REDACTED DECISION – DOCKET NUMBER 12-247 PT, 12-308 RP-M - By A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED for DECISION on JANUARY 27, 2014 – DECISION ISSUED on JULY 28, 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
ALTERNATIVE-FUEL MOTOR VEHICLES TAX CREDIT
ELIGIBILITY FOR CREDIT

"A taxpayer is eligible to claim the credit against tax provided in this article if he or she: (c) Constructs or purchases and installs qualified alternative fuel vehicle refueling infrastructure or qualified alternative fuel vehicle home refueling infrastructure that is capable of dispensing alternative fuel for alternative-fuel motor vehicles." W. Va. Code Ann. §11-6D-4(c) (West 2012).

TAXATION
ALTERNATIVE-FUEL MOTOR VEHICLES TAX CREDIT
DEFINITIONS

"Qualified alternative fuel vehicle refueling infrastructure" means property owned by the applicant for the tax credit and used for storing alternative fuels and for dispensing such alternative fuels into fuel tanks of motor vehicles, including, but not limited to, compression equipment, storage tanks and dispensing units for alternative fuel at the point where the fuel is delivered: *Provided*, That the property is installed and located in this state and is not located on a private residence or private home." W. Va. Code Ann. §11-6D-2(e) (West 2012).

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The definition of qualified alternative fuel vehicle home refueling infrastructure contained in West Virginia Code Section 11-6D-2(e) is clear and unambiguous.

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

None of the equipment installed at Petitioner A's company., "stores" electricity nor does it dispense anything into "fuel tanks", as those terms are used in West Virginia Code Section 11-6D-2(e).

WEST VIRGINIA SUPREME COURT OF APPEALS
CASE LAW

"In recognition of the heavy burden bourne by one seeking to estop the government, courts have held that the doctrine of estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent." Hudkins v. State Consol. Pub. Ret. Bd., 220 W. Va. 275, 280, 647 S.E.2d 711, 716 (2007).

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The Petitioners have not shown affirmative misconduct or wrongful conduct on the part of any Tax Department employee.

TAXATION

WEST VIRGINIA OFFICE OF TAX APPEALS
HEARING PROCEDURES

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

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The Petitioners have not met their burden of showing that the Tax Commissioner should be equitably estopped from denying the Alternative-Fuel Motor Vehicle Tax Credit they requested.

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The Petitioners have not met their burden of showing that the Tax Commissioner's denial of that portion of the requested tax credit relating to property that dispenses alternative fuels into the fuel tanks of motor vehicles was contrary to West Virginia law, clearly wrong or arbitrary and capricious.

FINAL DECISION

On May 14, 2012, the Taxpayer Services Division of the West Virginia State Tax Commissioner's Office (Tax Commissioner or Respondent) issued a return change letter to the Petitioner A, a WV Corporation. This return change did two things, it put the Petitioner A on notice that the Alternative Fuel Tax Credit it sought for tax year 2011 had been denied, and reinstated a business franchise tax due in the amount of $_____. Thereafter, on July 5, 2012, the Compliance Division of the Tax Department issued an assessment against the Petitioner A for tax in the amount of $_____, interest in the amount of $_____ and additions to tax in the

amount of $_____, for a total assessed liability of $_____. The Respondent issued a return change letter to Petitioners Mr. and Mrs. B on June 15, 2012. This letter modified their tax refund amount for tax year 2011 from $_____ to $_____.[1] This return change was related to the denial of the tax credit sought by Petitioner A. Petitioners B were part owners of Petitioner A, an S corporation. As a result of their ownership in a pass through entity, they had sought to apply a portion of the tax credit sought by the S corp to their personal income tax obligations for tax year 2011.[2] The Tax Commissioner seems to implicitly agree that if Petitioner A is entitled to the requested tax credit, so are Petitioners B.

Thereafter, on July 9, 2012, the Petitioner A filed a petition of appeal with this Tribunal, the West Virginia Office of Tax Appeals. *See* W. Va. Code Ann. §§11-10A-8(1); 11-10A-9 (West 2010). Petitioners B filed their appeal on August 20, 2012.[3]

Subsequently, notice of a hearing on the petitions was sent to the Petitioners, and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10, after 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 A. operates a business located in a West Virginia County.

