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REDACTED DECISION – DKT NO. 24-103

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON SEPTEMBER 26, 2025
ISSUED ON MARCH 20, 2026

FINAL DECISION

On June 4, 2024, the Criminal Investigation Division of the West Virginia State Tax Division (the "Tax Commissioner" or "Respondent") issued an Audit Notice of Assessment against the Petitioner. This assessment 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. The assessment was for tobacco products taxes for the period February 1, 2019, through May 31, 2023, for tax in the amount of $1,374,957.22, interest in the amount of $489,934.85, and additions to tax in the amount of $344,940.46, for a total assessed tax liability of $2,209,832.53.

Thereafter, on July 18, 2024, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for appeal. *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 June 9, 2025, 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 multi-member LLC, formed in 2013 in New York, with its principal place of business in Buffalo, New York. The Petitioner's primary business is the

distribution of vape products and it distributes its products to all fifty (50) states. Hr'g Tr. pp. 26:20-23, 27:1-17.

2. The Petitioner operates an online business, where its customers place orders on its website and the products are shipped via various common carriers, with the customer paying for the shipping. Hr'g Tr. pp. 6:8-11.
3. The Petitioner began sales into West Virginia sometime in 2018 or 2019. Hr'g Tr. pp. 6:16-17.
4. Due to changes in federal law, in March of 2021, the Petitioner registered as a wholesaler of tobacco products with the West Virginia Tax Division.[1] At that time the Petitioner also began collecting and remitting from its customers West Virginia's tobacco products excise taxes. Res. Ex. 2 & Hr'g Tr. pp. 15:1-23. 16:1-4.
5. Prior to March of 2021, the Petitioner was not collecting and remitting any tobacco excise taxes from its customers in West Virginia.
6. In May of 2023, an auditor with the Criminal Investigation Division of the Tax Division began an audit of the Petitioner's business. Hr'g Tr. pp. 85:10-12.
7. Between July and September of 2023, the auditor received various documents from the Petitioner, including sales data, customer lists, and product information. Hr'g Tr. pp. 85:18-23, 86:1-7.
8. The auditor did not receive invoices from the Petitioner. However, she was able to cross reference the data received from the Petitioner with invoices obtained by Criminal

[1] The Petitioner's business registration paperwork also lists the Petitioner as a retailer, however the record, in its entirety, shows that the Petitioner has never been a retailer of tobacco products in West Virginia, either through a physical location or through online sales. The Petitioner attributes this mistake in its registration paperwork to the attorney who filed on their behalf. Hr'g Tr. pp. 34:1-2.

Investigation Division employees during inspections/audits of the Petitioner's customers (vape shops) in West Virginia. Hr'g Tr. pp. 78:7-21.

9. This cross referencing revealed various problems with the Petitioner's record keeping and tax filings. In some instances, invoices showed that the Petitioner had collected the tobacco excise tax from its West Virginia customers, but the accompanying tobacco excise tax returns did not show remittance of that tax. Hr'g Tr. pp. 67:18-22, 68:1-17. In other instances, the opposite was found, namely that the Petitioner's excise tax returns shows remittance of the excise tax, however, the accompanying invoice did not reflect tax having been collected from the Petitioner's customer. Hr'g Tr. pp. 69:4-17. Finally, throughout the documents the auditor found, what she considered errors, in the way the Petitioner was calculating the amount of tax due. Specifically, she (and apparently the entire Tax Division) were interpreting West Virginia law to require "rounding up", meaning that if 1.2 milliliters of vaping/e-cigarette liquid was sold, at West Virginia's excise tax rate of ¢7.5 per milliliter then the tax collected/due on that sale should have been ¢15.

10. Despite the problems encountered by the auditor described above, and her opinion that she did not receive all the information/documents needed, she was able to complete the audit to her satisfaction. Hr'g Tr. pp. 79:3-6.

