

15-0857

F. Sayre

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

BROWN FUNERAL HOME, INC. and
ROBERT C. FIELDS and DONNA M. FIELDS,

Petitioners,

v.

Civil Action No. 14-AA-8
Judge John C. Yoder

MARK W. MATKOVICH,
STATE TAX COMMISSIONER
OF WEST VIRGINIA,

Respondent.

**FINAL ORDER DISMISSING PETITION
FOR APPEAL OF ADMINISTRATIVE ORDER**

I.

INTRODUCTION

Two separate but related taxpayers are involved in the case before the Court. Brown Funeral Home, Inc., (hereinafter sometimes referred to as "BFH") installed a rather sizeable system which generates electricity from solar energy.¹ The system installed by Brown Funeral Home had a total construction cost of approximately \$163,666 which would yield a tax credit of \$102,291. The solar system was installed during calendar year 2011. Brown Funeral Home

¹ The above-referenced case is one of ten (10) cases pending in Berkeley County, Jefferson County, and Morgan County, West Virginia appealing the decisions rendered from the Office of Tax Appeals concerning W. Va. Code § 11-6D-6(e) and W. Va. Code § 11-6D-6(f). Two (2) of the ten (10) cases concern businesses, while the remaining eight (8) concern individual taxpayers.

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claimed a tax credit of \$9,733.00 for the 2011 tax year on the company's West Virginia Income / Business Franchise Tax Return. As a result, Brown Funeral Home stated that it had zero tax liability for the 2011 tax year.

Robert Fields is the President and owner of Brown Funeral Home. The company is classified as an S Corporation under the Internal Revenue Code. Consequently, the income and the income tax liability of Brown Funeral Home pass through to the owner of the S Corporation. *See* W. Va. Code § 11-6D-6(f) (2011). Robert and Donna Fields filed a joint West Virginia personal income tax return for the 2011 calendar year. Robert and Donna Fields claimed a tax credit of \$20,988 for qualified alternative fuel vehicle refueling infrastructure pursuant to W.Va. Code §§11-6D-2(e) and 11-6D-3. By claiming the tax credit, Robert and Donna Fields claimed to be due a personal income tax refund of \$41,270 for tax year 2011.

The tax code allows a similar tax credit for qualified alternative fuel vehicle home refueling infrastructure pursuant to W.Va. Code §11-6D-2(f) (emphasis added). The home refueling infrastructure tax credit specifically includes infrastructure "... for providing electricity to plug-in hybrid electric vehicles on electric vehicles..." which language is omitted from the business infrastructure tax credit.

The West Virginia State Tax Department (hereinafter referred to as "Tax Department") denied the tax credits claimed by both Brown Funeral Home and Robert and Donna Fields. Subsequently, the Tax Department issued a tax assessment against the business and reduced the refund claimed by the owners from \$41,270 to \$20,282.

The Taxpayers timely appealed the tax assessment and the reduced refund to the West Virginia Office of Tax Appeals (hereinafter referred to as "OTA"). The Taxpayers agreed to consolidate the appeals and two administrative hearings were conducted on July 30, 2013. The

Office of Tax Appeals affirmed the Tax Department's position regarding both Taxpayers. Subsequently, the Taxpayers timely appealed the OTA Decision to the Circuit Court of Berkeley County. The Taxpayers demanded the Circuit Court to reverse the decision of the Office of Tax Appeals and reinstate the full amount of the tax credits claimed on the tax returns.

The Court has reviewed the Petitioner's Brief, the West Virginia State Tax Department's Circuit Court Brief, and the Petitioner's Reply Brief. Based upon the submitted briefs and a review of administrative record, the Court finds that oral argument is not necessary in order to resolve this case. The Court dismisses the *Petition for Appeal* and affirms the administrative decision in the Office of Tax Appeals Docket Nos.: 12-247 PT-M and 12-308 RP-M.

II.

FACTS BEFORE THE COURT

The Court adopts the five specific findings of fact in support of the administrative decision made by the Office of Tax Appeals (hereinafter "OTA").

1. The Petitioner Brown Funeral Home, Inc. operates a funeral home located in Martinsburg, Berkeley County, West Virginia. (OTA Decision Finding 1, R. Tab 2.)
2. In 2011, Brown installed a 25.3 kilowatt roof mounted solar array consisting of 108 235-watt panels and 3800 inverters and four Schneider EV charging stations. The total cost of the installation was \$172,280. (OTA Decision Finding 2, R. Tab 2)
3. That installation led Brown to file for an alternative fuel tax credit in the amount of \$9,733.00 for tax year 2011, an amount equal to its business franchise tax liability for that year. (OTA Decision Finding 3, R. Tab 2.)

