

REDACTED DECISION – DK# 15-409 PD-M

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON DECEMBER 14, 2018
ISSUED ON JANUARY 17, 2019**

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

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On November 5, 2015, the Taxpayer Services Division of the West Virginia State Tax Department (hereinafter the “Tax Commissioner” or “Respondent”) issued three documents to the Petitioners. These documents contained the heading “THIS IS NOT A BILL”, and are colloquially known as return change letters. The documents concerned the Petitioners’ tax returns for tax years 2012 through 2014, and explained that the refund requests made by the Petitioners for these three years in question had been adjusted downward. Specifically, for tax year 2012, there was a downward adjustment of \$ _____, for tax year 2013 it was \$ _____ and for 2014 there was a downward adjustment of \$ _____. In contrast to most actions appealed to this Tribunal, such as assessments or refund denials, these documents contained no indication that the adjustments to the Petitioners’ returns were appealable actions, or information as to the Petitioners’ appeal rights. Despite this, the Petitioners did in fact make their way to this Tribunal within the sixty-day deadline contained in West Virginia Code Sections 11-10A-8(1) and 11-10A-9. Subsequently, notice of a hearing on the petition was sent to the Petitioners, and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.¹ During the

¹ The evidentiary hearing in this matter was conducted by Chief Administrative Law Judge Heather Harlan. Since the date of the hearing, Judge Harlan has resigned her position, and this decision was written by Chief Administrative Law Judge A.M. “Fenway” Pollack.

evidentiary hearing in this matter and in post hearing briefs, neither party presented any evidence or argument regarding what relief the Petitioners seek. During a post briefing status conference the Petitioners' counsel indicated that they seek to have the return changes overturned, but could not state what the practical effect would be. In other words, the record in this matter does not reflect if the Petitioners received the full refund they sought, and now the Tax Commissioner seeks to recoup those monies, or if the refunds they sought during the years in question were reduced (or a carry forward was reduced) and now the Petitioners seek those monies as a future refund. Because we are ruling for the Tax Commissioner in full, this omission is not determinative. However, if, in the future a higher court were to rule for the Petitioners, the matter would need to be remanded for further fact finding. Finally, counsel for the Tax Commissioner participated in the post briefing status conference, and obviously participated in the hearing in this matter and filed a post hearing brief. At no time did the Tax Commissioner advance any arguments regarding this Tribunal's jurisdiction to hear this matter, despite being given the opportunity to do so. Presumably, the Tax Commissioner has taken an appealable action, either by denying the Petitioners a refund or modifying a carryforward.

FINDINGS OF FACT²

1. The Petitioners are Resident Individuals, as that term is defined in West Virginia Code Section 11-21-7. As such, they pay West Virginia income taxes.
2. During his working career, Petitioner, Mr. A was a law enforcement officer in various capacities. TR P6 at 1-5.

² It should be noted that during the evidentiary hearing in this matter, there was no evidence presented regarding what transpired between the Petitioners and the Tax Department. As such, findings of fact number 5 is taken from the Respondent's post hearing brief. The Petitioners were afforded the opportunity to file a reply brief, and they did not do so, so this Tribunal presumes that they do not object to the Respondent's proposed findings of fact.

3. Mr. A was the Chief of Police in a city in West Virginia from approximately 2005 to 2012. TR P6 at 8-15.
4. After he retired as Chief of Police, Mr. A received a pension from the West Virginia Public Employees Retirement System. TR P9 at 1-9.
5. The Petitioners filed their West Virginia income taxes for tax years 2012 through 2014 in such a way as to subtract from their federal adjusted gross income the entirety of the pension Mr. A received.
6. These tax filings are what presumably led to the return change letters of November 2015.

DISCUSSION

This matter concerns a provision in West Virginia law which allows certain West Virginia residents to deduct from their federal adjusted gross income, all of the retirement income they receive from certain sources. Specifically, residents who receive retirement income from any West Virginia police or fireman's retirement system, one of two state police retirement funds or the deputy sheriff retirement system. *See* W. Va. Code Ann. § 11-21-12(c)(6) (West 2018). Mr. A does not receive retirement income from any of those sources.

Some history is necessary for clarity. In tax years 2010 and 2011 a retired federal marshal named James Dawson sought the same modification that Mr. A seeks. He too, received no retirement income from any of the sources mentioned in West Virginia Code Section 11-21-12(c)(6), and the Tax Commissioner also denied his request. His case proceeded from this Tribunal all the way to the United States Supreme Court of Appeals, where it is currently pending a decision. Without belaboring the point, the legal arguments in the Dawson case involve whether West Virginia Code Section 11-21-12(c)(6) violates

the doctrine of intergovernmental immunity, as codified in 4 U.S.C. 111, because it is alleged that subdivision (6) allegedly discriminates against certain federal employees. This Tribunal has many cases in abeyance, awaiting an answer to that question. As stated above, Mr. A is not a retired federal employee, therefore, the question currently pending before the U.S. Supreme Court does not concern him, and it seems fairly certain that its decision will not answer the question before us.

That brings us to the issue before this Tribunal, which, at its essence, is that it is unfair that Mr. A, a retired West Virginia law enforcement officer does not get the same modification to his retirement income that other retired West Virginia law enforcement officers get. Obviously, the Petitioners' arguments, as presented by counsel, are more elegant, and are predicated on a violation of the Petitioners' constitutional rights, specifically their right to equal protection under the laws.

