

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

APPEAL NO. 15-0857

**BROWN FUNERAL HOME, Inc., and
ROBERT C. FIELDS and DONNA M. FIELDS,**

Petitioners, below Petitioners.

v.

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

Respondent, below Respondent.

**BRIEF OF THE
WEST VIRGINIA STATE TAX DEPARTMENT**

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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

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-2(e) and W. Va. Code § 11-6D-2(f). Two (2) of the ten (10) cases concern businesses, while the remaining eight (8) concern individual taxpayers. *Brown Funeral Home* and *Martin Distributing*, Appeal Number 15-0842, the two business cases, are before the Supreme Court. Two individual cases have been appealed as well—*David M. Hammer and Euphemia Kallas v. Matkovich*, Appeal Number 15-0869, and *Louis Larrow v. Matkovich*, Appeal Number 15-0867. Seven circuit court cases have been

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 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 and 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 or 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

decided in favor of the Tax Department's position; three cases are currently pending in Berkeley County.

refund claimed by the owners from \$41,270 to \$20,282. Both the Circuit Court of Berkeley County by the Honorable John C. Yoder and the Office of Tax Appeals affirmed the Tax Department's position in this case.

II. STATEMENT OF THE CASE

Ten cases revolve around the same set of facts and legal issues. Either the Legislature meant what it said when it enacted the two tax credits before the Supreme Court or the Legislature did not. That is the simple question at the heart of these cases. In 2011 the West Virginia Legislature enacted SB 465 which created the tax credits for qualified alternative fuel vehicle refueling infrastructure for business entities pursuant to W.Va. Code §11-6D-2(e) and qualified alternative fuel vehicle home refueling infrastructure pursuant to W.Va. Code §11-6D-2(f). The statutes do not authorize a tax credit for solar panels that create electricity from sunlight. The lion's share of the cost of the solar panel systems purchased by the Taxpayers is due to the purchase and installation of solar panels. Both tax credits only apply to property that is used to store or dispense alternative fuels. Unfortunately, the Taxpayers relied on advice from their own accountants and the solar panel system contractor who jumped the gun. The accountants and the solar panel contractor solicited sales before the State Tax Department had decided the parameters of the tax credits and issued any guidance to the general public. Consequently, the Circuit Court and the Office of Tax Appeals simply applied the language in the tax credits and denied any credits for the purchase of solar panels to generate electricity since W.Va. Code §11-6D-2(e) does not specifically list solar panels as qualified alternative fuel vehicle refueling infrastructure.

III. FACTS BEFORE THE COURT

Judicial review performed by the West Virginia Supreme Court of Appeals must start with the facts of the case. The Taxpayers' brief filed with this Court simply recites the facts argued by the Taxpayers before the Circuit Court of Berkeley County. While several of the facts argued by the Taxpayers were ultimately adopted as findings of fact by the Honorable John Yoder, nineteen (19) of the "facts" listed in the Taxpayers' brief to the Supreme Court were **not** findings of fact in the Circuit Court decision. The findings of fact in Judge Yoder's *Final Order* do **not** include the Taxpayers' "facts" number 8, 13, 14, 15 (partially), 17, 19, 20, 21, 22, 24, 25, 26 (first clause), 27, 29, 30, 31, 32, 40 and 42.

The Honorable John Yoder specifically adopted the five findings of fact made by the Office of Tax Appeals (hereinafter "OTA") which are set forth below. *See* Appendix Record at p. 109 (hereinafter, AR 109).

1. The Petitioner Brown Funeral Home, Inc. operates a funeral home located in Martinsburg, Berkeley County, West Virginia. AR 109.
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 installation was \$172,280. AR 109.
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. AR 109.
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. AR 110.

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. AR 110.

In addition, Judge Yoder ruled that the OTA Decision was further supported by numerous findings of fact found in the evidentiary record. AR 110.

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. AR 110.

7. Brown Funeral Home claimed a tax credit of \$102,291 based upon the construction cost of \$163,666. AR 110.

8. Mr. Williams stated that Brown Funeral Home purchased property for use in a commercial establishment and not a residence. AR 110.

9. Martin Distributing's system does not include any batteries to store electricity produced by the solar system. AR 110.

