REDACTED DECISION – DOCKET NUMBER 12-340 CU - By A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED for DECISION on NOVEMBER 8, 2013 – DECISION ISSUED on MAY 7, 2014

SYNOPSIS

TAXATION
SUPERVISION
GENERAL DUTIES AND POWERS OF COMMISSIONER; APPRAISERS

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).

TAXATION
WEST VIRGINIA PROCEDURE AND ADMINISTRATION ACT
COLLECTION OF TAXES

"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).

TAXATION
CONSUMERS SALES AND SERVICE TAX
AMOUNT OF TAX; ALLOCATION OF TAX AND TRANSFERS

"For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the Tax Commissioner in accordance with the provisions of this article." W. Va. Code Ann. §11-15-3(a) (West 2010).

TAXATION
CONSUMERS SALES AND SERVICE TAX
EXEMPTIONS

There is an exemption from the tax in Section 3(a) for "[C]harges for memberships or services provided by health and fitness organizations relating to personalized fitness programs." W. Va. Code Ann. §11-15-9(a)(34) (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The rules of statutory construction do not require us to read West Virginia Code Section 11-15-9(a)(34) in *pari materia* with West Virginia Code Section 11-15-8 because the two statutes do not relate to the same subject matter, are not integral to each other, do not refer to each other and were not passed at the same time.

WEST VIRGINIA SUPREME COURT OF APPEALS
CASE LAW

"In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syllabus Point 2 Fountain Place Cinema 8, LLC v. Morris, 227 W. Va. 249, 707 S.E.2d 859 (2011).

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

"Personalized", as the term is used in West Virginia Code Section 11-15-9(a)(34) means "to design or tailor to meet an individual's specifications, needs, or preferences." Dictionary.com, http://dictionary.reference.com/browse/personalized?s=ts

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The Petitioner's fitness programs are personalized because they are tailored to each member's needs or preferences. Specifically, the Petitioner's employees regularly meet with each member in a one-on-one situation to establish and monitor various goals. Moreover, there was, and is, a member of the Petitioner's staff on hand during physical activity to monitor each member's progress, as well.

TAXATION
WEST VIRGINIA OFFICE OF TAX APPEALS
HEARING PROCEDURES

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 or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010) and W. Va. Code R. §121-1-63.1 (2003).

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The Petitioner has met its burden of showing that the assessments issued against it were erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On July 19, 2012, the Auditing Division of the West Virginia State Tax Commissioner's Office (Tax Commissioner or Respondent) issued two Notices of Assessment against the Petitioner. 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 first assessment was for sales tax for the period January 1, 2007, through June 30, 2008, for tax in the amount of $_____, and interest in the amount of $_____, for a total assessed liability of $_____. The second assessment was for combined sales and use tax for the period October 1, 2010 through April 30, 2012, for tax in the amount of $_____, and interest in the amount of $_____, for a total assessed liability of $_____. Oddly, the next day the Auditing Division issued a third assessment that almost covered the gap in time between the two assessments listed above. This assessment was also for combined sales and use tax and covered the period between July 1, 2008 and June 30, 2010.[1] This third assessment was for tax in the amount of $_____, and interest in the amount of $_____, for a total assessed liability of $_____. Thereafter, on September 14, 2012, the Petitioner timely filed with this Tribunal, a petition for reassessment.[2] An evidentiary hearing was held in this matter on July 23, 2013, at the conclusion of which, the parties filed legal briefs. The matter became ripe for a decision at the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Petitioner is a West Virginia limited liability company that operates fitness clubs.

2. During the time period at issue here, the Petitioner was a company franchisee, until September of 2010, when the company switched over to another fitness concept called Company A. Thereafter, the Petitioner owned two locations and was the franchisor for others throughout West Virginia.

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[1] The Petitioner was not assessed for sales and use tax for the period from July 1, 2010 to September 30, 2010, because of a gap in its operations.

[2] As will be discussed below, the Respondent argues that with regards to two of the three assessments, the Petition was not timely, because those two assessments were not attached, nor did the Petition mention them.

3. The franchisee business model involved signing up members who would then be measured and weighed. Membership afforded the members the opportunity to appear at the franchisee location for a workout on exercise equipment. The members were free to use the equipment on their own schedule. The workout consisted of a circuit of eight different machines. The first time a new member would work out, a franchisee employee would show the member how to use each machine. Thereafter, if a member needed help or assistance with the machines a franchisee employee was there to assist. A typical workout would involve using each machine once for a total period of exercise of about thirty minutes. Some members who had specific goals, such as toning arm muscles, would sometimes be directed by employees to use certain machines a second time during the workout period. Members would be re-measured and weighed once a month and at that time they would undergo a re-evaluation of their progress and goals with a franchisee employee.

