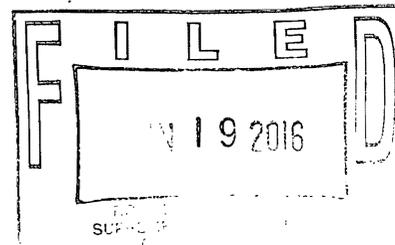


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-0867



LOUIS A. LARROW, et al.

Petitioners, below Petitioners,

v.

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

Respondent, below Respondent.

TAX COMMISSIONER'S RESPONSE BRIEF

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TAX COMMISSIONER'S RESPONSE BRIEF

I. INTRODUCTION

At the heart of this matter is a clear and unambiguous statute that provides a limited tax credit for the installation and purchase of property used for the storage and delivery of alternative fuels to alternative fuel vehicles.¹ See W.Va. Code § 11-6D-2(f). This statute very clearly limits the credit to infrastructure used to “store” or “dispense” alternative fuel.

¹ The above-referenced case is one of ten (10) cases previously pending in Berkeley County, Jefferson County, and Morgan County, West Virginia that appealed decisions rendered by the Office of Tax Appeals concerning W. Va. Code § 11-6D-2(e) and W. Va. Code § 11-6D-2(f). All ten (10) of the circuit court cases have been decided in favor of the Tax Department's position. Eight (8) of the ten (10) cases including the matter at bar concern individual taxpayers; the remaining two (2) cases concern business taxpayers. In addition to this case, individual taxpayers *David Hammer and Euphemia Kallas* (Appeal Number 15-0859), business taxpayer *Brown Funeral Home* (Appeal No. 15-0857), and business taxpayer *Martin Distributing* (Appeal Number 15-0842) are pending before this Court. Two residential taxpayer decisions rendered in favor of the Tax Department by Judge Wilkes in Morgan County were not appealed to this Court. Meanwhile, the appeal deadline has not yet expired in four decisions rendered in favor of the Tax Department by Berkeley County Circuit Judges Yoder and Wilkes.

For the 2011 tax year, Louis A. and Barbara E. Larrow and (hereinafter "Petitioners") claimed a Qualified Alternative Fuel Vehicle Home Refueling Infrastructure Tax Credit against their West Virginia Personal Income Tax liability in the amount of \$10,000.00. The Petitioners contend that this credit was due as a result of their 2011 purchase and installation of a \$28,300.00 solar electric system for their Charles Town, West Virginia residence.

The Tax Department denied the credit and issued a Personal Income Tax Assessment in the amount of \$10,000.00 with additional penalties and interest. Both the Circuit Court of Jefferson County by the Honorable David H. Sanders and the Office of Tax Appeals affirmed the Tax Department's position in this case.

II. STATEMENT OF THE CASE

Judicial review performed by the West Virginia Supreme Court of Appeals must start with the facts of the case. The Petitioners' brief filed with this Court simply recites the facts argued by the Petitioners before the Circuit Court of Jefferson County. While many of the facts argued by the Petitioners were ultimately adopted as findings of fact by the Honorable David H. Sanders, several of the "facts" listed in the Petitioners' brief were not findings of fact in the Circuit Court decision. Therefore, in accord with Rule 10(d) of the West Virginia Revised Rules of Appellate Procedure, the Respondent provides the following facts that were omitted and/or unclearly provided in the Petitioners' Statement of the Case. As required by Rule 10(c)(4) and contrary to the Petitioners' Statement of the Case, the Respondent provides specific citations to the designated record.

Judge Sanders specifically adopted the following findings of fact:

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. R. at 89.
2. The installation of said alternative fuel refueling infrastructure cost \$28,300.00. R. at 89.
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. R. at 90.
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. R. at 90.
5. The Petitioners admitted that they do not own an electric or plug-in hybrid electric vehicle. R. at 90.
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. R. at 90.

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. R. at 90.
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. R. at 90.
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. R. at 90.
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. R. at 91.

11. The general counsel of the tax department, several legislators, and representatives of one of Mr. Romine's clients met on July 24, 2012. R. at 91.
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. R. at 91.
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; R. at 91.
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. R. at 92.

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. R. at 92.
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. R. at 92.
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. R. at 92.

