REDACTED DECISION – DK# 14-115 RP

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON July 19, 2016
ISSUED ON APRIL 23, 2018

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

By a letter issued on March 21, 2014, the Tax Account Administration Division of the West Virginia Tax Department informed the Petitioner[1] that the Alternative Fuel Tax Credit (hereinafter "AFTC") that she had claimed for tax years 2012 and 2013 had been denied. On the same date as this letter, the Taxpayer Services Division of the Tax Department issued a return change form, showing Petitioner the changes that were made to her 2013 personal income tax return. These changes were the result of the denial of the AFTC. On June 23, 2014, the Taxpayer Services Division issued an assessment against Petitioner for personal income tax for tax year 2012. The assessment was for tax in the amount of $_____, penalties and additions in the amount of $_____ and interest in the amount of $_____. The assessment also contained what it identified as a "supplemental assessment" of penalties and additions in the amount of $_____.[2] The total assessed liability of this June 23rd assessment was $_____. On August 20, 2014 the Taxpayer Services Division issued a second assessment against Petitioner for personal income tax for tax year 2013. This assessment was for tax in the amount of $_____,

[1] The Petitioner has since married, and her married name is _____.
[2] The Tax Commissioner presented no witnesses at the evidentiary hearing. As a result, the record is unclear regarding certain actions taken by the Tax Commissioner, such as the reason for this supplemental assessment.

penalties and additions in the amount of $_____ and interest in the amount of $_____, for a total assessed liability of $_____.

Thereafter, on April 10, 2014, the Petitioner timely filed with this Tribunal, a petition for reassessment. An evidentiary hearing was held in this matter on July 19, 2016, at the conclusion of which, the parties filed legal briefs[3]. The matter became ripe for a decision at the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Petitioner is a Resident Individual, as that term is defined in West Virginia Code Section 11-21-7. As such, she pays West Virginia income taxes.

2. In June of 2012, Petitioner purchased a 2012 Chevrolet Tahoe truck. This vehicle is a "flex fuel" vehicle. At the time of the purchase by the Petitioner, it had been previously owned as a rental car and had 8399 miles on the odometer. Respondent's Exhibits 5 & 7.

3. Petitioner paid her 2012 West Virginia taxes in February of 2013. Shortly thereafter, she contacted the West Virginia Tax Department and actually visited a tax office in person, with the vehicle, so that it could be inspected to see if it was eligible for the tax credit contained in West Virginia Code Section 11-6D-1 *et seq*. Thereafter, Petitioner filed an amended return for tax year 2012, and was subsequently granted the credit. TR P 4 at 4-17.

4. For tax year 2013, Petitioner did not pay any taxes based upon her belief that she had carried over some of her alternative fuel tax credit from the previous year. She called the Tax Department to inquire as to the amount that she had carried over. Despite being informed that she

[3] 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.

did indeed have some carry over monies from the previous tax year, after filing Petitioner received a written notice that she was not, in fact, eligible for the credit. TR P 5 at 1-12.

5. The discovery by the Tax Department that Petitioner was not entitled to the credit led to the two assessments that form the basis of this appeal.[4]

DISCUSSION

The Petitioner in this matter is *pro se*, and argues, as one might expect, that it is patently unfair for her to have been granted the tax credit and then to have it taken away. The Tax Commissioner argues that under West Virginia law, in order to obtain the credit, a person must have either purchased a new alternative fuel vehicle or taken an existing vehicle and converted it to make it credit eligible.

The law creating the tax credit is fairly straightforward and neither party argues that it is ambiguous.

> A taxpayer is eligible to claim the credit against tax provided in this article if the taxpayer:
> (a) Converts a motor vehicle that is presently registered in West Virginia to operate exclusively on an alternative fuel as defined in this article or to operate as a bi-fueled alternative-fuel motor vehicle; or
> (b) Purchases from an original equipment manufacturer or an after-market conversion facility or any other automobile retailer, a new dedicated alternative-fuel motor vehicle or bi-fueled alternative-fuel motor vehicle for which the taxpayer then obtains a valid West Virginia registration;

W. Va. Code Ann. § 11-6D-4 (West 2013).[5]

[4] Again, because the Tax Commissioner did not present any witnesses, the record is not clear on what the Tax Department "discovered". Petitioner testified that she was told she could not claim the credit on a vehicle that had ever been registered in another state. By the time of the evidentiary hearing in this matter, the Tax Commissioner's position was that Petitioner was not entitled to the credit because she had purchased a used vehicle.

[5] Sometime between the purchase of the vehicle and Petitioner's filing of her amended 2012 return, West Virginia Code Section 11-6D-4 was amended. However, the changes were stylistic and do not affect our decision.

