

SYNOPSIS

BUSINESS FRANCHISE TAX – IMPOSITION OF TAX – In accordance with West Virginia Code Section 11-23-6(a) the annual business franchise tax is imposed on the privilege of doing business in this state and is collected on every domestic corporation, every corporation having a commercial domicile in this state and every foreign or domestic corporation owning or leasing real or tangible personal property or doing business in this state.

BUSINESS FRANCHISE TAX – DEFINITION OF DOING BUSINESS – The term “doing business” in West Virginia Code Section 11-23-3(b)(8) means any activity of a corporation enjoying the benefits and protection of the government and laws of this state, except the activity of agriculture and farming, meaning the production of food, fiber and woodland products by means of cultivation, tillage of the soil and all related farm practices occurring on not less than five acres of land used in the production of said activities resulting in the production of at least one thousand dollars of products per annum through the conduct of such business activities as set forth in section ten, article one-a, chapter eleven of this code.

BUSINESS FRANCHISE TAX – EXEMPTION FOR AGRICULTURE AND FARMING – Pursuant to West Virginia Code Section 11-23-7(h) the business franchise exemption is applicable to any corporation or partnership engaged in the activity of agriculture and farming, as defined in Subdivision 8, Subsection (b), Section Three of Article 23.

BUSINESS FRANCHISE TAX – EXEMPTIONS FROM TAXATION – Exemptions from taxation are strictly construed against the person making the claim for exemption. *See* Syllabus Point 4, *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20 488 S.E. 2d 20 (1997); and *Davis Memorial Hospital v. W. Va. Tax Commissioner*, 222 W. Va. 677, 671 S.E. 2d 682 (2008).

BUSINESS FRANCHISE TAX – THE OWNER OF THE PROPERTY AND THE TENANT OF THE PROPERTY ARE SEPARATE PERSONS UNDER THE BUSINESS FRANCHISE TAX STATUTE – Because Petitioner’s principal business activity is the ownership of the property and not the activity of farming Petitioner is not exempt from the business franchise tax due to the fact that it alone, did not produce, on more than five acres of land, at least one thousand dollars of products per annum. *See* again W. Va. Code Ann. §11-1A-10(b) (West 2010).

The Internal Auditing “Division” of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) conducted an examination of Petitioner’s (hereafter also referred to as Petitioner) 2007 West Virginia Income/Business Franchise Tax Return for S Corporation and Partnership. Thereafter, on April 6, 2009, the then Director of this “Division” of the Respondent State Tax Commissioner’s Office issued an assessment of business franchise tax against Petitioner for the period of January 1, 2007 through December 31, 2007. The assessment

was issued pursuant to the provisions of Chapter 11, Articles 10, 21 and 23 of the West Virginia Code, and was for tax of \$____, interest of \$____ and additions to tax of \$____, for a total assessed tax liability of \$_____.

Written notice of the assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked May 26, 2009, Petitioner 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) and 11-10A-9 (West 2010).

Subsequently, with the concurrence of this Tribunal, the parties agreed to forego an evidentiary hearing in person and, instead, agreed to submit this matter for a decision based upon joint stipulations of facts, designated exhibits, an affidavit in lieu of testimony and briefs.

JOINT STIPULATION OF FACTS

By deed dated July 31, 2006, Petitioner acquired title to an approximate 235 acre tract of real estate (the "Property"). The Property consists of orchard land (the orchards are no longer commercially productive), a former farm laborer "labor camp," and shop area that is situated on approximately one-half to one acre of the Property, and farm land. Petitioner was specifically formed to hold title to the subject Property. The Property is owned by, and constitutes the sole asset of, Petitioner.

Petitioner and its predecessor in title, namely Corporation A both entered into verbal leases with Ms. A, individually and dba Ms. A's Orchard, to allow her to use the subject Property for agricultural and horticultural purposes. Ms. A pays no monetary consideration to Petitioner under the subject verbal lease arrangement. Ms. A also leases from third parties other properties under a similar arrangement, but those properties are not at issue herein.

Ms. A does regularly mow the shop and camp area through the spring, summer, and fall; bush-hogs the orchard areas 3 or 4 times per year; monitors the Property (and has also helped

prosecute a person or persons who were illegally dumping trash on the Property); and “posts” the Property against trespassing and hunting each fall. Ms. A’s services exceeds the value of One Thousand Dollars per annum (the mowing, alone, equals at least \$2,800.00 of value per year).