4. As part owners of Brown Funeral Home, an S Corporation, Robert and Donna Fields also filed for alternative fuel tax credits on their personal income taxes for tax year 2011. (OTA Decision Finding 4, R. Tab 2.)
5. As stated above, the Tax Commissioner issued return change letters to all the Petitioners, informing them that the requested tax credit had been denied. (OTA Decision Finding 5, R. Tab 2.)

The Court finds that the OTA Decision is further supported by numerous facts found in the evidentiary record.

6. Mr. Colin Williams of Mountain View Solar testified at the administrative hearing that Brown Funeral Home purchased a system of 25.3 kilowatt roof mounted solar array including 108 235-watt panels, 3 8,000 inverters and four Schneider EV charging stations. The total cost of the installation was \$172,280.00. (Brown Funeral Home Transcript, July 30, 2013 hearing (hereinafter referred to as BFH Tr. P. ___, R. Tab 15) at PP. 1-2.)
7. Brown Funeral Home claimed a tax credit of \$102,291 based upon the construction cost of \$163,666. (State's Exhibit 1, p. 15, line 6 and p. 17, line 2, R. Tab 29.)
8. Mr. Williams stated that Brown Funeral Home purchased property for use in a commercial establishment and not a residence. (BFH Tr. PP. 1-2, R. Tab 15.)
9. Brown Funeral Home's system does not include any batteries to store electricity produced by the solar system. (BFH Tr. P. 2, R. Tab 15.)
10. Mr. Robert Fields, owner of Brown Funeral Home, testified that the business did not own any electric powered vehicle as of July 30, 2013. Although, Brown Funeral Home had considered purchasing alternative fuel vehicles in later years. (BFH Tr. p. 6, R. Tab 15.)

11. Mr. Robert Fields admitted that Brown Funeral Home's electric bills have decreased since the installation of the solar system. (BFH Tr. p. 7, R. Tab 15.)
12. Mr. Fields stated that the Brown Funeral Home solar system has four charging stations located in the company parking lot which are available for public use twenty-four hours a day at no charge. The publicly available charging stations are listed on the internet. (BFH Tr. pp. 5-6, R. Tab 15.)
13. Mr. Fields admitted that he does not know how often the charging stations are used by the public. However, he has seen people using the charging stations at various times. Mr. Brown has stated that the public charging stations are not used all the time. (BFH Tr. pp.6-7, 10, R. Tab 15.)
14. In addition, Mr. Fields also admitted that the electricity generated by solar power at the Brown Funeral Home facility is used for general electrical purposes of operating the business. (BFH Tr. p. 7, R. Tab 15.)
15. Mr. Fields stated that the business became aware of the alternative fuel tax credits after seeing an exhibit at the home show operated by Mountain View Solar. (BFH Tr. pp. 7-8, R. Tab 15.)
16. Mr. Fields stated that he learned more about the tax credits from CoxHollida, his company's accounting firm, and Mountain View Solar. (BFH Tr. pp. 7-8, R. Tab 15.)
17. Mr. Fields stated that he never received any correspondence or had any conversations with the Tax Department regarding whether the solar system would be eligible for the alternative fuel vehicle refueling infrastructure tax credit. (BFH Tr. p.8, lines 15-19, R. Tab 15.)

18. The representations regarding the availability and applicability of the tax credits were made by CoxHollida and Mountain View Solar. (BFH Tr. pp.7-8, R. Tab 15.)
19. On March 12, 2011, the West Virginia Legislature enacted SB465 to be effective July 1, 2011 that created the tax credit for Qualified Alternative Fuel Vehicle Refueling Infrastructure. W.Va. Code § 11-6D-6(e).
20. Subsequent to the passage of SB 465, Brian Romine, CPA with the accounting firm of CoxHollida, began inquiring about the applicability of the credit as it related to one of his clients Mountain View Solar Company (hereinafter referred to as "MVS"). (Joint Tr. p. 34, R. Tab 16.)
21. On cross-examination Mr. Romine admitted that he had some uncertainty and did not unequivocally promise his clients that the State Tax Department had agreed that his interpretation of the qualified alternative fuel vehicle recharging infrastructure tax credits was correct. (Joint Tr. p. 69, lines 5-18, R. Tab 16.)
22. On September 2, 2011, Mr. Romine sent a letter to John Montgomery at the Tax Department requesting clarification on whether the products sold by MVS would be eligible for the tax credit when purchased. (Petitioners' Joint Ex. 1, R. Tab 17.)
23. Mr. Montgomery did not respond to the letter. (Joint Tr. p. 36, R. Tab 16.)
24. Mr. Romine encountered Mr. Montgomery at a tax seminar in September 2011 and inquired about his earlier letter. Mr. Montgomery verbally requested that Mr. Romine send in some additional information. (Joint Tr. p. 36, R. Tab 16.)
25. Mr. Romine faxed a second letter to Mr. Montgomery on October 19, 2011. (Petitioner's Joint Ex. 2, R. Tab 18.)
26. Mr. Montgomery never responded to either the September or October 2011 letters.

