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OFFICE WEST VIRGINIA
SECRETARY OF STATE

REDACTED DECISION – DK# 16-472 PM

**BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON DECEMBER 13, 2017
ISSUED ON NOVEMBER 15, 2019**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On August 22, 2016, the Auditing Division of the West Virginia State Tax Commissioner's Office (the Tax Department or the Respondent) issued a Notice of Assessment, against the Petitioner, (hereinafter "the Petitioner").¹ 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 personal income tax for the tax year of 2015, in the amount of \$ _____, interest in the amount of \$ _____, and additions to tax in the amount of \$ _____, for a total assessed tax liability of \$ _____.

The Petitioner timely filed its Petition for Reassessment with this Tribunal on September 22, 2016. Subsequently, notice of a hearing was sent to the Petitioner and in accordance with the provisions of West Virginia Code Section 11-10A-10 a hearing was held on March 27, 2017, at

¹ The Notice of Assessment was sent to Petitioner and Spouse but Petitioner is the sole petitioner in this matter. Accordingly, he will be referred to as the Petitioner.

the conclusion of the Respondent filed a legal brief.² The matter became ripe for a decision at the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Petitioner is a pilot in the West Virginia National Guard for the tax year 2015. Tr. 6-9.
2. The Petitioner's military orders (three sets of orders) for the tax year 2015 were issued pursuant to the provisions of Title 10 U.S.C. 12301 (one set of orders) and Title 32 U.S.C. § 502(f) (two sets or orders). Petitioner's Exhibit No. 3.
3. The Petitioner's Title 32 Orders were in effect from August 19, 2015-September 30, 2015. *Id.*
4. The Petitioner's Title 10 Orders were in effect from October 1, 2015-December 2, 2015. *Id.*
5. The Petitioner's Title 32 (second set) were in effect from December 3, 2015-January 3, 2016. *Id.*
6. The Petitioner's Title 32 military orders were signed by order of the Governor/Commander of the West Virginia Air National Guard. *Id.*
7. The Petitioner's Title 32 orders do not refer to any specific Executive Order from the President of the United States. *Id.*
8. The Petitioner voluntarily applied and was hired for the position with his current unit. Tr. 9.
9. The Petitioner's Title 10 orders for the tax year in question were signed by order of the Secretary of the Air Force. *Id.*

² A briefing schedule was filed on August 14, 2017. The Petitioner did not file a brief but the Respondent filed his brief on November 22, 2017.

10. The Tax Department agrees to treat income earned by the Petitioner during the effective period of the one set of Title 10 Orders -October 1, 2015 to December 2, 2015 as being non-taxable. Tr.11.

11. The Tax Department views the income earned by the Petitioner during the effective period of the two Title 32 Orders -August 19, 2015 to September 30, 2015, and December 3, 2015 to January 3, 2016 as being taxable. *Id.*

DISCUSSION

The issue in this case is whether the Petitioner is entitled to claim the modification under West Virginia Code § 11-21-12e which reduces his federal adjusted gross income and is the controlling law in this case. The modification sought by the Petitioner states:

(a) For taxable years beginning after December 31, 2000, in addition to amounts authorized to be subtracted from federal adjusted gross income pursuant to subsection (c), section twelve of this article, active duty military pay received for the period of time an individual is on active duty as a member of the National Guard or armed forces reserve called to active duty pursuant to an Executive Order of the President of the United States for duty in Operation Enduring Freedom or for domestic security duty is an authorized modification reducing federal adjusted gross income, but only to the extent the active duty military pay is included in federal adjusted gross income for the taxable year in which it is received.

West Virginia Code Section 11-21-12e(a) (West 2018).

In the last few years, dozens of members of the West Virginia National Guard have sought the modification contained in West Virginia Code Section 11-21-12e(a) (hereinafter “Subsection (a)”). Some of these Petitioners have been represented by counsel and some have not. However, the arguments advanced by all of them can be distilled down to one simple theme, all members of the West Virginia National Guard who are doing domestic security duty are entitled to the

downward modification in Subsection (a), a contention that the Tax Commissioner obviously disagrees with.

