

**REDACTED DECISION – DKT NO. 21-013**

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE  
SUBMITTED FOR DECISION ON JULY 26, 2022  
DECISION ENTERED ON AUGUST 22, 2023**

**FINAL DECISION**

On November 20, 2020, the Compliance Division of the West Virginia State Tax Commissioner’s Office (hereinafter the “Tax Commissioner” or “Respondent”) issued a Notice of Proposed Tax Lien/Intent to Offset, against the Petitioner, AAA (hereinafter the “Petitioner”). This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Articles 10 and 21 *et seq*, of the West Virginia Code. The Notice informed the Petitioner that he had unpaid taxes, interest, and additions for tax years 2015 through 2017, in the aggregate amount of \$-----. Written correspondence of this Notice was served on the Petitioner, as required by law. Subsequently, a notice of a hearing on the petition 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 24, 2022, after which the parties filed legal briefs. The matter became ripe for decision at the conclusion of the briefing schedule.

**FINDINGS OF FACT**

1. The Petitioner is a Resident Individual, as that term is defined in West Virginia Code Section 11-21-7. As such, he pays West Virginia income taxes.
2. During the years 2015 through 2019, the Petitioner suffered a myriad of health problems, some of which necessitated surgery. Tr. P52.
3. During the same time, the Petitioner was a single parent, raising YYYY (-) children that he was granted custody of during a 2--- divorce. Tr. P2 at 15 & Tr. P54 at 2-4.

4. The Petitioner testified that his health problems, the accompanying diminishment of his income, and his parenting duties prevented him from filing income tax returns, both federal and state for the tax years at issue in this matter, namely 2015 through 2017. Tr. P53-55.

5. In October of 2018, the Petitioner, through his accountant, filed his federal tax returns for the years in question. Tr. P55 at 1-9.

6. The Petitioner testified that he was unaware that his West Virginia income tax returns for 2015-2017 had not been filed at the same time as his federal returns. Tr. P55-56.

7. Three (3) to four (4) years after a West Virginia personal income tax return is due, the Tax Commissioner receives what is called a “tax match” file from the Internal Revenue Service. This is a list of people who file returns with the IRS using a West Virginia address. The Tax Commissioner compares that list with a list of people who have filed West Virginia personal income tax returns. This comparison reveals those resident individuals who have not filed a state return. Tr. P21-22 at 20-16.

8. In 2020, the tax match list revealed the Petitioner’s missing returns for 2015-2017. As a result, the Tax Commissioner sent the Petitioner what is commonly referred to as a “gap filer” letter. This letter informs the Taxpayer that a review has revealed missing returns and gives the Taxpayer thirty (30) days to file the missing returns. Tr. P22-23.

9. In March of 2020, the Tax Commissioner sent two (2) gap filer letters to the Petitioner, one concerning tax year 2015 and one concerning tax year 2017.<sup>1</sup> State’s Ex. 1.

10. The Tax Commissioner typically gives Taxpayers forty-five (45) days after issuance of the gap filer letter to file the missing returns. If that does not happen, the Tax

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<sup>1</sup> No explanation was given regarding the Tax Commissioner’s failure to issue a similar letter to the Petitioner for tax year 2016. However, the Petitioner does not dispute that he failed to timely file a West Virginia personal income tax return for tax year 2016.

Commissioner prepares a return for the Taxpayer, and this return is based upon income information the Taxpayer filed with the IRS. Tr. P23-24 at 20-6.

11. Once the Tax Commissioner prepares a return for a delinquent filer, the Taxpayer is billed for the tax amount due on the administratively prepared return. The Taxpayer receives a statement of account showing the amount due, including taxes, interest and additions. Tr. P24 at 7-11.

12. The Tax Commissioner began sending Statements of Account to the Petitioner in May of 2020. State's Ex. 2.

13. Once the Petitioner began receiving the Statements of Account, he began discussions with the Tax Department and his accountant. In June of 2020, he filed West Virginia personal income tax returns for tax years 2015-2017. Petitioner's Ex. 9.

14. In June of 2020, when the Petitioner filed his state returns, he did not remit the tax due for years 2015-2017. Tr. P56 at 14-16.

15. The Petitioner stated that he did not remit the taxes due for years 2015-2017 because he did not have the money. Tr. P56 at 14-19.