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[1] The Petitioners did not introduce Petitioners B return change letter into evidence until a few days prior to the issuance of this decision. As a result, there is no mention of this document in the official transcript of this matter. Even so, we have added it to the exhibits in this matter and marked it as Petitioner's Exhibit 1.

[2] Despite the fact that Petitioner A is an S corp, and thus its income passes through to its owners, it still owes business franchise tax to West Virginia. It is this tax obligation that it sought to apply the tax credit against. The individuals sought to apply the credit to that portion of the income of the corporation that flowed to them. "When the taxpayer is a pass-through entity treated like a partnership for federal and state income tax purposes, the credit allowed under this article for the year shall flow through to the equity owners of the pass-through entity in the same manner that distributive share flows through to the equity owners and in accordance with any legislative rule the Tax Commissioner may propose for legislative approval in accordance with article three, chapter twenty-nine-a of this code to administer this section." W. Va. Code Ann. §11-6D-6(f) (West 2012).

[3] Because the facts and law are the same for all three Petitioners, we will generally refer to them as "Petitioners".

2. In 2011, Petitioner A installed a 25.3 kilowatt roof mounted solar array consisting of 108 235-watt panels and 3800 inverters and four Schneider EV charging stations. The total cost of the installation was $172,280.

3. That installation led Petitioner A to file for an alternative fuel tax credit in the amount of $_____ for tax year 2011, an amount equal to its business franchise tax liability for that year.[4]

4. As part owners of Petitioner A, an S Corporation, Petitioners B also filed for alternative fuel tax credits on their personal income taxes for tax year 2011.

5. As stated above, the Tax Commissioner issued return change letters to all the Petitioners, informing them that the requested tax credit had been denied.

DISCUSSION

Before we apply the controlling law to the facts in this matter, another argument raised by the Petitioners must be addressed. The Petitioners in this matter are part of a group of ten individuals and businesses who all had their solar installations done by the same company. That company was working in conjunction with an accounting firm to ascertain if the alternative fuel tax credit would apply to what they proposed to do, namely install a system like the one in this case. It appears from the record that there were two main questions to be answered. First, whether the solar panels would be considered part of "qualified alternative fuel vehicle refueling infrastructure" as that term is defined in West Virginia Code Section 11-6D-2.[5] The second concern was, could the electricity gathered by the solar panels be stored in "the grid" as opposed to at the applicant's location.

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[4] The record is unclear as to why the return change and the assessment issued by the Tax Commissioner indicated that Petitioner A's business franchise tax due was in the amount of $_____. Nonetheless, that is the amount assessed against A and the amount appealed.

[5] The solar panels are far and away the most expensive part of the installations at issue. However, the record is clear that the discussions involved the entirety of the systems that were to be installed.

Both an accountant from the firm and representatives of the solar energy company communicated with representatives of the Tax Department over a period of months beginning in August of 2011 and on into 2012. The point of these communications was, as discussed above, to understand how the tax credit would or could apply to customers of the accounting firm/solar energy company. The key fact regarding these discussions is that they were one way, meaning the record in this case is replete with documents and testimony as to how the accountant called and emailed the Tax Department regarding clarification. On the other hand, the record contains only one writing received from the Tax Department, an email dated March 19, 2012. Attached to this email were proposed interpretive rules regarding the fuel tax credits. These rules had not been released for public comment; however, they did indicate that solar panels would be considered part of the eligible infrastructure and that the electricity gathered could be stored in "the grid" as opposed to in the home or business of the applicant. These Petitioners and the other nine, argue that the upshot of this back and forth with the Tax Department led them to believe that their solar installations would qualify for the requested credit. At hearing, the vast majority of the testimony and the documents introduced revolved around the Petitioners' attempts to show the origins of their mistaken belief, and that the Tax Commissioner should consequently be equitably estopped from denying the requested tax credits.

