

REDACTED DECISION – DK#'S 16-545 X, 17-178 X

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON OCTOBER 28, 2019
ISSUED ON FEBRUARY 4, 2020**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

Traditionally, this Tribunal begins each final decision with a recitation of the actions the Tax Commissioner has taken which led to the filing of an appeal by the Petitioner. The vast majority of the time, the Tax Commissioner has issued an assessment or denied a refund or tax credit request. In those situations, jurisdiction is conferred on this Tribunal pursuant to West Virginia Code Section 11-10A-8. In this case, the Tax Commissioner has issued one assessment and two other documents. On May 19, 2016, he issued an assessment against the Petitioner for unpaid Tobacco Excise taxes in the total amount of \$_____. Then on July 7, 2016, the West Virginia State Tax Commissioner’s Office (the “Tax Department” or the “Respondent”) issued a Statement of Account, which stated that the Petitioner owed \$_____ in unpaid Tobacco Excise taxes. Then, on September 6, 2016, the Respondent issued a “Special Notice of Intent to Offset” which informed the Petitioner that it owed certain sums that the Tax Commissioner was undertaking to collect a Statement of Account. This Statement of Account stated that the Petitioner owed \$_____ in unpaid Tobacco Excise taxes.

The Petitioner timely filed its Petition of Appeal concerning the Special Notice of Intent to Offset, but inexplicably did not file an appeal regarding the May, 2016, assessment until over a year later. Despite these irregularities, the Tax Commissioner has never challenged this Tribunal’s jurisdiction to hear this matter. Additionally, at the time of the prehearing conference in this matter the parties agreed that should the Tax Commissioner prevail the amount in controversy is

\$_____, and the parties were sent an Order Summarizing the Prehearing Conference memorializing that as the amount in controversy.

Two evidentiary hearings were held in this matter, the first on January 8, 2019 and the second on April 15, 2019. Thereafter, the parties filed post hearing briefs and the matter became ripe for a decision at the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Petitioner is a West Virginia corporation with its principal place of business in a West Virginia City.

2. A part of the Petitioner's business is the sale of tobacco products, for which it must purchase excise stamps from the West Virginia Tax Department.

3. Prior to May 15, 2013, the Petitioner would purchase rolls of excise stamps from a West Virginia Bank. They would do so by sending an employee to the bank to pick up the stamps. At the time of pick up they would pay their outstanding balance. Tr. #2 P143-144. To be clear, the Petitioner would not pay for the stamps purchased at the time of purchase, instead businesses like the Petitioner would post a bond which allowed them to purchase stamps on a "rolling credit" basis. The end result of this system was that when the employee was picking up stamps, he or she would be paying for stamps purchased previously. Under West Virginia law, in order to purchase stamps the Petitioner was only allowed to have two outstanding unpaid invoices.

4. After May 15, 2013, the Bank no longer provided excise stamps to the Petitioner. Instead, the State Tax Department began providing them. At this point, the Petitioner would order new stamps and pay for old ones by computer. Tr. #2 P145-147.

5. In April of 2013, a Tax Department employee made an incorrect entry into a Tax Department database. The result of this entry was to show ten (10) rolls of stamps that the

Petitioner had received as being available for sale. This mistake also resulted in the computer thinking that the Petitioner had a ten (10) roll credit. Tr. #2 P224 at 12-23.

6. This mistake was compounded by a Tax Department employee calling the Petitioner's offices sometime in the fall of 2013, to inquire why they were still paying for excise stamps, when they had such a large credit on their account.¹ Tr. #2 P152.

7. As a result of this phone call, for a period of time between October 2013 and January 2014, the Petitioner was provided cigarette excise stamps that it did not pay for. Tr. #2 P153.

8. Sometime in the spring of 2016, the Petitioner was audited and the mistake from 2013 was discovered. This discovery led to the assessment, Notice of Intent to Offset and Statement of Account that form the basis of this appeal.

DISCUSSION

While it is understandable that the Petitioner in this matter would be shocked and dismayed to receive a tax bill of many thousands of dollars, by the same token, it is undisputed that it received numerous rolls of cigarette excise stamps that it did not pay for. Despite this troublesome fact, the Petitioner advances two arguments in support of its appeal. First, it argues that the Tax Commissioner had issued the Notice of Intent outside of the three-year statute of limitations that governs when the Tax Commissioner can issue an assessment. However, this argument is unpersuasive for a variety of reasons.

