brief. Two states out of the nine are not helpful to our analysis. In Maryland, it is apparently well settled, under state law, that administrative agencies can rule on the constitutionality of a statute. *See* Furnitureland South, Inc. v. Comptroller of Treasury of State, 364 Md. 126, 771 A.2d 1061 (Md.,2001); Montgomery County v. Broadcast Equities, Inc., 360 Md. 438 758 A.2d 995 (Md.,2000) (Under Maryland law, administrative agencies are fully competent to resolve issues of constitutionality and the validity of statutes or ordinances in adjudicatory administrative proceedings which are subject to judicial review).[3]

The various rulings from the remaining seven states all have a common set of themes. Generally, these courts have held that judicial economy, exhaustion of remedies and special agency expertise require parties to raise as applied constitutional challenges at the earliest possible time, before the initial fact finder. *See* Dorman v. Department of Health and Environmental Control, 350 S.C. 159 565 S.E.2d 119 (S.C.App.,2002) (merely asserting an alleged constitutional violation will not allow a party to avoid an administrative ruling); Kantara, Inc. v. State, 991 P.2d 332 (Colo.App.,1999) (plaintiff was not asserting unconstitutionality, as such he was required to raise as applied challenge administratively); Desilets on Behalf of Desilets v. Clearview Regional Bd. of Educ., 137 N.J. 585, 647 A.2d 150 (N.J.,1994) (citing Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 179 A.2d 729 (1962) as standing for the proposition that whether corporate franchise tax was unconstitutional as applied was issued initially to be determined by Division of Taxation); Universal Am-Can Ltd. v. Attorney General, 197 Mich. App. 34, 494 N.W.2d 787 (Mich.App.,1992) (if agency is merely asked to resolve issues couched in constitutional terms that do not involve the validity of a statute, it has

[3] Oregon has also ruled (on different grounds) that administrative agencies can rule on the constitutionality of statutes. *See e.g.* Cooper v. Eugene School Dist. No. 4J, 301 Or. 358, 723 P.2d 298 (Or. 1986).

jurisdiction to do so); Liability Investigative Fund Effort, Inc. v. Medical Malpractice Joint Underwriting Ass'n of Massachusetts, 409 Mass. 734, 569 N.E.2d 797 (Mass.,1991) (a party may challenge the as-applied constitutionality of a statute or regulation in Superior Court where the constitutionality does not depend on preliminary factual determinations within the agency's area of expertise); Richardson v. Tennessee Bd. of Dentistry, 913 S.W.2d 446 (Tenn.,1995) (policy behind allowing an agency to hear as applied challenges is to allow agency an opportunity to correct error of enforcing a constitutional mandate in an unconstitutional manner); Cleveland Gear Co. v. Limbach, 35 Ohio St.3d 229, 520 N.E.2d 188 (Ohio,1988). (Board of Tax Appeals must receive evidence concerning as applied constitutional challenges, if question is presented).[4]

Obviously, all of the research done by the Petitioner, and by this Tribunal is merely persuasive authority. However, we are persuaded that it is proper for this Tribunal to hear the Petitioner's as applied challenge in this matter. We are so persuaded for a variety of reasons. First and foremost, we have discovered virtually no authority (save for Wyoming) for the proposition that we cannot hear the challenge. Additionally, the logic applied by the courts, as discussed above, applies to this matter. Primarily we are referring to the concept of judicial economy, and to a lesser extent, exhaustion of remedies.[5] The key fact here is that the Petitioner also brought a non-constitutional argument to the Office of Tax Appeals, namely that it does not owe B&O Tax. The Petitioner was going to need a hearing before the Office of Tax Appeals no matter what. Therefore, if this Tribunal is not permitted to rule on the as applied challenge, it begs the question; would the Petitioner have to file two simultaneous actions, a declaratory judgment action in circuit court and an appeal before the Office of Tax Appeals? We do not believe that the West Virginia Supreme Court of Appeals would so rule. The only question

[4]It should be noted that the Cleveland Gear Court never addressed the Board of Tax Appeals ability to rule on an as applied question. This was due to the fact that the Board (on other grounds) did not take up the question.
[5]This Tribunal's special expertise was not necessary for resolving the alleged equal protection violation.

remaining becomes, having heard the evidence regarding the as applied challenge, should this Tribunal pass on a ruling and defer to the circuit courts? We think not, because, again, that is contrary to the concept of judicial economy. If we decline to rule, despite having heard the evidence, we force the parties into the scenario we just rejected above, namely the certainty of two actions, one here and one in circuit court. On the other hand, if we rule on the as applied challenge, it is possible, although unlikely, that the parties will be satisfied with the decision and will not file an appeal. Finally, because the parties have an automatic right of appeal, there is no actual harm in this Tribunal issuing a ruling. Once again, we are not infringing upon the exclusive providence of the Legislature, by ruling on the constitutionality of West Virginia's B&O Tax and we are adhering to the concept of judicial economy by not forcing the parties into two separate courses of litigation before two different tribunals.[6]

Now we must analyze if the Tax Commissioner has applied West Virginia Code Section 11-13-2(a) in a manner that violates either the United States Constitution or the West Virginia Constitution.