## **DISCUSSION**

The issue in this case is the Petitioner's contention that the Tax Commissioner committed an error in assessing him additions<sup>2</sup> to tax, because there was good cause for his failure to file and pay. The Petitioner also argues that the Tax Commissioner has miscalculated the amount of additions, in that they exceed the statutory maximum amount allowed under West Virginia law.

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<sup>2</sup> Throughout the evidentiary hearing in this matter, the Tax Commissioner's witness continually referred to the assessed amounts as "penalties/additions." Additionally, the Tax Commissioner's witness stated that there aren't any differences between the two (2) terms. As will be discussed below, additions to tax and penalties are two (2) distinct statutory animals, and while some of the post-hearing briefs use the term "penalties" we believe that the Petitioner has only been assessed additions.

The Tax Commissioner argues that the additions to tax were warranted and correctly calculated. The Tax Commissioner also argues that this Tribunal does not have jurisdiction to hear this matter, and we address this argument first.

The Tax Commissioner argues that this Tribunal lacks jurisdiction to hear this matter because he claims that he has not issued an assessment against the Petitioner. As such, the Tax Commissioner argues that the jurisdictional authority of this Tribunal, which is codified in Section 8 of Article 10A, Chapter 11 of the West Virginia Code is not implicated.<sup>3</sup> Instead, the Tax Commissioner argues that because the Petitioner filed a mathematically correct return, without remitting payment, he has proceeded directly to collection, pursuant to West Virginia Code Section 11-10-6(b).

(b) Collection of balance due.-- If a taxpayer files a mathematically correct return which reflects a balance due of any tax administered under this article, and if full payment thereof has not been made, the tax commissioner shall notify the taxpayer, in writing, of the amount of tax, additions to tax, penalties or interest due. The taxpayer shall have fifteen days after receipt of such notice within which to make payment. If the taxpayer fails to make payment within such fifteen-day period, the tax commissioner shall proceed under section eleven of this article to collect the amount due

W. Va. Code Ann. § 11-10-6(b) (West).

The Tax Commissioner's argument is predicated on his belief that because Section 6(b) allows him to proceed directly to collection once a mathematically correct return is filed without payment, the Petitioner cannot complain that additions are not warranted. There are numerous problems with the Tax Commissioner's argument in this regard. First, the additions to tax that the Petitioner complains of were not exclusively for the Petitioner's failure to remit payment with his late filed returns.

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<sup>3</sup> Section 8(1) gives this Tribunal exclusive jurisdiction to hear appeals of tax assessments issued by the Tax Commissioner pursuant Article 10 of Chapter 11. *See* W. Va. Code Ann. § 11-10A-8 (West).

MR. AAA: What are additions? Is that something different than penalties?

MS. BBB: No, not really.

MR. AAA: Okay, but it says Penalty and Additions, that's referring to the same thing? Just the penalty?

MS. BBB: Well, penalty and additions would be if there's an underpayment penalty because, if you know, if you owe greater than \$600 on your return and you don't make estimated payments then you are subject to an estimated penalty. So, that would be an addition.

MR. AAA: So, you get a penalty for filing late and you get a penalty for having the underpayment also, correct?

MS. BBB: Yes.

MR. AAA: Okay. So, the late filing penalty, and then there's an underpayment penalty. Is that what you're saying?

MS. BBB: And a late pay penalty as well.

MR. AAA: And a late pay penalty as well.

MS. BBB: Correct.

Tr. P34 at 1-16.

A review of the relevant statutory provisions shows that the Petitioner was **assessed** additions for two (2) statutory transgressions: his failure to timely file tax returns for tax years 2015-2017, and for his failure to remit any tax due when he did eventually file those returns.

*(a) Failure to file tax return or pay tax due.*

(1) In the case of failure to file a required return of any tax administered under this article on or before the date prescribed for filing such return (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: *Provided*, That this addition to tax shall be imposed only on the net amount of tax due;

(2) In the case of failure to pay the amount shown as tax, on any required return of any tax administered under this article on or

before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return one half of one percent of the amount of such tax if the failure is for not more than one month, with an additional one half of one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: *Provided*, That the addition to tax shall be imposed only on the net amount of tax due.