11. The auditor did not conduct what she considered a sample and projection audit. Hr'g Tr. pp. 11:1-7.

12. The end result of the audit was the assessment that forms the basis of this appeal.

13. The tax due portion of the assessment is generally made up of two components. First, that the Petitioner should have been filing returns and remitting tobacco excise taxes from when it began sales in West Virginia through to March of 2021. The second portion of the tax

due was based upon the Tax Commissioner's opinion that from March of 2021 to the end of the audit period, the Petitioner had been incorrectly calculating the amount of tax due on the milliliters of vape/e-cigarette liquid sold in West Virginia.

DISCUSSION

There are two areas of contention between the parties. First, the Petitioner argues that under West Virginia law, it is not the entity responsible for collecting and remitting West Virginia's tobacco excise taxes. This argument is complicated by the two time periods at issue in this case. The first time period is 2018 or 2019 to March of 2021, during which the Petitioner was neither collecting nor remitting tobacco excise taxes from its customers. Then, beginning in March of 2021, what it characterizes as a **voluntary** collection and remittance of the taxes, due to its interpretation of newly passed federal legislation, which will be discussed in greater detail below. The Petitioner's second legal argument is that the Tax Commissioner's method of calculating the amount of tax due on milliliters of vape/e-cigarette liquid is also contrary to West Virginia law.

The question of who is responsible for collecting and remitting tobacco excise taxes on vape/e-cigarette liquid in West Virginia is contained in Section 4b of Article 17, Chapter 11 of the West Virginia Code.

> (1) On and after July 1, 2016, an excise tax is levied and imposed on sales of e-cigarette liquid at the rate of 7.5 cents per milliliter or fraction thereof, or if not sold, then at the same rate upon the use by the wholesaler or dealer. For purposes of this article, any distributor, dealer, subjobber, subjobber dealer, retailer or **any other person** that imports or transports e-cigarette liquids into this state, or that causes e-cigarette liquids to be imported or transported into this state, is hereby deemed to be a wholesaler for purposes of this section and is liable for the tax imposed under this article.

W. Va. Code Ann. § 11-17-4b(b)(1) (West 2025)(emphasis added). The Petitioner first argues that it is not importing, or transporting vape/e-cigarette liquids into this state, nor is it causing such transportation or importation. The Tax Commissioner's theory of this case changed between the pre-hearing conference, the evidentiary hearing and again in his post-hearing brief. At pre-hearing the Tax Commissioner argued the simple opposite of the Petitioner's position, namely that Section 4b is written so broadly that he can look to anyone as the party responsible to remit. During the evidentiary hearing, counsel for the Tax Commissioner directed many of the questions to his witness towards the registration paperwork filed by the Petitioner, and the fact that it listed a West Virginia address for the Petitioner. The witness testified at length that the Tax Division assumed, in reliance on the registration paperwork, that the Petitioner was a West Virginia entity, involved in this state with both wholesale distribution of tobacco products and online retail sales.[2] Finally, in his post-hearing brief, the Tax Commissioner's theory of the case changed once again. He now argues that the Prevent All Cigarette Trafficking Act (PACT Act) codified in 15 U.S. Code §375 *et seq* controls the law of this case.[3]

We find the Tax Commissioner's numerous theories to be less than convincing. Turning first to his reliance on the amendments to the PACT Act, we find this to be the most troubling. First, is the fact that neither party discussed these statutory provisions at the prehearing conference. By letter dated November 13, 2024, the parties were advised, (as all parties before this Tribunal are advised) that post-hearing briefs should not contain citations to authority or legal arguments that were not discussed during the prehearing conference. This Tribunal has, for many years, attempted to hold parties to this directive, with varying levels of success. Someday, we will,

[2] The record is unclear why these two incorrect facts were not clarified prior to the issuance of the assessment, particularly because the auditor testified that she had many dealings with the Petitioner's employees, all of whom are located in Buffalo, New York. Nor was any testimony elicited as to why the auditor was unable to confirm that the Petitioner does not sell its wares to individuals in a retail setting.

