REDACTED DECISION – DK# 19-479 REFUND-SALES AND USE

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON FEBRUARY 1, 2021
ISSUED ON APRIL 27, 2021
CORRECTED DECISION ISSUED ON DECEMBER 10, 2014

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

FINAL DECISION

On July 16, 2019, the Tax Account Administration Division of the West Virginia State Tax Commissioner's Office ("Tax Commissioner" or "Respondent") issued a Refund Denial Letter to the Petitioner, a company. This letter denied the Petitioner's request for a refund of Consumer Sales and Service Tax in the amount of $_____. This refund denial was 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.

Thereafter, on September 13, 2019, the Petitioner timely filed with this Tribunal, a petition of appeal. An evidentiary hearing was held in this matter on October 1, 2020, 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, a company, is a Virginia limited liability company, located in a city, Virginia. Tr. P25 at 1-12.

2. The Petitioner's primary business is providing cell phone service, and it operates in Virginia, West Virginia, Maryland, Pennsylvania, Kentucky and Ohio. Tr. P25 at 20-22. These cell phone service operations are affiliated with Sprint, and contain the Sprint branding. Tr. P27 at 14-23 & Tr. P30 at 15-17.

3. The Petitioner has a subsidiary business called a company 2. This business owns the towers that holds some of the Petitioner's transmission equipment. Tr. P28 at 3-9.

4. If a customer of the Petitioner makes a cell phone call in an area served by one of the aforementioned towers, then that call is handled by both the Petitioner and Sprint. However, the Petitioner is not its own wireless company, and as such, no calls could be completed without its contractual (and technological) relationship with Sprint. Tr. P27 at 14-23. If a customer makes a call outside of the area where the Petitioner's subsidiary has towers, those calls are handled by the nearest tower able to accept calls of Sprint customers. Tr. P29 at 10-16.

5. In addition to owning cell phone towers, with the attendant equipment, the Petitioner operates retail cell phone service stores, in all the states listed above.

6. Sometime prior to the tax periods, in question in this matter, the Petitioner purchased approximately 30-35 retail locations operated by a competitor. These locations were affiliated with another wireless service company, called nTelos. Tr. P31 at 1-3.

7. Sometime during this acquisition/merger, it was discovered, that certain nTelos customers had phones that were not compatible with the Sprint network. These customers were given free phones as an inducement to stay with the Petitioner and Sprint. Tr. P33 at 5-14.

8. When these phones were provided to the former nTelos customers, no sales tax was charged, but the Petitioner did pay use tax on the purchases. Thereafter, the Petitioner determined that it was entitled to a refund of this use tax, and it filed a claim as such. Tr. P33-34 at 9-1.

9. It is the Tax Commissioner's denial of this refund request that forms the basis of this appeal.

DISCUSSION

Generally, if a business in West Virginia were to buy a case of glass cleaner from ABC Cleaning Supplies in Anytown, U.S.A., one of two things would happen. Either ABC would charge the business West Virginia sales tax, or the business would later remit use tax to the Tax Commissioner pursuant to West Virginia Code Section 11-15A-2, which states:

> An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article.

W. Va. Code Ann. §11-15A-2(a) (West 2010).

However, there are exemptions from the use tax, and one of those exemptions is if the property or service is exempt from sales tax, pursuant to Article 15 of Chapter 11. *See* W. Va. Code Ann. § 11-15A-3 (West 2013). Section 9 of Article 15, Chapter 11 contains the sales tax exemptions and subsection (b)(2) of Section 9 provides an exemption for:

> The following sales of tangible personal property and services are exempt from tax as provided in this subsection: . . . (2) Sales of services, machinery, supplies and materials directly used or consumed in the activities of manufacturing, transportation, transmission, communication, production of natural resources, gas storage, generation or production or selling electric power, provision of a public utility service or the operation of a utility service or the operation of a utility business, in the businesses or organizations named in this subdivision and does not apply to purchases of gasoline or special fuel;

W. Va. Code Ann. § 11-15-9(b)(2) (West 2018).

Additional guidance regarding what the phrase "directly used" means is contained in West Virginia Code Section 11-15-2 which defines the term as:

> "Directly used or consumed" in the activities of manufacturing, transportation, transmission, communication or the production of

> natural resources means used or consumed in those activities or operations which constitute an integral and essential part of the activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the activities.

W. Va. Code Ann. §11-15-2(b)(4) (West 2018).

This Tribunal is fairly well versed in the law of this case. In the last few years, we have, twice, had the occasion to issue final decision regarding the direct use exemption. Both Docket No. 15-035 and No. 15-040 involved requests for the exemption by Taxpayers engaged in the activity of natural resource production. One of those cases involved the purchase of services, and the other was similar to the case before us, involving the purchase of tangible personal property. The services involved the rental of various equipment on a natural gas well pad. The property purchased in the other case was asphalt for road repair and maintenance to a natural gas well site. In both cases we took the phrases "integral and essential" and "incidental, convenient or remote" and applied their common ordinary meaning, and we do so here, as well.[1]

The Petitioner argues that these purchased phones were integral and essential, because without them the new nTelos customers would not be able to make calls. The Tax Commissioner argues that the phones were used for marketing purposes, in contravention of the legislative rules governing the combined sales and service and use tax.

For the purposes of the direct use exemption, communications is defined as "Communication. - The activity of communication includes all telephone, radio, light, light wave, radio telephone, telegraph and other communication or means of communication, whether used for voice communication, computer data transmission, or other encoded symbolic information

[1] It should be noted that both decisions were appealed. In 15-040, the matter made its way to the West Virginia Supreme Court of Appeals. There the Court confirmed that West Virginia Code Section 11-15-2(b)(4) is clear and unambiguous and that the phrases at issue should be given their plain and ordinary meaning. *See* Antero v. Steager, 851 S.E.2d 527 (2020). The appeal of 15-035 is still pending in the Circuit Court of Kanawha County.

transfers." W. Va. Code R. § 110-15-123.4.5 (1993). Based upon the testimony in this matter, it appears that the Petitioner is involved in the activity of telephone communication, although the record is not entirely clear. The Petitioner's subsidiary owns cell phone towers, and on those towers is equipment owned by the Petitioner that facilitates calls placed by their customers. On the other hand, the Petitioner's witness testified that because they are not a wireless company, no calls can be completed without the assistance of Sprint. We rule that the Petitioner is engaged in the activity of communication, and as such, is entitled to the direct use exemption. Specifically, we rule that if a piece of equipment on one of the aforementioned cell phone towers were to need replacement, that purchase would be exempt, because it is integral and essential to the activity of telephone communications. However, the Petitioner is also engaged in other activities, specifically, it is a vendor of cell phone services, in tandem with Sprint, and it is a retailer of tangible personal property.

