

REDACTED DECISION – DK# 22-110
BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON JANUARY 25, 2023
ISSUED ON APRIL 28, 2023

FINAL DECISION

On April 13, 2022, a West Virginia State Tax Department criminal investigator was conducting motor fuel enforcement activities in COUNTY A, West Virginia. The following day he issued an assessment to the Petitioner, alleging that he had refused inspection of his vehicle for the purpose of taking a fuel sample, in violation of West Virginia Code Section 11-14C-37(a). On June 21, 2022, the Petitioner timely filed his Petition for Reassessment with this Tribunal, and the matter came for an evidentiary hearing on January 11, 2023.

FINDINGS OF FACT

1. On April 13, 2022, in COUNTY B, West Virginia, the Petitioner was operating his VEHICLE near the intersection of Routes A and B. Tr. P4 at 1-13.
2. At that time, an investigator with the West Virginia State Tax Department approached the Petitioner’s vehicle and requested that he pull over to allow the investigator to “stick his tank”.¹ Tr. P5 at 1-9.
3. The Petitioner knew that the request to “stick his tank” meant that the investigator was seeking to conduct a test to see if he was using dyed diesel fuel. Tr. P 5 & 21.
4. Rather than allow the test, the Petitioner informed the investigator that he believed that his fuel could not be tested without a warrant and drove off. Tr. P5 at 12-21.
5. The next day the investigator wrote the five-thousand dollar (\$5,000) assessment that forms the basis of this matter and mailed it to the Petitioner.

¹ The Tax Department investigators had set up a traffic stop to perform various enforcement activities, including random testing for the presence of dyed diesel fuel. Tr. P13.

DISCUSSION

The Petitioner's basis for his appeal is simple. He believes that his constitutional right to be free from unlawful searches and seizures would have been violated, by allowing the Tax Department's investigator to search his fuel tank without a search warrant. The Tax Commissioner, for his part, relies on the statutory authority granted to him by the Legislature to conduct such searches.

West Virginia Code Sections 11-14C-37 and 11-14C-45 contain the statutory provisions that control this matter. Section 45 contains the Tax Commissioner's authority to inspect and states: "The commissioner may stop, inspect and issue citations to operators of motor vehicles for violations of this article at sites where motor fuel is, or may be, produced, stored, or loaded into or consumed by motor vehicles." W. Va. Code Ann. § 11-14C-45(d) (West). The Petitioner's failure to allow an inspection is controlled by Section 37, and it states:

Any person who refuses to allow an inspection authorized by section forty-five of this article or to allow the taking of a fuel sample authorized by said section is subject to a civil penalty of five thousand dollars for each refusal. If the refusal is for a sample to be taken from a vehicle, the person operating the vehicle and the owner of the vehicle are jointly and severally liable for payment of the civil penalty.

W. Va. Code Ann. § 11-14C-37(a) (West).

This Tribunal is regularly confronted with Petitioners who claim that the Tax Commissioner's actions are "not fair". Sometimes, although not always, these arguments end up being actual questions regarding the constitutionality of a particular statutory provision in the tax code. The most obvious example of which is the "Dawson" cases, where various retired federal law enforcement officers argued that the giving of preferential treatment to certain retired West Virginia law enforcement officers, while excluding them, was unconstitutional. This case is

different, based upon two (2) factors. First, the Petitioner proceeding as a *pro se* litigant, and second, the politics of the day. Due to his *pro se* status, the Petitioner has not filed legal briefs, with citation to authority on 4th Amendment law. Moreover, it is hard to tell if the Petitioner is aware that the Tax Commissioner, as a member of the Executive branch, is bound to follow West Virginia's tax laws. The undersigned believes the most fair characterization of the Petitioner's arguments is that he is sick of government overreach or "big government", as is the sentiment of many citizens these days.

Both at the prehearing conference in this matter, and during the evidentiary hearing, it was explained to the Petitioner that this Tribunal, just like the Tax Commissioner, is part of the Executive branch, and as such, we are unable to declare West Virginia Code Section 11-14C-45 unconstitutional. This Tribunal has concluded as such on many occasions. *See e.g.* Docket No. 15-409, Conclusion of Law No. 8, "As a part of the executive branch, neither the Tax Commissioner nor this Tribunal may perform a judicial act, and declaring a statute unconstitutional is a judicial act." *See e.g. State ex rel. State Bldg. Comm'n v. Bailey*, 151 W. Va. 79, 150 S.E.2d 449 (1966); *Rice v. Underwood*, 205 W. Va. 274, 517 S.E.2d 751 (1998). We believe that the Petitioner generally understands that he must seek relief in a higher court.

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. Civil penalties levied under Section 37 of Article 14C are assessed and collected in the same manner as motor fuel taxes. *See* W. Va. Code Ann. § 11-14C-37(d) (West).

4. As a part of the executive branch, neither the Tax Commissioner nor this Tribunal may perform a judicial act, and declaring a statute unconstitutional is a judicial act. *See e.g. State ex rel. State Bldg. Comm'n v. Bailey*, 151 W. Va. 79, 150 S.E.2d 449 (1966); *Rice v. Underwood*, 205 W. Va. 274, 517 S.E.2d 751 (1998). *See also Gordon v. State by & through Capitol Bldg. Rehab.*, 2018 WY 32, 413 P.3d 1093 (Wyo. 2018); *Gannon v. State*, 305 Kan. 850, 390 P.3d 461 (2017); *Gen. Engines Co. v. Dir., Div. of Taxation*, 23 N.J. Tax 515 (2007).

5. 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).

6. In this matter, the Petitioner has not met his burden of showing that the April 14, 2022, \$5,000.00 assessment for his refusal to allow inspection, pursuant to West Virginia Code Section 11-14C-37(a), was contrary to West Virginia law, clearly wrong or arbitrary and capricious.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner on April 14, 2022, in the amount of \$5,000.00 shall be and is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

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

Date Entered