[3] To be precise, the Tax Commissioner is referring to the "Preventing Online Sales of E-Cigarettes to Children Act", which was an amendment to the PACT Act passed in 2020. CONSOLIDATED APPROPRIATIONS ACT, 2021, PL 116-260, December 27, 2020, 134 Stat 1182. (West 2025).

invariably, deem an argument waived because it was not identified prior to the evidentiary hearing, however, today is not that day. In the Tax Commissioner's defense, the amended PACT Act was discussed during the evidentiary hearing, but it was only brought up factually by the Petitioner, to explain why it **voluntarily** began collecting and remitting the taxes at issue. In fact, the Tax Commissioner's sole witness' testimony is contrary to the argument advanced by the Tax Commissioner. She clearly stated that the amended PACT Act does not provide the legal authority for the Tax Commissioner to assess the Petitioner.

> JUDGE POLLACK: So, are you saying that Wayfair or the PACT Act or both supersede that section 117 4B1? In other words, should I ignore that language about any other person that imports or transports into this state if that person or distributor, dealer, etc. imports but if they don't have Nexus, then are you saying that you and doing your job would go more with the PACT Act and Wayfair than that language in 4B?
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> MS. DAVIS: No, I'm saying in enforcing that we are limited because of that whole establishment of Nexus ---
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> JUDGE POLLACK: Okay.
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> MS. DAVIS : --- and the ability of states to go into other states. Like I said, it's whether it be voluntary registration, whether it be a Nexus qualification, that is what allows us to enforce and administer the tax on those parties.

Hr'g Tr. pp. 104:6-16.

Next, in his post-hearing brief, the Tax Commissioner offers citation to the amended PACT Act, specifically Subsection 376(b) of Title 15 of the U.S. Code.

> "**(**b) Presumptive evidence The fact that any person ships or delivers for shipment any cigarettes or smokeless tobacco shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a)(1) of this section, be presumptive evidence that such cigarettes or smokeless tobacco were sold, or transferred for profit, by such person. . . . 15 U.S.C.A. § 376"

See Respondent's Reply Brief P6. The Tax Commissioner goes on to argue that "The PACT Act clearly makes shipping or delivering an ENDS into any State where a person files a statement (return) with the tobacco tax administrator of the State a triggering event placing the the [sp] onus of charging, accounting for and remitting the TPET squarely on Petitioner's shoulders." *Id* at P7.

Again, we are unconvinced. As stated above, the Tax Commissioner's own witness testified that she did not rely on the amended PACT Act to establish a duty on the Petitioner's part to collect and remit West Virginia's vape/e-cigarette liquid excise tax. Moreover, Subsection (b), by its plain language, does not mention the collection and remittance of state taxes. Therefore, we find the Tax Commissioner's statement that the PACT Act **clearly** makes the Petitioner responsible for collecting and remitting to be incorrect. Moreover, the Tax Commissioner fails to discuss, let alone to offer any authority for the proposition that Subsection 376(b) of Title 15 preempts West Virginia Code Section 11-17-4b(b)(1), or that it was Congress' intention to do so. At least one court has ruled to the contrary of that proposition. In State v. Sedacca, an individual charged criminally with illegal transportation of untaxed cigarettes argued that Title 15, Section 375 *et seq* preempted Maryland's state laws regarding enforcement and taxation of tobacco products. The Sedacca court rejected that argument, stating:

> It is clear that the provisions of the Federal statute do not purport to cover all of the aspects of the enforcement of the state cigarette tax laws, as, for example, the wholesale and retail dealers who sell or transfer for profit to others cigarettes in interstate commerce who will ultimately transfer them to other states without paying the state tax. As we have indicated, there was no intention on the part of the Congress to preempt the field of state enforcement; rather the congressional intent was to strengthen and effecutate state enforcement of the cigarette tax laws.

