REDACTED DECISION – DK# 15-035 RC

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON JULY 29, 2019
ISSUED ON NOVEMBER 19, 2019

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

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On December 2, 2014, the Tax Account Administration Division of the West Virginia State Tax Commissioner's Office ("Tax Commissioner" or "Respondent") issued a Refund Denial Letter to the Petitioner, a Corporation. This letter denied the Petitioner's request for a refund of Consumer Sales and Service Tax in the amount of $_____. This refund denial 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.

Thereafter, on January 29, 2015, the Petitioner timely filed with this Tribunal, a petition of appeal. An evidentiary hearing was held in this matter on March 21, 2019, 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 an out of state corporation, whose business is road construction and paving.

2. The Petitioner operates in several states, including West Virginia.

3. Pursuant to West Virginia Code Section 22-6A-20, all entities seeking a permit to drill a horizontal gas well, must first certify that they have entered into an agreement with the West Virginia Division of Highways. The West Virginia Division of Highways (hereafter "DOH") drafted an Oil and Gas Road Policy in 2012, and updated it in 2013. *See* Parties Stipulation and Agreement Exhibit D. This policy requires those proposing to drill gas wells to meet with DOH employees to discuss and view the public roads that will be utilized by the natural gas producers (hereafter "Producers"). The purpose of these meetings is to ensure that the utilized roads will be maintained and if necessary, repaired, so that at the conclusion of drilling the roads are in the same condition as they were before drilling commenced. The result of these meetings is the DOH and the producers entering into a written agreement memorializing their mutual understanding regarding the road maintenance.

4. The Petitioner introduced one of these agreements at hearing. *See* Petitioner's Ex. 2. Additionally, numerous examples of these agreements were part of Exhibit E attached to the parties' stipulation and agreement.[1]

5. Paragraph VII of the "Oil and Gas Road District Wide Bonding Agreement." (hereinafter "Bonding Agreement") allows for three possibilities regarding the maintenance and repair of the utilized roads. The work can either be done by a contractor chosen by the driller, by

[1] Petitioner's Exhibit 2 is titled "Oil and Gas Road District Wide Bonding Agreement." Some of the agreements attached to Exhibit E have variations on this title, however, they all appear to have identical language. To complicate matters, at hearing and in post hearing briefs, the parties refer to a document called a "Road Use Maintenance Agreements" or RUMAs. The Petitioner's witness testified that Petitioner's Exhibit 2 was not a "Road Use Maintenance Agreement." Tr. P50. To be clear, the record in this matter does not contain any documents with the title Road Use Maintenance Agreement. To further complicate matters, Exhibit E also contained other agreements between the Producers and the DOH, however, unlike the bonding agreements, these do not state that they are entered into pursuant to the DOH's Oil & Gas Road Policy, and they appear to pertain to road work the Producers want to do in order to facilitate access to the well site. These agreements do not appear to be determinative of the issues before this Tribunal, and they were not referenced at hearing.

the DOH, or by a contractor chosen by the DOH. In all three scenarios the work is paid for by the Producers. *See* Petitioner's Ex. 2.

6. In July of 2014, the Petitioner, through its accounting firm, requested a refund of West Virginia consumer sales and service tax. *See* Parties Stipulation and Agreement Exhibit A. This refund request was based upon the Petitioner's contention that it had purchased asphalt pursuant to contracts with various Producers, thus the asphalt was directly used in an activity that was exempt from sales and service taxes. Specifically, the Petitioner argued that it was repairing and maintaining certain state roads pursuant to a contract with these natural resource producers, and that these Producers had signed Bonding Agreements with the West Virginia DOH. The Petitioner further argued that the statutory definition of "production of natural resources" includes reclamation work, and that its paving work fits that definition.

7. The parties stipulated as to exactly which natural gas producers the asphalt was bought for. Those Producers were, Producer 1, Producer 2, Producer 3, and Producer 4. *See* Parties Stipulation and Agreement, Paragraph 2.

8. No one from the four companies identified in paragraph 4 above testified at hearing. However, the parties agreed and stipulated that all of the asphalt purchases that are the subject of this matter were done pursuant to a contract between the Petitioner and the Producers. Therefore, it is clear that in this matter, the four Producers all chose to have the Bonding Agreement work done by a contractor of their choosing.