In addition, Ms. A grows certain crops including sweet corn, field corn, and soy beans; and further she also mows the meadows and orchard grasses for the purposes of making hay. Ms. A’s testimony would be that she uses more than five (5) acres (she indicates she uses approximately 234 acres) of the Property for agricultural and horticultural purposes, and that she further has production of more than One Thousand Dollars of products (corn, beans, hay) per annum from this subject Property through her use of the subject Property, pursuant to the aforesaid verbal lease arrangement.

Ms. A incurs and pays any and all costs and expenses of any kind or nature whatsoever (including labor costs) related to her agricultural and horticultural use of the subject Property. She further claims and reports on her own personal income tax return any and all revenue or income, as well as, any and all gross receipts derived from her transactions and activity in the regular course of her trade or business in West Virginia; which are received from her agricultural and horticultural activities from any crops, etc. produced, harvested, and/or sold from the subject Property.

Petitioner and Ms. A do not exchange or provide to the other any income tax documents of any kind or nature whatsoever.

Ms. A is not an owner, member, manager, stockholder, shareholder, director, or employee of Petitioner.

Ms. A, as agent for and on behalf of Petitioner and its predecessor in title as owner of the Property, has filed for, and has been granted, Farm Use status for ad valorem taxes for real property, for the Property by the Berkeley County Real Estate Assessment Office for tax years

2006, 2007, 2009, 2010, and 2011. Such Applications have been filed with the Berkeley County Real Estate Assessment Office on such Office's "WEST VIRGINIA STATE FARM CENSUS and FARM USE VALUATION APPLICATION" forms by Ms. A as the "Applicant" and the "Operator."

The Property has been, and is, utilized for the activity of agriculture and farming.

DISCUSSION

The sole issue for determination is whether Petitioner is entitled to claim an exemption from the business franchise tax because its tenant, Ms. A, with whom it has entered into verbal leases, is allowed to use and does use Petitioner's property for agricultural and farming purposes.

Based upon the applicable statutes and the law our finding is no.

The starting point is West Virginia Code Section 11-23-6(a) which provides for the imposition of a Business Franchise Tax. This code section states that:

- (a) *General.* -- An annual business franchise tax is hereby imposed on the privilege of doing business in this state and in respect of the benefits and protection conferred. Such tax shall be collected from every domestic corporation, every corporation having its commercial domicile in this state, every foreign or domestic corporation owning or leasing real or tangible personal property located in this state or doing business in this state and from every partnership owning or leasing real or tangible personal property located in this state or doing business in this state effective on and after the first day of July, one thousand nine hundred eighty-seven.

W. Va. Code Ann. § 11-23-6(a) (West 2010).

West Virginia Code Section 11-23-7(h) provides for an exemption from the business franchise tax for any corporation or partnership engaged in the activity of agriculture and farming as defined in Article 23, Section 3 of West Virginia's tax code. Section 3 of Article 23 defines the activity of agriculture and farming as:

Doing business. -- The term "doing business" means any activity of a corporation or partnership which enjoys the benefits and protection of the government and laws of this state, except the activity of agriculture and farming, which shall mean the production of food, fiber and woodland products (but not timbering activity) by means of cultivation, tillage of the soil and by the conduct of animal, livestock,

dairy, apiary, equine or poultry husbandry, horticulture, or any other plant or animal production and all farm practices related, usual or incidental thereto, including the storage, packing, shipping and marketing, but not including any manufacturing, milling or processing of such products by persons other than the producer thereof.

The activity of agriculture and farming shall mean such activity, as above defined, occurring on not less than five acres of land and the improvements thereon, used in the production of the aforementioned activities, and shall mean the production of at least one thousand dollars of products per annum through the conduct of such principal business activities as set forth in section ten, article one-a, chapter eleven of this code.

W. Va. Code Ann. § 11-23-3(b)(8) (West 2010).

Petitioner's disqualification is because the activity of agriculture and farming in 3(b)(8) unequivocally states "...and shall mean the production of at least one thousand dollars of products per annum through the conduct of such principal business activities as set forth in section ten, article one-a, chapter eleven of this code."¹ Petitioner, in its opening brief makes mention that, "The only activity Petitioner conducts in its business is the ownership of the property through Ms. A, Petitioner's tenant and agent." See Petitioner's Opening Brief, p. 6. It is undisputed that the only one doing the farming is the tenant, Ms. A, (not the Petitioner) and therefore, Petitioner is not the one producing at least one thousand dollars of products per annum through the conduct of such principal business activities.