It is well settled that the courts of this state can take judicial notice of historical facts. *See e.g.* State v. Ferree, 107 S.E. 126, 88 W.Va. 434 (1921); Hix v. Hix, 25 W.Va. 481 (1885). *See also* W. Va. R. Evid. 201 (Judicial Notice of Adjudicative Facts). Moreover, this Tribunal is not bound by the West Virginia Rules of Evidence. Thus, this Tribunal takes judicial notice of the fact that the definition of communication contained in Section 123.4.5 was enacted in 1993, before the time when cell phone service was common. In 1993, the "activity" of telephone communications in West Virginia was conducted almost exclusively by Bell Atlantic, one of the seven "Baby Bells" created in the 1980s after the break-up of AT&T. When Bell Atlantic engaged in the activity of telephone communication, as that term is used in Section 123.4.5, it was vastly different than the activities of the Petitioner in 2016. In 1993, the citizens of West Virginia did not have the plethora of options regarding phone service that the citizens have today. In fact, as

far as telephone communications went, the only option was whatever company owned the wire outside of your house, generally that was Bell Atlantic.[2] Nor did Bell Atlantic operate retail stores, similar to those operated by the Petitioner. In fact, to the undersigned's memory, Bell Atlantic did not care what type of phone you had in your house. A customer could use the phone provided by the company, or if they so desired they could go to Circuit City, or J.C. Penny, or wherever, and buy a more fancy phone. Whatever the case, all phones were alike, and all had the same little plug, that goes into the wall, to allow calls to be made. As a result, this Tribunal is of the opinion that the term "telephone communications" as used in Section 123.4.5 cannot be found to include all of the activities of the Petitioner, because those activities did not exist for phone companies in 1993. Unless the Legislature and Tax Department had a crystal ball, they could not have intended such a ruling. To be clear, we are ruling that when the Petitioner purchased the phones to be given away, and the activity it was engaged in at that time was the retail sales of cell phone services. This ruling was not the activity of telephone communication, as that term is used in Section 123.4.5.

If we give the Petitioner the benefit of the doubt, and rule that all of its activities are communications, as defined in Section 123.4.5, we are still unable to rule in its favor. The Tax Commissioner argues that the phones at issue were used for marketing purposes, in violation of West Virginia law, specifically Section 123.3.2.5 of Title 110, Series 15 of the West Virginia Code of State Rules, which states:

> 123.3.2. Uses of Property or Services Not Constituting Direct Use. - Uses of property or services which will not constitute direct use, thereby making the purchase subject to the sales and use tax shall include, but not be limited to the following: . . .123.3.2.5. Tangible

[2] We are aware that there may have been small regional telephone companies operating in the rural areas of this state, however that fact does not alter the underlying premise that residents did not have an option when choosing a telephone company. We are also aware that the wires outside a person's home may not have always been owned by Bell Atlantic, but again, that does not impact on the question of choice.

> personal property or services used in marketing, general management, supervision, finance, training, accounting and administration. For example, property purchased for use in research for a new or improved product would not be directly used.

W. Va. Code R. § 110-15-123.3.2.5 (1993). We agree with the Tax Commissioner, and find that these phones were used to market Sprint to the new nTelos customers. The problem for the Petitioner is that everyone in the developed world, including the undersigned, knows how the cell phone business works. Every day, cell phone companies are giving away, (or practically giving away) phones as an inducement to either stay with the company, or to switch. The undersigned, recently had the occasion to switch cellphone providers, and the new company's inducement was "buy one get one free." As a result, two top of the line new phones were provided at a price just above free. However, sales tax was charged on the $1,600 retail price of these phones. The reason for the practically free phones is obvious, the inducement to sign with cell phone company X, as opposed to company Y. And that is what has happened in this matter, and the Petitioner's sole witnesses clearly testified as such.

> JUDGE POLLACK: Okay. All right. Then, as you testified, during the merger, there were certain customers whose phones were not compatible. They were given the opportunity to have a phone, given a ---
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> PETITIONER'S WITNESS: Correct.
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> JUDGE POLLACK: --- be given a free phone? And to be clear, no sales tax was charged on those free phones?
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> PETITIONER'S WITNESS: No.
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> JUDGE POLLACK: Why not?
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> PETITIONER'S WITNESS: Because the customer was given them for them to stay with our service, and so they were not paying for the phone, so there was no tax to be charged on them.

Tr. P33 at 5-14.

Finally, even if we were to find that giving the free phones to the new customers was not strictly marketing, as the term is used in Section 123.3.2.5, we still must determine if the phones were "critical and essential" to the Petitioner's activities, as opposed to "incidental, convenient or remote" as those terms are used in West Virginia Code Section 11-15-2(b)(4). As stated above, this Tribunal has issued two decisions in the last few years involving the direct use exemption, and in both we determined that Section 11-15-2(b)(4) was clear and unambiguous, and as such the terms critical, essential, incidental, convenient and remote were to be given their plain and ordinary meaning.[3] Both of the recent direct use decisions from this Tribunal involved the activity of natural resource production, namely drilling for natural gas. One case involved the purchase of services by the natural gas company, and the other involved the sale of tangible personal property. In the first case, the services included the rental of porta-potties and trailers on the well pad site. Our analysis was simple, were the porta-potties and trailers critical and essential to the activity of drilling for the gas, or put another way, did the Petitioner have to have those services to engage in the activity? We ruled that you could not drill in remote locations without a place for employees to relieve themselves. Nor could they drill without a place to sleep for employees who were on site for weeks at a time. Our ruling was upheld by the West Virginia Supreme Court of Appeals in Antero Res. Corp. v. Steager, 851 S.E.2d 527 (W. Va. 2020). In the more recent case we conducted the same analysis, this time the sale of asphalt, again to a company drilling natural gas wells. There, the evidence showed that without an agreement with the West Virginia Division of

[3] In both Docket No. 15-035 and 15-040 none of the parties argued that Section 11-15-2(b)(4) was ambiguous or that the rules of statutory construction were needed. As such, we are aware that the Tax Commissioner's reliance on W. Va. Code R. § 11-15-123.3.2.5 is not strictly necessary. *See e.g.* Griffith v. Frontier W. Virginia, Inc., 228 W. Va. 277, 719 S.E.2d 747, (2011)(the very function of administrative rules, be they interpretive or legislative, is to supply that which the Legislature has omitted from its statutory enactments).