State v. Sedacca, 252 Md. 207, 219–20, 249 A.2d 456, 464 (1969).[4]

Finally, in the Tax Commissioner's post-hearing brief, he confusingly does an about face just two or three pages after he argues that the amended PACT Act clearly puts the onus of collection and remittance on the Petitioner. Beginning on page 7 of his post-hearing brief the Tax Commissioner addresses the Petitioner's commerce clause argument. There he cites a different section of the Act, section 376a.

> Except as provided in paragraph (2), no delivery seller may sell or deliver to any consumer, or tender to any common carrier or other delivery service, any cigarettes or smokeless tobacco pursuant to a delivery sale unless, in advance of the sale, delivery, or tender--(A) any cigarette or smokeless tobacco excise tax that is imposed by the State in which the cigarettes or smokeless tobacco are to be delivered has been paid to the State;

15 U.S.C.A. § 376a(d)(1) (West 2025).[5] Immediately after this citation to Subdivision (1) the Tax Commissioner states: "[T]his federal mandate **to comply with state and local tobacco laws** and taxes is paramount" *See* Respondent's Reply Brief P8. This Tribunal does not believe that this argument helps the Tax Commissioner's cause. On page 6 of his reply brief he essentially argues that the amended PACT Act preempts West Virginia's tax laws, and on page 8 he reverses course. Simply put, the amended PACT Act does direct entities, such as the Petitioner, to undertake a series of specific acts with regards to the sale of tobacco products. However, it does not contain

[4] We are aware that the Sedacca decision is fifty-five (55) years old and involves a criminal matter. Nonetheless, we do not believe these facts lessen its persuasive authority regarding the question of Title 15, Section 375 *et seq*., federally preempting state tax laws.

[5] Due to the fact that we are ruling that the amended PACT Act does not establish a duty to collect and remit on the part of the Petitioner, we are not addressing the incongruity of Subdivision (1) requiring remittance of excise taxes **before** shipment. We believe that the most likely explanation is that Subdivision (1) was drafted prior to the internet economy, during a time when tobacco product sellers purchased "stamps" to affix to the products they sold. Thus, the delivery seller presumably had some mechanism to ascertain that the excise taxes had been paid prior to shipment.

any language codifying a sellers duty to pay any particular state's taxes, or preempting any such tax laws.

Our ruling that the amended PACT Act does not require any specific party to collect and remit taxes and does not preempt any particular state's laws, still requires us to rule on who is responsible for collection and remittance, of the vape/e-cigarette liquid taxes **under West Virginia law**. As cited above, Subdivision (b)(1) of Chapter 11, Article 17, Section 4b **does not** impose the excise tax based upon an entity's designation as a dealer, retailer, wholesaler, etc. Rather, the tax is imposed on **any person** who "imports or transports e-cigarette liquids into this state, or that causes e-cigarette liquids to be imported or transported into this state". *Supra*

Again, to answer this question, the Tax Commissioner hangs his hat exclusively on the amendments to the PACT Act. The Petitioner on the other hand, argues that Subdivision (b)(1) is ambiguous and must be construed against the Tax Commissioner.[6] The Petitioner also points this Tribunal to one of its recently issued decisions regarding the applicability of West Virginia's motor fuel tax to methanol manufactured elsewhere and sold to customers in West Virginia. In that matter, this Tribunal was dealing with language similar to that found in Subdivision (b)(1).[7] While the language regarding liability for the motor fuel taxes found in Article 14C is similar to the language regarding liability for tobacco excise taxes found in Article 17, there are differences. First and foremost, in Article 14C there is a definition of "importer", although, due to its circular nature, that definition was not totally determinative of our decision in the methanol case. Also, given the nature of the sales of methanol involved, there were numerous important factual

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[6] The Petitioner also correctly points out that the regulations that accompany Article 17 of Chapter 11 were promulgated in 2002 and have not been updated since the inclusion of Section 4b into Article 17 in 2016. As such, the typical course of action whereby one would refer to properly promulgated regulations as an aid in statutory construction is not available in this instance.