27. In his oral discussion with Mr. Romine, Mr. Montgomery indicated that the Tax Department was working on publishing an interpretive rule that would provide guidance on this issue for all taxpayers. (Joint Tr. p. 39, R. Tab 16.)
28. In March of 2012, Mr. Romine received a copy of the proposed interpretive rule that Mr. Montgomery had mentioned. The proposed interpretative rule was supplied in response to Colin Williams, in his capacity as Vice President of Sales and Marketing for MVS, making an inquiry to the Governor's office regarding the status of the proposed interpretive rule. (Petitioner's Joint Ex. 4, R. Tab 20; Joint Tr. pgs. 39-40, R. Tab 16.)(emphasis added)
29. On cross-examination, Mr. Romine admitted that the proposed interpretative rule he received in March 2012 was never filed with the Secretary of State's Office. (Joint Tr. p. 69, lines19-22, R. Tab 16.)(emphasis added)
30. In July and September of 2012, meetings were held between the Tax Department and MVS that included representatives of the Legislature. (Joint Tr. pgs. 41 and 45, R. Tab 16.)
31. Subsequent to the July 2012 meeting, MVS provided information to the Tax Department regarding potentially allocating partial amounts of the installation costs. (Joint Tr. p. 41, R. Tab 16.)
32. After the September 2012 meeting, the Tax Department replied with a letter to Taxpayers' counsel that outlined the Tax Department's position regarding both commercial and home alternative fuel vehicle refueling station infrastructure. (State's Joint Ex. 1; R. Tab 28.)

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33. Mr. Mark Ballantine is a developer and owner of solar electric facilities and a consultant to renewable energy companies in the Mid-Atlantic United States. (Joint Tr. p. 9, R. Tab 16.)
 34. Mr. Ballantine is familiar with solar electrical alternative energy refueling infrastructures created by solar power. (Joint Tr. p. 9, R. Tab 16.)
 35. A functioning solar electric facility consists of solar modules that are arranged in strings of up to 8 to 12 modules each that are combined to feed into an inverter. The inverter converts the direct current electricity that is produced by the solar modules into alternating current electricity that is typically used in the recharging stations and by consumers. The system also includes meters for measuring the amount the electricity produced and, typically, an interconnection with the grid. (Joint Tr. p. 10, R. Tab 16.)
 36. A typical system would connect to the grid through the host; the host would be the owner of the system and would have the system installed on their facility. The system is typically connected to car charging stations, the utility distribution panel within the facility, and ultimately to the power grid. (Joint Tr. p. 10, R. Tab 16.)
 37. Solar panels are made up of individual solar cells. As the sunlight hits the cells, it excites the electrons and they are transferred into the system. (Joint Tr. p. 10-11, R. Tab 16.)
 38. After the electricity is transferred from the solar panel, it travels through wiring panels to an inverter to convert the current from direct current to alternating current. (Joint Tr. p. 11, R. Tab 16.)
 39. Once converted to alternating current, the electricity travels to a meter to measure the amount of electricity coming off the solar array into the distribution panel. The distribution panel has an additional meter between itself and the grid. The electrons

coming off the inverter travel to the host facility, which would include the car charging station and be used for general consumption at the facility. (Joint Tr. pgs. 11-12, R. Tab 16.)

40. When a plug-in vehicle comes to a recharging station during the day, it could be taking electrons off the solar system or off the grid depending on how much electricity is being consumed by the commercial facility or the house. If it is charging during non-daylight hours, it would be consuming electrons off the grid. (Joint Tr. p. 13, R. Tab 16.)

III.

STANDARD OF REVIEW

The West Virginia Supreme Court of Appeals has frequently addressed the standard of review to be employed by a circuit court in reviewing administrative decisions issued by State agencies. Factual findings made by the Tax Department or any other administrative agency receive deference. *See* Syl. pt. 2, *CB&T Operations Co., Inc. v. Tax Commissioner of State*, 211 W.Va. 198, 564 S.E.2d 408 (2002). On the other hand, questions of law are subject to *de novo* review. *See* Syl. pt. 1, *Davis Memorial Hospital v. West Virginia State Tax Commissioner*, 222 W.Va. 677, 671 S.E.2d 682 (2008); *see also* *CB&T*, at Syl. pt.1; Syl. pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

This Court may affirm the OTA decision based upon the evidentiary record from below. In the alternative, this Court may reverse, vacate or modify the administrative decision if the decision issued was in violation of constitutional or statutory provisions, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures, affected by other error of law, clearly wrong in view of the reliable, probative and substantial evidence on

the whole record, or arbitrary, capricious, characterized by abuse of discretion, or clearly unwarranted exercise of discretion. *See* W. Va. Code §§ 11-10A-19(f) and 29A-5-4(g).