Highways, to repair public roads in and around the well site, the producer could not even obtain a permit to drill. Those facts made our critical and essential analysis easy, in that the activity was not even going to begin until this asphalt was purchased and laid down.

So, we ask the same question here, does the Petitioner **have to have** these phones to engage in the activity of telephone communications? We rule that it does not. In so ruling, we are well aware of the Petitioner's argument in this regard, namely that this one unique situation they had to offer the free phones, because the existing phones were incompatible with the Petitioner's equipment. However, unlike the natural gas drillers described above, the Petitioner in this matter was engaged in the activity in question, telephone communications, at all times. In plain English, before it bought the nTelos locations it was doing whatever technical things it needed to do (in conjunction with Sprint) to make their customers calls go through. On the day after the nTelos sale was completed, the Petitioner was still engaged in the activity. Based upon these facts, and applying the same legal reasoning as we have previously, it is impossible to rule that the Petitioner had to have these free phones in order to engage in the activity of telephone communications. Instead, the record in this case shows that the Petitioner had a choice as to how to handle the incompatible phones, and it could have made other choices. For starters, it could have, like the undersigned's new service provider, given the phones away, but still charged sales tax. It could have charged the new customers for the phones, and given them a credit on their bills. The point being, that the business decisions made by the Petitioner to ensure the retention of customers, renders these phones incidental, convenient and remote to the activity of communications. Finally, if we were to rule for the Petitioner, we start down a slippery slope towards all cell phones, those that are free, or provided at a greatly reduced price, being essential and integral to the activity of

communications. We do not believe that the Legislature intended such a result when it created the direct use exemption.

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. "An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article." W. Va. Code Ann. §11-15A-2(a) (West 2010).

4. The use in this state of the following tangible personal property, custom software and services is hereby specifically exempted from the tax imposed by this article to the extent specified: . . .(2) Tangible personal property, custom software or services, the gross receipts from the sale of which are exempt from the sales tax by the terms of article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, and the property or services are being used for the purpose for which it was exempted." W. Va. Code Ann. §11-15A-3(a)(2) (West 2013).

5. West Virginia Code Section 11-15-9(b)(2) provides an exemption from the consumers sales and service tax for sales of services, machinery, supplies and materials directly

used or consumed in the activities of manufacturing, transportation, transmission, communication, or the production of natural resources.

6. Directly used or consumed is defined as "used or consumed in those activities or operations which constitute an integral and essential part of the activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the activities." W. Va. Code Ann. §11-15-2(b)(4) (West 2018).

7. The activity of communication is defined as "all telephone, radio, light, light wave, radio telephone, telegraph and other communication or means of communication, whether used for voice communication, computer data transmission, or other encoded symbolic information transfers." W. Va. Code R. § 110-15-123.4.5 (1993).

8. The Petitioner in this matter is engaged in two activities, communication, as defined in Title 110, Series 15, Section 123.4.5 and the retail sales of cellular phone service and tangible personal property.

9. When the Petitioner in this matter provided free cellular phones to certain customers it was engaged in the activity of retail sales of a service. As such, the direct use exemption does not apply.

10. "Uses of Property or Services Not Constituting Direct Use. - Uses of property or services which will not constitute direct use, thereby making the purchase subject to the sales and use tax shall include, but not be limited to the following: . . .123.3.2.5. Tangible personal property or services used in marketing, general management, supervision, finance, training, accounting and administration. For example, property purchased for use in research for a new or improved product would not be directly used." W. Va. Code R. § 110-15-123.3.2.5 (1993).

11. The Petitioner utilized the phones at issue in this matter for marketing purposes, as that term is used Section 123.3.2.5 of Title 110, Series 15 of the West Virginia Code of State Rules, again rendering the direct use exemption unavailable to their purchase.

12. It is necessary to give effect to every word and part of a statute in order to effectuate its true meaning. *See e.g.* Jackson v. Belcher, 232 W. Va. 513, 753 S.E.2d 11 (2013); Jackson v. Kittle, 34 W. Va. 207, 12 S.E. 484 (1890).

13. "Essential" means "something necessary, indispensable, or unavoidable." Webster's Third New International Dictionary, 777 (16th ed. 1971). Incidental is a direct antonym to essential and means "subordinate, nonessential, or attendant in position or significance." Id, at 1142.

14. Assuming arguendo that the Petitioner's only activity is communication, and that the phones were not used for marketing purposes, the phones at issue in this matter are not essential, because the Petitioner is able to engage in the activity of telephone communications for its other customers without the phones. Therefore, the phones are not integral and essential as those terms are used in West Virginia Code Section 11-15-2(b)(4).

15. In a hearing before the West Virginia Office of Tax Appeals, the burden of proof is upon the Petitioner to show that any denial of a tax refund is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2019).

16. In this matter the Petitioner has not met its burden of showing that the Tax Commissioner's denial of the requested refund of combined sales and use tax was erroneous.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the July 16, 2019, Refund Denial to the Petitioner, a company. in the amount of $_____ is hereby **AFFIRMED.**

WEST VIRGINIA OFFICE OF TAX APPEALS

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

_____
Date Entered

REDACTED DECISION – DK# 15-299 CUS-C

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON MAY 3, 2020
ISSUED ON SEPTEMBER 10, 2021

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

FINAL DECISION

On July 7, 2015, the Auditing Division of the West Virginia State Tax Commissioner's Office ("the Tax Department" or "the Respondent") issued an Audit Notice of Assessment, against the Petitioner, a company (hereinafter "the Petitioner"). This assessment was 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 assessment was for combined sales and use tax for the period of January 1, 2011, through March 31, 2015, for tax in the amount of $_____, and interest in the amount of $_____, for a total assessed tax liability of $_____. Written notice of the assessment was served on the Petitioner, as required by law. Thereafter, on September 2, 2015, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition of appeal. *See* W. Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010). Subsequently, notice of a hearing on the petition was sent to all parties, and an evidentiary hearing was held over two days, October 19, 2020, and December 9, 2020, at the conclusion of which the parties filed legal briefs[1]. The matter became ripe for a decision at the conclusion of the briefing schedule.