The Petitioners rely on one case in their estoppel argument, Hudkins v. State Consol. Pub. Ret. Bd., 220 W. Va. 275, 647 S.E.2d 711, (2007). However, their reliance on Hudkins, is puzzling, because it states

> In recognition of the heavy burden bourne by one seeking to estop the government, courts have held that the doctrine of estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent Id, at 280, 716.

In this matter the Petitioners do not even meet the elements of regular equitable estoppel, let alone the more rigorous standard laid out by the Hudkins Court.[6] In their briefs, the Petitioners do not even attempt to argue that in the discussions back and forth, the Tax Department officials committed affirmative misconduct or wrongful conduct. The absence of this argument is presumably because the Tax Department employees were doing what one would expect, having polite discussions with people seeking guidance about how to interpret West Virginia's tax laws. Therefore, we cannot rule that the Petitioners have met their burden of showing that the Tax Commissioner should be equitably estopped from denying their requested tax credit.

As for the actual law of this matter, it is found in West Virginia Code Section 11-6D-1 *et seq.* "A taxpayer is eligible to claim the credit against tax provided in this article if he or she: (c) Constructs or purchases and installs qualified alternative fuel vehicle refueling infrastructure or qualified alternative fuel vehicle home refueling infrastructure that is capable of dispensing alternative fuel for alternative-fuel motor vehicles." W. Va. Code Ann. §11-6D-4(c) (West 2012)

As discussed above, the conflict in this matter involves the definition of "qualified alternative fuel vehicle refueling infrastructure" contained in West Virginia Code Section 11-6D-2.

> Qualified alternative fuel vehicle refueling infrastructure" means property owned by the applicant for the tax credit and used for storing alternative fuels and for dispensing such alternative fuels into fuel tanks of motor vehicles, including, but not limited to, compression equipment, storage tanks and dispensing units for alternative fuel at the point where the fuel is delivered: *Provided*, That the property is installed and located in this state and is not located on a private residence or private home.

W. Va. Code Ann. §11-6D-2(e) (West 2012).

[6] Even under the less rigorous standard of equitable estoppel the Petitioners fail on numerous fronts. For example they called no witnesses from the Tax Department. Therefore, their testimony about the purported misrepresentations is hearsay. They also offer no citation to any authority as to whether oral misrepresentations made to a third party can lead to a defense of equitable estoppel (The Petitioners never spoke directly to anyone at the Tax Department). Lastly, by their failure to establish if the installations occurred before or after the initial contact between the accountant and the Tax Department in August of 2011 the Petitioners never established that they acted upon these purported misrepresentations.

As stated above, this matter is one of ten similar cases. Of those, two (including this one) involve solar installations in businesses, and eight are installations in private homes. Section 6D contains two definitions, one defining what constitutes the infrastructure for homes and one for other locations such as businesses. The definition of home refueling infrastructure contains language not found in the other definition.

> "Qualified alternative fuel vehicle home refueling infrastructure" means property owned by the applicant for the tax credit located on a private residence or private home and used for storing alternative fuels and for dispensing such alternative fuels into fuel tanks of motor vehicles, including, but not limited to, compression equipment, storage tanks and dispensing units for alternative fuel at the point where the fuel is delivered or for providing electricity to plug-in hybrid electric vehicles or electric vehicles: *Provided*, That the property is installed and located in this state.

W. Va. Code Ann. §11-6D-2(f) (West 2012) (emphasis added).

The Tax Commissioner argues that one of the tools of interpreting a statute is the maxim *expressio unius est exclusio alterius* which translates to "the express mention of one thing implies the exclusion of another"[7]. Utilizing the maxim, the Tax Commissioner argues that if the Legislature wanted refueling infrastructure located in both home and businesses to include equipment for providing electricity to electric vehicles, it would not have needed two definitions. He further argues that the Legislature clearly did not intend for Taxpayers other than private home owners to be eligible for the credit for installation of equipment to charge electric vehicles.