IV.

ARGUMENT

A. The Office of Tax Appeals Correctly Determined that the Taxpayers Do Not Qualify for the Tax Credit in W. Va. Code § 11-6D-2(e) Available for Business Entities.

The Court notes that tax law is very much a creature of statute. Therefore, the Court must examine the statutory language for the tax credit claimed by the Taxpayers. The West Virginia Legislature adopted two alternative fuel infrastructure tax credits during the legislative session in 2011. Although the two infrastructure tax credits parallel each other to a certain extent, the two credits contain very significant differences. The Taxpayers admitted in their brief to this Court that the tax credits found in W. Va. Code § 11-6d-2(e) (2011) for business entities² and W. Va. Code § 11-6D-2(f) (2011) for homes are mutually exclusive. *See* Taxpayers' Brief at p. 15. The Tax Department agrees.

The tax credit before the Court in this case is the infrastructure tax credit available for business entities.

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

² The Court will refer to the Section 2(e) tax credit as a credit available for business entities since the exact language of Section 2(e) employs the cumbersome phraseology of "... property not located at a private residence or private home..." Obviously, any entity may claim the Section 2(e) tax credit as long as the property is not located at a private residence or a private home.

W.Va. Code § 11-6D-2(e)(2011) (emphasis added). The Legislature specifically classified electricity generated from solar energy as an alternative fuel pursuant to W. Va. Code § 11-6D-2(a)(9). However, the tax credits claimed by the Taxpayers are not simply for the generation of alternative fuel; rather, the tax credits only apply to property used to store and dispense those alternative fuels. Neither tax credit in W. Va. Code § 11-6D-2 provides a tax credit for purchasing and installing solar panels which constitutes the lion's share of the solar system purchased by BFH. In fact, the tax credits before the Court do not include the term "solar panels." The tax credit is only available for property used for the storage and delivery of alternative fuels and not for property used for the creation of electricity from solar energy. *See* W.Va. Code § 11-6D-4(c).

The essence of the claim by Brown Funeral Home Company is that it installed a solar system at the business location which creates electricity used to power plug-in hybrid electric vehicles or electric vehicles.

The Taxpayer's argument fails for several reasons. If the Legislature had intended to create a tax credit for generating alternative fuel from solar energy, the Legislature would have explicitly said so. In 2009 the Legislature enacted a \$2,000.00 tax credit for property used to generate electricity from solar energy for residential use. *See* W.Va. Code § 11-132-1, *et seq.* Electricity generated from solar energy qualifies for the tax credit pursuant to W.Va. Code § 11-132-2(1). Clearly, the Legislature knows how to create tax credits for the generation of electricity from solar power. However, the statutory framework before the Court today only applies to refueling infrastructure and not generation of electricity from solar energy. This Court refuses to infer a tax credit that the Legislature did not create.

The testimony at BFH's evidentiary hearing was clear. Colin Williams testified that the Company purchased a business system and not a home system. (See Finding 8, *supra*.) Therefore, BFH can only claim the tax credit for property owned by and located at a business location as set forth in W. Va. Code § 11-6D-2(e). The credit in Section 2(e) covers property used for storing alternative fuels and dispensing alternative fuels. The tax credit includes but is not limited to compression equipment, storage tanks and dispensing units, for alternative fuels at the point where the fuel is delivered. Brown Funeral Home did not purchase and install any compression equipment. (See BFH Tr. P. 2, R. Tab 15). Mr. Williams also testified that BFH's system does not have any batteries to store the electricity generated by the solar system. (See Finding 9, *supra*). Furthermore, Robert Fields admitted that the electricity generated by the solar panels was used for general electrical purposes to operate the business. (See Finding 14, *supra*).

Nevertheless, the Taxpayers argue that they actually store electricity in the grid. (See Taxpayer's Brief at p. 19). However, this argument ignores the clear statutory requirement that the Taxpayer must own the property and that the property must be located in this State. Brown Funeral Home does not own the electrical grid. The testimony of BFH's own witnesses clearly demonstrates that the solar system purchased by the Company does not include any storage capacity. Brown Funeral Home's argument fails under the clear language of W. Va. Code § 11-6D-2(e).

Instead, Brown Funeral Home is attempting to claim the broader exemption found in W.Va. Code §11-6D-2(f). Brown Funeral Home is attempting to slip into the tax credit for qualified alternative fuel vehicle home refueling infrastructure.