[7] *See* W. Va. Code Ann. § 11-14C-6(a) (West 2025)(The tax levied pursuant to section five of this article is imposed at the time motor fuel is imported into this state, . . .and is payable by the person importing the motor fuel).

differences from the sales of vape/e-cigarette liquids we are confronted with here. Most importantly, the methanol at issue was shipped according to the Incoterms established by the International Chamber of Commerce. Those terms are well settled worldwide, and while the methanol was shipped under a variety of different conditions (such as rail car or barge), the uncontroverted evidence was that no matter which Incoterm shipping method was used, title to the methanol passed to the buyer at the flange point in the methanol manufacturing plant. These facts loomed large in our determination that the West Virginia buyer was the importer under Article 14C.[8]

In this matter we have different facts. Neither party presented any testimony nor documentary evidence that the shipments of the vape/e-cigarette liquids at issue here were governed by Incoterms. Therefore, we find our reasoning in the methanol decision to be slightly persuasive, but not determinative. We are still confronted with the same question here, as in many cases before us namely what did the West Virginia Legislature intend when it put the burden of collecting the tobacco excise taxes on any person who "imports or transports e-cigarette liquids into this state, or that causes e-cigarette liquids to be imported or transported into this state". This language provides us two paths to rule, although one path is decidedly less persuasive than the other. First, "transporter" is a defined term under Article 17. "Transporter" means a person importing or transporting into this state a tobacco product obtained from a source located outside this state or transporting within this state tobacco products belonging to another person. W. Va. Code Ann. § 11-17-2(b)(21) (West 2025). We could rule that the phrase "obtained from a source located outside this state" is the Legislature's way of identifying the Petitioner's customers, the

[8] The Tax Commissioner's position in the methanol case was also weakened by the fact that his only witness testified that in her opinion, under the Incoterms, the West Virginia buyer was the importer.

retailers, as the entity importing the vape/e-cigarette liquids into this state. However, it could be argued that the Petitioner has also obtained their products from a source located outside of this state, rendering a ruling based upon such a reading as less convincing.

We believe that the straightest avenue to a resolution is to read West Virginia Code Section 11-17-4b, and apply the plain and ordinary meaning to the word "causes". In plain English, when the Petitioner sells vape/e-cigarette liquids to its customers in West Virginia, who "causes" that sale to happen? We believe this analysis does the least violence to the Legislature's intentions. We rule that it is the West Virginia retailers, the Petitioner's customers, that cause the vape/e-cigarette liquids to be imported or transported into this state. We rule as such, based upon a common sense understanding of e-commerce in 2025. The West Virginia Supreme Court of Appeals has stated, *in dicta*, that courts should not abandon their common sense at the courthouse door. "Although a court may not read into a statute language purposefully omitted, courts of this state are not required to **"insulate themselves from all knowledge of happenings and events in the world about them, and pretend ignorance to that which among the mass of citizens is common knowledge, . ."**" State v. Blatt, 235 W. Va. 489, 500, 774 S.E.2d 570, 581 (2015) (internal citations omitted)(emphasis added). Common sense tells us that what causes the shipment of vape/e-cigarette liquids into this state is the same thing that causes hundreds of millions of dollars worth of products to be shipped into this state each year, namely someone sitting at a computer and hitting the "order" button. In this matter, it is the Petitioner's customers doing so. To rule that the Petitioner is the entity that causes the vape/e-cigarette liquids to be shipped here would require a finding that they caused each shipment by their mere presence on the internet, via their website. Again, common sense tells us that merely setting up a website does not, in and of itself, create sales.