W. Va. Code Ann. § 11-10-18(a) (West).

Reviewing both the testimony from the hearing and the parties post-hearing briefs, it is clear that the Petitioner was assessed additions under both Subdivisions (1) and (2) of Subsection (a), due to his failure to timely file and for his failure to pay. Thus, when we circle back to the Tax Commissioner's jurisdictional argument, we come to problem number one, namely the fact that the Petitioner was not just assessed additions for his failure to pay upon the filing of a mathematically correct return. Therefore, the Tax Commissioner's reliance on West Virginia Code Section 11-10-6, as standing for the proposition that upon filing a no pay return, the Tax Commissioner can proceed to collection, no questions asked, is not even implicated in half of the additions assessed in this matter.

Problem number two with the Tax Commissioner's argument is that he presents no statutory or regulatory authority for the proposition that proceeding to collection under 11-10-6 disallows Taxpayers to argue that there was reasonable cause for their failures. No language in 11-10-6 or 11-10-18 states or even suggests that a Taxpayer who wants to argue good cause for a failure to pay is precluded from doing so, just because the Tax Commissioner has begun collection efforts.

The third problem with the Tax Commissioner's jurisdictional argument is that it would create an equal protection problem, in that it would create two (2) classes of Taxpayers, those who

want to argue good cause for a failure to pay, and those who have been assessed additions for some other reason. The Tax Commissioner assesses thousands of Taxpayers with additions every year, for a myriad of reasons. Adopting the Tax Commissioner's reasoning would create two (2) classes of Taxpayers, the thousands who would have the ability under West Virginia Code Section 11-10-18 to argue that there is good cause to abate their additions and the small subset who have filed no pay returns and would be unable to argue as such. However, as stated above, this Tribunal has been presented with no statutory or regulatory authority to suggest that the Legislature envisioned such a dual track for the Taxpayers of the state.

Finally, it should be noted that the Tax Commissioner argues that he has not assessed additions against the Petitioner because none of the documents sent to the Petitioner have the heading "Notice of Assessment." This Tribunal is unsure what to make of this argument, because it is so patently illogical. The document that led to the Petitioner's appeal before this Tribunal had the heading "Notice of Proposed Tax Lien/Intent to Offset." This document **assessed** the Petitioner over \$----- in additions. In his post hearing brief, the Tax Commissioner offered no other verb to take the place of "assessed" to describe what action he has taken in deciding that the Petitioner shall be monetarily penalized for his failure to timely file and to pay. We have no desire to get into a form over function debate over the fact that the notice of lien does not anywhere contain the word assessment. Call the Tax Commissioner's actions what you will, the fact is he has informed the Petitioner that he has been "dinged" or "billed" with over \$----- in additions, and pursuant to West Virginia Code Section 11-10-18, this particular Taxpayer seeks to argue that there is good cause for his failures. We rule that under those facts, we have jurisdiction to hear this matter.

Turning now to the Petitioner's argument that there is good cause for his failure to file West Virginia personal income tax returns for tax years 2015-2017, and for his failure to remit payment when he did file those returns, we are unconvinced.

Regarding the Petitioner's failure to file, he argues that he was under the impression that his accountant had filed his West Virginia returns for the years in question. However, the Petitioner failed to call his accountant as a witness or offer any further evidence as to how he came to this mistaken impression. To make matters worse, the Petitioner introduced his Exhibit 4, which is an email from his accountant to him. This email is dated October 24, 2018, and it asks the Petitioner to sign his IRS returns for tax years 2015-2017. The reason this exhibit makes matters worse is twofold. First, it does not mention West Virginia state tax returns at all. Moreover, as stated, it was sent in the year 2018. This begs the question, how would this email bolster the Petitioner's argument that he was under the impression that his accountant had filed his West Virginia tax returns, when it shows that his federal returns were being filed late? It is axiomatic that a Taxpayer's West Virginia personal income is based upon the Taxpayer's federal adjusted gross income. So, if the Petitioner was just establishing his federal adjusted gross income for tax years 2015-2017 in October of 2018, how could his accountant have filed his West Virginia returns on time?

The Petitioner also argues that his failure to file was due to his myriad of health problems. Obviously, this Tribunal is sympathetic to the Petitioner, due to his ill health, as is the Tax Commissioner. However, the Petitioner in this matter is an attorney, at a well-established, respected, law firm. Therefore, he knows, (and has probably often used) the phrase "slippery slope." For this Tribunal to rule that health problems are good cause to not timely file tax returns would be both contrary to West Virginia law, and a textbook example of a slippery slope. How

would the Petitioner have this Tribunal, or the Tax Commissioner for that matter, decide how sick a Taxpayer has to be before they can be absolved of additions for a failure to timely file their tax returns? Such a scenario is obviously an impossibility, and one that is not contemplated by the West Virginia Legislature.