[1] During the hearing on December 9, 2020, which was conducted electronically, the Petitioner sent two photographs to this Tribunal. The photographs were of two documents. These photos were referred to as Petitioner's exhibits 2 and 3, counsel for the Petitioner stated that the original documents would be sent at a later date. That never occurred, and we have marked the photographs as Petitioner's Exhibits 2 & 3.

FINDINGS OF FACT

1. The Petitioner is a West Virginia limited liability company, comprised of two members. During the tax years in question, the Petitioner had its principal place of business in two locations, City 1, West Virginia and City 2, West Virginia. Tr. #1P 34 & 44.

2. The Petitioner's business was the retail sale and installation of flooring products. Tr. #1P38-39 at 21-7.

3. At some point in 2013 or 2014, the members of the LLC had disagreements regarding the business, including one member's discovery of possible state tax problems. Tr. #1P51-52 at 19-2. The disgruntled member had concerns that led her to attempt to dissolve the LLC. This member was of the opinion that the LLC could not be dissolved until any outstanding state tax problems were resolved. As a result, she retained a tax preparer to begin a dialogue with the West Virginia State Tax Department. Tr. #1P52-53 at 20-7.

4. The tax preparer's discussions led to what the disgruntled member characterized as a "desk audit." Although, the witness further testified that she was not involved in this audit, and did not know exactly what transpired. Tr. #1P52-53 at 20-7.

5. Despite the witnesses' confusion, in March of 2014, the LLC received a "Statement of Good Standing" from the West Virginia State Tax Department. *See* Tax Commissioner's Exhibit 1. Upon receipt of this statement of good standing, the disgruntled member believed that she could now dissolve the LLC through the Secretary of State's office. However, the member discovered that due to non-payment of some administrative fee, the LLC was no longer registered with the Secretary of State's office. Tr. #1P62-63 at 18-12.

6. Sometime in the summer of 2014, this disgruntled member of the LLC was contacted by an auditor with the West Virginia State Tax Department, who explained that she was

seeking to conduct an audit of the Petitioner. The member then provided the auditor with various financial documents. Tr. #1P65 at 3-23.

7. The auditor was not provided any sales documents from the business. However, she did have tax returns and bank statements. Those documents showed a discrepancy between the amount of sales reported on the Petitioner's consumer sales returns versus the amount of money shown on the bank deposits and the LLC's income tax returns. Additionally, the auditor found no evidence that the amounts deposited into the LLC's bank account were from any source other than retail sales. Tr. #2P27-29.

8. The result of the 2014 audit was the assessment that forms the basis of this action.

DISCUSSION

Normally, this Tribunal begins the discussion section of each final decision with a brief summary of the issues and then citations the law of the case. This matter is not typical, and at both the prehearing conference and in post hearing briefs, the Petitioner presented no legal authority to support its position that the Tax Commissioner has erred in his issuance of the sales and use tax assessment at issue. Some background is necessary to explain the unique nature of the matter.

While the assessment in this matter was issued against a company, the Petitioner never appeared in this matter. Normally, when an entity such as a corporation or LLC proceeds to hearing, it, the entity, hires lawyers and accountants to explain why the assessment (or refund denial) is wrong. In such a case, a representative of the business may or may not testify regarding some facts related to the alleged error in the assessment. When that happens, those witnesses are obviously speaking on behalf of the entity in which they are employed or associated. None of that happened here. The only witness in this matter was one of the two members of the LLC, and she most definitely did not testify regarding whether or not a company remitted the proper amount of West Virginia sales taxes during the years in question. Simply put, her testimony was that she lent

a friend money to start a carpet/flooring business and that the LLC, "a company" was just what she called a "pass through" entity, although she further testified that she was not entirely sure what a "pass through" was. In her mind, the point was that the money she was owed would be put into the a company's bank account, and she would get repaid in that manner. However, as such situations often do, she was not repaid and grew frustrated. Moreover, she had a full-time job, and she allegedly had little or no involvement with the day to day running of the business. None of these facts are laid out above in the findings of fact, because they are not relevant to the case at hand. They are offered here to explain, for lack of a better term, the Petitioner's lack of a traditional appearance in this matter. The witnesses testimony was much closer to what would be presented in an officer liability case. In fact, at one point the witness admitted, through her attorney, that such was the case.

> JUDGE POLLACK: So why --- you know, to sort of put it bluntly, why do you care? A company --- you know, you don't --- A company presumably doesn't have any money. It doesn't exist anymore. Why are you so concerned about an assessment against an entity that you were barely part of and doesn't exist anymore?
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> PETITIONER'S WITNESS: To clear my name. For lack of better words, I --- to make sure that I've done the right thing.
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> JUDGE POLLACK: Okay. So ---.
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> PETITIONER'S ATTORNEY: Number one, Your Honor, to a hundred percent penalty assessment.
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> JUDGE POLLACK: I'm sorry. Say that again, Petitioner's counsel.
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> PETITIONER'S ATTORNEY: Step number one towards a flow-through attempt to hold the members responsible.
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> JUDGE POLLACK: Oh, okay. And Petitioner's witness, had someone advised you that you, down the road, could be personally liable?
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> PETITIONER'S WITNESS: Petitioner's counsel had mentioned it. Yes, Your Honor.
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> JUDGE POLLACK: Okay.

> PETITIONER'S ATTORNEY: I don't think she --- I don't think she could because I don't think she was the person who was responsible for remitting, but ---.
>
> JUDGE POLLACK: Right. Well, that's obviously an argument for another day.

Tr. #1P69 at 1-19. This background information is included here, because, as stated above, in virtually every instance when a vendor has appealed a sales and use tax assessment, it is the vendor that appears at hearing. Therefore, in a typical final decision, this Tribunal refers to the "Petitioner" throughout. In this final decision, when we refer to the Petitioner, we are speaking of the witness, the disgruntled member of the LLC, who essentially appeared on her own behalf.