10. Mr. Robert Fields, owner of Brown Funeral Home, testified that the business did not own any electric powered vehicles as of July 30, 2013. Although, Brown Funeral Home had considered purchasing alternative fuel vehicles in later years. AR 110.

11. Mr. Robert Fields admitted that Brown Funeral Home's electric bills have decreased since the installation of the solar system. AR 111.

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. AR 111.

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. Fields has stated that the public charging stations are not used all the time. AR 111.
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. AR 111.
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. AR 111.
16. Mr. Fields stated that he learned more about the tax credits from CoxHollida, his company's accounting firm, and Mountain View Solar. AR 111.
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. AR 111.
18. The representations regarding the availability and applicability of the tax credits were made by CoxHollida and Mountain View Solar. AR 112.
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). AR 112.
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"). AR 112.
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. AR 112.

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. AR 112.
23. Mr. Montgomery did not respond to the letter. AR 112.
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. AR 112.
25. Mr. Romine faxed a second letter to Mr. Montgomery on October 19, 2011. AR 112.
26. Mr. Montgomery never responded to either the September or October, 2011 letters. AR 112.
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. AR 113.
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. AR 113.
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. AR 113 (emphasis added).

30. In July and September, 2012, meetings were held between the Tax Department and MVS that included representatives of the Legislature. AR 113.
31. Subsequent to the July 2012 meeting, MVS provided information to the Tax Department regarding potentially allocating partial amounts of the installation costs. AR 113.
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. AR 113.
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. AR 114.
34. Mr. Ballantine is familiar with solar electrical alternative energy refueling infrastructures created by solar power. AR 114.
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. AR 114.
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. AR 114.
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. AR 114.

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. AR 114.
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. AR 114-115.
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. AR 114.

As noted below in the standard of review section, the findings of fact made by the administrative agency and the additional findings of fact made by the Circuit Court of Berkeley County receive deferential review on appeal to the Supreme Court. The facts recited by the Appellant in its brief do not receive deference and are little more than argument for the Supreme Court to consider.

IV. STATEMENT REGARDING ORAL ARGUMENT

The Tax Department requests a Rule 20 Oral Argument, pursuant to the Rules of Appellate Procedure, in this case because it involves fundamental issues regarding the scope of the exemption found in W. Va. Code § 11-6D-2(e) which created a tax credit for “qualified alternative fuel vehicle refueling infrastructure”.

V. STANDARD OF REVIEW

The standard of review on appeal is well-settled. Legal questions before the Supreme Court are subject to *de novo* review. See Syl. pt. 1, *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000). On the other hand, 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). Furthermore, the ultimate decision of the Circuit Court of Berkeley County while sitting as an appellate court should be reviewed under same standards employed by circuit courts in reviewing administrative agency decisions. *Corliss v. Jefferson County Board of Zoning Appeals*, 214 W. Va. 297, 591 S. E, 2d 399 at syllabus point 2 (1995), *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E. 2d 399 (1995).

VI. ARGUMENT

The Tax Department argued below that the Taxpayers are not entitled to claim the tax credit in West Virginia Code 11-6D-2(e)².

A. The Circuit Court of Berkeley County 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 Circuit Court observed that tax law is very much a creature of statute. Therefore, the Supreme Court must examine the statutory language for the tax credit claimed by the Taxpayers.

² As a preliminary matter, the Taxpayers' brief does not comply with Rule 10(c)(7) of the *Rules of Appellate Procedure*. Specifically, the argument section of the Taxpayers' brief does not contain any pinpoint citations noting when and how the arguments were presented to the lower tribunals. Although the Taxpayers include numerous citations in their statement of facts to the transcripts and several exhibits from the Office of Tax Appeals hearing, the argument section does not include one single cite to where they argued the points before the Circuit Court of Berkeley County or the Office of Tax Appeals. See Taxpayers' Brief at pp. 11-17.

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 credit credits contain very significant differences. The Taxpayers admitted in their brief to this Court and the Circuit Court that the tax credits found in W. Va. Code § 11-6d-2(e) (2011) for business entities³ 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 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.

