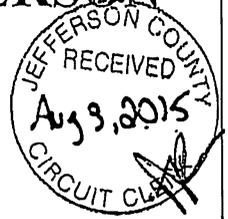


15-0867 F. Sayre

IN THE CIRCUIT COURT OF JEFFERSON
COUNTY, WEST VIRGINIA



LOUIS A. LARROW, et. al.,
Petitioners,

v.

Case No. 15-AA-2

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

ORDER DENYING PETITION FOR APPEAL OF DECISION OF WEST VIRGINIA
OFFICE OF TAX APPEALS DATED DECEMBER 9, 2014

This matter came before the Court on the 3rd day of August, 2015, pursuant to the Petitioner's Petition for Appeal, and the subsequent responses and replies of the parties. The Petitioners requested appeal within sixty (60) days of entry of the administrative decision by the West Virginia Office of Tax Appeals (thus effecting timely appeal under W. Va. Code § 11-10A-19(a)). The Petitioners have requested to make an oral presentation to the Court; however, the Court finds the record sufficiently replete with evidence to make a ruling on the pleadings. Under W. Va. Code § 29A-5-4(f), this Court's "review shall be conducted by the court without a jury and shall be upon the record made before the agency." Accordingly, the Court sets forth its findings of fact and conclusions of law as detailed below.

I. FINDINGS OF FACT

The factual record below can be summarized by the following undisputed findings:

1. The Petitioners installed an alternative fuel refueling infrastructure; to wit: a 4.7 kilowatt roof mounted solar system, consisting of twenty (20) 235-watt solar panels, twenty (20) Enphase micro-inverters, and one (1) AV electric vehicle charging station.
2. The installation of said alternative fuel refueling infrastructure cost \$28,300.00.

3. The aforementioned twenty (20) 235-watt solar panels and twenty (20) Enphase micro-inverters are not required for the storage or dispensing of electricity to a hybrid vehicle or electric vehicle. Such functions only require the charging station and distribution panel.

4. As evidenced by testimony at the administrative hearing below, the installation was designed to produce more electricity than what would be required to power the entire house and a car.

5. The Petitioners admitted that they do not own an electric or plug-in hybrid electric vehicle.

6. Although the Petitioners' installation is capable of dispensing electricity to a hybrid or electric vehicle, it cannot store electricity as it lacks any on-site storage or batteries. Rather, the installation is designed to provide the entire residence with power, and transfer any excess electricity that it has created back to the grid.

7. The bill creating the Qualified Alternative Fuel Vehicle Home Refueling Infrastructure tax credit was enacted by the West Virginia Legislature on March 12, 2011, thus effecting this tax credit under West Virginia Code § 11-6D-6 as of July 1, 2011.

8. Brian Romine, CPA, reviewed said bill and, on behalf of one of his clients, contacted Mr. John Montgomery (Attorney Supervisor, Technical Unit, Legal Division, State Tax Department) in August of 2011 to seek clarification on what types of components would qualify for the tax credit.

9. During the August 2011 conversation, Mr. Montgomery indicated that Mr. Romine had a plausible interpretation of the statute, but he asked Mr. Romine to send a letter of clarification. Mr. Romine faxed said letter in early September of 2011.

10. Mr. Montgomery failed to respond to said letter. After running into Mr. Romine

in person at the West Virginia Tax Institute for a seminar that same month, Mr. Montgomery requested additional information, prompting Mr. Romine to fax a second letter on October 19, 2011. Mr. Montgomery failed to respond to this second letter. However, both parties agreed that around this time, Mr. Romine had a conversation with Mr. Montgomery, during which the latter stated that the department would publish interpretive rules. Mr. Romine did not receive a copy of interpretive rules until March of 2012, and as admitted at the administrative hearing below, these proposed interpretive rules were never filed with the Secretary of State's Office. These rules categorized solar systems, including solar panels, as qualifying refueling infrastructures.

11. The general counsel of the tax department, several legislators, and representatives of one of Mr. Romine's clients met on July 24, 2012.

12. This meeting concluded with a promise to provide guidance to taxpayers on the issue with an administrative notice within a month. Despite attempts by Mr. Romine to follow up, the Tax Department failed to provide this notice, thereby necessitating a second meeting on September 12, 2012. It was at this second meeting that the Tax Department expressed an opinion which differed from the earlier, proposed rules concerning the non-home refueling infrastructure.

13. After counsel for the Petitioners sent a letter (upon the Tax Department's request); Mr. Morton (General Counsel, West Virginia State Tax Division) issued a letter suggesting a severely restricted use of the residential infrastructure credit. Thereafter, the Tax Department issued a revised AFTC-1 (Alternative-Fuel Tax Credit Form), which added this language to the instructions: "Solar panels cannot store or dispense electrical power, and therefore they do not qualify for the Alternative Fuel Vehicle Home Refueling Infrastructure Tax Credit set forth." Petitioner[s]' Exhibit 9.