9. The Petitioner filed its refund claim on or about July 31, 2014. *See* Ex. A, Parties Stipulation and Agreement.

10. The Tax Commissioner's denial of the refund request stated that it was being denied because the Tax Commissioner did not believe that the asphalt in question was directly used in the

production of natural resources. Nor did the Tax Commissioner believe that the Petitioner was conducting reclamation activities. *See* Ex. B, Parties Stipulation and Agreement.

11. At some point after the Petitioner filed its appeal with this Tribunal, a Tax Department employee discovered a mathematical error with the refund request. This discovery led the Tax Commissioner to request additional documentation from the Petitioner. This documentation was provided in March of 2018. Tr. P81-84.

12. The Tax Commissioner takes the position that if the Petitioner were to prevail in this matter, interest should not run from the date the Petitioner filed its refund request. Instead, the Tax Commissioner argues that interest should begin to run starting in March of 2018, when he received the additional information in support of the Petitioner's refund request.

DISCUSSION

Generally, if a business in West Virginia were to buy a case of glass cleaner from ABC Cleaning Supplies in Anytown, U.S.A., one of two things would happen. Either ABC would charge the business West Virginia sales tax or the business would later remit use tax to the Tax Commissioner pursuant to West Virginia Code Section 11-15A-2, which states:

> An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article.

W. Va. Code Ann. §11-15A-2(a) (West 2010).

However, there are exemptions from the use tax, and one of those exemptions is if the property or service is exempt from sales tax, pursuant to Article 15 of Chapter 11. *See* W. Va.

Code Ann. § 11-15A-3 (West 2013). Section 9 of Article 15, Chapter 11 contains the sales tax exemptions and subsection (b)(2) of Section 9 provides an exemption for:

> The following sales of tangible personal property and services are exempt from tax as provided in this subsection: . . . (2) Sales of services, machinery, supplies and materials directly used or consumed in the activities of manufacturing, transportation, transmission, communication, production of natural resources, gas storage, generation or production or selling electric power, provision of a public utility service or the operation of a utility service or the operation of a utility business, in the businesses or organizations named in this subdivision and does not apply to purchases of gasoline or special fuel;

W. Va. Code Ann. § 11-15-9(b)(2) (West 2018).

Additional guidance regarding what the phrase "directly used" means is contained in West Virginia Code Section 11-15-2 which defines the term as:

> "Directly used or consumed" in the activities of manufacturing, transportation, transmission, communication or the production of natural resources means used or consumed in those activities or operations which constitute an integral and essential part of the activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the activities.

W. Va. Code Ann. §11-15-2(b)(4) (West 2018).

Paragraph (A) of Subdivision (4) contains a list of activities that are considered direct use:

> (A) Uses of property or consumption of services which constitute direct use or consumption in the activities of manufacturing, transportation, transmission, communication or the production of natural resources include only:
> (i) In the case of tangible personal property, physical incorporation of property into a finished product resulting from manufacturing production or the production of natural resources;
> (ii) Causing a direct physical, chemical or other change upon property undergoing manufacturing production or production of natural resources;
> (iii) Transporting or storing property undergoing transportation, communication, transmission, manufacturing production or production of natural resources;

(iv) Measuring or verifying a change in property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
(v) Physically controlling or directing the physical movement or operation of property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
(vi) Directly and physically recording the flow of property undergoing transportation, communication, transmission, manufacturing production or production of natural resources;
(vii) Producing energy for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
(viii) Facilitating the transmission of gas, water, steam or electricity from the point of their diversion to property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
(ix) Controlling or otherwise regulating atmospheric conditions required for transportation, communication, transmission, manufacturing production or production of natural resources;
(x) Serving as an operating supply for property undergoing transmission, manufacturing production or production of natural resources, or for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
(xi) Maintaining or repairing of property, including maintenance equipment, directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
(xii) Storing, removal or transportation of economic waste resulting from the activities of manufacturing, transportation, communication, transmission or the production of natural resources;
(xiii) Engaging in pollution control or environmental quality or protection activity directly relating to the activities of manufacturing, transportation, communication, transmission or the production of natural resources and personnel, plant, product or community safety or security activity directly relating to the activities of manufacturing, transportation, communication, transmission or the production of natural resources; or
(xiv) Otherwise using as an integral and essential part of transportation, communication, transmission, manufacturing production or production of natural resources