Both the United States Constitution and the West Virginia Constitution contain sections guaranteeing citizens equal protection of the laws. *See* U.S. Const. amend. XIV §1; W.Va. Const. art. 3 §10.

The Petitioner claims that it is the only 501(c)(12) utility in West Virginia that is paying B&O Taxes. During the evidentiary hearing in this matter the Petitioner's general manager, QQQ, testified that she had examined the Public Service Commission's web site and could not find another similarly situated utility that was paying the tax. This Tribunal finds Ms. Qqq's testimony, with nothing more, to be unpersuasive. Despite the problems with Ms. Qqq's

[6] The question of what is the proper venue when a party brings a stand-alone as applied challenge is one for another day.

testimony in this regard, the Petitioner did clearly prove that three 501(c)(12) public utilities are not paying B&O Taxes. The Petitioner proved this by the testimony of accountant Zachary Dobbins. Mr. Dobbins testified that he has three clients, AAA Water Association, BBB Water Association, and CCC Water Association and that all three are similarly situated to the Petitioner and that none of them are paying the tax. Along with Mr. Dobbins' testimony, the Petitioner introduced documents confirming that these three entities are not paying B&O Taxes. This Tribunal is unaware of any threshold amount necessary to prove an equal protection violation. In other words, we do not find the difference between **all** 501(c)(12)'s not paying the tax, versus three not doing so, to be determinative.

In its Opening Brief, the Petitioner first lays out the general propositions, regarding both equal protection and equal protection and taxes.[7] The Petitioner offers citation to numerous federal and state decisions which explain how the state cannot treat similarly situated parties (and taxpayers) differently. Those propositions are well settled and do not require analysis. The Petitioner then discusses in detail, three cases, one from the U.S. Supreme Court and two state cases. The Petitioner seems to be offering these cases because they are analogous to the facts of this matter; however, the Petitioner is incorrect. We use the phrase "seems to be" because the Petitioner's reliance on these three cases is not entirely clear. The three cases are Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931); Armco Steel Corp. v. Department of Treasury, Corp. Franchise Fee Div., 419 Mich. 582, 358 N.W.2d 839 (1984); Gosnell Development Corporation v. Arizona Department of Revenue, 154 Ariz. 539, 744 P.2d 451 (1987). The Petitioner offers scant analysis as to how these three cases are similar to this matter. This lack of analysis is probably due to the fact that these three cases are

[7]The Tax Commissioner's brief fails to discuss the Petitioner's equal protection argument, save for his assertion that the Office of Tax Appeals cannot entertain such an argument.

markedly different from this case. The difference is that in each case relied on by the Petitioner, some official or officials have taken direct affirmative action to create two classes of taxpayers and one group is receiving favored treatment and one is not. For example, in Iowa-Des Moines Nat'l Bank, a county auditor took it upon himself to change the ad valorem tax rate against national banks so that they were higher than those of similarly situated domestic banks. In Armco Steel Corp. the Michigan Department of Treasury, as the result of a Michigan Court of Appeals decision, rescinded or canceled unpaid corporate deficiencies. However, the Department refused refund request from similarly situated Taxpayers. A similar situation existed in Gosnell Development Corporation. There, the Arizona Department of Revenue prospectively applied a court decision regarding contractors, but refused a refund request from similarly situated Gosnell. The common thread through these cases is affirmative action by someone to create two groups of similarly situated taxpayers, winners and losers.

In this case, the Petitioner does not argue that the Tax Commissioner has affirmatively and intentionally told the AAA, BBB and CCC water associations not to pay B&O Taxes. The evidence in this matter just shows that the three entities are not paying the tax; we have no explanation as to why not. It is important to reiterate that this matter began with the Petitioner's request for a refund of the B&O Taxes it believes it had erroneously been paying. One could speculate that until the Tax Department received the refund request it had never looked closely at the issue of whether or not the public utility 501(c)(12)'s were or were not paying B&O Taxes.

It is precisely because we have been presented with no evidence as to why AAA, BBB and CCC are not paying B&O Taxes that the Petitioner's argument must fail. The Petitioner, in its briefs, fails to cite or discuss the numerous authorities that discuss the difference between lax or less than perfect enforcement of the laws versus purposeful, intentional discrimination.