Despite this unique situation, the Petitioner did not appear empty handed. The Petitioner presented three arguments. First, she argued that as a "pass through" entity, a company conducted no business, and therefore it could not owe unremitted sales and use taxes. More specifically, she contended that the other member of the LLC, whom we will refer to as Mr. X, was really operating the flooring business under another name, Mr. X's flooring. As such, if there truly was unremitted sales and use tax, it was owed by Mr. X's flooring. There are numerous problems with this argument, and as such, we are unpersuaded. First and foremost, it fails to address any problems with the audit conducted on a company, which should have been the only goal in this appeal. The auditor in this matter offered clear, cogent, and unrebutted testimony that during the audit she reviewed federal income tax returns and bank statements of a company. So, even if we, for the sake of argument, take the Petitioner's version of events as true, it still begs the question, why was a company filing federal tax returns, and where did this money deposited in its bank account come from? When counsel for the Tax Commissioner inquired of the witness on these topics, she had no satisfactory explanation.

> RESPONDENT'S ATTORNEY: Okay. You stated earlier that Mr. X conducted a desk audit of this business, of a company ---
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> PETITIONER'S WITNESS: Yes.
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> RESPONDENT'S ATTORNEY: --- LLC?
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> PETITIONER'S WITNESS: Yes, sir.
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> RESPONDENT'S ATTORNEY: Did you explain to Mr. X that a company wasn't doing business?
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> PETITIONER'S WITNESS: Mr. X actually worked through my tax preparer and they discussed it. I just received ---.
>
> RESPONDENT'S ATTORNEY: But you don't know --- you don't know if Mr. X was ever informed that A company was wasn't doing business. Right?
>
> PETITIONER'S WITNESS: I --- all I know is Mr. X was provided tax --- tax prepared --- prepared tax documents. I'm sorry.
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> RESPONDENT'S ATTORNEY: Well, okay. Again, I'm not sure what tax documents would need to be prepared if this company was not engaging in business.
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> PETITIONER'S WITNESS: I don't know how to answer that.

Tr. #1P18 at 7-22.

> RESPONDENT'S ATTORNEY: And you had gross receipts of ---. Let me see. In 2014, the tax liability was 5,000 ---. Well, in 2013, the tax liability was 8,900 --- $8,900, almost $9,000. That's 150 --- roughly, $150,000 in gross receipt to A company, that went into s company's bank account. Is that correct?
>
> PETITIONER'S WITNESS: I had no control over the ---. I'm not going to say I didn't have any control over the bank account. I did not know what was going in the bank account. As my responsibility, the rent was in my name. The utilities were in my name personally. And I ensured they were paid.

Tr. #1P21 at 8-15. This testimony shows the inherent difficulty in this argument by the Petitioner. On one hand, she states that she has a full-time job and knows nothing about the business, but on the other hand, she knows that A company was not conducting business. Simply put, without a credible explanation as to the source of the income on A company' federal tax returns, and the money in its bank account, this Tribunal cannot rule that the auditor committed an error in attributing that income to the sales of goods and services. Additionally, no explanation was given

as to why this information about Mr. X and Mr. X's Flooring was not provided to the auditor during the audit, and was brought up for the first time during the evidentiary hearing.

The Petitioner's next argument is that she was given a "Statement of Good Standing" after the purported desk audit and that because A company was in good standing it cannot be assessed for allegedly unpaid sales and use taxes for periods prior to the date of the statement. The most obvious problem with this argument is that the statement of good standing says, on its face "The issuance of this Statement of Good Standing shall not bar any audits, investigations, assessments, refund or credits with respect to the Taxpayer named above and is based only on a review of the tax returns and not on a physical audit of records." *See* Respondent's Ex. 1. (emphasis added). The purpose of statements of good standing was explained at hearing by an Assistant Director from the Tax Department's Compliance Division.

> RESPONDENT'S ATTORNEY: Okay. Are you familiar with this type of letter?
>
> RESPONDENT'S WITNESS: Yes.
>
> RESPONDENT'S ATTORNEY: And just briefly explain what type of letter this is.
>
> RESPONDENT'S WITNESS: This letter is issued to a taxpayer when they request the good standing. It states that at that period of time that the taxpayer filed and paid all the outstanding taxes that are due at that period of time.
>
> RESPONDENT'S ATTORNEY: Okay. Is this a letter that the Compliance Division has a little bit of hand in when it's issued?
>
> RESPONDENT'S WITNESS: Yes. We can --- we can review and let them know, let the good standing unit know that the taxpayer is in good standing.
>
> RESPONDENT'S ATTORNEY: Okay. Now, does this --- does this letter normally ---? Let me rephrase that. To be in good ---. Oh. To be in a good standing, does that mean that the taxpayer has filed all of their required returns?
>
> RESPONDENT'S WITNESS: Yes.

> RESPONDENT'S ATTORNEY: Does that mean that the taxpayer has paid whatever the amounts are on those returns?
>
> RESPONDENT'S WITNESS: Yes.
>
> RESPONDENT'S ATTORNEY: Okay. Does a Letter of Good Standing mean that the taxpayer can't be determined to owe additional money for those same periods in the future?
>
> RESPONDENT'S WITNESS: No. It does not mean that.
>
> RESPONDENT'S ATTORNEY: Does it mean they can't be audited in the future for those periods?
>
> RESPONDENT'S WITNESS: No.
>
> RESPONDENT'S ATTORNEY: When the Tax Department receives a tax return and let's say the tax return shows a liability of sales tax of $100, and the taxpayer sends in a check for $100 and the return shows they owed $100 ---
>
> RESPONDENT'S WITNESS: Uh-huh (yes).
>
> RESPONDENT'S ATTORNEY: --- just exactly, I mean do we actually check to see if they actually owed $100 when that return comes in?
>
> RESPONDENT'S WITNESS: Not through the good standing process, no.
>
> RESPONDENT'S ATTORNEY: Okay. So the good standing process is not a matter of whether the returns are correct. It's a matter of whether they're filed and whatever they say is paid?
>
> RESPONDENT'S WITNESS: Correct.