The dozens of “military” cases filed with this Tribunal have generated three final decisions. Two of those were decided by another administrative law judge, and the Petitioner prevailed. However, the Circuit Court of Kanawha County overruled one of those decisions.³ In the third final decision, written by Chief Judge Pollack, the Tax Commissioner prevailed, and we ruled for him in this matter as well, based upon the same grounds.

Again, the arguments advanced by virtually all the guardsmen seeking the Subsection (a) downward modification can be summarized as “I’m in the guard, I’m doing domestic security work, therefore I’m entitled to the modification.” The Tax Commissioner argues that certain members of the guard are entitled to the modification, and he is able to articulate which members those are.

At the outset, we rule that Subsection (a) is ambiguous. We do so because there are numerous provisions contained in the Subsection that are undefined and cannot be given their plain and ordinary meaning. The first of these is the term “active duty”. The term is used three times, first to discuss the pay that may be subtracted from federal adjusted gross income, and the second time to describe duty in the National Guard or armed forces reserve. It is the third usage of the term that creates the ambiguity, because it suggests, without clearly stating as such, that there are two types of active duty, duty in the guard or reserves and some other type of duty. It is this second, undefined type of duty that makes a Taxpayer eligible for the modification. We also find the phrase “pursuant to an Executive Order of the President of the United States” to be ambiguous, again, because it is undefined and does not clearly identify whom in the military is called to active

³ The other is pending a decision.

duty in this way. Despite the ambiguity, as will be discussed below, the rules of statutory construction allow us to reach a conclusion regarding the Tax Commissioner's actions in denying the Petitioners' requested modification, and we rule that the Tax Commissioner was not clearly wrong, nor was he arbitrary and capricious in his denial.

Due to the fact that the modification the Petitioners seek lowers their tax liability, it must be strictly construed against them. *See* Syl. Pt. 5 Davis Memorial Hosp. v. West Virginia State Tax Com'r, 222 W.Va. 677, 671 S.E.2d 682 (2008) (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). A well settled canon of statutory construction in West Virginia is "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous" *See* Security National Bank & Trust Company v. First W.Va. Bancorp [.] Inc., 166 W.Va. 775, 277 S.E.2d 613 (1981); Appalachian Power Co. v. State Tax Dep't of W. Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995); W. Virginia Consol. Pub. Ret. Bd. v. Wood, 233 W. Va. 222, 757 S.E.2d 752 (2014). In this matter, (and all similar matters) the Tax Commissioner has interpreted the phrase "called to active duty pursuant to an Executive Order of the President of the United States" using federal law. The Tax Commissioner first directs us to Title 32, Section 101 of the United States Code. Title 32 concerns the National Guard and Section 101 is the definition section. This section contains two definitions that clear up much of the ambiguity in Subsection (a) discussed above. Subsection (12) defines "active duty" and Subsection (19) defines "full time National Guard duty". Active duty is:

"Active duty" means full-time duty in the active military service of the United States. It includes such Federal duty as full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. **It does not include full-time National Guard duty.**

32 U.S.C.A. § 101(12) (West) (emphasis added). Full time National Guard duty is:

“Full-time National Guard duty” means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of this title for which the member is entitled to pay from the United States or for which the member has waived pay from the United States

32 U.S.C.A. § 101(19) (West).

The Tax Commissioner further clarifies the difference between National Guard duty and active duty by directing us to Title 10 of the United States Code, which deals with the U.S. Armed Forces. Title 10 contains Subtitle E which concerns the reserves, and Chapter 1209 of Subtitle E contains numerous sections discussing the topic before us, namely calling National Guardsmen to active duty in the active military. There is more than one section in Chapter 1209 that discusses the topic, and the Tax Commissioner directs us to many of them. For the purposes of this decision, we need only cite one of them, Section 12302, which states:

(a) In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve under the jurisdiction of that Secretary to active duty for not more than 24 consecutive months