Ironically, the Gosnell decision, relied on by the Petitioner, points out this distinction. "This brings us to the conduct of the Department. If this were a case of the Department's failing to collect taxes by oversight or negligence or some similar conduct, we do not believe a case could be made that such conduct results in unequal treatment." Gosnell at 541, 453. Numerous other courts, including the U. S. Supreme Court, have addressed this critical distinction in proving a violation of equal protection. *See* Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397 (U.S. 1944) (denial of equal protection not proven unless there is shown to be present an element of intentional or purposeful discrimination); Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, 488 U.S. 336, 109 S.Ct. 633 (U.S.1989) (equal protection tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes); Central Airlines, Inc. v. U.S., 138 F.3d 333, (C.A.8 (Mo.),1998) (Unequal application of the regulations in question; however, does not violate equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination); People v. Dobbs Ferry Medical Pavillion Inc., 69 Misc.2d 886, 332 N.Y.S.2d 186 (N.Y. Sup. 1972) (Mere laxity in enforcement of a law does not become the basis of a denial of equal protection. Nor is it sufficient to merely show that a law or ordinance has not been enforced against other persons as it is sought to be enforced against the person claiming discrimination).

This precise issue was recently addressed by the West Virginia Supreme Court of Appeals in Summers v the West Virginia Consolidated Public Retirement Board, 217 W.Va. 399, 618 S.E.2d 408 (2005) (per curiam).[8] In Summers, two teachers complained of unequal treatment from the Retirement Board. There, the issue was how final salaries are calculated for purposes of arriving at retirement benefit amounts. Specifically, the inclusion or exclusion of

[8] Walker v. Doe, 210 W.Va. 490, 558 S.E.2d 290 (2001) (per curiam opinions have precedential value as an application of settled principles of law to facts necessarily differing from those at issue in signed opinions)

unused vacation time that was converted into wages, and whether that money should be used for calculating final salary. Among the issues the appellants complained of, was the Board's apparent habit of creating an arbitrary line in the sand by letting people who has less than two thousand dollars of unused vacation time apply that to their final salary calculation.[9] The Summers appellants, in similar fashion to the Petitioner here, complained that this arbitrary two thousand dollar cut off created two classes of retirees, and violated their equal protection rights.

The Summers Court was not persuaded by this argument, stating, "[I]n the instant case, the facts show nothing more than an administratively less-than-perfect system and do not rise to the level of intentional, purposeful, or arbitrary discrimination that is offensive to the equal protection clause." Id, at 404, 413.[10]

Based upon the citations above, to meet its burden in regards to its equal protection claim, the Petitioner needed to show intentional, purposeful discrimination. However, the Petitioner has not even shown the "laxity of enforcement" or the "less than perfect" system that were found acceptable by the Dobbs Ferry Medical and Summers courts. This Tribunal's speculation that the Tax Department has just missed the fact that AAA, BBB and CCC are not paying B&O Taxes is just that, speculation. The Petitioner has not even proven as much as the appellants in Summers. As such the Petitioner has not met its burden of proving an equal protection violation.

CONCLUSIONS OF LAW

1. "There is hereby levied and shall be collected annual privilege taxes against the persons, on account of their business and other activities, and in the amount to be determined by

[9] We use the phrase "apparent habit" because the Summers decision does not go into great detail about how the fact of this $2,000.00 threshold was established.

[10] Apparently, the Summers Court was satisfied that the Retirement Board had, in fact, created this arbitrary threshold, because, in a footnote it stated that it was "troubled" by the Board's hit or miss approach to arriving at final salary amounts. The Court urged the Board to adopt a more efficient system.

the application of rates against the measures of tax as set forth in sections two-d, two-e, two-f, two-m, two-n and two-o of this article." W. Va. Code Ann. §11-13-2(a) (West 2010).

2. "'Business' shall include all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect. 'Business' shall include the rendering of gas storage service by any person for the gain or economic benefit of any person, including, but not limited to, the storage operator, whether or not incident to any other business activity." W. Va. Code Ann. §11-13-1(b)(6) (West 2010).

3. "In determining whether a business is engaged in for direct or indirect economic gain or benefit, the lack of profit suffered in the activity is not relevant; nor is it material that the business was engaged without profit as the primary motivation." W. Va. Code R. §110-13-1a.2.2.2 (1996).

4. 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).

5. The Petitioner has failed to meet its burden of showing that it is not engaged in business, as that term is used in West Virginia Code Section 11-13-2(a).