4. The Company A model is very similar to the franchisee model, with the main difference being the absence of exercise machines. Instead of a circuit of machines, Company A members attend scheduled exercise classes. These classes have at least two Company A employees present, one to lead the class and one to observe and assist any member who appears to need extra attention.[3] During the time period in this matter, Company A offered approximately six to eight different exercise classes, with each class offering a distinct exercise regime. The other difference between the franchisee and Company A is that the latter has a diet component. Specifically, Company A members are provided with nutritional information and

[3] The testimony was that at certain times for certain classes there could be as many as four or five employees assisting with the classes. However, both parties seem to agree that every class would have a minimum of two employees.

the opportunity to attend weekly meetings regarding diet and nutrition. Company A members are also re-evaluated monthly regarding their progress towards their stated goals.

5. During an audit of the Petitioner's books and records, it was revealed that the Petitioner was not collecting sales tax on the memberships it was selling. That revelation led to the assessments in this matter.

DISCUSSION

Before we address the legal arguments regarding the merits of this matter, we will address the Tax Commissioner's reassertion of his argument against allowing the Petitioner to amend its July 19, 2012, Petition. This July Petition only referenced one of the three assessments issued against the Petitioner. Thereafter, the Petitioner filed a Motion to Amend in order to make the other two assessments part of this litigation. The Tax Commissioner opposed the Motion to Amend. This Tribunal granted the Petitioner's Motion to Amend and we do not feel the need to restate the entire argument between the parties here. Instead, we will incorporate, by reference, our December 7, 2012 Order Granting Petitioner's Motion to Amend Petition for Reassessment.

While we do not feel the need to restate the entire argument, we can summarize our ruling by stating that the Tax Commissioner seeks to have us rewrite West Virginia Code Section 11-10A-9 to add a jurisdictional requirement where none exists.[4] This Tribunal has always considered the timeliness requirement in Section 9 to be jurisdictional, but not the requirements

[4] Section 11-10A-9 states:(a) A proceeding before the Office of Tax Appeals appealing a tax assessment, a denial of a tax refund or credit or any other order of the Tax Commissioner, or requesting a hearing pursuant to the provisions of any article of this chapter which is administered pursuant to article ten of this chapter, shall be initiated by a person timely filing a written petition that succinctly states: (1) The nature of the case; (2) The facts on which the appeal is based; and (3) Each question presented for review by the Office of Tax Appeals. W. Va. Code Ann. §11-10A-9(a) (West 2010)

regarding the contents of the Petition. We should add that the overall nature of the Tax Commissioner's argument is completely at odds with the position he (and his predecessors) have taken in virtually all proceedings before the Office of Tax Appeals. In any given year, the Office of Tax Appeals receives between four and five hundred appeals. The majority of these appeals are from *pro se* Taxpayers. Much of the time, perhaps even a majority of the time, these Petitions do not come close to comporting with the requirements of Section 9(a), in that they do not state the nature of the case, the facts upon which the appeal is based or identify each question presented for review. In fact, the Petition for Reassessment form, used by the Office of Tax Appeals, and contained on its website, does not even have a section for Petitioners to identify each question presented for review. Much of the time this Tribunal receives what you would expect to receive from *pro se* litigants who are unsophisticated in financial or tax matters, namely handwritten plaintive pleas, expressing confusion as to what the Tax Commissioner has done, and what needs to be done to remedy it. This confusion is evidenced by the fact that many of the Petitions we receive are addressed to the Tax Commissioner or other Tax Department employees, but sent to the Office of Tax Appeals. None of these Petitioners have read West Virginia Code Section 11-10A-9(a) and have no idea of its requirements. This Tribunal has traditionally allowed cases such as those to proceed, with nary a complaint from this Tax Commissioner or any of his predecessors.[5] To switch gears now, would, hold this Taxpayer to a different standard than others with cases before us. Second, it would make the requirements of Section 9(a) jurisdictional, resulting in the dismissal of a large percentage of future Petitions for their failure to follow those directives. We are of the opinion that neither the Legislature, the West Virginia Supreme Court of Appeals nor the Governor would find this a palatable option. Nor do we believe that the Legislature intended a poorly

[5] Within the last two years the Tax Commissioner has filed one motion to dismiss, which was based upon the Petitioner's failure to attach a copy of the assessment at issue.

filled out Petition to be a jurisdictional bar. Finally, the Tax Commissioner has presented us with no authority for the proposition that the petition contents requirement is jurisdictional. As a result, until directed otherwise by the West Virginia Supreme Court, this Tribunal will continue **(on a case by case basis)** to allow cases to proceed as long as Petitioners get something here in writing within sixty days of an adverse action by the Tax Commissioner. This does not mean that this Tribunal will never entertain a motion to dismiss, just that it will continue to operate as it has in the past.