What is missing from the Petitioners' argument is any mention of what errors the Tax Commissioner has made in regard to the Petitioners. The reason for this is because the Tax Commissioner has not made any errors. West Virginia Code Section 11-21-12(c)(6) allows certain individuals a tax break on their retirement income; Mr. A is not one of those individuals. Therefore, when the Tax Commissioner informs the Petitioners that they are not entitled to that modification, he is simply following the law as written. What is also missing from the Petitioners' post hearing briefs, is any citation to any legal authority that would allow the Tax Commissioner, when confronted with a situation such as this to say to the Taxpayer "you're right, this tax statute gives you a raw deal, so I'm going to fix things for you." The Petitioners cite no such authority, because obviously none

exists. The Tax Commissioner cannot rewrite the tax laws on a whim, based upon some vague standard of fairness.

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

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

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

Next we must ask, is declaring a statute unconstitutional a purely judicial act? The short answer is yes, and virtually every state court in the nation has, at some time in the past, clearly and cogently stated as such. *See e.g.* Gordon v. State by & through Capitol Bldg. Rehab., 2018 WY 32, 413 P.3d 1093 (Wyo. 2018) (Declaring the validity of statutes in relation to the constitution is a power vested in the courts); Gannon v. State, 305 Kan. 850, 390 P.3d 461 (2017) (the judiciary has the sole authority to determine whether an act of the legislature conforms to their supreme will, *i.e.*, is constitutional); Gen. Engines Co. v. Dir., Div. of Taxation, 23 N.J. Tax 515 (2007) (Division

of Taxation, as an administrative agency, has neither the responsibility, the authority, nor the jurisdiction to declare statutes unconstitutional).

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

In summation, Mr. A does not receive retirement income from any of the sources mentioned in West Virginia Code Section 11-21-12(c)(6). Therefore, the Tax Commissioner cannot have committed an error when he informed the Petitioners that they were not entitled to the requested modification. Nor can the Tax Commissioner or this Tribunal declare Section 11-21-12(c)(6) unconstitutional. Therefore, the Petitioners have not met their burden of showing that the Tax Commissioner’s actions in this matter were contrary to West Virginia law, clearly wrong or arbitrary and capricious.

There is one other matter to address. As discussed above, the modification the Petitioners seek is contained in West Virginia Code Section 11-21-12(c)(6), and if a taxpayer is eligible they

can deduct from their federal adjusted gross income **all** of the retirement income they receive from one of the enumerated retirement systems. However, directly above subdivision (6) is subdivision (5). This subdivision allows retirees who receive retirement income from the West Virginia Public Employees Retirement System (among others) to modify downward their federal adjusted gross income by the first two thousand dollars received. At the conclusion of the evidentiary hearing in this matter, counsel for the Petitioners indicated that the Petitioners **may** have been denied this two thousand dollar modification. Counsel for the Respondent indicated that if that had in fact happened, the Tax Commissioner would correct that mistake. By letter dated November 9, 2018, this Tribunal inquired of the parties as to the substance of this argument, and gave the parties a deadline to supplement the record with evidence of this possible error. The provided deadline has passed and the parties have failed to respond, and as such that argument is considered waived.

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. Resident individual means an individual: (1) Who is domiciled in this State, unless he maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this State W. Va. Code Ann. § 11-21-7 (West 2013).

4. The Petitioners are resident individuals, as that term is defined in West Virginia Code Section 11-21-7, and as such, they pay West Virginia taxes.
5. There shall be subtracted from federal adjusted gross income to the extent included therein:
... (6) Retirement income received in the form of pensions and annuities after December 31, 1979, under any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System, including any survivorship annuities derived from any of these programs, to the extent includable in gross income for federal income tax purposes. W. Va. Code Ann. § 11-21-12(c)(6) (West 2018).
6. The Tax Commissioner did not commit an error in denying the modification contained in West Virginia Code Section 11-21-12(c)(6) to the Petitioners, because the Petitioners do not receive retirement income from any of the sources discussed in the subdivision.
7. The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature. W. Va. Const. art. V, § 1.
8. As a part of the executive branch, neither the Tax Commissioner nor this Tribunal may perform a judicial act, and declaring a statute unconstitutional is a judicial act. *See e.g. State ex rel. State Bldg. Comm'n v. Bailey*, 151 W. Va. 79, 150 S.E.2d 449 (1966); *Rice v. Underwood*, 205 W. Va. 274, 517 S.E.2d 751 (1998). *See also Gordon v. State by & through Capitol Bldg. Rehab.*, 2018 WY 32, 413 P.3d 1093 (Wyo. 2018); *Gannon v. State*,

305 Kan. 850, 390 P.3d 461 (2017); Gen. Engines Co. v. Dir., Div. of Taxation, 23 N.J. Tax 515 (2007).

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 the actions taken by the Tax Commissioner are 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).
10. In this matter, the Petitioners have not met their burden of showing that the return changes issued against them for tax years 2012, 2013 and 2014, which reduced their refund requests were contrary to West Virginia law, clearly wrong or arbitrary and capricious.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the return change letter for 2012, with a downward adjustment of \$ _____, the return change letter for tax year 2013 with a downward adjustment of \$ _____ and the return change letter for tax year 2014 with a downward adjustment of \$ _____ should be and hereby are **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

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

Date Entered