(f) "Qualified alternative fuel vehicle home refueling infrastructure" means property owned by the applicant for the tax credit located on a private residence

or private home and used for storing alternative fuels and for dispensing such alternative fuels into fuel tanks of motor vehicles, including, but not limited to, compression equipment, storage tanks and dispensing units for alternative fuel at the point where the fuel is delivered or for providing electricity to plug-in hybrid electric vehicles or electric vehicles: *Provided*, That the property is installed and located in this state. (emphasis added).

W.Va. Code § 11-6D-2(f)(2011). The home refueling infrastructure tax credit is found in the paragraph immediately following the refueling infrastructure tax credit for business entities in the statute. While the two tax credits contain similar language throughout, one distinction between the two tax credits is critical to this Court's analysis. The home refueling infrastructure tax credit includes the proviso for property used "... for providing electricity to plug-in hybrid electric vehicles or electric vehicles..." The two tax credits are virtually identical up to the quoted proviso. However, the language related to plug-in hybrid electric vehicles and electric vehicles is conspicuously absent in Section 2(e) which applies to business entities.

It is well settled that the Legislature meant what it said in the statutes and that the statutes say what the Legislature meant. *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995), quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391, 397 (1992); *See also Appalachian Power Co. v. State Tax Dept.*, 195 W.Va. 573, 586, 466 S.E.2d 424, 437 (1995). Obviously, the Legislature made a conscious decision to provide a refueling infrastructure tax credit for delivering alternative fuel to plug-in hybrid electric vehicles or electric vehicles only at the home. The Taxpayer's argument that business refueling infrastructure used for providing electricity to plug-in hybrid electric vehicles or electric vehicles should fall within the tax credit in Section 2(e) requires a leap of faith. To adopt the Taxpayer's argument, the Court must conclude that the Legislature explicitly stated that refueling infrastructure supporting plug-in hybrid electric vehicles or electric vehicles qualifies at the home and that the Legislature forgot to mention

electric vehicles in the business refueling infrastructure tax credit. The leap between Section 2(e) and Section 2(f) is simply too far to jump.

Furthermore, the doctrine of *expressio unis est exclusio alterius* precludes the adoption of the Taxpayer's argument. Generally, it means the expression or inclusion of one thing implies the exclusion of another or the alternative. The West Virginia Supreme Court has held, "If the legislature includes a qualification in one statute, but omits qualification in another related statute, courts should presume the omission was intentional; the courts infer that the Legislature intended the qualification would not apply to the latter statute." *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995). The doctrine is clearly applicable since the two tax credits follow one right after the other in the statute. If the Legislature had intended the refueling infrastructure tax credit for business entities in W. Va. Code 11-6D-2(e) (2011) to include plug-in hybrid electric vehicles or electric vehicles, then the Legislature would have said so like it said in the home refueling infrastructure tax credit found in W. Va. Code § 11-6D-2(f) (2011).

In addition, the Taxpayer argues that W.Va. Code §11-6D-1 *et. seq.*, is socioeconomic legislation which should be liberally construed by the courts according to *Brockway Glass Company v. Caryl*, 183 W.Va. 122 at 124-125, 394 S.E.2d 524 at 526-527 (1990). See Taxpayer's Brief at 15-16. The Taxpayer's have correctly stated the black letter law. Nevertheless, the Legislature enacted the qualified alternative fuel motor vehicle home refueling infrastructure tax credit at issue before the Court in 2011. See W.Va. Code §11-6D-1(2011). The Legislature repealed the alternative fuel vehicle home refueling infrastructure tax credit in 2013. The home refueling infrastructure tax credit was expressly revoked for construction on or after April 15, 2013. See W.Va. Code §11-6D-4(d)(2)(2013). Obviously, the home refueling infrastructure tax credit was a socioeconomic experiment which the Legislature rejected after

only two years. This Court refuses to extend a tax credit from the home refueling infrastructure to the business infrastructure tax credit which has been subsequently revoked by the Legislature.

B. The OTA Decision correctly determined that the Tax Department is not barred by the doctrine of equitable estoppel in concluding that the Taxpayers are not eligible for the Qualified Alternative Fuel Vehicle Refueling Infrastructure tax credit.

The OTA Decision correctly determined that the State Tax Department is not barred by the doctrine of equitable estoppel in concluding that Brown Funeral Home Company is not eligible for the qualified alternative fuel vehicle refueling infrastructure tax credit for business entities found in W. Va. Code § 11-6D-2(e). In support of its argument, the Taxpayers interestingly cite to a West Virginia Supreme Court of Appeals case that is detrimental to the position they are advocating. See *Hudkins v. State Consol. Public Retirement Board*, 220 W.Va. 275, 646 S.E.2d 711 (2007). The *Hudkins* Court acknowledges a more rigorous standard when attempting to estop the government. The opinion specifically provides:

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. *Id.* at 280, 716.