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

III. SUMMARY OF ARGUMENT

Ten cases previously pending in the Eastern Panhandle revolve around the same set of facts and legal issues. At the heart of this matter is a simple question. Either the Legislature

meant what it said when it enacted the tax credit currently before this Court or the Legislature did not.

In 2011, the West Virginia Legislature enacted SB 465 which created two 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 credit at issue in this matter is limited to the home refueling infrastructure. The statutes do not authorize a tax credit for solar panels that create electricity from sunlight. Furthermore, the lion's share of the cost of the system purchased by the Petitioners 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. The factual record developed below shows that the Petitioners unfortunately relied upon advice from their own accountants and the solar panel system contractor who inaccurately stated that the solar panels would fall under the tax credit. The record further reflects that 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(f) does not specifically list solar panels as qualified alternative fuel vehicle refueling infrastructure.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to the Revised Rules of Appellate Procedure, the Tax Department requests a Rule 20 Oral Argument in this case because it involves fundamental issues regarding the scope

of the exemption found in West Virginia Code § 11-6D-2(f) that created a tax credit for “qualified alternative fuel vehicle home 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). “An inquiring court—even a court empowered to conduct *de novo* review—must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.” *Id.* at 582. Furthermore, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syl. pt. 4, *Security Nat. Bank & Trust Co. v. First W.Va. Bancorp, Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981).

This Court reviews the decisions of a circuit court, when the latter was sitting as an appellate court, under the same standard by which a circuit court is required to review the decision of the lower tribunal or administrative agency in the first instance. *Martin v. Randolph Cnty. Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995).

West Virginia Code § 11-10A-19(f) provides that appeals from OTA shall be governed by the standards set forth in the Administrative Procedures Act. Specifically, West Virginia Code § 29A-5-4(g) provides that:

(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.

VI. ARGUMENT

The arguments advanced by the Petitioners against the Tax Department at the circuit court below were properly dismissed. As detailed below, all applicable legal authority substantiates the denial of the full tax credit claimed by the Petitioners.²

A. The Circuit Court of Jefferson County correctly concluded that only a portion of the infrastructure purchased and installed by the Petitioners qualified for the Qualified Alternative Fuel Vehicle Home Refueling Infrastructure tax credit.

In contrast to the first assignment of error asserted by the Petitioners, the circuit court's affirmation of the administration decision is not clearly erroneous, nor is it based upon an

² As a preliminary matter, the Petitioners' brief does not comply with Rule 10(c)(7) of the Revised Rules of Appellate Procedure. Specifically, the argument section of the Petitioners' brief does not contain any pinpoint citations noting when and how the arguments were presented to the lower tribunals. Although the Petitioners included numerous citations in their statement of the facts to the transcripts and several exhibits from the Office of Tax Appeals hearing, the argument section does not include one single cite where they argued the points before the Circuit Court of Jefferson County or the Office of Tax Appeals. *See* Petitioners' Brief at pp. 11-19.

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 was passed in 2011. At that time, the West Virginia Legislature adopted two alternative fuel infrastructure tax credits – one pertaining to business entities and one pertaining to individual taxpayers. At issue in this matter is the individual taxpayer credit known as the Qualified Alternative Fuel Vehicle Home Refueling Infrastructure tax credit. *See* West Virginia Code §11-6D-2(f). Per statute, a “taxpayer is eligible to claim the credit against tax provided in this article if he or she: (c) Constructs or purchases and installs qualified alternative-fuel vehicle refueling infrastructure that is capable of dispensing alternative fuel for alternative-fuel motor vehicles.” *See* W.Va. Code § 11-6D-4.

The controversy in this matter stems from the definition of “qualified alternative fuel vehicle home refueling infrastructure” contained in West Virginia Code § 11-6D-2. West Virginia Code § 11-6D-2(f) states:

“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).

The Legislature specifically classified electricity generated from solar energy as an alternative fuel pursuant to West Virginia Code § 11-6D-2(a)(9). However, the tax credits claimed by the Petitioners are not for the generation electricity from sunlight or the generation of alternative fuels; rather, the tax credits apply to property used to store and dispense those

alternative fuels. Neither credit in West Virginia 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 the Petitioners. In fact, the tax credit before the Court does not even 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.

