BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

REDACTED DECISION

DK#'S 14-286 AFTC, 15-147 AFTC, 16-230 AFTC, 17-125 P, CONS 15-0018

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON DECEMBER 11, 2018
ISSUED ON JULY 8, 2019

FINAL DECISION

FINDINGS OF FACT

1. The Petitioners are Resident Individuals, as that term is defined in West Virginia Code Section 11-21-7. As such, they pay West Virginia income taxes.

2. On August 29, 2012 the Petitioners purchased a white 2012 Chevy Avalanche. Petitioners' Ex. 3. This vehicle was a "flex fuel" vehicle. Tr. P13 at 4-5.

3. As a result of this purchase, when the Petitioners filed their 2012 West Virginia taxes, they sought the tax credit contained in West Virginia Code Section 11-6D-1 *et seq.* Petitioners' Ex. 1 & Tr. P26 at 1-7. The credit is thirty-five percent (35%) of the purchase price of the vehicle, up to a maximum of $7,500.00. *See* W. Va. Code Ann. § 11-6D-5(a)(West 2018).

4. If a taxpayer's liability is less than $7,500.00 in the tax year that the credit is first sought, then the taxpayer can carryover the credit for up to four succeeding taxable years. *See* W. Va. Code Ann. § 11-6D-9(a) (West 2018).

5. The Petitioners were granted this credit for tax year 2012, in the amount of $_____, which was the amount of tax they owed for that year. Tr. *Passim.*

6. At the time of their next tax filing, for tax year 2013, the Petitioners calculated that their carry-over amount was $_____.[1] The Petitioners' tax liability for tax year 2013 was $1,447.00, and that is the amount they sought as a carry over for that year. *See* Petitioners' Ex. 2.

7. The Petitioners were denied the carryover amount for tax year 2013, and in the subsequent years they requested it.

8. It is not clear from the documents in the record why the Tax Commissioner denied the Petitioners the carry-over monies they sought. At the evidentiary hearing the argument advanced by the Tax Commissioner was that the Petitioners traded in the white Avalanche in February of 2013 and once they no longer owned that vehicle they were no longer entitled to the carry-over.

DISCUSSION

It should be noted at the outset, that this case contains numerous irregularities, that if not clarified, would bog down any reader and any reviewing court. For starters, this Tribunal traditionally begins each final decision with an introductory paragraph explaining the basic procedural posture of the case. Included in this paragraph is a recitation of what appealable action the Tax Commissioner has taken, the relevant dates and other procedural information. This case is an outlier, because it is still unclear (from the documents) what action the Tax Commissioner has taken. When the Petitioners sought the carry-over of the credit in their 2013 tax filing, they apparently never received either an assessment or refund denial letter, which are the documents the Tax Commissioner would traditionally send, if an error in tax filings causes a taxpayer to either not remit enough taxes (generating an assessment) or if a taxpayer asks for a refund they are not

[1] $7,500.00 minus the amount of credit they were granted in 2012, $_____, should equal a carry-over of $_____. The record is not clear as to the nature of these differing amounts. However, because our ruling below will require a remand to the Tax Commissioner for recalculation, this confusion is not determinative.

entitled to (generating a refund denial letter). In this case, the Petitioners received four return change letters, one each year from 2014 through 2017. The Petitioner filed an appeal with this Tribunal upon receipt of each of these letters. None of these return change letters stated that the Petitioners were being denied the carry-over they sought because they no longer owned the vehicle in question.

This irregularity was not discovered until the evidentiary hearing in this matter. At that time, counsel for the Tax Commissioner was directed to review the Petitioners' file and provide copies of any assessment or refund denial that had been issued. This Tribunal advised both parties that if such documents had not been issued in this matter, any jurisdictional arguments the Tax Commissioner would or could raise would be considered waived. Obviously, the Tax Commissioner cannot refuse to provide the carry-over to the Petitioners and then say "you cannot appeal, because I have not, over a course of four years, provided you with an appealable document". As of this writing, the Tax Commissioner has not supplemented the record in this matter. As such, the facts of this matter are based upon the testimony of both parties, both of whom agree that the Petitioners were granted the Alternative Fuel Tax Credit (AFTC) for tax year 2012, for their purchase of the white Avalanche, but have never received any carry-over monies.