We agree with the Tax Commissioner. It is hard to see what other intention the Legislature could have had in this instance. The two definitions are right next to each other in the Code, therefore the absence of the providing electricity to vehicles language in Subsection 2(e) is

[7] The West Virginia Supreme Court of Appeals has utilized the maxim on many occasions and it is considered a basic tool of statutory construction. *See e.g.* Kubican v. The Tavern, LLC, 232 W. Va. 268, 752 S.E.2d 299 (2013).

particularly striking.[8] The Petitioners, for their part, argue that Subsections 2(e) and (f) are mutually exclusive and clear and unambiguous. The Petitioners are correct. Despite the fact that the maxim *expressio unius est exclusio alterius* is an aide to statutory construction, we are not actually construing Subsection 2(e). Instead, we are reading two clear and unambiguous Subsections in *pari materia*. In reading a clear and unambiguous statute we must give the words it contains 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.") The plain and ordinary meaning of the words "store" and "fuel tanks" are fatal to the Petitioners' case because neither the solar panels, nor any of the other equipment installed at the distribution facility stores electricity, and it does not dispense anything into fuel tanks. In the eight related cases involving home installations the Tax Commissioner acknowledged that some of the equipment installed, namely the electric car charging units, would qualify for the tax credit. Here, reading Sections 11-6D-2(e) and (f) together makes it clear that the Tax Commissioner is correct; equipment for providing electricity to electric cars is only eligible for the credit when installed in a private home. As a result, we rule that Petitioner A has not installed "qualified alternative-fuel vehicle refueling infrastructure" as that term is defined in West Virginia Code Section 11-6D-2(e).

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).

[8] We should note that even if the two definitions were in entirely different volumes of the code and had been written at different times, the Legislature is still presumed to have known and understood the laws they had earlier enacted. *See* Appalachian Power Co. v. State Tax Dep't of W. Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995).

2. "A taxpayer is eligible to claim the credit against tax provided in this article if he or she: (c) Constructs or purchases and installs qualified alternative fuel vehicle refueling infrastructure or qualified alternative fuel vehicle home refueling infrastructure that is capable of dispensing alternative fuel for alternative-fuel motor vehicles." W. Va. Code Ann. §11-6D-4(c) (West 2012).

3. "Qualified alternative fuel vehicle refueling infrastructure" means property owned by the applicant for the tax credit and used for storing alternative fuels and for dispensing such alternative fuels into fuel tanks of motor vehicles, including, but not limited to, compression equipment, storage tanks and dispensing units for alternative fuel at the point where the fuel is delivered: *Provided*, That the property is installed and located in this state and is not located on a private residence or private home." W. Va. Code Ann. §11-6D-2(e) (West 2012).

4. The definition of qualified alternative fuel vehicle home refueling infrastructure contained in West Virginia Code Section 11-6D-2(e) is clear and unambiguous.

5. None of the equipment installed at Petitioner A, "stores" electricity nor does it dispense anything into "fuel tanks", as those terms are used in West Virginia Code Section 11-6D-2(e).

6. "In recognition of the heavy burden bourne by one seeking to estop the government, courts have held that the doctrine of estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent." Hudkins v. State Consol. Pub. Ret. Bd., 220 W. Va. 275, 280, 647 S.E.2d 711, 716 (2007).

7. The Petitioners have not shown affirmative misconduct or wrongful conduct on the part of any Tax Department employee.

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

9. The Petitioners have not met their burden of showing that the Tax Commissioner should be equitably estopped from denying the Alternative-Fuel Motor Vehicle Tax Credit they requested.

10. The Petitioners have not met their burden of showing that the Tax Commissioner's denial of that portion of the requested tax credit relating to property that dispenses alternative fuels into the fuel tanks of motor vehicles was contrary to West Virginia law, clearly wrong or arbitrary and capricious.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the July 5, 2012, assessment issued against Petitioner A, for a total assessed liability of $_____, and the June 15, 2012, return modification issued to Petitioners B are hereby **AFFIRMED.**

WEST VIRGINIA OFFICE OF TAX APPEALS

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

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Date Entered