The essence of the Petitioners' claim is that they installed a residential solar panel system which creates electricity that could possibly be used to power plug-in hybrid electric or electric vehicles. They assert that the statute "clearly and unambiguously" supports the conclusion that the entire solar system installed on their home should be subject to the Qualified Alternative Fuel Vehicle Home Refueling Infrastructure tax credit. The Tax Department instead asserts that some of the infrastructure installed by the Petitioners qualifies for the credit, but the applicable statute does not contemplate a tax credit for an entire solar system providing power to an entire home and sending excess power to the grid. Consistent with the statute, 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.

The Petitioners' 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 West Virginia 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 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.”). (Argued below, R. at 195-196.)

The statute at issue very plainly states that the subject infrastructure is property used for **storing** and **dispensing** alternative fuels into fuel tanks of motor vehicles. The entire solar system installed in the Petitioners’ home does not meet the requirements for the tax credit because the system is designed to supply power to the entire home and to transfer any excess electricity generated back to the grid. The system does not exclusively store on site or dispense electricity into a plug-in hybrid electric or electric vehicle. In fact, the Petitioners do not even own a plug-in hybrid electric or electric vehicle. R. at 83. Testimony from the administrative hearing reveals that the purpose of the installed system was to produce more than the car and the entire house would use. R. at 87.

The solar system installed on Petitioners' house is unable to store electricity by itself. There is no on-site storage or batteries to store the electricity generated by the solar system. R. at 86. Any excess electricity generated is sent to "the grid." R. at 87. Although the Petitioners have not argued the issue to the Supreme Court, the Taxpayers argued before the Circuit Court of Jefferson County that they actually store electricity in the grid. This argument is flawed because it ignores the clear statutory requirement that the taxpayer must own the property and it must be located in this State. Merriam-Webster has defined the term "power grid" as "a network of electrical transmission lines connecting a multiplicity of generating stations to loads over a wide area." For the credit to apply, the infrastructure must be "owned by the applicant" and "located on a private residence or private home." *See* W.Va. Code § 11-6D-2(f). The Petitioners do not own the power grid and the power grid is certainly not located on their private residence or home. (Argued below, R. at 176-177 and 196-197.)

Although there is no "storage" as contemplated by West Virginia Code § 11-6D-2(f), the Tax Department concedes that a small portion of the total system does "dispense" electricity to charge a plug-in hybrid electric or electric vehicle. However, the entirety of the solar system installed on Petitioners' private home generates electricity available for use in the whole house thereby rendering a credit for the full system improper.

The Petitioners' witness at the administrative hearing, Mr. Mark Ballantine, stated that only the charging station and part of the distribution panel would be required to charge an electric vehicle. Solar panels, inverters, outgoing meters, and additional connection to the grid would not be required to simply charge a plug-in hybrid electric or electric vehicle. R. at 21. All of those additional components were purchased as part of the solar system in this case, but none

of them store or dispense electricity into an electric or electric-hybrid vehicle. Consequently, the costs associated with those components do not qualify for inclusion in the calculation of the tax credit.

A determination that the entire solar system would qualify for the credit under the statute would create absurd results. Using Petitioners' logic, all of the wiring and meters and connection to the grid in a conventional house would be eligible for the credit as long as there is a car charging station. That is clearly not what the legislature intended. They intended, as the statute reads, to give credit to infrastructure that **specifically stores or dispenses** electricity to a plug-in hybrid electric or electric vehicle, not the cost of the entire electrical system of a house. (Argued below, R. at 176-177 and 197-198.)

In addition, the Petitioners argue that West Virginia 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* Petitioners' Brief at 15-16. The Petitioners 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 expand the scope of the home refueling infrastructure tax credit, which

has been subsequently repealed by the Legislature, the same as Judge Sanders refused to do so.
(Argued below, R. at 198-200)

In conclusion, the Circuit Court correctly concluded that only a portion of the infrastructure purchased and installed by the Petitioners qualified for the Qualified Alternative Fuel Vehicle Home Refueling Infrastructure tax credit. The plain language of the statute limits the credit to infrastructure that stores and dispenses electricity to a plug-in hybrid electric or electric vehicle. The entirety of the system installed by the Petitioners does not meet this statutory requirement.