This matter is further confused by the fact that when the Petitioners traded in their white flex fuel Avalanche, they purchased a black flex fuel Avalanche. That second truck purchase led the Petitioners to request the AFTC, and to be initially denied. Again, the record is not entirely clear, but it appears that some of the return change letters received by the Petitioners, and hence some of their four appeals to this Tribunal involve the black truck purchase. However, to be clear, the parties agree that the only remaining matter of dispute between the parties is the Petitioners' failure to receive any carry-over monies from the grant of the AFTC for their purchase of the white Avalanche. The parties further agree that the Tax Commissioner's denial of carry-over monies to

the Petitioners has nothing to do with the Petitioners' purchase of the black truck. Rather, the sole issue of contention in this matter is whether a taxpayer forfeits carry-over monies once they no longer own the vehicle that generated the grant of the AFTC in the first place.

The Alternative Fuel Tax Credit is contained in Article 6D of Chapter 11 of the West Virginia Code. "A taxpayer is eligible to claim the credit against tax provided in this article if the taxpayer: . . .(b) Purchases from an original equipment manufacturer or an after-market conversion facility or any other automobile retailer, a new dedicated alternative-fuel motor vehicle. . . ." W. Va. Code Ann. § 11-6D-4 (West).

> (a) For taxable years beginning on and after January 1, 2011, but prior to termination or cessation of this credit as specified in this article, the amount of the credit allowed under this article for an alternative-fuel motor vehicle that weighs less than twenty-six thousand pounds is thirty-five percent of the purchase price of the alternative-fuel motor vehicle up to a maximum amount of $7,500

W. Va. Code Ann. § 11-6D-5(a) (West).

In this matter, it is undisputed that the Petitioners purchased a new dedicated alternative fuel motor vehicle, that it weighs less than twenty-six thousand pounds, and that thirty-five percent of the purchase price is more than $7,500.00. Therefore, the maximum credit that would be allowed to the Petitioners would be $7,500.00. However, there are limits on the eligibility for the credit.

> (e) The credit provided in this article for purchase of an alternative-fuel motor vehicle or conversion of a motor vehicle to an alternative-fuel motor vehicle, is not available to and may not be claimed by any taxpayer in, or for, any tax year in which the taxpayer did not own the alternative-fuel motor vehicle for which the claim is filed on the last day of the taxpayer's tax year for which the credit is claimed

W. Va. Code Ann. § 11-6D-4(e) (West).

Finally, there is the provision allowing taxpayers to carry over the credit to succeeding tax years.

> (a) If the alternative-fuel motor vehicle tax credit allowed under this article in the first taxable year in which the tax credit is allowable to offset tax exceeds the taxpayer's tax liability as determined in accordance with article twenty-one, article twenty-three and article twenty-four of this chapter for that taxable year, the excess may be applied for not more than the four next succeeding taxable years until the excess tax credit is used or the end of the fourth next succeeding taxable year, whichever occurs first. Any excess credit remaining at the end of the fourth next succeeding taxable year shall be forfeited.

W. Va. Code Ann. § 11-6D-9(a) (West).

The issue in this matter is clear, when the Petitioners traded in their white Chevy Avalanche in 2013, did that forfeit their right to obtain the excess of the $7,500.00 credit they were granted in tax year 2012? The Tax Commissioner claims that because the Petitioners did not own the vehicle at the end of tax year 2013, Section 4(e) precludes them from obtaining the carry-over or excess. At the conclusion of the evidentiary hearing in this matter, counsel for the Tax Commissioner was directed to discuss Section 9(a) and to explain her legal reasoning as it relates to the language in both Section 4(e) and 9(a). Unfortunately, counsel for the Tax Commissioner neglected to do so. Neither the argument section, nor the conclusions of law in the Tax Commissioner's brief even mention Section 9(a), let alone discuss the import of the same. This omission makes it difficult to rule for the Tax Commissioner. Ignoring a statutory provision that you believe is detrimental to your case is not the recipe for a winning argument, particularly when the presiding Administrative Law Judge indicated that analysis of the code section was necessary.