The Petitioner relies on West Virginia Code Section 11-10-15 "(a) *General rule.* -- The amount of any tax, additions to tax, penalties, and interest imposed by this article or any of the

¹ The record does not reflect the exact amount of credit the Petitioner was told it had. The record seems to show that it was a large figure amount.

other articles of this chapter to which this article is applicable shall be assessed within three years after the date the return was filed” W. Va. Code Ann. § 11-10-15(a) (West 2019). This argument is somewhat tricky to the uninitiated. While the Petitioner obviously files both state and federal tax returns at some point each year, this case is not about those. In this case the documents at issue are the monthly “West Virginia Tobacco Products Tax Report” filed by the Petitioner. Neither party argues that these documents are not returns, and this Tribunal rules that pursuant to West Virginia Code Section 11-10-4 they are in fact “returns,” as that term is defined in Section 4.²

Therefore, the first question to be answered in this matter is, has the Tax Commissioner missed his three-year deadline to issue the Special Notice of Intent to Offset and the accompanying Statement of Account? Or put another way, did the Petitioner file incorrect returns/reports within three years of the Statement of Account, or the Special Notice? The Statement of Account was issued on July 7, 2016, and the Special Notice was issued on September 6, 2016. As one might expect, the Petitioner focuses on the mistakes made in the spring of 2013, and argues that when those mistakes were discovered a Tax Department employee went back and “recreated these liabilities.” Therefore, the Petitioner argues that the Tax Commissioner had three years from April and May of 2013 to assess. The Tax Commissioner acknowledges the mistake that was made sometime in April or May of 2013, but also correctly points out that two mistakes were made. In October of 2013 a Tax Department employee called the Petitioner and incorrectly advised it that it had a large credit, so that it should stop paying for cigarette stamps, in order to spend down this false credit. We should point out here that due to the Petitioner’s accounting methods, when it

² “‘Return’ means for taxable years beginning on or after January 1, 2007, a tax or information return or **report**, declaration of estimated tax” W. Va. Code Ann. § 11-10-4 (West) (emphasis added).

received this phone call it was unable to ascertain if it in fact did or did not have such a credit. The Tax Commissioner argues that it is the period after this phone call, the months of October through December of 2013, when the Petitioner submitted returns that were incorrect, because they did not contain payment for the stamps the Petitioner was receiving. Interestingly, the Tax Commissioner submitted copies of the Petitioner's Tobacco Products Tax Report for these three months in 2013, and they make no mention of this false credit or indicate that the Petitioner was receiving stamps without payment. *See* Petitioner's Exhibit 4, P. 908-915. Both at hearing and in post hearing briefs neither party offers any explanation of this anomaly.

We find the Tax Commissioner's argument on this point to be more persuasive. While it is true that mistakes were made at the Tax Department in the spring of 2013, and that in 2016 a Tax Department employee went into the computer system and made changes to correct those mistakes, it was not until the fall of 2013 that the Petitioner made its mistake, which was filing monthly Tobacco Products Tax Reports without proper payment for cigarette stamps received. It was this mistake, on the part of the Petitioner, that led the Tax Commissioner to take the actions appealed of. Of course, as will be discussed below, the Petitioner argues that it should not be penalized for the Tax Department's mistakes. However, regarding the statute of limitations argument, we rule that the Petitioner committed an error in the fall of 2013, thereby making the July and September 2016 actions by the Tax Commissioner timely.

The Petitioner next argues that the Tax Commissioner's own mistake should estop him from collecting the cigarette stamp monies that were never remitted in the fall of 2013. For his part, the Tax Commissioner makes two arguments in response. First, he argues that this Tribunal cannot hear an equitable argument, such as made by the Petitioner. Alternatively, he argues that the Petitioner does not meet the elements of equitable estoppel.

The Tax Commissioner relies on two previous decisions from this Tribunal (Docket Nos 07-159 & 07-502) as standing for the proposition that we cannot hear an equitable estoppel argument. The Tax Commissioner's reliance on these two decisions is curious, because in 2014 this Tribunal, in Docket No 08-211, ruled that it could in fact hear an equitable estoppel argument. In just the last two years, in Docket Nos. 14-115 and 17-274 this Tribunal again entertained an equitable estoppel argument.

The elements of equitable estoppel are:

a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice

First Am. Title Ins. Co. v. Firriolo, 225 W. Va. 688, 695-96, 695 S.E.2d 918, 925-26 (2010).

Based upon the facts in this matter, the Petitioner fails to meet one of the elements of equitable estoppel. When the Petitioner was told on the phone in the fall of 2013 that it had a cigarette stamp credit in excess of many thousands of dollars it certainly had the capability of obtaining the real facts, to refute the false representation from the Tax Department employee. At hearing, the Petitioner's witness acknowledged that, while the Tax Department's computer system was cumbersome and not user friendly, it certainly was not impossible for the Petitioner to keep books and accounts of its cigarette stamp purchases.

JUDGE POLLACK: So you could go to your computer, pull up a requisition screen, order rolls of stamps, and you could pay for them then or later?

[MR. X]: Correct.

JUDGE POLLACK: So why couldn't you when you're paying, tie that payment to a specific serial number?

[MR. X]: That serial number is not on the requisition or anything. It's actually on the receipt of goods. That would have happened two requisitions earlier.