Tr. #2P2-4. At hearing, and in her post hearing brief, the Petitioner offered no statutory, regulatory or case law authority to rebut the plain language of the Statement itself, or the testimony from Respondent's witness.

The Petitioner's final argument is actually part and parcel of the Statement of Good Standing argument. She argues that because she took the Statement of Good Standing to the Secretary of State's office, in order to dissolve the LLC, and that the LLC was in fact no longer in existence at the time of the audit, then the Tax Commissioner cannot have issued the assessment at issue. This Tribunal finds this argument to be particularly unconvincing. If going to the

Secretary of State's office to shut down a business wiped out the ability of the Tax Commissioner to conduct an audit, then the Secretary of State's office would be busier than the DMV. The Petitioner again offers no statutory, regulatory or case law authority for the proposition that dissolving an LLC prevents the Tax Commissioner from conducting an audit, because no such authority exists. The ability of all fifty states and the federal government to audit taxpayers is such a part and parcel of the fabric of life in America that in this context it is not even a question of law.[2]

In this matter, as a practical matter, the Petitioner, a company never appeared. One member of the LLC did appear, to argue on the one hand that she was just a silent partner who knew nothing about the business, but on the other hand, she was intimately familiar with the machinations of her co-member, and his attempts to cheat her/and or the Tax Department. None of the evidence presented on those points was relevant to the correctness of the audit and resulting assessment. As for the legal arguments made by the member, she was unable to present any authority for the proposition that a statement of good standing or the dissolution of a business prevents the Tax Commissioner from conducting an audit.

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] Obviously, there are limitations on the Tax Commissioner's ability to conduct audits such as West Virginia Code Section 11-10-15, which, with some exceptions, limits assessments to three years after a return is filed. The Petitioner advances no argument under Section 15. Again, there is no blanket statutory prohibition on the Tax Commissioner's ability to issue an assessment after an entity is administratively dissolved with the Secretary of State.

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. Article Fifteen of the West Virginia Tax Code imposes a general consumer's sales and service tax, for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services, and it is the duty of the vendor to collect the same. *See* W. Va. Code Ann. § 11-15-1 and § 11-15-3 (West 2010).

4. "The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser." W. Va. Code Ann. § 11-15-4 (West 2010).

5. "(b) The vendor shall keep records necessary to account for: (1) The vendor's gross proceeds from sales of personal property and services; (2) The vendor's gross proceeds from taxable sales; (3) The vendor's gross proceeds from exempt sales; (4) The amount of taxes collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the tax commissioner . . . ." W. Va. Code Ann. § 11-15-4 (West 2010).

6. "To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established." W. Va. Code Ann. § 11-15-6(b) (West 2010).

7. "Every person doing business in the State of West Virginia…shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes." W. Va. Code R. § 110-15-14a.1 (1993).

8. If, when auditing taxpayer records, said records are, ". . . inadequate to accurately reflect the business operations of the taxpayer, the tax auditor will determine the best information available and will base the audit report on that information." W. Va. Code R. § 110-15-14b.4 (1993).

9. The Petitioner failed to account for and remit to the Tax Commissioner all of the sales taxes collected from its customers.

10. The records which were provided to the Tax Commissioner were not complete and accurate enough to determine the Petitioner's liability for consumer sales and use tax purposes. Nor were they adequate to accurately reflect the Petitioner's business operations.

11. The Tax Commissioner was not clearly wrong or arbitrary and capricious when he determined that the best information available, as that term is used in Section 14b.4, to reflect the Petitioner's sales of goods and services was the Petitioner's banks statements and federal tax filings.

12. "If the Tax Commissioner believes that any tax administered under this article has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor." W. Va. Code Ann. § 11-10-7(a) (West 2010).

13. 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).

14. The Petitioner in this matter has not met its burden of proof showing that the combined sales and use tax assessment against it was erroneous as discussed above.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that: the combined sales and use tax assessment issued against a company on July 7, 2015, for a total assessed tax liability of $_____ is hereby **AFFIRMED.**

Interest continues to accrue on these unpaid taxes until fully paid. W. Va. Code Ann. § 11-10-17(a) 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS

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

_____
Date Entered

REDACTED DECISION – DK# 15-385 P, 15-386 CU

BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON MAY 8, 2020
ISSUED ON NOVEMBER 2, 2020

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

FINAL DECISION

On September 10, 2015, the Auditing Division of the West Virginia State Tax Department (the "Tax Commissioner" or "Respondent") issued an Audit Notice of Assessment, one against a company and one against the Petitioners, individually. 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 assessment for a company was for combined sales and use tax for the period beginning August 1, 2009, through June 30, 2015, for tax in the amount of $_____, and interest in the amount of $_____, additions in the amount of $_____ for a total assessed tax liability of $_____. The personal income tax assessment was for the period of December 31, 2012 through December 31, 2013, for tax in the amount of $_____, and interest in the amount of $_____, additions in the amount of $_____, for a total assessed tax liability of $_____.

Thereafter, on November 9, 2015, the Petitioners 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); 11-10A-9 (West 2010).

Subsequently, notice of a hearing on the petition was sent to the Petitioner, and, in accordance with the provisions of West Virginia Code Section 11-10A-10, a hearing was held on

September 5, 2019, after which the parties filed legal briefs. The matter became ripe for decision at the conclusion of the briefing schedule.[1]

FINDINGS OF FACT

1) A company (hereinafter "a company") is a limited liability company with Petitioner (hereinafter "Petitioner") as its sole member. Petitioner has owned the franchise since 2009. TR. 62,63.

2) A company operates a franchised tax preparation service, a tax preparation service in Multiple Cities, West Virginia. TR. 22, 63.

3) A company prepares state and federal personal income tax returns. TR.63.

4) A company does not employ any CPAs, public accountants, or enrolled agents. TR. 56.

5) A company's tax preparation service employees are required to pass an annual examination approved by the Internal Revenue Service (hereinafter "IRS") and administered by a tax preparation service. TR.

6) A tax preparation service requires a continuing education requirement of 25 hours which is sufficient to satisfy the IRS. TR.

7) Sales taxes were never collected and no sales and use tax return were ever filed on behalf of a company. Tr. 69.

8) The Petitioner testified that neither a high school diploma nor GED is required to process tax returns. TR. 49.