The West Virginia Supreme Court of Appeals has stated the general rule that estoppel may not be invoked against a governmental unit when functioning in its governmental capacity. *Cunningham v. Wood County Court*, 148 W.Va. 303, 309 (1964). Equitable estoppel should only be applied against the government "with the utmost caution and restraint." *Boulez v. Commissioner*, 810 F.2d 209 (D.C. Cir. 1987). Courts have additionally taken a particularly strict approach to estoppel claims against the government when dealing with public funds. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). Simply put, the Taxpayers did not meet this heightened burden at the Office of Tax Appeals and there is absolutely no evidence in

the record indicating that the Tax Department committed affirmative misconduct or wrongful conduct.

In addition to failing to meet the elevated burden for seeking to estop a government agency, the Taxpayers have failed to prove the traditional elements of equitable estoppel. The West Virginia Supreme Court articulated the elements of equitable estoppel in *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956):

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.

An analysis of the facts in this matter reveals that none of the multiple elements have been proven by the Taxpayers. First of all, the Taxpayers did not rely on advice or representations from the State Tax Department. Robert Fields owner of Brown Funeral Home Company, stated that they had no contact or discussions with the State Tax Department regarding the tax credits at issue. *See* Finding 17, *supra*. The Taxpayers at bar relied upon the professional advice of Mr. Romine, the CPA, and Mr. Williams, the solar panel contractor, in deciding to install the solar system at issue. *See* Findings 18, *supra*.

Rather, the Taxpayers make a blanket assertion that the Tax Department represented to Mr. Romine that taxpayers would be eligible for the credit and that in grid storage would meet the requirements of the statute. However, the factual record does not reflect this argument. In actuality, the record shows that Mr. Romine sent two letters to Mr. Montgomery dated September 2, 2011 and October 19, 2011. (Petitioners' Joint Exhibits 1 & 2, Tabs 17 & 18; Joint Tr. p. 36.) The Tax Department did not respond to either of these letters. The record further

reflects that Mr. Romine encountered Mr. Montgomery at a tax seminar and was simply advised to provide the Tax Department with additional information. (Joint Tr. p. 36.) The only written communication received by Mr. Romine from the Tax Department occurred on March 19, 2012—well after the close of the 2011 tax year. On that date, Mr. Montgomery emailed Mr. Romine a copy of a **proposed** interpretive rule. (Petitioners' Joint Exhibit 4, Tab 20; Joint Tr. pp. 70, 73).

Prong 1: False representation or a concealment of material fact.

The record below does not reflect any false representations by the Tax Department and does not show any concealment of material facts. In fact, the evidence in the record shows that the Tax Department had no contact whatsoever with the Taxpayers in this case prior to the installation of the solar systems. Nevertheless, the Taxpayers cite to unanswered letters from Mr. Romine to the Tax Department, oral communications with Mr. Romine at a tax seminar, and the provision of proposed interpretive rules which were received by Mr. Romine after the tax year at issue had closed. These allegations fall far short of misrepresentations.

The Taxpayers' own witness, Mr. Romine, even said he harbored an "element of uncertainty" regarding whether MVS's products would qualify for the credit. (Joint Tr. p. 69.) Mr. Romine simply jumped the gun on advising his clients that MVS's solar systems would be eligible for the tax credit. At the OTA hearing, Mr. Romine testified that he thought that MVS's products were "more likely than not" eligible for the credit. (Joint Tr. p. 66.) "More likely than not" is not the type of mindset that one would get from the type of definite misrepresentation that one would need to prove in order to prevail on a claim of equitable estoppel. Mr. Romine cannot claim to be completely blindsided by the Tax Department's position when he himself was not

entirely sure the solar systems were going to be eligible for the credit. Especially, since Mr. Romine is not the Taxpayer before the Court claiming the tax credits.

Prong 2: The false representation or concealment of material fact must have been made with knowledge, actual or constructive, of the facts.

Since there was no false representation or concealment of material fact, the Taxpayers have failed to meet this prong. Assuming *arguendo* that the Taxpayers had made such a showing, the Taxpayers introduced no evidence into the record that the alleged misrepresentations were made with knowledge. The Taxpayers called no witnesses from the Tax Department to testify regarding such knowledge. The Taxpayers have admitted that they had no contact with the State Tax Department when they decided to purchase and install the solar systems.

Prong 3: The party to whom it was made must have been without knowledge or the means of knowledge of the real facts.