10 U.S.C.A. § 12302 (West).

As stated, there are other sections in Chapter 1209 discussing pulling guardsmen out of their normal duties and putting them on active duty, but we do not feel the need to belabor the point. Both the definitions in Title 32, and the numerous provisions in Title 10, Chapter 1209 show us that the Tax Commissioner was not clearly wrong in relying on them to interpret West

Virginia Code Section 11-21-12e(a). The provisions in Title 10 and Title 32 relied on by the Tax Commissioner clears up the ambiguity in Subsection (a). Reading the relevant sections shows us first, that duty in the National Guard is separate and distinct from duty in the active military, and second, that a person on Full Time National Guard Duty may (among various options) be ordered to active duty for not more than 24 consecutive months. Finally, if a guardsman is so ordered, the proverbial ball starts rolling with a declaration by the President, or action by the Secretary of Defense. These federal statutes satisfy both questions, namely, what it means to be called to active duty, and what is meant by “pursuant to an Executive Order of the President of the United States.”

Another primary objective of statutory construction is to ascertain and give effect to the intent of the Legislature. This point has been stated many times by the West Virginia Supreme Court of Appeals and is well settled. *See e.g. Smith v. State Workmen’s Comp. Com’r*, 159 W.Va. 108, 219 S.E.2d 361 (1975); *State ex rel. Fetters v. Hott*, 173 W. Va. 502, 318 S.E.2d 446 (1984); *State ex rel. Hechler v. Christian Action Network*, 201 W. Va. 71, 491 S.E.2d 618 (1997); *In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d 138, (2005); *Reed v. Exel Logistics, Inc.*, 240 W. Va. 700, 815 S.E.2d 511 (2018). Normally, this Tribunal does not have the benefit of any evidence regarding legislative intent; however, in this case we do. The Tax Commissioner has introduced State’s Exhibit 4, which is a copy of Senate Bill 6013, the legislation introducing the modification at issue. The bill contains a note from the Senate which states:

NOTE: The purpose of this bill is to exempt from West Virginia personal income tax, income of members of the West Virginia national guard or reserve forces who are called to active duty for operation Enduring Freedom or for domestic security duty as a result of a call out pursuant to an Executive Order of the President of the United States

DOMESTIC SECURITY DUTY—NATIONAL GUARD OR RESERVE FORCES CALLED TO ACTIVE DUTY—PERSONAL INCOME TAX EXEMPTION, 2001 West Virginia Laws 6th Ex.

Sess. Ch. 22. *See also* Respondent's Ex. 4. This note clearly puts to rest the Petitioners' contention that every Guard member or reservist doing domestic security duty is entitled to the exemption, and confirms that it is limited to those called out pursuant to Executive Orders.

The Petitioner, and others, argue that it does not matter whether they have Title 32 Orders or Title 10 Orders, and that the nature of today's military requires flexibility, such that they constantly move between missions of varying nature, with orders that constantly change as well. While this Tribunal's understanding of the byzantine nature of today's military is limited, we generally agree with the Petitioners. However, our general agreement in this regard has nothing to do with the issue before us. Our job is to utilize the rules of statutory construction to figure out who the Legislature intended the Subsection (a) downward modification to apply to. It is vital to note that the Petitioner's seek an interpretation of Subsection (a) that would apply it to virtually all West Virginia guardsmen, or at least all guardsmen performing domestic security duties. We believe that the Tax Commissioner's interpretation of Subsection (a) is not clearly wrong, and that the Petitioners' interpretation is incorrect.

In summation, we rule against the Petitioners because they seek to skip a crucial step. The federal law discussed above shows that there are two distinct types of active duty. The only way to obtain the modification is to be on full time national guard duty, as defined in 32 U.S.C.A. § 101(19), and then something else has to happen, namely a "call to active duty" as that term in Subsection (a) has been interpreted by the Tax Commissioner. In order for the Petitioners to obtain the requested downward modification we would have to rewrite Subsection (a), to remove this step. This Tribunal is unwilling and unable to rewrite West Virginia's tax laws. Moreover, if the Legislature wanted all West Virginians who are on full time national guard duty doing domestic security duty to have the modification, they would have drafted Subsection (a) to state as such.