The Petitioner's post-hearing briefs make no argument regarding the additions he has been assessed for his failure to remit. This may be due to the fact that he testified that the reason for the failure was simple, he did not have the funds.

JUDGE POLLACK: Okay. So then, when in 2020 when you filed the returns through Mr. Gibson or with Mr. Gibson's assistance, there was no remittance of tax due.

MR. AAA: Correct.

JUDGE POLLACK: Why not?

MR. AAA: 'Cause at that point, I just didn't submit---I didn't submit the tax due at that point. I mean, I just didn't have it, . . . .

Tr. P56 at 14-19.

Obviously, no Taxpayer, anywhere in this country can tell the taxman, "sorry, I don't have the money" and consider that good cause for a failure to pay.<sup>4</sup>

Lastly, the Petitioner argues that the Tax Commissioner has made a mathematical error in the amount of additions assessed. Specifically, he argues that West Virginia Code Section 11-10-18 limits the amount of additions to no more than twenty-five percent (25%) of the aggregate of the amount of tax owed. We would note that the Petitioner failed to raise this argument at the pre-hearing conference in this matter. This Tribunal regularly admonishes litigants that if an argument is not raised at the pre-hearing conference, such argument will not be

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<sup>4</sup> See e.g. Benjamin Franklin's Nov. 13, 1789, letter to French scientist Jean-Baptiste Le Roy expressing the sentiment "in this world, nothing is certain except death and taxes." <https://constitutioncenter.org/blog/benjamin-franklins-last-great-quote-and-the-constitution>.

entertained in post-hearing briefs. Unfortunately, in efforts to be fair, this Tribunal just as regularly fails to hold litigants to that standard. Moreover, the Petitioner did attempt to cross-examine the Tax Commissioner's witness regarding how the amount of additions was calculated, and the witness was unable to offer virtually any illumination.

MR. AAA: I got you. And then we have Penalty and Additions, you see that column?

MS. BBB: Yes, sir.

MR. AAA: So, I know what the---what's the penalty? How is that determined?

MS. BBB: I would have to look at the tax booklets to give you the correct---I mean, because we don't manually do that. That is done by our GenTax system, but I know it's compromised at whether it's a late paid return, a late filed return, or a combination of both.

MR. AAA: Okay. So, then there's also Additions, correct?

MS. BBB: Mm-hmm (yes).

Tr. P33 at 13-23.

Upon completion of this Final Decision, the matter was remanded back to the parties due to the fact that in addition to his argument that he should not be assessed additions at all, the Petitioner also argued that the Tax Commissioner had incorrectly calculated his additions. The parties were unable to agree on a recalculated amount. As a result, the parties provided additional briefing and on July 11, 2023, the evidentiary hearing was continued.

The Petitioner makes two (2) arguments regarding the Tax Commissioner's calculations of the amounts of additions. The first argument concerns the fact that the Petitioner's employer does not withhold federal or state taxes from his income. Therefore, the Petitioner pays estimated taxes throughout the tax year, but obviously he did not do so during the tax years at issue in this matter. As a result, some of the additions the Tax Commissioner has assessed are pursuant to West Virginia Code Section 11-10-18a, which states:

*Additions to tax.*- Except as otherwise provided in this section, in the case of any underpayment of estimated tax, there shall be added to the tax due for the taxable year, under article twenty-one, twenty-three or twenty-four of this chapter, an amount determined by applying the rate established under section seventeen or seventeen-a of this article, as appropriate for the taxable year, to the amount of the underpayment of estimated tax, for the period of the underpayment.