Regarding the law of this matter, it is clear that, "For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser, the tax as provided under this article, and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article."[6] W. Va. Code Ann. §11-15-3(a) (West 2010). In this case, the Petitioner is claiming one of the exemptions from the requirements of Section 3(a), the one contained in West Virginia Code Section 11-15-9(a)(34) which provides an exemption for "[C]harges for memberships or services provided by health and fitness organizations relating to personalized fitness programs." W. Va. Code Ann. §11-15-9(a)(34) (West 2010). The Tax Commissioner, on the other hand, wants this Tribunal to view this matter differently, as if the Petitioner was seeking an exemption for providing a personal service pursuant to West Virginia Code Section 11-15-8.[7] The Tax Commissioner argues as such because when the Petitioner's businesses were audited, the auditor, his supervisor, and members

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[6] Vendor means "any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property." W. Va. Code Ann. §11-15-2(z) (West 2010). The amount of consumers sales and service tax is "six cents on the dollar of sales or services, excluding gasoline and special fuels, which remain taxable at the rate of five cents on the dollar of sales." W. Va. Code Ann. §11-15-3(b) (West 2010).

[7] West Virginia Code Section 11-15-8 states: "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, and except those services furnished by businesses subject to the control of the public service commission when the service or the manner in which it is delivered is subject to regulation by the public service commission." W. Va. Code Ann. §11-15-8 (West 2014).

of the Tax Commissioner's legal division relied on the regulations that inform 11-15-8. These regulations discuss under what circumstances a personal physical fitness program will qualify as a personal service. *See* W. Va. Code R. §110-15-8.1.2.3 (1993) (The issue as to whether a program qualifies as a personal service will be determined by the nature of physical contact, the degree and level of individual supervision, and the degree to which the program is tailored to the requirements of the individual participant.) At the briefing stage in this matter the Tax Commissioner's argument continued this theme, namely that because "personalized fitness programs" is not defined, we must use Section 8.1.2.3 for guidance. The Petitioner argues that the rules of statutory construction simply require us to give the phrase its common, ordinary and excepted meaning.

We are inclined to agree with the Petitioner on this point. The Tax Commissioner's only authority for the proposition that we must look to Section 8.1.2.3 for guidance is the case of Fisher v. Reamer, a 1961 decision from the West Virginia Supreme Court of Appeals. The Tax Commissioner cites Fisher as standing for the proposition that statutes relating to the same subject, whether enacted at the same time or different times, must be read and construed together. While the Tax Commissioner does not mischaracterize the Fisher decision, since that time the West Virginia Court has, on numerous occasions, elaborated the rule of statutory construction regarding statutes being in *pari materia.* As recently as last year, the Court clarified that the rule is most applicable to statutes that refer to each other. *See* Johnson v. Kirby, 230 W. Va. 432, 739 S.E.2d 283 (2013). In Johnson, the Court cited to Manchin v. Dunfee, a 1984 West Virginia Supreme Court case which discussed the rule at length.

> Furthermore, to say that because several statutes relate to the same subject, they must always be read in *pari materia* is an oversimplification of the rule. First, it is apparent that what is

> meant by statutes relating to the same subject matter is an inquiry that is answered by how broadly one defines the phrase "same subject matter." Second, the application of the rule of in *pari materia* may vary depending on how integral the statutes are to each other. The rule is most applicable to those statutes relating to the same subject matter which are passed at the same time or refer to each other or amend each other. A diminished applicability may be found where statutes are self-contained and have been enacted at different periods of time

Manchin v. Dunfee, 174 W. Va. 532, 536, 327 S.E.2d 710, 714 (1984). Based upon this language, we rule that West Virginia Code Sections 11-15-8 and 11-15-9(a)(34) do not relate to the same subject matter, are not integral to each other, do not refer to each other and were not passed at the same time. No matter how broadly one were to read the two statutes, it is clear that Section 8 seeks to include all services (with an exception for professional and personal services) in the consumers sales and service tax. Subsection 9(a)(34), on the other hand, is a narrow, specific exemption from the consumers sales and service tax. In fact, the exception for professional and personal services in Section 8 is so broad, and undefined, that the Tax Commissioner has promulgated regulations to define and explain what is and is not a personal service. We should note that despite the fact that those regulations discuss personal physical fitness programs, they are not defining or explaining what is or is not a "personalized fitness program" pursuant to Subsection 9(a)(34).

We still must answer the ultimate questions before us, is the Petitioner entitled to the exemption contained in Subsection 9(a)(34)? It is obvious, from the testimony and the briefs of the parties, that the only word the parties are arguing about, and therefore that we must construe, is "personalized". It is equally obvious that the Tax Commissioner's reliance on the consumers sales and use tax regulations is because he believes that the services provided by the Petitioner are not "personal" enough. If we distill the Tax Commissioner's argument to its base element,

he argues that the Petitioner should not prevail because it is not providing personal trainers, of the type who would accompany a member to and from each piece of gym equipment and exhort them to "give me two more pull ups."