We know from the legislative history that the Legislature most definitely did not intend that result. We therefore cannot rule that the Tax Commissioner's refusal to grant the requested downward modification was clearly wrong, contrary to West Virginia law, 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 was a resident individual, as that term is defined in West Virginia Code Section 11-21-7, and as such, he pays West Virginia taxes during the tax period at issue.

5. For taxable years beginning after December 31, 2000, in addition to amounts authorized to be subtracted from federal adjusted gross income pursuant to subsection (c), section twelve of this article, active duty military pay received for the period of time an individual is on active duty as a member of the National Guard or armed forces reserve called to active duty pursuant to an Executive Order of the President of the United States for duty in Operation Enduring Freedom or for domestic security duty is an authorized modification reducing federal adjusted gross income, but only to the extent the active duty military pay is included in federal adjusted

gross income for the taxable year in which it is received. West Virginia Code Section 11-21-12e(a) (West 2018).

6. West Virginia Code Section 11-21-12e(a) is ambiguous because a plain and ordinary meaning cannot be attributed to the phrase “called to active duty pursuant to an Executive Order of the President of the United States.” Additionally, “active duty” and “Executive Order of the President of the United States” are undefined terms.

7. One of the primary objectives of statutory construction is to ascertain and give effect to the intent of the Legislature. *See e.g. Smith v. State Workmen’s Comp. Com’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975); *State ex rel. Fetters v. Hott*, 173 W. Va. 502, 318 S.E.2d 446 (1984); *State ex rel. Hechler v. Christian Action Network*, 201 W. Va. 71, 491 S.E.2d 618 (1997); *In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d 138, (2005); *Reed v. Exel Logistics, Inc.*, 240 W. Va. 700, 815 S.E.2d 511 (2018).

8. It was the intent of the West Virginia Legislature to provide the modification contained in Subsection (a) to members of the West Virginia national guard or reserve forces who are called to active duty for operation Enduring Freedom or for domestic security duty as a result of a call out pursuant to an Executive Order of the President of the United States.

9. 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).

10. In order to obtain the modification in Subsection (a) a guardsman or reservist must be called to active duty pursuant to an Executive Order of the President.

11. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous. *See Security National Bank & Trust Company v. First*

W.Va. Bancorp [.] Inc., 166 W.Va. 775, 277 S.E.2d 613 (1981); Appalachian Power Co. v. State Tax Dep't of W. Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995); W. Virginia Consol. Pub. Ret. Bd. v. Wood, 233 W. Va. 222, 757 S.E.2d 752 (2014).

12. This Tribunal gives deference to the Tax Commissioner's interpretation of Subsection (a), insofar as that interpretation requires a guardsman to be on active duty, as that term is defined in 32 U.S.C.A. § 101(12), and be federalized (ie; called to duty) pursuant to Title 10, Chapter 1209 of the United States Code, before he or she may obtain the modification in Subsection (a).

13. The Tax Commissioner's interpretation of Subsection (a) is not clearly erroneous.

14. During the time period in question in this matter, tax year 2015, Petitioner was on Full Time National Guard Duty, as that term is defined in 32 U.S.C.A. § 101(19).

15. Petitioner's service in the West Virginia National Guard during tax years 2015 was not pursuant to a call to active duty pursuant to an Executive Order of the President of the United States, as those terms are used in West Virginia Code Section 11-21-12e(a).

16. 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 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).

17. The Petitioner has failed to meet his burden of showing that the Tax Commissioner was clearly wrong, or unlawful when he issued the October 8, 2015, return change letters against him.

DISPOSITION

It is further **ORDERED**, that pursuant to the Tax Commissioner's recalculation, the Petitioner's tax liability for tax year 2015 is \$ _____ in tax and \$ _____ in interest, with all penalties and additions waived.

Interest continues to accrue on the unpaid tax until this liability is fully paid pursuant to the West Virginia Code Section 11-10-17(a).

WEST VIRGINIA OFFICE OF TAX APPEALS

By:

Crystal S. Flanigan
Administrative Law Judge

Date Entered