W. Va. Code Ann. § 11-10-18a(a) (West).

Part of the additions<sup>5</sup> assessed against the Petitioner are pursuant to this language in Subsection (a) of Section 18a, and importantly, the Petitioner does not argue that the Tax Commissioner has incorrectly calculated the additions for his failure to pay estimated taxes. Instead, the Petitioner's argument is predicated on West Virginia Code Section 11-10-18(b)(3), which states "*Exception for estimated tax.* -- Subsection (a) shall not apply to any failure to pay any estimated tax." W. Va. Code Ann. § 11-10-18(b)(3) (West). The Petitioner argues that this language negates the Tax Commissioner's ability to assess him the additions for failure to file and failure to pay, under West Virginia Code Section 11-10-18(a)(1)&(2) cited above. Specifically, the Petitioner argues that Subdivision (3) is clear and unambiguous, and that because he failed to pay estimated taxes, the additions the Tax Commissioner assessed against him pursuant to 11-10-18a(a) are all that can be assessed against him. While we agree with the Petitioner that West Virginia Code Section 11-10-18(b)(3) is clear and unambiguous, we find the Petitioner's argument in this regard to be unconvincing.

The Tax Commissioner, for his part, argues that the "penalties" (which are really additions pursuant to 11-10-18a(a)) are necessary because of the Petitioner's withholding situation. Simply

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<sup>5</sup> It should be noted that in his first correspondence after remand, the Tax Commissioner calls the additions assessed against the Petitioner for failing to pay estimated taxes "penalties" despite the fact that West Virginia Code Section 11-10-18a calls them "additions". Despite this, it appears that from the record, taken in its entirety, that both parties agree that the Petitioner was assessed additions under two code Sections, 11-10-18 and 11-10-18a.

put, when the Petitioner fails to make his timely estimated personal income tax payments, the State is deprived of that money, and therefore the interest that money would accrue when the estimated payments are submitted.

To clarify, we find that the primary code sections at issue in this matter, namely, Sections 11-10-18 and 11-10-18a to be clear and unambiguous. As result, we are not interpreting them, but rather giving the words their plain and ordinary meaning. Doing so, requires a ruling against the Petitioner on the question of whether he has been improperly assessed additions under West Virginia Code Section 11-10-18. Both parties agree that the Petitioner failed to pay estimated taxes, as he was statutorily mandated to do. As a result, he was assessed the additions called for in West Virginia Code Section 11-10-18a. However, in addition to failing to make his estimated payments, the Petitioner also committed two (2) other discrete acts, he did not file his West Virginia personal income tax returns timely for tax years 2015 through 2017. Moreover, when the Petitioner did file his returns for those years, he failed to remit the payment due. It is for these two (2) acts that the Petitioner has been assessed the additions under West Virginia Code Section 11-10-18. While the Petitioner claims that West Virginia Code Section 11-10-18(b)(3) is clear and unambiguous, he really seeks to have this Tribunal rewrite it, such that a Taxpayer who 1) does not pay estimated taxes timely, 2) does not file timely, and 3) does not pay tax due timely, is only assessed additions that represent the interest on the failed estimated payments. West Virginia Code Section 11-10-18(b)(3) clearly and unambiguously **does not** provide for that, and we are unwilling to rewrite it as the Petitioner seeks. *See e.g. Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 582 S.E.2d 841, (2003) (it is not for courts arbitrarily to read into a statute that which it does not say). Moreover, to read Subdivision 3 as the Petitioner seeks would create two (2) classes of Taxpayers, those who fail to pay estimated taxes, and are rewarded with the ability to then not timely file or

remit without any financial repercussions, and those who just fail to timely file and pay, and are subjected to the assessment of additions for these failures. This Tribunal is of the opinion that Subdivision 3 was not promulgated to create two (2) such classes.

The Petitioner next argues that the Tax Commissioner has improperly applied West Virginia Code Section 11-10-18(b)(1)(A), which states,

- (b) *Limitation and special rule.* --
- (1) Additions under more than one paragraph:
- (A) With respect to any return, the amount of the addition under paragraph (1) of subsection (a) shall be reduced by the amount of the addition under paragraph (2) of subsection (a) for any month to which an addition to tax applies under both paragraphs (1) and (2)

W. Va. Code Ann. § 11-10-18(b)(1)(A) (West). Here, the Parties' arguments require careful explanation. The additions to tax for failure to timely file returns and for failing to remit payment when due are both capped at twenty-five percent (25%) of the tax due. Taking the Petitioner's tax year 2015 as an example shows that his tax due was \$11,963, and that he filed his return for that year fifty (50) months late. If one were to calculate additions of five percent (5%) per month for fifty (50) months, the Petitioner's additions for late filing would be \$29,907.50, so obviously the twenty-five percent (25%) cap kicks in to reduce his additions to \$2990.75. As for the Petitioner's failure to remit his 2015 taxes due, when he finally filed fifty (50) months late, when one adds the one half of one percent (.005%) to his tax due and multiplies it by fifty (50), the amount brings us right to the twenty-five percent (25%) aggregate called for in West Virginia Code Section 11-10-18(a)(2), namely \$2990.75.