W. Va. Code Ann. §11-15-2(b)(4)(A) (West 2018).

In post hearing briefs, neither party makes a serious argument that the statutory provisions above are ambiguous. By our use of the word "serious" we mean that in the twenty-eight (28) page post hearing brief, the Tax Commissioner only had this to say, regarding any ambiguity in Subdivision (4), "[W]hile the direct use exemption provides certain statutory definition, how to apply the exemption remains ambiguous, as evidenced by the differing opinions as to how the exemption is to be applied in this matter, as well as in *Antero Resources Corporation v. State Tax Commissioner*, Kanawha County Civil Action No. 18-AA-218." If the legal standard for ambiguity in a tax exemption was the fact that the Tax Commissioner and Taxpayers disagreed, then every exemption on the books is ambiguous. Additionally, as will be discussed in greater detail below, the Circuit Court of Kanawha County, in Civil Action 18-AA-218, did not find West Virginia Code Section 11-15-2(b)(4) to be ambiguous.

As a result, we will apply that statute as written, giving the words their common ordinary meaning. Moreover, even if we were to turn to the legislative rules, as the Tax Commissioner wishes, Section 2.27 of Series 15, Title 110 of the West Virginia Code of State Rules contains a definition of direct use that is identical to that contained in Subdivision (4). However, to be clear, this decision does not rely on the legislative rules precisely because neither party makes a credible argument that the definition of direct use is ambiguous (nor silent on a key point) so resorting to the rules for statutory interpretation is not necessary. *See e.g.* Griffith v. Frontier W. Virginia, Inc., 228 W. Va. 277, 719 S.E.2d 747 (2011) (legislative rules provide guidance when statute is silent or ambiguous with respect to the specific issue).

Based upon the foregoing, we rule that the question of law to be answered in this matter is, were the purchases of asphalt by the five natural resource Producers identified in finding of fact number 7 above, integral and essential to their activities, or incidental, convenient or remote?

Prior to addressing the parties' arguments on that point, we must first discuss another argument/debate advance by both parties in this matter. When the Petitioner first requested the refund in this matter, it did so through a third-party accounting firm. The firm reasoned that the Petitioner was entitled to the direct use exemption because the definition of "production of natural resources" as contained in West Virginia Code Section 11-15-2(b)(14)(B) includes the act of reclamation, as done by the either the owner of the natural resources or a contractor. At hearing and in post hearing briefs, the Tax Commissioner argues that the Petitioner is not entitled to the exemption because it is not a producer of natural resources. The parties appeared before this Tribunal for oral argument on their post-hearing briefs, and at that time the Petitioner argued, among other things, that the definition of production of natural resources was determinative in this matter. This Tribunal believes that arguments about whether or not the Petitioner is a producer of natural resources ignores the legal question before us. As stated above, we find both the exemption itself, as contained in West Virginia Code Section 11-15-9(b)(2) and the definition of "direct use" in Section 11-15-2(b)(4) to be clear and unambiguous. As such, the exemption is clearly available for any integral and essential services purchased by producers of natural resources. In this case, no one disputes that the five natural gas companies identified above purchased the services of the Petitioner, and that part of those purchases included the asphalt at issue. Obviously, the five companies are natural gas Producers, and neither party argues otherwise. It is equally obvious that the Petitioner is not a producer of natural resources, it is in the business of road construction. But that is not a determinative fact before this Tribunal. Under the plain language of Section 11-15-9(b)(2), the legal question to be answered is, were their asphalt purchases "integral and essential." Finally, one might ask, can the Petitioner stand in the shoes of the natural resource Producers, and request the exemption itself? On this point the Tax Commissioner's own witness

testified that, while one might expect the Producers themselves to request the exemption, it is not improper for the Petitioner to request it.