The West Virginia Legislature clearly made this particular tax credit unavailable to purchasers of used alternative fuel vehicles. A review of the legislative purpose bears this out when the Legislature states that "However, because the cost of motor vehicles which utilize alternative-fuel technologies remains high . . . citizens of this state who might otherwise choose an alternatively-fueled motor vehicle are forced by economic necessity to continue using motor vehicles that are fueled by more conventional means." W. Va. Code Ann. § 11-6D-1 (West 2013). It certainly appears that the Legislature was trying to promote a new and emerging industry and was not concerned with or thinking about advocating for the purchase of used alternative fuel vehicles.

In her post hearing brief, Petitioner argues that the guidelines from the Tax Department that she relied on (which are not part of the record in this matter) never made clear the unavailability of the credit for used car purchases. While not stated directly, the Petitioner's argument is equity based. Petitioner essentially argues that the Tax Commissioner should be estopped from denying her the credit, either because of the actions of the Tax Department employee who viewed the vehicle and subsequently approved the credit or just out of a general sense of fair play. However, based upon the uncontroverted facts in this matter, and the laws of West Virginia, Petitioners' arguments are unavailing.

Most importantly, the West Virginia Legislature has contemplated the scenario before us and given the Tax Commissioner the statutory authority to correct mistakes such as were made in this case.

> If the tax commissioner believes that an erroneous refund has been made or an erroneous credit has been established, he or she may proceed to investigate and make an assessment or institute civil action to recover the amount of the refund or credit, within two years from the date the erroneous refund was paid or the erroneous credit was established . . . .

W. Va. Code Ann. § 11-10-14(k) (West). The purpose of this statutory provision is obvious, to prevent Taxpayers from receiving windfall benefits to which they are unentitled, due to occasional mistakes made by the myriad number of employees at the Tax Department.

To the extent Petitioner is arguing that despite the clear statutory provisions above, the Tax Commissioner should be estopped from taking back a credit already granted, that argument too is not borne out by existing law. Twice in the last decade the West Virginia Supreme Court of Appeals has addressed the issue of estopping a government agency. Interestingly, in both instances it was the West Virginia Consolidated Public Retirement Board.

> The general rule governing the doctrine of equitable estoppel is that, in order to constitute equitable estoppel or estoppel in pais, there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.

Syl. Pt. 4, W. Virginia Consol. Pub. Ret. Bd. v. Jones, 233 W. Va. 681, 760 S.E.2d 495 (West 2014). Seven years prior to the Jones case, the Court had added an extra burden on those seeking to estop the government.

> In recognition of the heavy burden borne 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).

Both the Hudkins and Jones cases were *per curiam* decisions and in one, Hudkins, the Court did estop the government. However, the Court took pains to point out that its decision was

limited to the specific facts of the case and was to prevent a manifest and grave injustice. Id, at 282, 718.

In the case before us, we rule that Petitioner has not made the requisite showing necessary to estop the Tax Commissioner. First, Petitioner did have the means of obtaining knowledge of the real facts regarding her entitlement to the credit, she simply needed to read West Virginia Code Section 11-6D-4. Additionally, we do not believe (nor do we think the West Virginia Supreme Court of Appeals would believe) that a Tax Department employee mistakenly failing to ascertain whether a vehicle is new or used (for tax credit purposes) would rise to the level of "wrongful conduct" as that term is used in Hudkins. Finally, ruling that every mistake made by a Tax Department employee that leads to an erroneous credit being issued was, in fact, wrongful conduct would appear to contravene West Virginia Code Section 11-10-14(k). As stated above, by its enactment of Section 14(k), the Legislature has given the Tax Commissioner the ability to correct mistakes that lead to erroneous refunds or credits. However, Section 14(k), by its plain language, does not limit itself to mistakes only by Taxpayers. Therefore, when a credit is granted due to an error by a Tax Department employee, it would be nonsensical to allow the Tax Commissioner to correct the error, and then rule that the Tax Commissioner is estopped from correcting the error.[6]

Finally, there is the issue of the additions that the Tax Commissioner has added to the assessments.[7] While there was no testimony or specific evidence introduced at the evidentiary

[6] This Tribunal also considered whether Petitioners' arguments could be construed to allege an *ultra vires* act on the part of the Tax Department employee who erroneously granted the credit. However, allegations of errors will not suffice to bring such a claim. *See e.g.* Robinson v. Salazar, 885 F. Supp. 2d 1002 (E.D. Cal. 2012)(A federal officer acts ultra vires when the officer is doing the business which the sovereign has empowered him to do in a way which the sovereign has forbidden; a claim of error in the exercise of that power is therefore not sufficient).