The Petitioner argues that, pursuant to West Virginia Code Section 11-10-18(b)(1)(A), the Tax Commissioner needs to reduce his failure to timely file additions of \$2,990.75 by his \$2,990.75 additions for his failure to timely remit payment. In other words, at least for tax year

2015, the Petitioner seeks to have his additions cut in half.<sup>6</sup> At first blush, that would seem to be what Paragraph (A) seems to be calling for, namely a reduction of the additions for failure to file, by the amount of the additions for failure to file. However, the Tax Commissioner argues that the Petitioner is ignoring that part of Paragraph A which states that the reduction in the failure to file additions only applies to “any month to which an addition to tax applies under both paragraphs”. Id. Due to the twenty-five percent (25%) cap in both Subdivisions (1) and (2) of Subsection (a) of Section 18 the Tax Commissioner is calculating the reductions for only six (6) months, because, due to the amount of tax due from the Petitioner, it only takes six (6) months, at five percent (5%) per month, to get to the twenty-five percent (25%) aggregate amount. Simply put, the Tax Commissioner has reduced the five percent (5%) per month additions contained in Section 11-10-18(a)(1), by the 0.005 additions called for in Section 11-10-18(a)(2), but only for six (6) months.<sup>7</sup>

When this Tribunal first began operations a Taxpayer mistakenly sent its appeal to the West Virginia Tax Department, missing the statutory deadline to file an appeal here. That case ended up at the West Virginia Supreme Court, and in Helton v. Reed the Court held, that “[H]e who seeks equity must do equity”. Syllabus Point 2, Helton v. Reed, 219 W. Va. 557, 638 S.E.2d 160 (2006). One might wonder at the seeming oddness of that syllabus point, and its relation to the case before us. The appeal that was late was filed by Elk Run Coal Co.. Had Elk Run not missed its filing

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<sup>6</sup> It is just a coincidence that for tax year 2015 the Petitioner’s late file and late pay amounts are the same, and this is due to the amount of months of non-filing and non-payment. For tax years 2016 and 2017 the number of months of non-filing and non-payment are lower. So, for example, for tax year 2017, the period of non-filing and non-payment was thirty-four (34) months. Therefore, the Petitioner’s twenty-five percent (25%) aggregate amount of additions for non-filing was \$2,000 ( $\$8,000 \text{ tax due} \times 25\% = \$2,000$ ). For non-payment the .005% per month does not equal \$2,000, ( $\$8,000 \times .005\% = \$1,360$ ). So, presumably, the Petitioner seeks to have his additions for late filing of \$2,000 reduced by \$1,360. That being said, the only submission from the Petitioner that contains calculations, a March 6, 2023 letter does not show such a calculation.

<sup>7</sup> Based upon the Tax Commissioner’s March 6, 2023, recalculation letter, and a proffer from counsel for the Tax Commissioner at the continued evidentiary hearing, it is clear that the calculations are not as simple as just reducing the failure to file additions by 0.005 for six (6) months. However, the Petitioner does not dispute the mathematical calculation performed by the Tax Commissioner, but rather argues that the Tax Commissioner has calculated the amount of months incorrectly.

deadline, it would have been part of a much larger case involving West Virginia's severance tax, and tens of millions of dollars. The interesting twist is that in that much larger case, the Tax Commissioner also missed a filing deadline, forcing him to refund 20 million dollars of Taxpayer money. Hence Syllabus Point 2, where Justice Starcher pointed out the incongruity of Elk Run's argument, namely that it wanted "equity" when it came to its missed filing deadline, but it certainly was not going to argue for equity regarding the Tax Commissioner's missed deadline; no, it would be looking for its portion of the 20 million dollar refund.