There are two important concepts regarding our decision that must be discussed. First, we are aware that had we been applying the plain and ordinary meaning to "causes" fifty or seventy-five years ago, our analysis most likely would be different. While Section 4b of Article 17 regarding vape/e-cigarette liquid was promulgated in 2016, portions of Article 17 regarding tobacco products generally date back to the 1940's and 50's. Hence, the existence of terms in Article 17 like "subjobber". Seventy-five years ago, a retailer selling tobacco products was most likely dealing face to face with either a direct employee of the wholesaler, or a third party subjobber who traveled, selling the wholesaler's tobacco products. During those years, applying a common sense answer to who "caused" a sale of tobacco products to a retailer in West Virginia would require a different analysis and might well generate a different answer.

Secondly, we are aware of a general incongruity to our analysis. When we liken the sales at issue in this matter to the millions of transactions conduct in regular e-commerce, this Tribunal understands that in West Virginia, and presumably in all fifty (50) states, it is the online seller who must collect West Virginia's sales and use taxes. However, that collection obligation on the part of online sellers is based upon the U.S. Supreme Court's decision in S. Dakota v. Wayfair, 585 U.S. 162, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018) and the ensuing changes to West Virginia Code Section 11-15A-1 *et seq*. We need not delve too deeply into the statutory obligations of certain online retailers to collect and remit state sales and use taxes, precisely because the Petitioner in this matter is not bound by West Virginia Code Section 11-15A-1 *et seq.* Moreover, the addition of Section 4b to Article 17, Chapter 11 occurred in 2016, years before the Wayfair decision and the subsequent changes to West Virginia's sales and use tax statutes.[9]

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[9] The changes to West Virginia's sales and use tax statues in 2019, based upon the Wayfair decision created new nexus standards for online sellers (among others). If the Legislature had wished those nexus standards to apply to entities such as the Petitioner they could have legislated as such. *See e.g.* Appalachian Power Co. v. State Tax Dep't of W.

Despite our ruling regarding the Petitioner's legal duty to collect and remit, the facts in this matter clearly show that upon passage of the amendments to the PACT Act, the Petitioner voluntarily began to collect and remit West Virginia's vape/e-cigarette liquid excise taxes. As such, we must address the other area of disagreement between the parties, namely, how is the amount of tax calculated.

"On and after July 1, 2016, an excise tax is levied and imposed on sales of e-cigarette liquid at the rate of 7.5 cents per milliliter or fraction thereof, ..." W. Va. Code Ann. § 11-17-4b(b)(1) (West 2025). Here, the Petitioner argues that the math is simple, the tax for a 1.2 milliliter cartridge of vape/e-cigarette liquid would be 9 cents. The Petitioner calculates this as follows: 1 milliliter at 7.5 cents and the .2 milliliters at 1.5 cents, for a total of 9 cents. Simply put, the Petitioner argues that the fractions of a milliliter should be taxed in proportion to the whole 7.5 cents rate, or three quarters of a cent for each tenth of a milliliter. The Tax Commissioner argues that the language in Subdivision (1) above calls for "rounding up", meaning in our example above, the 1.2 milliliter sale would result in a tax amount of 15 cents.

Neither party was able to provide citation to a decision from the West Virginia Supreme Court of Appeals on this point, nor did this Tribunal also could not find such a decision. The Petitioner argues that to interpret Subdivision (1) in the way the Tax Commissioner seeks would create an absurd result. For his part, the Tax Commissioner simply makes an *ipso facto* argument, stating "[T]here is simply no other way to interpret that statute, than the rate of 7.5 cents applies to every ML, and any portion that is not a full ML." *See* Respondent's Reply Brief P10.

Virginia, 195 W. Va. 573, 585, 466 S.E.2d 424, 436 (1995)(The Legislature is presumed to have known and understood the laws they had earlier enacted).