Despite this omission, we will conduct the analysis here. As stated above, we believe that Sections 4, 5(a), and 9(a) of Article 6D are clear and unambiguous, and neither party argues otherwise. Nor does either party argue about Sections 4(b) or 5(a) regarding the purchase of the

vehicle or the amount of the credit. As such, we will proceed to Sections 4(e) and 9(a) and apply them as written and give the words therein their plain and ordinary meaning. We start with Section 4(e), which states that a taxpayer cannot claim the AFTC in any tax year where they, the taxpayers, do not own the vehicle on the last day of the tax year. The Tax Commissioner argues that this is the beginning and end of the debate. The Petitioners did not own the vehicle on the last day of tax year 2013, so they are not eligible for the excess carryover. However, Section 4(e) makes no mention of the excess carry-over. It clearly states that what is not available is "The credit provided in this article for purchase of an alternative-fuel motor vehicle . . . ." W. Va. Code Ann. § 11-6D-4(e) (West). Section 4(e) says nothing about the excess carryover being unavailable if you do not own the vehicle on the last day of the tax year. Nor does Section 9(a) ever use the word "claim". There are only two ways for the Tax Commissioner to prevail in his argument. First, one would have to find that when a taxpayer seeks to apply the excess carryover they are filing a new "claim" for the tax credit. However, the plain language of Section 4 states that "A taxpayer is eligible to claim the credit . . .if the taxpayer: . . .(b) Purchases . . .a new dedicated alternative-fuel motor vehicle. . . ." W. Va. Code Ann. § 11-6D-4 (West). The credit is claimed when one purchases a new alternative fuel vehicle. In this matter, the Petitioners owned the vehicle on the last day of tax year 2012, they claimed the credit, and it was granted. The Tax Commissioner argues that when the Petitioners sought the carryover, they were filing a new claim for the credit. However, by its plain language Section 4(a) states that you claim the credit upon your purchase of an eligible vehicle.

Turning now to Section 9(a), it states that if the "tax credit **allowed** under this article in **the first taxable year** in which the tax credit is allowable" does not match the tax obligations of the taxpayer, then they can apply the excess, (up to the $7,500.00 limit) over four succeeding tax years. W. Va. Code Ann. § 11-6D-9(a) (West)(emphasis). We believe that Section 9(a), by its use of the

word "allowed", and the phrase "the first taxable year" is discussing a credit that has been granted. Again, that is the case in this matter. As stated above, the Tax Commissioner has failed to discuss Section 9(a). Nonetheless, to rule for the Tax Commissioner we would need to rewrite Section 9(a) to plainly state that the excess credit shall be forfeited if the vehicle is not owned during the carryover period.

Our belief that ruling for the Petitioners is proper is bolstered by an argument informally advanced by the Petitioners prior to post hearing briefs. The Petitioners astutely point out that if they were millionaires, with a tax liability greater than $7,500.00 in tax year 2012, then they would have received the entire credit in the first year. While they do not put it in these exact terms, they essentially argue that the Tax Commissioner's application of Section 4(e) creates a violation of their equal protection rights. Those taxpayers who are able to claim the entire tax credit in year one are then free to trade in or sell the vehicle with no financial repercussions. However, under the Tax Commissioner's reasoning, another group of taxpayers is forced to either keep the vehicle until the excess credit has been applied, or dispose of the vehicle and forfeit the credit. We agree with the Petitioners' argument in this regard.

In summation, we are not persuaded by the Tax Commissioner's *ipso facto* argument regarding Section 4(e). We rule that the act of claiming the credit according to West Virginia Code Section 11-6D-4(a), after purchase of an alternative fuel vehicle, is statutorily distinct from applying the excess carryover provided for in West Virginia Code Section 11-6D-9(a). Moreover, to rule as the Tax Commissioner seeks would create two classes of recipients of the credit, those who obtain the credit in full and then dispose of the vehicle and those who would be forced to keep possession of the vehicle until the entire credit has been applied.