It is well settled that exemptions from taxation are strictly construed against the person making the claim for exemption. See Syllabus Point 4, *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 488 S.E. 2d 20 (1997); and *Davis Memorial Hospital v. W. Va. Tax Commissioner*, 222 W. Va. 677, 671 SE 2d 682 (2008). While the Petitioner argues that Ms. A's activities should inure to its benefit, it offers no authority to support this proposition. We cannot therefore modify the statute to allow the Petitioner to meet the \$1,000.00 test by boot strapping Ms. A's sales of

¹ Although 3(b)(a) references principal business activities as set forth in section ten, article one-a, chapter 11 of the code that section is not applicable to the Petitioner because Petitioner is a limited liability company and not a corporation.

\$1,000.00 per year from the property over to Petitioner. The tenant and the Petitioner are separate persons under the statute and each stands alone for business franchise tax purposes.

Petitioner also argues that *Morris v. Heartwood Forestland Fund LTD. Partnership* 2010 W. Va. Lexis 137 (November 18, 2010) entirely supports its position because Ms. A's "activities on and her management of the Property in her capacity as agent for Petitioner, constitutes Petitioner's own actions and redound to Petitioner's benefit in a similar management relationship as was the case in *Morris*." See Petitioner's Reply Brief p. 4. The Petitioner's reliance on *Heartwood* is misplaced. There, the Petitioner was actively engaged in the producing and sustaining of timber on the land and selling of harvest rights to the standing timber to third parties which was declared by the court to be the principal business activity of agriculture. This Petitioner is not engaged in the principal activity of farming other than to allow someone else to farm. As we said before, the exemption strictly construed pertains to the one actually doing the exempt principal business activity not someone else as its agent.

We also find that the fact that Ms. A, as agent for and on behalf of Petitioner has filed for and has reportedly been granted, "Farm Use Status" for ad valorem taxes for real property for the Property by the Berkeley County Real Estate Assessment Office is of no consequence. The test here is the activity of agriculture and farming by the corporation or partnership actually seeking the exemption, and not because the property was taxed as a farm. It should be noted that Petitioner has offered no authority for the proposition that how the county taxing authority designates property is determinative under West Virginia Code Sections 11-23-7(h) or 11-23-3(b)(8).

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

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. 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 him 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).
3. Article 23 imposes the “annual business franchise tax upon every domestic corporation, every corporation having its commercial domiciles in this state, every foreign or domestic corporation owning or leasing real or tangible personal property located in this state or doing business in this state....” W. Va. Code Ann. § 11-23-6(a) (West 2010).
4. The term “doing business” encompasses the activity of agriculture and farming if that activity occurs on more than five acres used in the production of at least one thousand dollars of products per annum through the conduct of such principal business activities as set forth in section ten, article one-a, chapter eleven of this code. *See* W. Va. Code Ann. § 11-23-3(b)(8) (West 2010).
5. Because Petitioner is not itself engaged in the business of farming as its principal business activity, nor alone produces any product of any kind from farming with a value of \$1,000.00 per year on more than five acres it is not exempt from the annual business franchise tax.
6. Exemptions from taxation are strictly construed against the person making the claim for exemption. *See* Syllabus Point 4, *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20,

488 S.E. 2d 20 (1997); and *Davis Memorial Hospital v. W. Va. Tax Commissioner*, 222 W. Va. 677, 671 S.E. 2d 682 (2008).

7. Inasmuch as Petitioner is not itself engaged in the business of farming as its principal activity the fact that its tenant is so engaged does not inure to the benefit of Petitioner so that Petitioner can claim the exemption from the business franchise tax.

8. Petitioner and its tenant are separate persons under the Article 23 of Chapter 11 of the West Virginia Code in that the exemption therein for agriculture and farming is applicable only to the one doing the farming (the tenant) and not the one who merely owns the land.

9. Petitioner did not show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid.

DISPOSITION

WHEREFORE, it is the FINAL DECISION of the West Virginia Office of Tax Appeals that the business franchise tax assessment issued against Petitioner for the period of January 1, 2007 through December 31, 2007, for tax in the amount of \$____, interest in the amount of \$____, and additions to tax in the amount of \$____ for a total tax liability of \$____, should be and is hereby **AFFIRMED**.

Interest continues to accrue on the unpaid tax until the liability is fully paid.