14. The above exclusion of solar panels was not in the original AFTC-1 that was

issued for the tax year 2011. Petitioner[s'] Exhibits 3, 9. In light of the communications with the tax department, a review of the original AFTC-1 as well as the statute, Mr. Romine advised the Petitioners that the installation of the vehicle refueling infrastructure would qualify for the tax credit.

15. The Petitioners timely filed a tax return claiming a Qualified Alternative Fuel Vehicle Home Refueling Infrastructure Tax Credit in the amount of \$10,000.00.

16. The Tax Department denied the credit, and on September 20, 2012 notified the Petitioners of a deficiency in their personal income tax in the amount of \$305.08.

17. The Petitioner Louis Larrow timely filed a Petition for Reassessment with the West Virginia Office of Tax Appeals ("OTA"). A hearing on the Petitioner was convened by the Honorable A.M. "Fenway" Pollack, Chief Administrative Law Judge (CALJ) of the OTA in Martinsburg, West Virginia, on July 30, 2013. By an administrative decision dated December 9, 2014, the OTA modified the assessment issued against the Petitioners and ordered that the Petitioners receive a refund in the amount of \$1,715.00.

II. STANDARD OF REVIEW

Pursuant to W. Va. Code § 11-10A-19(f), the statute controlling judicial review of office of tax appeals decisions, this Court has jurisdiction to hear the Petition for Appeal, but cannot enter a monetary judgment: "The circuit court shall hear the appeal as provided in section four, article five, chapter twenty-nine-a of this code: Provided, That when the appeal is to review a decision or order on a petition for refund or credit, the court may determine the legal rights of the parties, but in no event shall it enter a judgment for money."

According to the statutory language above, the standard of review is found, in part, in W. Va. Code § 29A-5-4:

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The judicial review of office of tax appeals decisions is also, as a general proposition, deferential by nature: “[o]nce a full record is developed, both the circuit court and this Court will review the findings and conclusions of the Tax Commissioner under a clearly erroneous and abuse of discretion standard unless the incorrect legal standard was applied.” Frymier-Halloran v. Paige, 193 W. Va. 687, 696 (1995).

III. CONCLUSIONS OF LAW

A. The Administrative Decision is not clearly erroneous, nor is it based on an incorrect legal standard in concluding that merely a portion of the infrastructure purchased and installed by the Petitioners qualified for the Tax Credit

The statute at the heart of this litigation, West Virginia Code § 11-6D-2, states:

As used in this article, the following terms have the meanings ascribed to them in this section.

(a) “*Alternative fuel*”.--

(1) For purchase or installations occurring on and after January 1, 2011, but prior to April 15, 2013, the term “alternative fuel” means and includes:

(A) Compressed natural gas;

...

(I) Electricity, including electricity from solar energy.

...

(f) “Qualified alternative-fuel vehicle 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 vehicles or electric vehicles: *Provided*, That the property is installed and located in this state. (emphasis added).

The Petitioners argue that the entirety of their solar panel system installed at their residence falls under the Qualified Alternative Fuel Vehicle Home Refueling Infrastructure tax credit. The Respondent instead argues that only a portion of the Petitioners' system qualifies for the tax credit, because the statute does not cover the function of the installation that provides power to the entire home, and excess power to the grid. As the Respondent reads the statute, it only contemplates a tax credit for the part(s) of the installation that is used for the storage and delivery of alternative fuels—not for the part(s) which create(s) electricity from solar energy.

This Court agrees with not only the Respondent's reading of the statute, but also the Respondent's application of the statute to the facts. It is not disputed that dispensing electricity to an alternative fuel vehicle is not the sole function of the installation. The Petitioners' argument that the entire installation qualifies for the tax credit because it "stores" electricity is likewise flawed, because any excess electricity is sent to the grid (which is not owned by the Petitioners, and is not, as required by the statute, "located on a private residence or private home").

As noted in the above Findings of Fact, not all of the components of the Petitioners' installation are necessary for the delineated functions of storing and dispensing electricity. Were such storage and dispensing the primary function of *all* components, then the installation in its entirety could qualify for the tax credit. However, this is not the case, as the system is primarily designed to power the residence, a conclusion bolstered by the fact that the Petitioners do not even own a hybrid or electric vehicle. For these reasons, the Respondent correctly notes that the costs associated with those components ought to be excluded from the tax credit calculation.

The Petitioners attempt several arguments in support of their position. The Petitioners first point to a red herring: the section of the statute that defines who is eligible for a tax credit. It is not disputed that the Petitioners are eligible for a tax credit; what is disputed is *the extent*

to which the Petitioners are entitled to that tax credit. The Petitioners also instruct that “[i]n the interpretation of a statute, the legislative intention is the controlling factor.” Petitioner[s’] Brief, 13. Although the language of the statute is clear on its face,¹ the legislative intent cited by the Petitioner does not support the argument that the tax credit contemplated a reimbursement for just any infrastructure that could conceivably further the cause of alternative vehicles. Rather, the legislative intent appears to have focused specifically on infrastructures designed for the use of alternatively-fueled motor vehicles: “in order to encourage the use of alternatively-fueled motor vehicles and possibly reduce unnecessary pollution of our environment... There is hereby created an alternative-fuel motor vehicles tax credit and an alternative-fuel infrastructure tax credit.” *Id.* at 14.