> **ATTORNEY RODAK:** Just to summarize, why is it you concluded that this petitioner does not provide personal services? I mean where did they fail to meet the test?
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> **MR. HUNT:** Well, the nature of physical contact and the one-on-one --- there's a lack of --- the ratio is not ---. You know, when there's two or even if there's five and you've got 25, it's not necessarily a ---. If that's the classes that you're offering, we didn't --- it's not considered a personal one-on-one.

See Transcript p. 105.

However, as stated above, we are not determining if the Petitioner is providing a personal service, but rather, is it entitled to the exemption in West Virginia Code Section 11-15-9(a)(34). Because the terms in Subsection 9(a)(34) are not defined, we must take them at their plain and ordinary meaning. *See* Syllabus Point 2 Fountain Place Cinema 8, LLC v. Morris, 227 W. Va. 249, 707 S.E.2d 859 (2011). ("In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.")

If we take the word "personalized" at its common ordinary meaning the Petitioner must prevail. "Personalize, to design or tailor to meet an individual's specifications, needs, or preferences." Dictionary.com, http://dictionary.reference.com/browse/personalized?s=ts. This is precisely what the Petitioner does with its members. Specifically, it meets with them at the outset to tailor a fitness program to meet their needs, whether those needs are weight loss, toning of the muscles, general fitness or otherwise. The Petitioner will also tailor a diet for its members. After the initial sign-up, the Petitioner's employees meet with the members monthly to weigh

them and to modify (if necessary) these personalized programs and diets. Finally, during the workout sessions at the franchisee and during the classes at Company A there is always at least one employee of the Petitioner ready and able to give personal assistance, if needed. In fact, the testimony was that during Company A classes, the observer employee (as opposed to the class leader) will sometimes offer unsolicited advice and assistance if they see that the member is having trouble with the movements being taught. The testimony in this matter, which was unrebutted, paints a picture of the Petitioner as deliberately seeking a business model, under which the one-on-one interaction is part of the service being offered. This scenario is quite different than a typical gym membership, whereby a member can show up and exercise without any interaction from the gym staff. The Tax Commissioner might well argue that it is possible to partake of the Petitioner's services without any interaction from its employees, and this is true, although from the totality of the evidence it seems that a member would have to go out of their way to avoid one-on-one interaction, particularly because members are weighed monthly. However, the possibility of ignoring the personalized nature of membership does not negate the fact that the Petitioner is offering a personalized fitness program.

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. "For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the Tax Commissioner in accordance with the provisions of this article." W. Va. Code Ann. §11-15-3(a) (West 2010).

4. There is an exemption from the tax in Section 3(a) for "[C]harges for memberships or services provided by health and fitness organizations relating to personalized fitness programs." W. Va. Code Ann. §11-15-9(a)(34) (West 2010).

5. The rules of statutory construction do not require us to read West Virginia Code Section 11-15-9(a)(34) in *pari materia* with West Virginia Code Section 11-15-8 because the two statutes do not relate to the same subject matter, are not integral to each other, do not refer to each other and were not passed at the same time.

6. "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syllabus Point 2 Fountain Place Cinema 8, LLC v. Morris, 227 W. Va. 249, 707 S.E.2d 859 (2011).

7. "Personalized", as the term is used in West Virginia Code Section 11-15-9(a)(34) means "to design or tailor to meet an individual's specifications, needs, or preferences." Dictionary.com, http://dictionary.reference.com/browse/personalized?s=ts

8. The Petitioner's fitness programs are personalized because they are tailored to each member's needs or preferences. Specifically, the Petitioner's employees regularly meet with each member in a one-on-one situation to establish and monitor various goals. Moreover, there was, and is a member of the Petitioner's staff on hand during physical activity to monitor each member's progress.

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 or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010) and W. Va. Code R. §121-1-63.1 (2003).

10. The Petitioner has met its burden of showing that the assessments issued against it were erroneous, unlawful, void or otherwise invalid.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the following assessments are hereby **VACATED**:

1. Sales tax, issued on July 19, 2012, for the period January 1, 2007, through June 30, 2008, for tax in the amount of $_____, and interest in the amount of $_____, for a total assessed liability of $_____.

2. Combined sales and use tax, issued on July 19, 2012, for the period October 1, 2010 through April 30, 2012, for tax in the amount of $_____, and interest in the amount of $_____, for a total assessed liability of $_____.

3. Combined sales and use tax, issued on July 20, 2012, for the period between July 1, 2008 and June 30, 2010, for tax in the amount of $_____, and interest in the amount of $_____, for a total assessed liability of $_____.

WEST VIRGINIA OFFICE OF TAX APPEALS

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

Date Entered