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REDACTED DECISION – DK# 15-385 P, 15-386 CU

BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON MAY 8, 2020
ISSUED ON NOVEMBER 2, 2020

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

FINAL DECISION

On September 10, 2015, the Auditing Division of the West Virginia State Tax Department (the "Tax Commissioner" or "Respondent") issued an Audit Notice of Assessment, one against Company A and one against the Petitioners, individually. These assessments were issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq*, of the West Virginia Code. The assessment for company A was for combined sales and use tax for the period beginning August 1, 2009, through June 30, 2015, for tax in the amount of $______, and interest in the amount of $_____, additions in the amount of $_____ for a total assessed tax liability of $_____. The personal income tax assessment was for the period of December 31, 2012 through December 31, 2013, for tax in the amount of $_____, and interest in the amount of $_____, additions in the amount of $_____, for a total assessed tax liability of $_____.

Thereafter, on November 9, 2015, the Petitioners timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010).

Subsequently, 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

September 5, 2019, after which the parties filed legal briefs. The matter became ripe for decision at the conclusion of the briefing schedule.[1]

FINDINGS OF FACT

1) Company (hereinafter "company A") is a limited liability company with Petitioner (hereinafter "Petitioner") as its sole member. Petitioner has owned the franchise since 2009. TR. 62,63.

2) A company operates a franchised tax preparation service, a tax preparation service in Multiple Cities, West Virginia. TR. 22, 63.

3) Company A prepares state and federal personal income tax returns. TR.63.

4) Company A does not employ any CPAs, public accountants, or enrolled agents. TR. 56.

5) Company A's tax preparation service employees are required to pass an annual examination approved by the Internal Revenue Service (hereinafter "IRS") and administered by a tax preparation service. TR.

6) A tax preparation service requires a continuing education requirement of 25 hours which is sufficient to satisfy the IRS. TR.

7) Sales taxes were never collected and no sales and use tax return were ever filed on behalf of Company A. Tr. 69.

8) The Petitioner testified that neither a high school diploma nor GED is required to process tax returns. TR. 49.

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[1] A briefing schedule was entered on February 20, 2020. Thereafter, on March 7, 2020, the Petitioner filed a motion for enlargement of time to file briefs which extended the closure of evidence until May 8, 2020.

9) The Petitioner testified that preparing a tax return involved entering data from a "Customer Data Sheet" into the computer and then relying on a tax preparation service software to prepare and electronically file a final return. TR. 55, Petitioners' Ex. 2.

10) The Petitioner testified that there is no professional licensing requirement to prepare federal and state returns. TR. 69.

11) The Petitioner testified that there is no continuing education requirement to prepare federal and state tax returns. TR. 67.

12) The individual Petitioners (the Petitioner and spouse) are residents of a county in West Virginia and were assessed for personal income taxes for tax years 2012 and 2013. TR. 21, 62.

DISCUSSION

Company A claims the assessment against it regarding the collection of sales taxes for the tax preparation services it provides is in error, because it is providing a professional service.

The law of this case starts with West Virginia Code Section 11-15-8. Article 15 relates to West Virginia's consumers sales and service tax, and Section 8 states that sales tax must be collected when providing services, but it also provides an exception for professional and personal services. "The provisions of this article apply not only to selling tangible personal property and custom software, but also to the furnishing of all services, except professional and personal services . . . ." W. Va. Code Ann. §11-15-8 (West 2010). Professional services are not defined in Chapter 11, so we must turn to Title 110, Series 15 of the West Virginia Code of State Rules which contains the legislative rules for combined consumers sales and service and use tax. There, professional service is defined as: "'Professional service' means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity

determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in West Virginia Code Section 11-15-1 et seq., to be professional. *See* Section 8.1.1 of these regulations." W. Va. Code R. §110-15-2.65 (1993). Section 8.1.1 of Series 15, Title 110 of the Code of State rules provides further guidance.