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 for the generation of electricity from sunlight or the generation of alternative fuels; 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 credit for purchasing and installing solar panels to generate electricity which constitutes the lion's share of the solar system purchased by Brown Funeral Home. In fact, the tax credits before the Court do even not include the term "solar panels." The tax credit is only

³ The Tax Department 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.

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 is that it installed a solar panel system at the business location which creates electricity that could possibly be used to power plug-in hybrid electric vehicles or electric vehicles.

The Taxpayers' 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 § 11-13Z-1, *et seq.* Electricity generated from solar energy qualifies for the tax credit pursuant to W.Va. Code § 11-13Z-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 to the generation of electricity from solar energy. The Supreme Court should refuse to infer a tax credit that the Legislature did not create the same as Judge Yoder refused to do.

The testimony at Brown Funeral Home'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, Brown Funeral Home 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* AR 110 and Finding 6, *supra.* Mr.

Williams also testified that Brown Funeral Home's system does not have any batteries to store the electricity generated by the solar panel system. *See* Finding 9, *supra*. Furthermore, Mr. Robert Fields of Brown Funeral Home admitted that the electricity generated by the solar panels was used for general electrical purposes to operate the business. *See* Finding 14, *supra*.

Although the Taxpayers have not argued the issue to the Supreme Court, the Taxpayers argued before the Circuit Court of Berkeley County that they actually store electricity in the grid. 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 Brown Funeral Home's own witnesses clearly demonstrates that the solar panel 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). (Argued below AR 266-269.)

Instead, Brown Funeral Home is attempting to claim the broader exemption found in W.Va. Code §11-6D-2(f). Martin Distributing 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. (Argued below AR 269.)

The Taxpayers argue before the Supreme Court that the Office of Tax Appeals' reliance on the doctrine *expressio unis est exclusio alterius* is misplaced. See Taxpayers' Brief at pp. 14-15. The question before the Supreme Court is whether the Circuit Court of Berkeley County decided the legal issues correctly or incorrectly. Judge Yoder specifically found W.Va. Code § 11-6D-2(e) to be clear and unambiguous. As a result, the Circuit Court of Berkeley County applied the tax credit as written by the Legislature and did not engage any attempts to interpret or expand the tax credit. In short, both the Circuit Court and the Office of Tax Appeals refused to read into the statute an exemption for solar panels when the Legislature did not include any reference to solar panels used to generate electricity from sunlight. See AR 128 at Conclusion of Law 12.

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. The Circuit Court refused to make such a leap. (Argued below AR 269-270.)

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 the 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 at footnote 14 (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 indicated that, just like the Legislature said in the home refueling infrastructure tax credit found in W. Va. Code § 11-6D-2(f) (2011). (Argued below AR 270.)

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 Taxpayers have correctly stated the black letter law.

Nevertheless, the Legislature enacted the qualified alternative fuel motor vehicle home refueling infrastructure tax credit 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. The Supreme Court should refuse to extend the home refueling infrastructure tax credit, which has been subsequently repealed by the Legislature, to the business infrastructure tax credit the same as Judge Yoder refused to extend the tax credit. (Argued below AR 270-271.)

Unfortunately, the Taxpayers have misunderstood the Tax Department's argument before the Circuit Court. The Taxpayers claim that the Tax Department viewed the repeal of the home refueling infrastructure tax credit found in W. Va. Code § 11-6D-2(f) as proof that the infrastructure tax credit "...was not in furtherance of the promotion of social good." The Taxpayers further claim that the Circuit Court erroneously adopted the Tax Department's argument. *See* Taxpayers' Brief at p. 14. Notwithstanding the State's long history with fossil fuels, the Tax Department most certainly agrees that promoting the use of alternative fuels such as compressed natural gas, hydrogen, and electricity generated from sunlight, are critical needs for our nation's energy future and independence. The Tax Department's argument at the Circuit Court was far more nuanced than the Taxpayers' misunderstanding. The Tax Department simply argued that socioeconomic legislation should not be used as a guise by the Office of Tax Appeals or the circuit courts to expand the clear statutory language found in W. Va. Code §§ 11-6D-2(e) and 2(f) to include solar panels for the generation of electricity from sunlight when the Legislature did **not** include any mention of solar panels in the tax credits at issue. The

Honorable Judge Yoder adopted the Tax Department's position and refused to read language into the statute that the Legislature did not write.