As in so many cases, we must try and acertain what the Legislature intended when it promulgated Section 4b of Chapter 11, Article 17. Unfortunately, as stated above, due to the fact that there are no regulatory rules governing the sale of vape/e-cigarette liquid, our first avenue of statutory construction is unavailable. We are inclined to rule for the Petitioner on this point for three reasons. First, the Tax Commissioner offers no legal analysis whatsoever, including any response to the Petitioner's absurd result argument. Secondly, in its initial brief, the Petitioner provides a clear and cogent mathematical example of its absurd result concerns. It states that if two fictional companies both sold 100,000 units a year, but one company was selling 2 milliliter units, and the other was selling 1.1 milliliter units, under the Tax Commissioner's calculations both would owe $15,000 in excise taxes. However, under the Petitioner's calculations the company selling the smaller units would only owe $8,250. This Tribunal agrees that it is an absurd result for two Taxpayers, one selling 200,000 milliliters of vape/e-cigarette liquid and one selling 110,000 milliliters, to pay an identical amount of excise taxes.

Our belief that the Legislature did not intend for the 7.5 cent milliliter rate to be rounded up is bolstered by a review of the methodology utilized by other states.[10] The emphasized language

[10] *See e.g.* "There is imposed a tax upon the sale, use, or distribution of liquid nicotine within this State by a distributor or wholesaler to a retail dealer or consumer at the rate of $0.30 per fluid milliliter on the volume of the liquid nicotine as listed by the manufacturer, and **a proportionate rate on all fractional parts of a fluid milliliter** of volume of liquid nicotine as listed by the manufacturer." N.J. Stat. Ann. § 54:40B-3.2 (West 2025)(emphasis added); "(4) Effective January 1, 2025:(i) All vapor products other than those taxed under (a)(ii) of this subsection are taxed at a rate equal to twenty-seven cents per milliliter of solution, regardless of whether it contains nicotine, **and a proportionate tax at the like rate on all fractional parts of a milliliter** thereof." Wash. Rev. Code Ann. § 82.25.010 (West 2025)(emphasis added); "(c) The tax on an electronic nicotine delivery system containing three milliliters or less of consumable material shall be five cents per milliliter of consumable material **and a proportionate tax at the like rate on all fractional parts of a milliliter.**" Neb. Rev. Stat. Ann. § 77-4008 (West 2025)(emphasis added); "(a) On and after July 1, 2017, a tax is hereby imposed upon the privilege of selling or dealing in electronic cigarettes in this state by any person engaged in business as a distributor thereof, at the rate of $.05 per milliliter of consumable material for electronic cigarettes **and a proportionate tax at the like rate on all fractional parts thereof**." Kan. Stat. Ann. § 79-3399 (West 2025)(emphasis added); "An excise tax is imposed upon the sale, offering or exposing for sale, possession with intent to sell or removal for consumption or sale or other disposition for any purpose of vapor products by any person engaged as a distributor of them at the rate of 5 cents per milliliter of the liquid or other substance based

from the five states below helps persuade us that while West Virginia Code Section 11-17-4b does not contain the word "proportionate", nonetheless, the Legislature intended the vape/e-cigarette liquid excise tax to be calculated such that each tenth of a milliliter is taxed at a rate of three quarters of a cent.

Despite our rulings above, this matter cannot be resolved without a remand back to the parties for recalculation. This is necessitated by a variety of factors, first and foremost the fact that the Petitioner is voluntarily collecting and remitting the excise taxes from its West Virginia customers. However, the testimony and exhibits in this matter clearly create uncertainty that the Petitioner was actually correctly calculating the amount of tax due from its customers. Many of the invoices failed to accurately reflect what amount of milliliters were shipped, and in some instances how much tax was collected, or if any tax was collected. To be clear, we rule that if the Petitioner is going to voluntarily collect and remit the taxes at issue, it must do so consistent with West Virginia law, and this decision.[11] To allow otherwise would create an absurd result. Something the Petitioner, by its own admission, seeks to avoid. As such, by letter dated December 18, 2025, this Tribunal remanded the matter back to the Tax Commissioner, to allow a new audit to begin. During a status conference on January 21, 2026, counsel for the Tax Commissioner indicated that the Tax Commissioner was unwilling to conduct a new audit, but rather sought issuance of a final appealable order.