> JUDGE POLLACK: In a perfect world, how is it supposed to work?
>
> MS. ACREE: In a perfect world, then Producer 4 would have given the exemption certificate to Petitoner. That would be the optimal --- if that's the route they wanted to pursue, that would be if I was --- if I were Producer 4 and you know, I was going to be charged for it, I would want to give that certificate to them so that they were not, you know, charging me for the sales tax if I felt that it was exempt. That would be the optimal.
>
> JUDGE POLLACK: But that didn't happen here?
>
> MS. ACREE: No.
>
> JUDGE POLLACK: But it's okay what Petitioner did procedurally?
>
> MS. ACREE: Procedurally, yes.

Tr. P102 at 4-13.

This brings us to the main argument of the parties. Obviously, the Petitioner argues that the purchases of asphalt by the five natural gas Producers was integral and essential to their gas drilling operations. The Petitioner bases this argument on the simple fact that, under West Virginia law, before you can get a permit to drill for natural gas you must sign an agreement with the West Virginia Division of Highways to maintain/repair certain identified roads that will be utilized to get to and from the well pad. Once the arguments regarding ambiguity and who is and is not a Producer of natural resources are addressed, the Tax Commissioner only has one remaining argument, namely that the ruling in Kanawha County Civil Action 18-AA-218, if followed, would allow him to prevail in this matter.

The Antero decision, in similar fashion to this matter, involved a natural gas Producer that sought the direct use exemption regarding various services provided on the well pad. Antero prevailed before this Tribunal and the Circuit Court reversed that decision. The Tax Commissioner's post-hearing brief in this matter quotes the dicta from the Antero decision,

however, he fails to direct us to any specific conclusion of law that he believes is applicable to the matter before us. We believe the Antero decision is of limited usefulness in this matter because there, not only did the Court not declare West Virginia Code Section 11-15-2(b)(4) ambiguous, it did not discuss this question of law at all. Nor does the decision discuss the common ordinary meaning of the words "integral," "essential," "incidental," "convenient," or "remote." Finally, in both dicta and conclusions of law numbers 21 & 22, the Antero decision discusses how it is outside of this Tribunal's statutory authority to declare a statute mooted or to rewrite any statutory provision. We are in agreement with the Antero Court's conclusions of law to that effect. For over one hundred years it has been well settled law in West Virginia that it is necessary to give effect to every word and part of a statute in order to effectuate its true meaning. *See e.g.* Jackson v. Belcher, 232 W. Va. 513, 753 S.E.2d 11 (2013); Jackson v. Kittle, 34 W. Va. 207, 12 S.E. 484 (1890). As stated above, it is the intention, and duty, of this Tribunal to give force and effect to every word in West Virginia Code Section 11-15-2(b)(4), and to give those words their common ordinary meaning.

There is no mystery about the common ordinary meaning of the words at issue in this case, namely "integral," "essential," "incidental," "convenient," and "remote." Essential means "something necessary, indispensable, or unavoidable." Webster's Third New International Dictionary, 777 (16th ed. 1971). Incidental is a direct antonym to essential and means "subordinate, nonessential, or attendant in position or significance." Id, at 1142. This presents us with a simple question, namely, could the natural gas Producers drill for natural gas without these asphalt purchases. Normally our answer would be a quick and obvious yes, because asphalt has nothing to do with drilling for natural gas. However, under the facts of this case, our answer must be, no, the Producers could not drill for gas without these asphalt purchases. Article 6A of Chapter 22 of

the West Virginia Code contains the West Virginia Natural Gas Horizontal Well Control Act. Section 20 of the Act contains the language that controls our decision here.

> As part of the permit application for horizontal wells, the operator shall submit a letter of certification from the Division of Highways that the operator has, pursuant to the Division of Highways Oil and Gas Road Policy, entered into an agreement with the Division of Highways pertaining to the state local service roads associated with the proposed well work set forth in the permit application or has certified that no such agreement is required by the Oil and Gas Road Policy and the reasons therefor

W. Va. Code Ann. § 22-6A-20 (West)

Neither party disputes the facts in this case. The facts show that Section 20 led the Divisions of Highways to draft a policy, and pursuant to the policy, each of the producers involved in this matter signed agreements to maintain and repair certain roads. As part of the parties' stipulation, they introduced copies of the Division of Highways Policy and hundreds of pages of agreement documents between the Producers and Highways. The Tax Commissioner does not dispute that the asphalt purchases at issue were made pursuant to these agreements. Obviously, no one can dispute the key fact, that under West Virginia law, Producers cannot get a permit to drill until they sign an agreement to maintain and repair certain roads.