Furthermore, the Taxpayers argue that the repeal of W. Va. Code § 11-6D-2(f) was required because Tax Department "... stated in its fiscal review [of the original bill] that the credit would have a zero impact on the budget." *See* Taxpayers' Brief at p. 14. The Taxpayers are arguing a fact that is not included in the evidentiary record from the Office of Tax Appeals and, therefore, is not in evidence before the Supreme Court and was not in evidence before Judge Yoder. The Taxpayers did not place the fiscal note prepared by the Tax Department for SB 465 into the record. *Assuming arguendo*, that the Tax Department erroneously calculated the amount of the tax credit enacted in SB 465, the budget impact is irrelevant. The Legislature clearly decided in 2013 to repeal the home refueling infrastructure tax credit found in W. Va. Code § 11-6D-2(f). The Legislature concluded in 2013 that an experiment in socioeconomic legislation was not worth the cost and repealed the tax credit. Nevertheless, the Tax Department's argument is the same—courts should not use the catch phrase "socioeconomic legislation" as a pretext to expand the clear language and the boundaries of the tax credit as determined by the Legislature.

B. The Circuit Court Correctly Ruled That The Property Constructed By The Taxpayers Does Not Store Electricity Or Dispense Electricity Into Fuel Tanks.

The Taxpayers argue that they qualify for the tax credit in W. Va. Code § 11-6D-2(e) because the solar panel system dispenses electricity which is generated from sunlight. In essence, the Taxpayers argue that W. Va. Code § 11-6D-4(c) only requires that the solar panel system must dispense the electricity. If the equipment can dispense electricity, then the Taxpayers qualify for the tax credit found in W. Va. Code § 11-6D-2(e). *See* Taxpayers' Brief at pp. 17-18. The Taxpayers second argument is inextricably linked to their first argument.

The language written by the Legislature is critical to the Supreme Court's analysis. The second argument is premised on W. Va. Code § 11-6D-4(c) (emphasis added) which states that a taxpayer is eligible for the tax credit if the taxpayer:

(c) Constructs or purchases and installs qualified alternative fuel vehicle refueling infrastructure or qualified alternative fuel vehicle home refueling infrastructure that is capable of dispensing alternative fuel for alternative-fuel motor vehicles.

The question becomes whether the Taxpayers have purchased and installed qualified alternative fuel vehicle refueling infrastructure.

As noted above, the tax credits claimed by the Taxpayers pursuant to W. Va. Code § 11-6D-2(e) are not simply for the generation of electricity from solar panels or the generation of alternative fuel from solar panels; rather, the tax credits only apply to property used to store and dispense those alternative fuels. The Tax Department argued below that qualified alternative fuel vehicle refueling infrastructure as defined in W. Va. Code § 11-6D-2(e) is limited by the statutory language. 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* AR 110 and Finding 6, *supra*. Mr. Williams also testified that Brown Funeral Home's system does not have any batteries to store the electricity generated by the solar panel system. *See* Findings 9 and 10, *supra*. Furthermore, Mr. Craig Martin of Brown Funeral Home admitted that the electricity generated by the solar panels was used for general electrical purposes to operate the business. *See* Finding 14, *supra*. 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 Circuit Court correctly determined that the property installed by the Taxpayers does not qualify for the available tax credits. (Argued below AR 116-118; 266-268; and 285-287.)

C. The Circuit Court 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 Taxpayers have not expressly raised the issue of estoppel as an assignment of error on this appeal. Although the Taxpayers argued estoppel before the Office of Tax Appeals and the Circuit Court of Berkeley County, both tribunals rejected the claim very clearly. However, the Taxpayers have reiterated a few facts in their statement of facts which could be argued as a basis for a claim of estoppel.