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on the volume as listed by the manufacturer **and at a proportionate rate for any other quantity or fractional part thereof**." Wis. Stat. Ann. § 139.76 (West 2025)(emphasis added).

[11] Obviously, this decision is appealable, and subject to reversal by a reviewing 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. On and after July 1, 2016, an excise tax is levied and imposed on sales of e-cigarette liquid at the rate of 7.5 cents per milliliter or fraction thereof, or if not sold, then at the same rate upon the use by the wholesaler or dealer. For purposes of this article, any distributor, dealer, subjobber, subjobber dealer, retailer or any other person that imports or transports e-cigarette liquids into this state, or that causes e-cigarette liquids to be imported or transported into this state, is hereby deemed to be a wholesaler for purposes of this section and is liable for the tax imposed under this article. W. Va. Code Ann. § 11-17-4b(b)(1) (West 2025).

3. Presumptive evidence The fact that any person ships or delivers for shipment any cigarettes or smokeless tobacco shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a)(1) of this section, be presumptive evidence that such cigarettes or smokeless tobacco were sold, or transferred for profit, by such person. . . . 15 U.S.C.A. § 376(b) (West 2025).

4. The presumptive evidence pursuant to Subsection (b) of Title 15, Section 375 of the U.S. Code, regarding sales of vape/e-cigarette liquids to any particular state, does not preempt any portion of West Virginia Code Section 11-17-4b.

5. It is the Petitioner's West Virginia customers that "cause", as that term is used in West Virginia Code Section 11-17-4b, vape/e-cigarette liquids to be imported or transported into this state. This causation occurs when the Petitioner's customers place orders online through the Petitioner's website or otherwise contact the Petitioner to place orders.

6. The West Virginia Supreme Court of Appeals has regularly cautioned against interpreting a statue in a manner that would lead to an absurd result. *See e.g.,* Dunlap v. Friedman's, Inc., 213 W.Va. 394, 582 S.E.2d 841 (W.Va. 2003).

7. It would create an absurd result to interpret West Virginia Code Section 11-17-4b in such a way that two vape/e-cigarette liquid sellers, one who sells 200,000 milliliters to a customer in West Virginia and one who sells 110,000 milliliters to a customer in West Virginia both need to collect the same amount of vape/e-cigarette liquid excise taxes.

8. It is persuasive that five other states also calculate their vape/e-cigarette liquid excise taxes to account for sales of fractional amounts, and when they do so, they do not "round up" but rather clearly state that the amounts due on the fractional sales should be proportionate to the rate due on whole milliliters.

9. 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. §§ 121-1-37.5 (2023).

10. As to the period of the assessment prior to March of 2021, the Petitioner has met its burden of showing that the assessment against it is erroneous.

11. As to the period of the assessment from March 2021 to June 2023, the Petitioner has met its burden of showing that to the extent the assessment establishes the Petitioner's legal duty to collect and remit vape/e-cigarette liquid excise taxes, the assessment is erroneous.

12. It would create an absurd result to allow the Petitioner to voluntarily collect and remit the vape/e-cigarette liquid excise taxes from its customers, in a manner inconsistent with West Virginia law and this decision.

13. The Petitioner has not met its burden of showing that the portion of the assessment attributable to its lax record keeping is erroneous.

14. In determining the outcome of a case, the office of tax appeals may affirm, reverse, modify or vacate an assessment of tax; may order the payment of or deny a refund, in whole or part; may authorize or deny a credit, in whole or part; or may grant other relief necessary or appropriate to dispose of the matter. W. Va. Code Ann. § 11-10A-12 (West 2025).

15. Based upon the findings of fact and conclusions of law above, the assessment at issue requires modification, which requires remand back to the parties.

DISPOSITION

Based upon the foregoing, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the Tax Commissioner's June 4, 2024, Assessment against the Petitioner for a total assessed tax liability of $2,209,832.53 is hereby **VACATED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

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

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Date