[7] (a) *Failure to file tax return or pay tax due.* --
(1) In the case of failure to file a required return of any tax administered under this article on or before the date prescribed for filing such return (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding

hearing regarding this topic, a review of the relevant statutory provision does not show that the Tax Commissioner was statutorily authorized to assess additions to tax in this matter. Petitioner did not fail to file a return, as discussed in Subdivision 1; she did not fail to pay an amount shown, as discussed in Subdivision 2; she did not fail to pay within fifteen days of notice and demand, as discussed in Subdivision 3; and she did not negligently or intentionally disregard a rule thus leading to an underpayment of a tax, as discussed in Subsection (c). We are unable to find any statutory authority for additions being added when, as here, a Taxpayer is told by the Tax Department that they are eligible for a credit, receives the credit, and it is later determined that the credit was granted in error.

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twenty-five percent in the aggregate*: Provided,* That this addition to tax shall be imposed only on the net amount of tax due;

(2) In the case of failure to pay the amount shown as tax, on any required return of any tax administered under this article on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return one half of one percent of the amount of such tax if the failure is for not more than one month, with an additional one half of one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: *Provided,* That the addition to tax shall be imposed only on the net amount of tax due;

(3) In the case of failure to pay any amount in respect to any tax required to be shown on a return specified in paragraph (1) which is not so shown within fifteen days of the date of notice and demand therefore, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand one half of one percent of the amount of each tax if the failure is for not more than one month, with an additional one half of one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate: *Provided,* That this addition to tax shall be imposed only on the net amount of tax due. . . .

(c) *Negligence or intentional disregard of rules and regulations*. -- If any part of any underpayment of any tax administered under this article is due to negligence or intentional disregard of rules (but without intent to defraud), there shall be added to the amount of tax due five percent of the amount of such tax if the underpayment due to negligence or intentional disregard of rules is for not more than one month, with an additional five percent for each additional month or fraction thereof during which such underpayment continues, not exceeding twenty-five percent in the aggregate: *Provided,* That these additions to tax shall be imposed only on the net amount of tax due and shall be in lieu of the additions to tax provided in subsection (a), and the Tax Commissioner shall state in his or her notice of assessment the reason or reasons for imposing this addition to tax with sufficient particularity to put the taxpayer on notice regarding why it was assessed. W. Va. Code Ann. § 11-10-18 (West 2018)

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 Petitioner is a resident individual, as that term is defined in West Virginia Code Section 11-21-7, and as such, pays West Virginia taxes.

5. Article 6D of Chapter 11 of the West Virginia Code provides various tax credits, including one for taxpayers who purchase "from an original equipment manufacturer or an after-market conversion facility or any other automobile retailer, a new dedicated alternative-fuel motor vehicle or bi-fueled alternative-fuel motor vehicle for which the taxpayer then obtains a valid West Virginia registration". W. Va. Code Ann. § 11-6D-4 (West 2013)

6. Petitioner is ineligible for the tax credit provided to purchasers of alternative fuel motor vehicles because she purchased a used vehicle.

7. The general rule governing the doctrine of equitable estoppel is that, in order to constitute equitable estoppel or estoppel in pais, there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice. Syl. Pt. 4, W. Virginia Consol. Pub. Ret. Bd. v. Jones, 233 W. Va. 681, 760 S.E.2d 495 (West 2014).

8. In recognition of the heavy burden borne 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).

9. The Tax Commissioner should not be estopped from denying the tax credit to Petitioner, despite having previously granted it to her, because West Virginia Code Section 11-10-14(k) allows the Tax Commissioner three years after the grant of an erroneous refund to investigate and correct the mistake.

10. Nor should the Tax Commissioner be estopped, because after the erroneous grant of the credit, Petitioner had the means to ascertain that she was not entitled to the credit. *See* Syl. Pt. 4, W. Virginia Consol. Pub. Ret. Bd. v. Jones, 233 W. Va. 681, 760 S.E.2d 495 (West 2014) (estoppel will not lie when the party to whom a false representation has been made has the means of obtaining the real facts).

11. West Virginia Code Section 11-10-18 does not provide for additions to tax when a Taxpayer has erroneously been granted a tax credit.

12. 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. §§ 121-1-63.1 and 69.2 (2003)

13. Save for the issue of additions to tax discussed above, the Petitioner in this matter has not carried her burden of proving that the June 23, 2014, and the August 20, 2014, assessments were erroneous, unlawful, void or otherwise invalid.

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner on June 23, 2014, in the total amount of $_____, and the assessment issued on August 20, 2014, in the total amount of $_____ are hereby **MODIFIED** to remove additions to tax in the amount of $_____**.**

Interest continues to accrue on the unpaid tax until this liability is fully paid pursuant to the West Virginia Code Section 11-10-17(a).

WEST VIRGINIA OFFICE OF TAX APPEALS

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

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Date Entered