> Professional services, as defined in Section 2 of these regulations, are rendered by physicians, dentists, lawyers, certified public accountants, public accountants, optometrists, architects, professional engineers, registered professional nurses, veterinarians, licensed physical therapists, ophthalmologists, chiropractors, podiatrists, embalmers, osteopathic physicians and surgeons, registered sanitarians, pharmacists, psychiatrists, psychoanalysts, psychologists, landscape architects, registered professional court reporters, licensed social workers, enrolled agents, professional foresters, licensed real estate appraisers and certified real estate appraisers licensed in accordance with W. Va. Code '37-14-1 et seq., nursing home administrators, licensed professional counselors and licensed real estate brokers . . . . The determination as to whether other activities are "professional" in nature will be determined by the State Tax Division on a case-by-case basis unless the Legislature amends W. Va. Code '11-15-1 et seq. to provide that a specified activity is "professional." When making a determination as to whether other activities fall within the "professional" classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements.

W. Va. Code R. §110-15-8.1.1.1 (1993).

Obviously, tax preparers are not listed as providing a professional service in Section 8.1.1.1. Nor does the Petitioner argues that it was recognized as such under the common law. As stated above, the West Virginia Legislature has not determined any activity to be professional in Article 15 of Chapter 11. It should be noted that the only place the Legislature has determined what professions are professional is in Section 8.1.1.1, which, as a properly promulgated legislative rule, has the force and effect of law. *See e.g.* Appalachian Power Company v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995). As a result, we are left with the last two sentences of Section 8.1.1.1. and the Legislature's grant to the Tax Commissioner of the discretionary authority to determine whether other activities are professional.

As one might expect, Company A argues that the services it provides meet the four part "test" contained in Section 8.1.1.1. Company A takes the position that real life experiences should be considered for determining the level of education of a professional, rather than academic training alone. Company A further argues that it follows the credentials and licensing requirements of the Internal Revenue Service for its tax preparers and as such it meets the nature and extent for nationally recognized standards for performance and the licensing requirements on the State and national level. Finally, that the because the franchise of a tax preparation service requires 25 continuing education requirements that suffices for the last element of extend of continuing education requirements.

Company A attempts to expand the Regulation and the same time, ignore this Tribunal's professional exemption precedent. Even as recent as 2016, the necessary elements of the four-part test and how they are met were clearly explained in prior precedent. There is nothing is OTA's precedent that provides for real life experiences meeting the level of education ***required for the activity***. Petitioner testified that no certain level of education was required to work as a tax preparer and that many of Company A's tax preparers had a GED or high school education. Additionally, there were no facts or law providing for how real-life experiences meet any type of educational requirement for tax preparers.

Recently, this Tribunal issued a decision regarding a licensed home inspector who sought the professional services exemption contained in West Virginia Code Section 11-15-8. In that case, the Petitioner proved that the activity was licensed by the West Virginia Fire Marshall, and also subject to continuing education requirements. This Tribunal ruled against the Petitioner, in large part because the activity had no minimum educational requirements. We stated that, "We would not call it a serious mistake or unreasonable result to determine that an activity that can be

done by someone with a GED degree is not professional." *See* Final Decision, Docket No. 16-056 at P. 9. We would apply the same logic here, because, like licensed home inspectors, tax preparation can apparently be done by anyone who can meet the IRS's currently undefined standards, regardless of their level of education.

Additionally, Company A argues that it has its tax preparers follow the licensing requirements and credentials of the Internal Revenue Service but admits that there are no licensing requirements to prepare federal and West Virginia state tax returns. While Company A follows a tax preparation service franchise annual requirement of 25 hours continuing education for tax preparers, Petitioner admitted that there were no continuing education requirements to file federal and West Virginia state tax returns. As such, Company A could not point to any requirement for tax preparers pursuant to the four part of test of Section 8.1.1.1.

The Petitioner advanced additional arguments regarding the professional exemption. First, the Petitioner argued that the Respondent's website provides for tax preparers being listed as "Tax Professionals" and that it was proof positive that the Respondent considers them as professionals, allowing them to properly exempt tax preparation. However, Petitioner testified that he did not rely upon the Respondent's website regarding the definition of professionals and, in fact, stated that he had never reviewed or relied upon the Tax Department's website in any way. Instead, he relied upon a representative with a tax preparation service, for sales and use tax advice. There was no testimony that the Petitioner ever sought any additional tax or legal advice due to his reliance upon the representative's mistaken understanding of West Virginia taxation. Therefore, the website appears to have no relevance to this matter, and we find this argument unpersuasive.