9) The Petitioner testified that preparing a tax return involved entering data from a "Customer Data Sheet" into the computer and then relying on a tax preparation service software to prepare and electronically file a final return. TR. 55, Petitioners' Ex. 2.

[1] A briefing schedule was entered on February 20, 2020. Thereafter, on March 7, 2020, the Petitioner filed a motion for enlargement of time to file briefs which extended the closure of evidence until May 8, 2020.

11 The Petitioner testified that there is no professional licensing requirement to prepare federal and state returns. TR. 69.

12) The Petitioner testified that there is no continuing education requirement to prepare federal and state tax returns. TR. 67.

13) The individual Petitioners (the Petitioner and spouse) are residents of a county in West Virginia and were assessed for personal income taxes for tax years 2012 and 2013. TR. 21, 62.

DISCUSSION

A company claims the assessment against it regarding the collection of sales taxes for the tax preparation services it provides is in error, because it is providing a professional service.

The law of this case starts with West Virginia Code Section 11-15-8. Article 15 relates to West Virginia's consumers sales and service tax, and Section 8 states that sales tax must be collected when providing services, but it also provides an exception for professional and personal services. "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 . . . ." W. Va. Code Ann. §11-15-8 (West 2010). Professional services are not defined in Chapter 11, so we must turn to Title 110, Series 15 of the West Virginia Code of State Rules which contains the legislative rules for combined consumers sales and service and use tax. There, professional service is defined as: "'Professional service' means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in West Virginia Code Section 11-15-1 et seq., to be professional. *See* Section 8.1.1 of these regulations." W. Va. Code R. §110-15-2.65 (1993). Section 8.1.1 of Series 15, Title 110 of the Code of State rules provides further guidance.

> Professional services, as defined in Section 2 of these regulations, are rendered by physicians, dentists, lawyers, certified public accountants, public accountants, optometrists, architects, professional engineers, registered professional nurses, veterinarians, licensed physical therapists, ophthalmologists, chiropractors, podiatrists, embalmers, osteopathic physicians and surgeons, registered sanitarians, pharmacists, psychiatrists, psychoanalysts, psychologists, landscape architects, registered professional court reporters, licensed social workers, enrolled agents, professional foresters, licensed real estate appraisers and certified real estate appraisers licensed in accordance with W. Va. Code '37-14-1 et seq., nursing home administrators, licensed professional counselors and licensed real estate brokers . . . . The determination as to whether other activities are "professional" in nature will be determined by the State Tax Division on a case-by-case basis unless the Legislature amends W. Va. Code '11-15-1 et seq. to provide that a specified activity is "professional." When making a determination as to whether other activities fall within the "professional" classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements.

W. Va. Code R. §110-15-8.1.1.1 (1993).

Obviously, tax preparers are not listed as providing a professional service in Section 8.1.1.1. Nor does the Petitioner argues that it was recognized as such under the common law. As stated above, the West Virginia Legislature has not determined any activity to be professional in Article 15 of Chapter 11. It should be noted that the only place the Legislature has determined what professions are professional is in Section 8.1.1.1, which, as a properly promulgated legislative rule, has the force and effect of law. *See e.g.* Appalachian Power Company v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995). As a result, we are left with the last two sentences of Section 8.1.1.1. and the Legislature's grant to the Tax Commissioner of the discretionary authority to determine whether other activities are professional.

As one might expect, a company argues that the services it provides meet the four part "test" contained in Section 8.1.1.1. A company takes the position that real life experiences should be considered for determining the level of education of a professional, rather than academic training alone. A company further argues that it follows the credentials and licensing requirements

of the Internal Revenue Service for its tax preparers and as such it meets the nature and extent for nationally recognized standards for performance and the licensing requirements on the State and national level. Finally, that the because the franchise of a tax preparation service requires 25 continuing education requirements that suffices for the last element of extend of continuing education requirements.

A company attempts to expand the Regulation and the same time, ignore this Tribunal's professional exemption precedent. Even as recent as 2016, the necessary elements of the four-part test and how they are met were clearly explained in prior precedent. There is nothing is OTA's precedent that provides for real life experiences meeting the level of education ***required for the activity***. Petitioner testified that no certain level of education was required to work as a tax preparer and that many of a company's tax preparers had a GED or high school education. Additionally, there were no facts or law providing for how real-life experiences meet any type of educational requirement for tax preparers.

Recently, this Tribunal issued a decision regarding a licensed home inspector who sought the professional services exemption contained in West Virginia Code Section 11-15-8. In that case, the Petitioner proved that the activity was licensed by the West Virginia Fire Marshall, and also subject to continuing education requirements. This Tribunal ruled against the Petitioner, in large part because the activity had no minimum educational requirements. We stated that, "We would not call it a serious mistake or unreasonable result to determine that an activity that can be done by someone with a GED degree is not professional." *See* Final Decision, Docket No. 16-056 at P. 9. We would apply the same logic here, because, like licensed home inspectors, tax preparation can apparently be done by anyone who can meet the IRS's currently undefined standards, regardless of their level of education.

Additionally, a company argues that it has its tax preparers follow the licensing requirements and credentials of the Internal Revenue Service but admits that there are no licensing requirements to prepare federal and West Virginia state tax returns. While a company follows a tax preparation service franchise annual requirement of 25 hours continuing education for tax preparers, Petitioner admitted that there were no continuing education requirements to file federal and West Virginia state tax returns. As such, a company could not point to any requirement for tax preparers pursuant to the four part of test of Section 8.1.1.1.

The Petitioner advanced additional arguments regarding the professional exemption. First, the Petitioner argued that the Respondent's website provides for tax preparers being listed as "Tax Professionals" and that it was proof positive that the Respondent considers them as professionals, allowing them to properly exempt tax preparation. However, Petitioner testified that he did not rely upon the Respondent's website regarding the definition of professionals and, in fact, stated that he had never reviewed or relied upon the Tax Department's website in any way. Instead, he relied upon a representative with a tax preparation service, for sales and use tax advice. There was no testimony that the Petitioner ever sought any additional tax or legal advice due to his reliance upon the representative's mistaken understanding of West Virginia taxation. Therefore, the website appears to have no relevance to this matter, and we find this argument unpersuasive.