The Petitioner rebuts that “[t]he statute does not have any language that indicates that the infrastructure has to be exclusive to providing fueling[;] it only requires that the property must dispense the alternative fuel.” Petitioner[s’] Reply Brief, 2. This argument mirrors a similarly specious argument made by the Petitioner using West Virginia Code § 11-6D-4: namely, that this particular section renders any taxpayer eligible for the credit, as long as that taxpayer constructs or purchase and installs an alternative fuel vehicle refueling infrastructure that is capable of dispensing such fuel. Petitioner[s’] Brief, 13. These arguments fail to recognize the limiting language of § 11-6D-2(f), and a general rule of statutory construction (*in pari materia*).

B. The Administrative Decision is not clearly erroneous, nor is it based on an incorrect legal standard in concluding that solar panels do not store or dispense electricity in the manner controlled by West Virginia Code § 11-6D-2(f)

The Petitioners attempt to bootstrap the functions of their infrastructure that are not delineated in West Virginia Code § 11-6D-2(f) into the tax credit scheme. However, as the

¹ The statute’s clarity obviates 1) any prolonged inquiry into the meaning of the statute, and 2) further discussion of the Petitioner’s argument that the statute is ambiguous and as such should be construed against the Respondent.

Respondent argues, the statute did not include the limiting language so that such requirements could be ignored. This Court need not reiterate the arguments of the preceding section, as it is made clear upon reviewing West Virginia Code § 11-13Z-1 that solar panels have been addressed by a separate tax credit. In light of the presumption that the legislature is familiar with all of the laws it has created, the existence of tax credit for solar panels separate from the tax credit at bar underscores the argument that the instant tax credit cannot be said to also cover solar panels, as such a reading would render one of the two credits redundant. See Charleston Gazette v. Smithers, 232 W.Va. 449, 467 (2013).

C. The Administrative Decision is not clearly erroneous, nor is it based on an incorrect legal standard in concluding that the State Tax Department is not barred by the doctrine of equitable estoppel

The Petitioners' estoppel argument strikes this Court as a thinly-veiled attempt to shift blame for what was ultimately a gamble on the part of the Petitioners. Because the Petitioners must first prove the traditional elements of estoppel in order to estop the government, the Court first addresses the traditional elements of estoppel. Hudkins v. State Consol. Pub. Ret. Bd., 220 W.Va. 275, 280 (2007). The Supreme Court has adopted the following five elements of (traditional) equitable estoppel:

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.

Id. at 281. Therefore this Court must first apply these five elements to reach conclusions of law on this broader point.

a. The Respondent neither made a false representation nor concealed material facts

The Petitioners attempt to use the communications between Mr. Romine and employees

of the Tax department as a foothold into the estoppel claim. However, these communications did not contain definitive statements as to the applicability of the tax credit to the Petitioners infrastructure. Mr. Romine himself admitted in a deposition that he was uncertain whether the components of the infrastructure would qualify. See Tax Commissioner's Response to the Petitioners' Brief, 17. The Petitioners would have a stronger case if they had received a proposed legislative interpretation suggesting that their infrastructure would qualify during the tax year in question, instead of in 2012, but this is not the case. Thus an analysis of the remaining prongs is academic, and unnecessary to support this Court's ruling.

IV. CONCLUSION

Accordingly, this Court **ORDERS** that the Petition for Appeal to Circuit Court is **DENIED**.

The objection of the parties to any and all adverse rulings is noted.

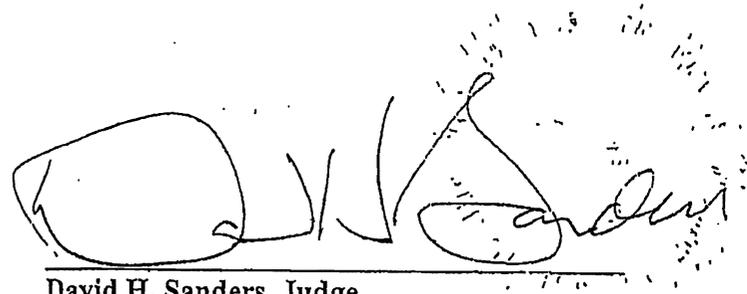
This is a Final Order from which any party may appeal to the West Virginia Supreme Court of Appeals under applicable rules.

There being no further issues remaining, this matter shall be stricken from the Court's docket and placed among causes ended. The Clerk is directed to enter this **ORDER** and forward attested copies to all the parties and counsel of record.

5 cc's:

Entered: 8/3/15

- L. Law
- F. Saye
- T. Waggoner
- C. Means
- M. Matkovich
- CIO C. Means
- 8.4.15 BC



David H. Sanders, Judge
Twenty-Third Judicial Circuit, West Virginia

A TRUE COPY
ATTEST.

LAURA E. STORM
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY B. Clark
DEPUTY CLERK