6. Article 13 of Chapter 11 contains an exemption from the B&O Tax for "fraternal societies, organizations and associations organized and operated for the exclusive benefit of their members and not for profit: *Provided,* That the exemption shall not extend to that part of the gross income arising from the sale of alcoholic liquor, food and related services of fraternal societies, organizations and associations which are licensed as private clubs under the provisions of article seven, chapter sixty of this code." W. Va. Code Ann. §11-13-3(b)(3)(West 2013).

7. "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." *See* Syl. Pt. 5 Davis

Memorial Hosp. v. West Virginia State Tax Com'r, 222 W.Va. 677, 671 S.E.2d 682 (2008); Syl. Pt. 1 RGIS Inventory Specialists v. Palmer, 209 W.Va. 152, 544 S.E.2d 79 (2001); Syl. Pt. 4 Shawnee Bank, Inc. v. Paige, 200 W.Va. 20, 488 S.E.2d 20 (1997).

8. As strictly construed, in Section 3(b)(3) of Article 13, Chapter 11, the word "fraternal" modifies the words societies, organizations and associations.

9. The Petitioner is not entitled to the exemption contained in Section 3(b)(3) of Article 13, Chapter 11.

10. Both the United States Constitution and the West Virginia Constitution contain sections guaranteeing citizens equal protection of the laws. *See* U.S. Const. amend. XIV §1, W.Va. Const. art. 3 §10.

11. The guarantee of equal protection under the laws includes the guarantee to not be subjected to taxes not imposed on others of the same class. *See e.g.* Hillsborough Tp., Somerset County, N.J., v. Cromwell, 326 U.S. 620, 66 S.Ct. 445 (1946).

12. It is generally well settled that administrative agencies, as members of the executive branch of government, cannot rule on the constitutionality of statutes. *But see* Furnitureland South, Inc. v. Comptroller of Treasury of State, 364 Md. 126, 771 A.2d 1061 (Md.,2001); Montgomery County v. Broadcast Equities, Inc., 360 Md. 438 758 A.2d 995 (Md.,2000); Cooper v. Eugene School Dist. No. 4J, 301 Or. 358, 723 P.2d 298 (Or. 1986).

13. Numerous jurisdictions have ruled that the principles of judicial economy, exhaustion of remedies and special agency expertise require parties to raise as applied constitutional challenges at the earliest possible time, before the initial fact finder. *See* Dorman v. Department of Health and Environmental Control, 350 S.C. 159 565 S.E.2d 119 (S.C.App.,2002); Kantara, Inc. v. State, 991 P.2d 332 (Colo.App.,1999); Desilets on Behalf of

Desilets v. Clearview Regional Bd. of Educ., 137 N.J. 585, 647 A.2d 150 (N.J.,1994); Universal Am-Can Ltd. v. Attorney General, 197 Mich. App. 34, 494 N.W.2d 787 (Mich.App.,1992); Liability Investigative Fund Effort, Inc. v. Medical Malpractice Joint Underwriting Ass'n of Massachusetts, 409 Mass. 734, 569 N.E.2d 797 (Mass.,1991); Richardson v. Tennessee Bd. of Dentistry, 913 S.W.2d 446 (Tenn.,1995); Cleveland Gear Co. v. Limbach, 35 Ohio St.3d 229, 520 N.E.2d 188 (Ohio,1988).

14. Based upon the principles of judicial economy, exhaustion of remedies and to a lesser extent, special agency expertise, this tribunal is competent to rule on an as applied constitutional challenge.

15. Lax enforcement, administrative oversight, errors in judgment or negligence in administering the tax laws will not establish an equal protection violation. Rather, a party must show intentional or purposeful discrimination. *See* Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397 (U.S. 1944); Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, 488 U.S. 336, 109 S.Ct. 633 (U.S.1989); Central Airlines, Inc. v. U.S., 138 F.3d 333, (C.A.8 (Mo.),1998); People v. Dobbs Ferry Medical Pavillion Inc., 69 Misc.2d 886, 332 N.Y.S.2d 186 (N.Y.Sup. 1972); Summers v the West Virginia Consolidated Public Retirement Board, 217 W.Va. 399, 618 S.E.2d 408 (2005) (per curiam).

16. The Petitioner has not met its burden of proving that the Tax Commissioner was intentionally or purposefully discriminating against it, as the result of the AAA, BBB and CCC Water Associations' failure to pay B&O Taxes.

FINAL DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the Petitioner's refund request for $89,501.15 of business and occupation taxes for tax years 2009 through 2011 should be and hereby is **DENIED.**

WEST VIRGINIA OFFICE OF TAX APPEALS

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

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Date Entered