The Taxpayers in this matter were not without knowledge or the means of knowledge of the real facts. The Taxpayers' own witness testified that he was not completely convinced by the Tax Department's communications that MVS's solar systems were eligible for the credit. (Joint Tr. p. 69.) What the record does reflect is that the Tax Department was gathering information and preparing to issue definitive guidance after a thorough review.

Prong 4: The false representation or concealment of facts must have been made with the intention that it should be acted on.

Since there was no false representation or concealment of material fact, the Taxpayers have failed to meet this prong. Assuming *arguendo* that the Taxpayers had made such a showing, the Taxpayers introduced no evidence into the record indicating intent by the Tax Department that a misrepresentation should be acted on. Rather, the record reflects that the Tax Department was gathering information so that definitive guidance could eventually be provided to taxpayer.

The only written communication Mr. Romine received from the Tax Department was a copy of a *proposed* interpretive rule. (Petitioners' Joint Exhibit 4, Tab 20; Joint Tr. pp. 70, 73). A **proposed** rule by definition is prospective and not a certainty to be acted on.

Prong 5: The party to whom it was made must have relied on or acted on it to his prejudice.

The timeline of events in this matter also precludes the Taxpayers from showing the requisite standards for equitable estoppel. The fifth prong requires that the relying party must have acted on a false representation to his prejudice. However, many of the events cited to by the Taxpayers in support of the equitable estoppel claim occurred after the tax year in question had closed. The Taxpayers assert they are entitled to the tax credit for the 2011 tax year ending on December 31, 2011. Although the Taxpayers failed to establish a timeline of installation and whether such installation occurred before or after the accountant sent letters that were unanswered by the Tax Department, it is undeniable that the proposed interpretive rules were sent on March 19, 2012 – more than two months after the 2011 tax year had closed. The July and September 2012 meetings between the Tax Department, MVS and legislative representatives also occurred well after the 2011 tax year. Therefore, the Taxpayers cannot assert that they relied upon information to their prejudice when the information was provided after the solar system was already constructed. Furthermore, since the Taxpayers admitted they had no contact with the Tax Department, the Taxpayers could not have relied upon the Tax Department's representations.

The Taxpayers have not shown the elements of traditional equitable estoppel let alone the more rigorous standard applicable when attempting to estop a governmental entity.

V. CONCLUSIONS OF LAW

1. West Virginia law is clear. The taxpayer has the burden of proof in a hearing before the Office of Tax Appeals. W. Va. Code § 11-10A-10(e).
2. On March 12, 2011, the West Virginia Legislature enacted SB465 to be effective July 1, 2011 that created the tax credits codified as the Alternative-Fuel Motor Vehicles Tax Credit. W. Va. Code § 11-6D-1, *et seq.*
3. Specifically, the tax credit at issue before this Court is the Qualified Alternative Fuel Vehicle Refueling Infrastructure Tax Credit available for business entities.

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

W.Va. Code § 11-6D-2(e)(2011).

4. The Legislature specifically classified electricity generated from solar energy as an alternative fuel pursuant to W. Va. Code § 11-6D-2(a)(9).
5. The Legislature adopted a similar tax credit for home infrastructure which states:

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

W.Va. Code § 11-6D-2(f)(2011).

6. The language related to plug-in hybrid electric vehicles and electric vehicles found in W. Va. Code § 11-6D-2(f) for home refueling infrastructure is conspicuously absent in Section 2(e) which applies to business infrastructure.

7. It is well settled that the Legislature meant what it said in the statutes and that the statutes say what the Legislature meant. *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995), quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391, 397 (1992); *See also Appalachian Power Co. v. State Tax Dept.*, 195 W.Va. 573, 586, 466 S.E.2d 424, 437 (1995).

8. The doctrine of *expressio unis est exclusio alterius* precludes the adoption of the Taxpayer's argument. The doctrine means the expression or inclusion of one thing implies the exclusion of another or the alternative.

9. The West Virginia Supreme Court has held, "If the legislature includes a qualification in one statute, but omits qualification in another related statute, courts should presume the omission was intentional; the courts infer that the Legislature intended the qualification would not apply to the latter statute." *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995). The doctrine is clearly applicable since the two tax credits follow one right after the other in the statute.

10. The Court finds that the Legislature made a conscious decision to provide a refueling infrastructure tax credit for delivering alternative fuel to plug-in hybrid electric vehicles or electric vehicles only at the home and not to enact a similar tax credit for business infrastructure.

11. The West Virginia Supreme Court of Appeals has repeatedly held that where a statute is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation. Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968); *see also* Syl. Pt. 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970) ("Where the language of a statute

is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.”); Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951) (“A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.”).

12. The Court finds the language in W. Va. Code § 11-6D-2(e) to be clear and unambiguous. Therefore, the Court will apply the tax credit as written and not engage in any attempts to interpret the tax credit.