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 Petitioners are resident individuals, as that term is defined in West Virginia Code Section 11-21-7, and as such, pay West Virginia taxes.

5. When the Petitioners purchased their new 2012 flex fuel Chevy Avalanche they were eligible to claim the tax credit created by West Virginia Code Section 11-6D-1 *et seq.*

6. "A taxpayer is eligible to claim the credit against tax provided in this article if the taxpayer: . . .(b) Purchases from an original equipment manufacturer or an after-market conversion facility or any other automobile retailer, a new dedicated alternative-fuel motor vehicle. . . ." W. Va. Code Ann. § 11-6D-4 (West).

7. For taxable years beginning on and after January 1, 2011, but prior to termination or cessation of this credit as specified in this article, the amount of the credit allowed under this article for an alternative-fuel motor vehicle that weighs less than twenty-six thousand pounds is

thirty-five percent of the purchase price of the alternative-fuel motor vehicle up to a maximum amount of $7,500. W. Va. Code Ann. § 11-6D-5(a) (West).

8. The credit provided in this article for purchase of an alternative-fuel motor vehicle or conversion of a motor vehicle to an alternative-fuel motor vehicle, is not available to and may not be claimed by any taxpayer in, or for, any tax year in which the taxpayer did not own the alternative-fuel motor vehicle for which the claim is filed on the last day of the taxpayer's tax year for which the credit is claimed. W. Va. Code Ann. § 11-6D-4(e) (West).

9. If a taxpayer's entire liability is less than $7,500.00 in the first year of obtaining the credit, they may carryover the excess credit. "If the alternative-fuel motor vehicle tax credit allowed under this article in the first taxable year in which the tax credit is allowable to offset tax exceeds the taxpayer's tax liability as determined in accordance with article twenty-one, article twenty-three and article twenty-four of this chapter for that taxable year, the excess may be applied for not more than the four next succeeding taxable years until the excess tax credit is used or the end of the fourth next succeeding taxable year, whichever occurs first." W. Va. Code Ann. § 11-6D-9(a) (West).

10. West Virginia Code Sections 11-6D-4(e) and 11-6D-9(a) are clear and unambiguous.

11. When pursuant to Section 11-6D-9(a), a taxpayer seeks to apply excess credit monies to subsequent tax years, they are not "claiming" the credit, as that term is used in Section 11-6D-4(e). This is so because Section 11-6D-4(b) predicates claiming the credit upon the purchase of certain alternative fuel vehicles.

12. To the extent the Tax Commissioner is "interpreting" Article 6D, his interpretation would create two classes of taxpayers, those whose tax liability would exceed the $7,500.00 credit in the first year, and those whose would not. The first group would be free to subsequently dispose

of the vehicle with no financial tax repercussions. If members of the second group sought to subsequently dispose of the vehicle, they would suffer tax repercussions.

13. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

14. The Petitioners in this matter have carried their burden of proving that the Tax Commissioner's denial of excess tax credit monies, pursuant to West Virginia Code Section 11-6D-9(a) was erroneous or unlawful.

DISPOSITION

Based upon the confusion discussed above regarding what had transpired in this matter, after this decision was drafted the matter was remanded for further clarification and recalculation. The result of that inquiry and recalculation was an agreement between the Petitioner and the Tax Commissioner regarding the amount of refund and interest due. This agreement was memorialized in a June 10, 2019, letter to this Tribunal.

Based upon the foregoing, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the Tax Commissioner's denial of excess tax credit monies, pursuant to West Virginia Code Section 11-6D-9(a) is hereby **VACATED**.

It is further **ORDERED** that the Petitioner is entitled to an additional refund of $_____ and additional interest, through June 10, 2019 of $_____, for a total refund amount through June 10, 2019 of $_____.

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

WEST VIRGINIA OFFICE OF TAX APPEALS

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

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Date Entered