We are aware that some might quibble and say that simply having to sign an agreement with Highways is far removed from the actual asphalt purchases at issue here. At hearing the Petitioner introduced its Exhibit 2, which is an example of an agreement between a Producer and the Division of Highways. The agreement gives the Producers three choices, hire their own contractor to fix the roads, or let Highways (or a contractor hired by Highways) do the work and bill the Producers. We rule that while there may be some variables in how the roads are fixed, this is a distinction without a difference. The asphalt at issue cost millions of dollars. At the end of

the day, these Producers were going to be spending these millions to maintain and repair the roads, the only question being, who were they going to write the check to.

Finally, we should note that this Tribunal is mindful of the Tax Commissioner's incredulity. Throughout the pendency of this matter, his position can be summarized as "the purchase of asphalt is just too far removed from the act of drilling for natural gas, and there is no way the Legislature would have intended this outcome." We believe those sentiments make sense. The paving of roads is far removed from the act of drilling for natural gas, and at first glance it seems incongruous that the Legislature would approve of a tax exemption for such a distant activity. That being said, this Tribunal is also mindful of the fact that our opinions (or the Tax Commissioner's for that matter) matter not one bit. As an executive branch agency, we have two tasks, to gather the facts, and to properly apply the law to those facts. If West Virginia law clearly and unambiguously states that anything that is integral and essential to the activity of drilling for natural gas is eligible for the direct use exemption, and if we apply the plain and ordinary meaning to the words integral and essential, and finally if the Producers cannot obtain a permit to drill until they agree to repair and maintain certain roads, then the Petitioner in this matter must prevail. If any part of our analysis in the previous sentence is wrong, then the Circuit Court and the West Virginia Supreme Court of Appeals will inform us as such.

There is one other point of contention between the parties. The Petitioner argues that it filed its claim for refund on July 30, 2014 and that if it prevails in this matter interest on its refund should be calculated from that date forward. The Tax Commissioner argues that interest does not begin to run until a claim for refund is complete, and in this matter that date was March 12, 2018.

Numerous statutory and regulatory provisions are implicated in this argument. We begin with West Virginia Code Section 11-10-17, regarding interest and overpayments.

> (d) *Overpayments.*- Interest shall be allowed and paid at the annual rate of eight percent per annum upon any amount which has been finally administratively or judicially determined to be an overpayment in respect of each tax administered under this article except the taxes imposed by articles twelve, fourteen and fourteen-a of this chapter: . . The interest shall be allowed and paid for the period commencing with the date of the filing by the taxpayer of a claim for refund or credit with the tax commissioner and ending with the date of a final administrative or judicial determination of overpayment.

W. Va. Code Ann. § 11-10-17(d) (West).

While Subsection (d) appears to be clear and unambiguous, the Tax Commissioner points to West Virginia Code Section 11-10-4, which contains the definition of "return" and explains that a claim for refund is considered a return, and that returns are deemed not to be filed until they are complete.

> (g) "Return" means for taxable years beginning on or after January 1, 2007, a . . .claim or petition for refund . . .which is complete . . ."complete" means for taxable years beginning on or after January 1, 2007, the information required to be entered is entered on the applicable return forms. A return form is not to be considered complete if the information required to be entered on the applicable return forms is only contained in amendments or supplements thereto, including supporting schedules, attachments, or lists. A return that is not considered complete is deemed not to be filed: (1) For purposes of claiming a refund of any tax administered under this article;

W. Va. Code Ann. § 11-10-4(g) (West).

Finally, the Tax Commissioner has promulgated a procedural rule to address the providing of documentation to support claims for tax refunds or credits.

> 6.1 Any person asserting or exercising a claim for a refund or a credit shall file such records or documents as the Commissioner may require proving or verifying the taxpayer's right and entitlement to such refund or credit. The Commissioner may inspect or examine the records or documents of a taxpayer or any other person to verify the truth and accuracy of any report or return or to ascertain whether the tax has been paid.