13. Socioeconomic legislation should be liberally construed by the courts according to *Brockway Glass Company v. Caryl*, 183 W.Va. 122 at 124-125, 394 S.E.2d 524 at 526-527 (1990).

14. Nevertheless, the Legislature enacted the qualified alternative fuel motor vehicle home refueling infrastructure tax credit, raised by the Taxpayers before this Court, in 2011. See W.Va. Code §11-6D-1(2011). The Legislature repealed the alternative fuel vehicle home refueling infrastructure tax credit in 2013. The home refueling infrastructure tax credit was expressly revoked for construction on or after April 15, 2013. See W.Va. Code §11-6D-4(d)(2)(2013).

15. The Court refuses to expand the tax credit from the home refueling infrastructure tax credit, which has been subsequently repealed by the Legislature, to the business infrastructure tax credit set forth in W. Va. Code § 11-6D-2(e). If the Legislature had intended for Section 2(e) to include plug-in hybrid electric vehicles and electric vehicles in Section 11-6D-2(e), the Legislature would have simply included that language.

16. The Taxpayers’ claims for estoppel fail as well. In *Hudkins v. State Consol. Public Retirement Board*, 220 W.Va. 275, 646 S.E.2d 711 (2007), the Supreme Court acknowledged a

more rigorous standard when attempting to estop the government. The opinion specifically provides:

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. *Id.* at 280, 716.

17. The West Virginia Supreme Court of Appeals has stated the general rule that estoppel may not be invoked against a governmental unit when functioning in its governmental capacity.

Cunningham v. Wood County Court, 148 W.Va. 303, 309 (1964).

18. Equitable estoppel should only be applied against the government "with the utmost caution and restraint." *Boulez v. Commissioner*, 810 F.2d 209 (D.C. Cir. 1987). Courts have additionally taken a particularly strict approach to estoppel claims against the government when dealing with public funds. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).

19. The Court finds that the Taxpayers have not met this heightened standard which is required in order to invoke the principles of equitable estoppel against the State.

20. The West Virginia Supreme Court has articulated the traditional elements which any litigant must show in order to invoke the doctrine of equitable estoppel in *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956):

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.

21. The Taxpayers have failed to establish that the State Tax Department made false representations or concealed any material facts which are essential elements of equitable

estoppel. In fact, the Taxpayers had no interaction with the State Tax Department in deciding to purchase the solar system.

22. The Taxpayers have failed to demonstrate that they relied upon any representations made by the State Tax Department when they purchased the solar system. The record clearly shows that the Taxpayers relied on the representations of Mr. Romine, the certified public accountant from CoxHollida, and Mr. Williams, the solar panel contractor.

23. The Taxpayers' accountant only obtained the proposed interpretive rule after the tax year at issue was closed.

24. The Court finds that the Taxpayers have established none of the five traditional elements required to sustain the claim of equitable estoppel as set forth in *Stuart, supra*.

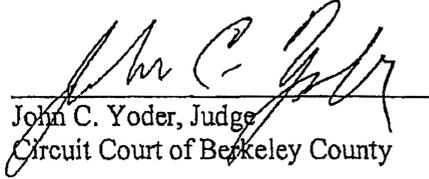
VI. DISPOSITION

The Court finds that the tax credit set forth in W. Va. Code § 11-6D-2(e) is clear and unambiguous. The Court has applied the tax credit as enacted by the Legislature. The Court finds that the Taxpayers have failed to carry the burden of proof as required by W. Va. Code § 11-10A-(e). Based upon the review of the entire record from the Office of Tax Appeals, the Court finds that the OTA Decision complies with the dictates of W. Va. Code §§ 11-10A-19(f) and 29A-5-4(g). Therefore, the Court **AFFIRMS** the OTA Decision and **DISMISSES** the *Petition for Appeal of Administrative Decision* with prejudice. The objections of all parties are noted for the record and preserved.

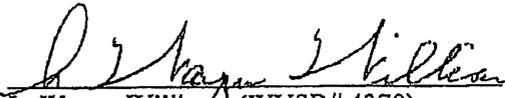
The Clerk of the Circuit Court is directed to transmit a true copy of the *Final Order* to the parties and counsel of record at the addresses listed below.

It is ORDERED.

Entered: 7/22/16


John C. Yoder, Judge
Circuit Court of Berkeley County

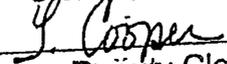
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The Clerk is directed to retire this
action from the active docket and
place it among causes ended.

A TRUE COPY
ATTEST

Virginia M. Sine
Clerk Circuit Court

By: 
Deputy Clerk

Copy to:

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