JUDGE POLLACK: So in other words, when you're paying, if you can pull up the requisition screen and you're going to pay right then, you don't know what the serial number is 'til you get it?

[MR. X]: Absolutely not. Right.

JUDGE POLLACK: But could you go back later and say okay, I just ordered this roll, I paid for it on Thursday. I got it on Monday. Here's the payment, you know, this serial number goes with that check or that payment.

[MR. X]: Essentially did something similar to that.

BRIEF INTERRUPTION

JUDGE POLLACK: I'm sorry. Siri wants to help us with the hearing.

[MR. X]: After the notice of offset, we did --- and put something like that into place.

JUDGE POLLACK: Right. But prior to that?

[MR. X]: I guess it would have been possible.

Tr. #2 P179-180.

Frankly, this Tribunal is quite surprised that upon receiving the mistaken information regarding the false credit, the Petitioner, apparently without any independent verification, accepted that it had overpaid for stamps by many thousands of dollars. At the end of the day, this Petitioner, like all of the other Petitioners who have argued that the Tax Commissioner should be estopped, is in an almost impossible situation. The element of the doctrine requiring being without knowledge or the means of knowledge of the real facts will almost always be fatal to a Petitioner in an administrative hearing, particularly one involving taxes. It would be the rare situation where a Tax Department employee gives incorrect advice or information and a Taxpayer would have

absolutely no way to ascertain the truth. Most times a careful review of the tax laws, by the Taxpayer, an accountant, or an attorney will show the truth. Or, as is the case here, better record keeping by the Taxpayer would clear up the confusion. It is because the Petitioner here **did** have the means of obtaining the real facts that its estoppel argument must fail.³

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. (a) *Tax on cigarettes and tobacco products other than cigarettes.* -- For the purpose of providing revenue for the General Revenue Fund of the state, an excise tax is hereby levied and imposed on sales of cigarettes and tobacco products other than cigarette. W. Va. Code Ann. § 11-17-3 (West).

3. (a) The tax imposed by this article on cigarettes shall be paid by the purchase of stamps as provided in this article. W. Va. Code Ann. § 11-17-5 (West).

4. (a) *Due date.*- On or before the fifteenth day of each month, manufacturers, importers, common carriers, wholesalers, subjobbers, retail dealers, and agents or vending machine operators shall, when required by this article or the tax commissioner, file a report covering the business transacted in the previous month providing any information the

³ It is because the Petitioner cannot prevail under the general elements of equitable estoppel that we need not discuss the higher standard that must be met under West Virginia law in order to estop the government. In Hudkins v. State Consol. Pub. Ret. Bd., 220 W. Va. 275, 647 S.E.2d 711, (2007) the West Virginia Supreme Court of Appeals stated, in dicta “courts have held that the doctrine of estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent.” Id., at 280, 716.

commissioner determines necessary for the ascertainment or assessment of the taxes imposed by this article. W. Va. Code Ann. § 11-17-12 (West).

5. “Return means for taxable years beginning on or after January 1, 2007, a tax or information return or report, declaration of estimated tax . . .” W. Va. Code Ann. § 11-10-4 (West).

6. “(a) *General rule.* -- The amount of any tax, 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 shall be assessed within three years after the date the return was filed” W. Va. Code Ann. § 11-10-15(a) (West 2019).

7. The “returns” that form the basis of this matter were filed during the period October to December of 2013. As a result, the Tax Commissioner’s Assessment, Statement of Account and Notice of Intent to Offset, issued in May, July, and September of 2016, respectively, did not violate the three-year statute of limitations contained in West Virginia Code Section 11-10-15(a).

8. The elements of equitable estoppel are: a false representation or a concealment of material facts; it must have been made with knowledge, actual, or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice. First Am. Title Ins. Co. v. Firriolo, 225 W. Va. 688, 695 S.E.2d 918 (2010)

9. Because the Petitioner had the means of knowledge of knowing that it did not in fact have a credit of tobacco excise taxes in the fall of 2013, the Tax Commissioner cannot be estopped from issuing the documents that led to this matter, and from collecting the taxes not remitted.

10. In proceedings before the West Virginia Office of Tax Appeals, the burden of proof is upon the Petitioner. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010).

11. The Petitioner in this matter has not met its burden of showing that the Tax Commissioner's actions in this matter were clearly wrong, or arbitrary and capricious. Nor has the Petitioner met its burden of showing that the Tax Commissioner has committed an error of law.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner on May 19, 2016 in the total amount of \$_____, the Statement of Account issued on July 7, 2018, which stated that the Petitioner owed \$_____ in unpaid Tobacco Excise taxes, and the Special Notice of Intent to Offset issued on September 6, 2016, are all hereby **AFFIRMED**.

Pursuant to the agreement of the parties, it is further **ORDERED** that the amount in controversy is, as of the date of this Final Decision, \$_____.

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

WEST VIRGINIA OFFICE OF TAX APEALS

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

Date Entered