> 6.2. Beginning on or after February 15, 2014, any person filing a claim for refund of Consumers Sales and Service Tax or Use Tax, is required to provide the following information on the applicable form:
> Vendor name
> Invoice date
> Invoice number
> Exempt item description
> Invoice amount
> West Virginia sales tax paid

W. Va. Code R. § 110-10L-6.

The Tax Commissioner argues that due to the fact that the Petitioner did not provide all the necessary supporting documentation for its refund claim until March of 2018, the claim was not complete until that time, and thus interest could not begin to run until then. There are numerous problems with the Tax Commissioner's argument in this regard. The biggest impediment to the Tax Commissioner prevailing on this argument is the fact that the refund denial that forms the basis of this matter makes no mention of the need for the Petitioner to provide additional documentation before a ruling can be made.

> Your refund request is being denied based on the following:
> The purchase of paving services and materials to repair public roads damaged by companies engaged in the production of natural resources is not directly used itself in the production of those resources stated in W.Va. Code sec. 11-15-9(b)(2). Such services do not constitute reclamation within the rules promulgated thereunder and does not qualify for such an exemption

See Parties Joint Stipulation Ex. B. Exhibit B clearly shows that the Tax Commissioner did not find the Petitioner's refund claim incomplete, and thus deem it not filed. The testimony from the Tax Commissioner's own witness shows that after the Petitioner appealed to this Tribunal, she, at some uncertain date, discovered a mathematical error in the Petitioner's calculations, and she asked for more information. Thus, the Tax Commissioner seems to be arguing that despite the fact that he never deemed the refund claim not filed, during the pendency of this matter, when the

mathematical error was discovered, the refund claim was retroactively deemed not filed, however the Petitioner was never informed of this fact in writing. Clearly, the statutory provisions cited above do not envision such a scenario.

Lastly, during the evidentiary hearing, counsel for the Petitioner elicited the following testimony from the Tax Commissioner's witness:

> PETITONER ATTORNEY : . . . Section 6.2 of Exhibit 2 requires the following information on the applicable form. The vendor name.
>
> MS. ACREE: Uh-huh (yes).
>
> PETITIONER ATTORNEY: Was that provided?
>
> MS. ACREE: Yes, it was.
>
> PETITIONER ATTORNEY: Invoice date?
>
> MS. ACREE: Yes.
>
> PETITIONER ATTORNEY: Invoice number?
>
> MS. ACREE: All of this was on the spreadsheet.
>
> PETITIONER ATTORNEY: That was attached to the refund claim?
>
> MS. ACREE: Yes, it was.
>
> PETITIONER ATTORNEY: The exempt item description, asphalt?
>
> MS. ACREE: Yep.
>
> PETITIONER ATTORNEY: The invoice amount?
>
> MS. ACREE: Yes.
>
> PETITIONER ATTORNEY: The West Virginia sales tax paid?
>
> MS. ACREE: Yes.

Tr. P88-89 at 21-14. During this cross examination, counsel for the Petitioner was directing the witness to review Section 6.2 of the Tax Commissioner's procedural rule. Based upon this testimony, even if we were to give any kind of controlling weight to the Tax Commissioner's

procedural rule, (which is something we are not bound to do) his own witness testified that the Petitioner's refund claim was not deficient.

Based upon the foregoing, we rule that interest in this matter began to run on the "date of the filing by the taxpayer of a claim for refund or credit with the tax commissioner" as those terms are used in West Virginia Code Section 11-10-17. We rule as such for two reasons. First, because the Tax Commissioner never deemed the Petitioner's refund request incomplete and thus not filed. Second, even if we read West Virginia Code Section 11-10-4 in *pari materia* with the Tax Commissioner's procedural rule, a refund request form is complete if it contains all of the information listed in Section 6.2 of Series 10L of Title 110 of the West Virginia Code of State Rules. The Tax Commissioner's own witness testified that in this case, that is what happened.

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. "An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the

property or taxable services, except as otherwise provided in this article." W. Va. Code Ann. §11-15A-2(a) (West 2010).

4. The use in this state of the following tangible personal property, custom software and services is hereby specifically exempted from the tax imposed by this article to the extent specified: . . .(2) Tangible personal property, custom software or services, the gross receipts from the sale of which are exempt from the sales tax by the terms of article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, and the property or services are being used for the purpose for which it was exempted." W. Va. Code Ann. §11-15A-3(a)(2) (West 2013).