The Petitioner further argues that it is the activity of tax preparation that should be exempted and the title of the person doing the activity should be irrelevant. The argument is

essentially what's the difference between a CPA or certified accountant providing tax preparation and someone who is not a CPA or certified accountant providing the same service? This Tribunal recognizes the Petitioner's argument as being equity based or essentially, that it is unfair to assess one person for sales and use tax and exempt another person for the same activity of tax preparation. Company A's counsel argued at hearing the following:

> PETITIONERS' COUNSEL: Because it's not a question of whether these are professionals. The question is whether or not they render a professional service. Those are different things. And the preparation of tax returns is a professional service. Now, for instance, the practice of law includes conducting real estate closings. There has been a compromise reached between the bankers and the State Bar that allows banks, bank officers to conduct real estate closings. And it's a practice of law, but it's being tolerated to be performed by a non-lawyer. It's an example of a professional service that's being performed by a non-professional individual. It's still a professional service. Likewise, what the petitioner does is perfectly legal. Both witnesses for the Petitioner have testified to that. It's well within all licensing requirements, and yet it is a professional service. The preparation of tax returns is a professional service as recognized when it's performed by a CPA, it's recognized when a public account used to do it, and an Enrolled Agent. And the arbitrary separation of the sheep from the goats that these people who are performing exactly the same service don't have to collect sales tax. And these people who are performing exactly the same service do have to collect sales tax.
> JUDGE FLANIGAN: Okay.
> PETITIONERS' COUNSEL: There's no basis for that.
> JUDGE FLANIGAN: Okay. So, are you saying that it's unfair, then?
> PETITIONERS' COUNSEL: Well, it's clearly unfair.
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> (Evidentiary Hearing, Tr. 145-146).

While the Petitioner's fairness argument is not lost on this Tribunal, it ignores the four-part test of Section 8.1.1.1 of Title 10, Series 15 and a litany of OTA's precedent applying this test. Furthermore, we are not a court of equity and do not have the authority to consider it.[2] We are a

[2] The Office of Tax Appeals is regularly asked to estop the Tax Commissioner in the name of fairness pursuant to Hudkin's v. State of West Virginia Consolidated Public Retirement Board, 220 W.Va. 275, 647 SE2d 711 (2007). However, Company A is not asking for relief under the Doctrine of Equitable Estoppel.

statutorily created tribunal of very limited jurisdiction and are strictly bound by statutes and regulations.

Company A does not specifically argue Equal Protection and insists that a constitutional argument is not being put forth. However, the fundamental basis of Company A's case is the argument that similarly situated people who are performing the same work are being treated differently for no rational reason under Section 8.1.1.1 of Series 15 Title 110 of the Code of State rules. This Tribunal does not have the authority to determine the constitutionality of statutes or regulations. A review of a statute or regulation's constitutionality would be properly before a West Virginia Circuit Court and not this administrative tribunal.

With that being said, we do not seek to minimize the Petitioner's constitutional arguments, but we believe that it is important to reiterate this issue. It is well settled that, as part of the executive branch, neither the Tax Commissioner nor this Tribunal can declare a statute unconstitutional. Actually, two concepts are well settled. The first is the separation of powers doctrine. In West Virginia, as in many states, it is more than a doctrine and is actually an article of our State Constitution.

> The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature

W. Va. Const. art. V, § 1. The West Virginia Supreme Court of Appeals has elaborated on this constitutional provision on many occasions, including mere weeks prior to the issuance of this decision. "The separation of powers doctrine works six ways. The Courts may not be involved in legislative or executive acts. The Executive may not interfere with judicial or legislative acts." State ex rel. Workman v. Carmichael, 819 S.E.2d 251, 261 (W. Va. 2018).

Next, we must ask, is declaring a statute unconstitutional a purely judicial act? The short answer is yes, and virtually every state court in the nation has, at some time in the past, clearly and cogently stated as such. *See e.g.* Gordon v. State by & through Capitol Bldg. Rehab., 2018 WY 32, 413 P.3d 1093 (Wyo. 2018) (Declaring the validity of statutes in relation to the constitution is a power vested in the courts); Gannon v. State, 305 Kan. 850, 390 P.3d 461 (2017) (the judiciary has the sole authority to determine whether an act of the legislature conforms to their supreme will, *i.e.*, is constitutional); Gen. Engines Co. v. Dir., Div. of Taxation, 23 N.J. Tax 515 (2007) (Division of Taxation, as an administrative agency, has neither the responsibility, the authority, nor the jurisdiction to declare statutes unconstitutional).