Facts are important to the Supreme Court's analysis in this case. The Taxpayers demanded a tax credit for the "qualified alternative fuel vehicle refueling infrastructure" as set forth in W. Va. Code § 11-6D-2(e) for the 2011 calendar year. Obviously, the 2011 calendar year closed on December 31, 2011. Therefore, reliance on any correspondence from or documentation issued by the Tax Department in 2012 does not apply to the question before this Court. For example, the Taxpayers argue that an interpretive rule promulgated by the Tax Department supports the Taxpayers' argument. *See* Taxpayers' Brief at p. 16. The Taxpayers introduced a **proposed** interpretive rule into the record before the Office of Tax Appeals. *See Interpretive Rule Department of Tax and Revenue* (Taxpayers' Joint Exhibit 4) at AR 154-163. The face page of the **proposed** interpretive rule does not contain a filing date with the Office of the Secretary of State or an effective date. Taxpayers' Joint Exhibit 4 is only a **proposed** rule; it reflects ideas that were never adopted by the State of West Virginia and has no precedential

value whatsoever. In addition, the **proposed** interpretive rule was not provided by the Tax Department to the Taxpayers' accountants until March 19, 2012—well after the close of the 2011 tax year. *See* AR 187. The testimony from the OTA hearing was clear; the interpretive rule was never filed by the State Tax Department with the Secretary of State's Office as part of the rule making process. *See* OTA Transcript at AR 52 lines 2-8 & 70 lines 19-22. Mr. Romine, the Taxpayers' accountant, specifically testified that he did not receive any copies of the interpretive rules from the State Tax Department prior to December 31, 2011. *See* AR 41 lines 1-3. As noted above, the tax year before the Court closed on December 31, 2011. A proposed interpretive rule provided to the Taxpayers' accountants for the first time after the 2011 tax year had closed does not support the Taxpayers' argument.

The Circuit Court of Berkeley County correctly determined that the State Tax Department is not barred by the doctrine of equitable estoppel in concluding that Brown Funeral Home 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 before the lower court, 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, stated that he 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 16 & 20, 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 support this argument. In actuality, the record shows that Mr. Romine sent two letters to Mr. Montgomery of the Tax Department dated September 2, 2011 and October 19, 2011. *See Findings 22, 23, 25 and 26, supra.* 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. *See Finding 24.* 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. *See Findings 28 and 29, supra.*

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 legislative 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. OTA Transcript at

AR 69-70. 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. OTA Transcript at AR 67. "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. OTA Transcript at AR 69-70. What the record does reflect is that the Tax Department was gathering information and preparing to issue a definite guidance after 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 a definite 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. AR 154-164; OTA Transcript at AR 70 & 75. 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. (Argued below AR 270-276.)

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.

VII. CONCLUSION

The Taxpayers are attempting to read language into a tax credit that the Legislature did not write. The tax credits before the Court do not provide a tax credit for solar panels used to generate electricity from sunlight; the tax credits only apply to property that is used to store or dispense alternative fuels. Either the Legislature meant what it said when it enacted the two tax credits before the Supreme Court or the Legislature did not. Both the Circuit Court and the Office of Tax Appeals simply applied the language in the tax credits and denied any credits for the purchase of solar panels to generate electricity since W.Va. Code §11-6D-2(e) does not specifically list solar panels as qualified alternative fuel vehicle refueling infrastructure. Furthermore, socioeconomic legislation should not be used as a guise to extend a tax credit beyond the boundaries set by the Legislature. The Decision of the Circuit Court of Berkeley County complies with West Virginia law. Therefore, the State Tax Department requests that this

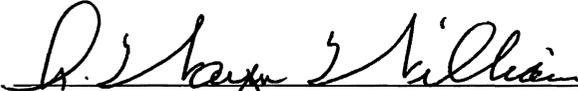
Honorable Court affirm the decision of the Circuit Court.

Respectfully submitted,

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

APPEAL NO. 15-0857

**BROWN FUNERAL HOME, Inc., and
ROBERT C. FIELDS and DONNA M. FIELDS,**

Petitioners, below Petitioners.

v.

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

Respondent, below Respondent.

CERTIFICATE OF SERVICE

I, L. Wayne Williams, Assistant Attorney General, do hereby certify that the foregoing *Brief of the West Virginia State Tax Department* was served upon counsel for the Petitioner by mailing a true copy thereof in the United States Mail, first-class postage prepaid and via E-mail correspondence, this 8th day of January, 2016, addressed as follows:

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