5. West Virginia Code Section 11-15-9(b)(2) provides an exemption from the consumers sales and service tax for sales of services, machinery, supplies and materials directly used or consumed in the activities of manufacturing, transportation, transmission, communication, or the production of natural resources.

6. Directly used or consumed is defined as "used or consumed in those activities or operations which constitute an integral and essential part of the activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the activities." W. Va. Code Ann. §11-15-2(b)(4) (West 2018).

7. It is necessary to give effect to every word and part of a statute in order to effectuate its true meaning. *See e.g.* Jackson v. Belcher, 232 W. Va. 513, 753 S.E.2d 11 (2013); Jackson v. Kittle, 34 W. Va. 207, 12 S.E. 484 (1890).

8. "Essential" means "something necessary, indispensable, or unavoidable." Webster's Third New International Dictionary, 777 (16th ed. 1971). Incidental is a direct antonym

to essential and means "subordinate, nonessential, or attendant in position or significance." Id, at 1142.

9. "As part of the permit application for horizontal wells, the operator shall submit a letter of certification from the Division of Highways that the operator has, pursuant to the Division of Highways Oil and Gas Road Policy, entered into an agreement with the Division of Highways pertaining to the state local service roads associated with the proposed well work set forth in the permit application or has certified that no such agreement is required by the Oil and Gas Road Policy and the reasons therefor" W. Va. Code Ann. § 22-6A-20 (West).

10. The exemption contained in West Virginia Code Section 11-15-9(b)(2) applies to integral and essential services that are purchased by Producers of natural resources. Therefore, the fact that the Petitioner is not a Producer of natural resources is not a determinative fact. Moreover, it was procedurally proper for the Petitioner to seek the exemption from the Tax Commissioner.

11. In a hearing before the West Virginia Office of Tax Appeals, the burden of proof is upon the Petitioner to show that any denial of a tax refund is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2019).

12. In this matter the Petitioner has met its burden of showing that the Tax Commissioner's denial of the requested refund of combined sales and use tax was erroneous.

13. (d) *Overpayments.*- Interest shall be allowed and paid at the annual rate of eight percent per annum upon any amount which has been finally administratively or judicially determined to be an overpayment in respect of each tax administered under this article except the taxes imposed by articles twelve, fourteen and fourteen-a of this chapter: . . The interest shall be allowed and paid for the period commencing with the date of the filing by the taxpayer of a claim

for refund or credit with the tax commissioner and ending with the date of a final administrative or judicial determination of overpayment. W. Va. Code Ann. § 11-10-17(d) (West).

14. (g) "Return" means for taxable years beginning on or after January 1, 2007, a . . . claim or petition for refund . . . which is complete . . ."complete" means for taxable years beginning on or after January 1, 2007, the information required to be entered is entered on the applicable return forms. A return form is not to be considered complete if the information required to be entered on the applicable return forms is only contained in amendments or supplements thereto, including supporting schedules, attachments, or lists. A return that is not considered complete is deemed not to be filed: (1) For purposes of claiming a refund of any tax administered under this article . . . W. Va. Code Ann. § 11-10-4(g) (West).

15. The fact that a Tax Department employee discovered a mathematical error in the Petitioner's refund request, some time after the case was brought before this Tribunal, does not, in and of itself, render the Petitioner's refund claim incomplete, pursuant to West Virginia Code Section 11-10-4(g).

16. Due to the fact that the Petitioner entered all required information on its refund request, and that the Tax Commissioner never informed the Petitioner, in writing, that its refund request was deemed not filed, interest on the overpayment by the Petitioner will run "for the period commencing with the date of the filing by the taxpayer of a claim for refund or credit with the tax commissioner," as those terms are used in West Virginia Code Section 11-10-17(d).

DISPOSITION

Based upon the foregoing, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the Tax Commissioner's December 2, 2014, Refund Denial is hereby **VACATED**.

It is further **ORDERED** that pursuant to the parties Stipulation and Agreement, the amount of refund the Petitioner is entitled to is $_____.

Based upon the foregoing, it is further **ORDERED** that interest on this refund amount shall begin to run from the Petitioner's initial filing date on or about July 31, 2014, and continues to accrue 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

_____
Date Entered