The West Virginia Supreme Court of Appeals has never answered the precise question before us, namely can an executive branch agency declare a statute unconstitutional. What the Court has said is that the mere fact that an executive branch agency performs quasi-judicial functions does not make it a court, and that it is the duty of the courts to declare statutes unconstitutional. *See e.g.* State ex rel. State Bldg. Comm'n v. Bailey, 151 W. Va. 79, 150 S.E.2d 449 (1966) (it is the duty of a court to declare a statute invalid if its unconstitutionality is clear); Rice v. Underwood, 205 W. Va. 274, 517 S.E.2d 751 (1998) (the deciding of contested cases by a board or regulatory body is a recognized administrative function and does not transform the administrative agency into a court). We do not think the fact that the Bailey Court failed to say that it is "solely" the duty of a court to declare a statute unconstitutional is determinative. This Tribunal is quite certain that the concept is as equally well settled in West Virginia as elsewhere.

For his part, the Tax Commissioner argues that the activities conducted by the Petitioner, state and federal personal income tax preparation are not professional and that there are decades worth of precedent ruling as such. As a result, currently a tax preparer filing federal and state

returns has no minimum educational requirements, no licensing, no recognized standards (because there is no testing requirement) and no continuing education requirements. Thus, not meeting any of the requirements in West Virginia Code of Regulations §110-15-8.1.1.1. (1993). Furthermore, the Tax Commissioner argues that he reviewed this case based upon years of precedent and by denying the professional exemption they are correctly following precedent

We rule for the Tax Commissioner in this matter, for a variety of reasons, most specifically, that neither Petitioner or the expert witness, a Certified Public Accountant, could provide any evidence that there was a required level of education, nationally recognized standards, licensing requirements, and continuing education requirements for tax preparation. A Certified Public Accountant's testimony supported the differences between a CPA and a tax preparer. A CPA provides tax advice, auditing, prepares business, estate, and other complicated tax returns. While a Certified Public Accountant testified to the multitude of services that a CPA provides, the Petitioner testified that Company A's tax preparers provide a very specific service of only preparing state and federal personal income taxes. Additionally, Petitioner testified that the tax preparation service software allows the tax preparer to essentially enter data into a computer and print a return in a speedy manner. A tax preparer is not required to meet any specific standard and as such, the four-part test of Section 8.1.1.1 of Title 10, Series 15 is simply not meet in the instant case.

In summation, Company A's theory of this case has been that its activities meet the four part "test" of Section 8.1.1.1 of Title 110, Series 15 of the West Virginia Code of State Rules. However, the Petitioners failed to adequately prove as such.

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. Article 15A goes on to explain that services which are not subject to West Virginia consumers sales tax are also specifically exempted from use tax. *See* W. Va. Code Ann. §11-15A-3(a)(4) (West 2010).

5. One type of service that it excepted from West Virginia's consumers sales tax is professional services. *See* W. Va. Code Ann. §11-15-8 (West 2010).

6. Professional services are not defined in Chapter 11 of the West Virginia Code.

7. The Tax Commissioner has promulgated rules which do define professional service. "'Professional service' means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in W. Va. Code

'11-15-1 et seq. to be professional. See Section 8.1.1 of these regulations." W. Va. Code R. §110-15-2.65 (1993).

8. The determination as to whether other activities are "professional" in nature will be determined by the State Tax Division on a case-by-case basis unless the Legislature amends West Virginia Code Section 11-15-1 et seq., to provide that a specified activity is "professional." When making a determination as to whether other activities fall within the "professional" classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements. W. Va. Code R. §110-15-8.1.1.1 (1993).

9. In this matter, the Petitioner has failed to prove that the activity it is engaged in, the preparation of federal and state personal income tax returns, has nationally recognized standards, has state and national licensing requirements, a certain level of continuing education requirements, or the extent of continuing education requirements.

10. 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 any assessment of tax against it is 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).

11. The Petitioner in this matter has not carried its burden of proving that the $________, assessment issued against it was erroneous, unlawful, void, or otherwise invalid.

DISPOSITION

Based upon the above, it is the FINAL DECISION of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioners on $_____, in the amount of $_____ is hereby AFFIRMED.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: ________________________________
Crystal S. Flanigan
Administrative Law Judge

____
Date Entered