The Petitioner further argues that it is the activity of tax preparation that should be exempted and the title of the person doing the activity should be irrelevant. The argument is essentially what's the difference between a CPA or certified accountant providing tax preparation and someone who is not a CPA or certified accountant providing the same service? This Tribunal recognizes the Petitioner's argument as being equity based or essentially, that it is unfair to assess

one person for sales and use tax and exempt another person for the same activity of tax preparation. A company's counsel argued at hearing the following:

> PETITIONERS' COUNSEL: Because it's not a question of whether these are professionals. The question is whether or not they render a professional service. Those are different things. And the preparation of tax returns is a professional service. Now, for instance, the practice of law includes conducting real estate closings. There has been a compromise reached between the bankers and the State Bar that allows banks, bank officers to conduct real estate closings. And it's a practice of law, but it's being tolerated to be performed by a non-lawyer. It's an example of a professional service that's being performed by a non-professional individual. It's still a professional service. Likewise, what the petitioner does is perfectly legal. Both witnesses for the Petitioner have testified to that. It's well within all licensing requirements, and yet it is a professional service. The preparation of tax returns is a professional service as recognized when it's performed by a CPA, it's recognized when a public account used to do it, and an Enrolled Agent. And the arbitrary separation of the sheep from the goats that these people who are performing exactly the same service don't have to collect sales tax. And these people who are performing exactly the same service do have to collect sales tax.
>
> JUDGE FLANIGAN: Okay.
>
> PETITIONERS' COUNSEL: There's no basis for that.
>
> JUDGE FLANIGAN: Okay. So, are you saying that it's unfair, then?
>
> PETITIONERS' COUNSEL: Well, it's clearly unfair.
>
> (Evidentiary Hearing, Tr. 145-146).

While the Petitioner's fairness argument is not lost on this Tribunal, it ignores the four-part test of Section 8.1.1.1 of Title 10, Series 15 and a litany of OTA's precedent applying this test.

Furthermore, we are not a court of equity and do not have the authority to consider it.[2] We are a statutorily created tribunal of very limited jurisdiction and are strictly bound by statutes and regulations.

A company does not specifically argue Equal Protection and insists that a constitutional argument is not being put forth. However, the fundamental basis of a company's case is the argument that similarly situated people who are performing the same work are being treated differently for no rational reason under Section 8.1.1.1 of Series 15 Title 110 of the Code of State rules. This Tribunal does not have the authority to determine the constitutionality of statutes or regulations. A review of a statute or regulation's constitutionality would be properly before a West Virginia Circuit Court and not this administrative tribunal.

With that being said, we do not seek to minimize the Petitioner's constitutional arguments, but we believe that it is important to reiterate this issue. 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

[2] The Office of Tax Appeals is regularly asked to estop the Tax Commissioner in the name of fairness pursuant to Hudkin's v. State of West Virginia Consolidated Public Retirement Board, 220 W.Va. 275, 647 SE2d 711 (2007). However, a company is not asking for relief under the Doctrine of Equitable Estoppel.

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.

For his part, the Tax Commissioner argues that the activities conducted by the Petitioner, state and federal personal income tax preparation are not professional and that there are decades worth of precedent ruling as such. As a result, currently a tax preparer filing federal and state returns has no minimum educational requirements, no licensing, no recognized standards (because there is no testing requirement) and no continuing education requirements. Thus, not meeting any of the requirements in West Virginia Code of Regulations §110-15-8.1.1.1. (1993). Furthermore, the Tax Commissioner argues that he reviewed this case based upon years of precedent and by denying the professional exemption they are correctly following precedent

We rule for the Tax Commissioner in this matter, for a variety of reasons, most specifically, that neither Petitioner or the expert witness, a Certified Public Accountant, could provide any evidence that there was a required level of education, nationally recognized standards, licensing requirements, and continuing education requirements for tax preparation. A Certified Public Accountant's testimony supported the differences between a CPA and a tax preparer. A CPA provides tax advice, auditing, prepares business, estate, and other complicated tax returns. While a Certified Public Accountant testified to the multitude of services that a CPA provides, the Petitioner testified that a company's tax preparers provide a very specific service of only preparing state and federal personal income taxes. Additionally, Petitioner testified that the tax preparation service software allows the tax preparer to essentially enter data into a computer and print a return in a speedy manner. A tax preparer is not required to meet any specific standard and as such, the four-part test of Section 8.1.1.1 of Title 10, Series 15 is simply not meet in the instant case.

In summation, a company's theory of this case has been that its activities meet the four part "test" of Section 8.1.1.1 of Title 110, Series 15 of the West Virginia Code of State Rules. However, the Petitioners failed to adequately prove as such.

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. "An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article." W. Va. Code Ann. §11-15A-2(a) (West 2010).

4. Article 15A goes on to explain that services which are not subject to West Virginia consumers sales tax are also specifically exempted from use tax. *See* W. Va. Code Ann. §11-15A-3(a)(4) (West 2010).

5. One type of service that it excepted from West Virginia's consumers sales tax is professional services. *See* W. Va. Code Ann. §11-15-8 (West 2010).

6. Professional services are not defined in Chapter 11 of the West Virginia Code.

7. The Tax Commissioner has promulgated rules which do define professional service. "'Professional service' means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in W. Va. Code

'11-15-1 et seq. to be professional. See Section 8.1.1 of these regulations." W. Va. Code R. §110-15-2.65 (1993).

8. The determination as to whether other activities are "professional" in nature will be determined by the State Tax Division on a case-by-case basis unless the Legislature amends West Virginia Code Section 11-15-1 et seq., to provide that a specified activity is "professional." When making a determination as to whether other activities fall within the "professional" classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements. W. Va. Code R. §110-15-8.1.1.1 (1993).

9. In this matter, the Petitioner has failed to prove that the activity it is engaged in, the preparation of federal and state personal income tax returns, has nationally recognized standards, has state and national licensing requirements, a certain level of continuing education requirements, or the extent of continuing education requirements.

10. 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).

11. The Petitioner in this matter has not carried its burden of proving that the _____, assessment issued against it was erroneous, unlawful, void, or otherwise invalid.

DISPOSITION

Based upon the above, it is the FINAL DECISION of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioners on _____, in the amount of $_____ is hereby AFFIRMED.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Crystal S. Flanigan
Administrative Law Judge

_____
Date Entered