The Petitioner in this matter is in a position similar to Elk Run's. When it's time to calculate his additions for his filing his 2015 returns fifty (50) months late, he is happy for the Tax Commissioner to follow West Virginia Code Section 11-10-18(a)(1), and cap his additions at twenty-five percent (25%) of the tax due. As discussed above, based upon the Petitioner's tax due, the twenty-five percent (25%) cap is reached in about six months. But when it comes time to calculate the limitations on additions contained in 11-10-18(b)(1)(3), the Petitioner wants the reduction to be based upon the whole fifty (50) months of non-filing. Or, as Justice Starcher so aptly put it "Elk Run wants 'sauce for the goose'—the application of strict jurisdictional deadlines to the procedural error by the Commissioner, but not 'sauce for the gander'—the application of the same strict deadlines to a procedural error by Elk Run." *Id.*, at 562, 165.

### **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 (30) days of the taxable year in this State. W. Va. Code Ann. § 11-21-7 (West 2013).

4. The Petitioner is a resident individual, as that term is defined in West Virginia Code Section 11-21-7, and as such, pays West Virginia taxes.

5. West Virginia Code Section 11-10-18 provides for the Tax Commissioner to assess additions to tax when a Taxpayer fails to timely file tax returns and when a Taxpayer fails to pay the amount of tax due on a return.

6. “The Office of Tax Appeals has exclusive and original jurisdiction to hear and determine all: (1) Appeals from tax assessments issued by the Tax Commissioner pursuant to article ten of this chapter; . . .” W. Va. Code Ann. § 11-10A-8 (West).

7. Pursuant to West Virginia Code Section 11-10-18(a), the Tax Commissioner has assessed the Petitioner with, among other things, additions to tax. As a result, this Tribunal has jurisdiction to hear this matter.

8. The Petitioner has failed to show reasonable cause, as that term is used in West Virginia Code Section 11-10-18(a), for his failure to timely file West Virginia personal income tax returns for tax years 2015-2017. The Petitioner has also failed to show reasonable cause for his failure to pay the amount shown as tax, when he did file his personal income tax returns for tax years 2015-2017.

9. “*Additions to tax* -- Except as otherwise provided in this section, in the case of any underpayment of estimated tax, there shall be added to the tax due for the taxable year, under article twenty-one, twenty-three or twenty-four of this chapter, an amount determined by applying the rate established under section seventeen or seventeen-a of this article, as appropriate for the taxable year, to the amount of the underpayment of estimated tax, for the period of the underpayment.” W. Va. Code Ann. § 11-10-18a(a) (West).

10. “(b) *Limitation and special rule* (1) Additions under more than one paragraph: (A) With respect to any return, the amount of the addition under paragraph (1) of subsection (a) shall be reduced by the amount of the addition under paragraph (2) of subsection (a) for any month to which an addition to tax applies under both paragraphs (1) and (2).” W. Va. Code Ann. § 11-10-18(b)(1)(A) (West).

11. In a hearing before the West Virginia Office of Tax Appeals 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).

12. The Petitioner in this matter has failed to carry his burden of proving that the Tax Commissioner’s Notice of Proposed Tax Lien/Intent to Offset of additions to tax against him pursuant to West Virginia Code Section 11-10-18(a) was erroneous or unlawful.

13. The Petitioner has failed to carry his burden of proving that the Tax Commissioner’s assessment of additions, pursuant to West Virginia Code Section 11-10-18a, for the Petitioner’s failure to pay estimated taxes precludes the Tax Commissioner from assessing additions pursuant to Subdivisions (1) and (2) of West Virginia Code Section 11-10-18(a).

14. The Petitioner has failed to carry his burden of proving that the Tax Commissioner incorrectly applied West Virginia Code Section 11-10-18(b)(1)(A), when he limited the additions

assessed against the Petitioner for his failure to timely file returns and his failure to properly remit taxes due.

**DISPOSITION**

**WHEREFORE**, it is the final decision of the West Virginia Office of Tax Appeals that: the Notice of Proposed Tax Lien/Intent to Offset issued against the Petitioner, AAA, on November 20, 2020, for a total assessed tax liability of \$----- is hereby **AFFIRMED**.

Interest continues to accrue on these unpaid taxes until fully paid. W. Va. Code Ann. § 11-10-17(a) (West).

**WEST VIRGINIA OFFICE OF TAX APPEALS**

By: \_\_\_\_\_  
A. M. “Fenway” Pollack  
Chief Administrative Law Judge

\_\_\_\_\_  
Date Entered