B. The Circuit Court of Jefferson County correctly held that the property constructed by the Petitioners does not store electricity or dispense electricity into fuel tanks.

The Petitioners argue that they qualify for the tax credit in West Virginia Code § 11-6D-2(f) because the solar panel system dispenses electricity which is generated from sunlight. In essence, the Petitioners argue that West Virginia Code § 11-6D-4(c) only requires that the solar panel system must dispense the electricity. If the equipment can dispense electricity, then the Petitioners qualify for the tax credit found in West Virginia Code § 11-6D-2(f). *See* Petitioners' Brief at pp. 16-19. The Petitioners' 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 Petitioners have purchased and installed qualified alternative fuel vehicle refueling infrastructure.

As noted above, the tax credit claimed by the Petitioners pursuant to West Virginia Code § 11-6D-2(f) is not simply for the generation of electricity from solar panels or the generation of alternative fuel from solar panels; rather, the tax credit only applies 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 West Virginia Code § 11-6D-2(f) is limited by the statutory language. The credit in Section 2(f) 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. The Petitioners did not purchase and install any compression equipment. Testimony below substantiated that the Petitioners' system does not have any batteries to store the electricity generated by the solar panel system. R. at 86. Furthermore, the Petitioners' witness admitted that the system was designed with expectation that it would use more than either a car or entire home would use. R. at 87. 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 Petitioners does not qualify for the available tax credits.

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

The Petitioners have not expressly raised the issue of estoppel as an assignment of error on this appeal. Although the Petitioners argued estoppel before the Office of Tax Appeals and the Circuit Court of Jefferson County, both tribunals rejected the claim very clearly. However, the Petitioners 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 Petitioners demanded a tax credit for the "qualified alternative fuel vehicle home refueling infrastructure" as set forth in West Virginia Code § 11-6D-2(f) 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. The Petitioners introduced a **proposed** interpretive rule into the record before the Office of Tax Appeals. 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 Petitioners' accountants until March 19, 2012—well after the close of the 2011 tax year. 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 R. 53 lines 2-8 & 71 lines 19-22. Mr. Romine, the Petitioners' 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* R. 42 lines 1-3. As noted above, the tax year before the Court closed on December 31, 2011. A proposed interpretive rule provided to the Petitioners' accountants for the first time after the 2011 tax year had closed does not support the Petitioners' argument.

The Circuit Court of Jefferson County correctly determined that the Petitioners' estoppel claim is a "thinly-veiled attempt to shift blame for what was ultimately a gamble on the part of the Petitioners." R. at 96.

In support of its argument before the lower court, the Petitioners 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 Petitioners did not

meet this heightened burden 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 Petitioners 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 Petitioners. First of all, the Taxpayers did **not** rely on advice or representations from the State Tax Department. 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.

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. R. at 91. 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. R. at 91. 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. R. at 91.

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 Petitioners in this case prior to the installation of the solar systems. Nevertheless, the Petitioners cited below 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 Petitioners' own witness, Mr. Romine, even said he harbored an "element of uncertainty" regarding whether his products would qualify for the credit. OTA Transcript at R. 71. 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 R. 69. "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 Petitioner 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 Petitioners have failed to meet this prong. Assuming *arguendo* that the Petitioners had made such a showing, the Petitioners introduced no evidence into the record that the alleged misrepresentations were made with knowledge. The Petitioners called no witnesses from the Tax Department to testify regarding such knowledge. The Petitioners 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 Petitioners in this matter were not without knowledge or the means of knowledge of the real facts. The Petitioners' 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 R. 69-71. 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 Petitioners have failed to meet this prong. Assuming *arguendo* that the Petitioners had made such a showing, the Petitioners 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. 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 Petitioners 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 Petitioners in support of the equitable estoppel claim occurred **after** the tax year in question had closed. The Petitioners assert they are entitled to the tax credit for the 2011 tax year ending on December 31, 2011. Although the Petitioners 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 Petitioners 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 Petitioners admitted they had no contact with the Tax Department, the Petitioners could not have relied upon the Tax Department's representations. (Argued below, R. at 200-205 and 179-182.)

The Petitioners 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

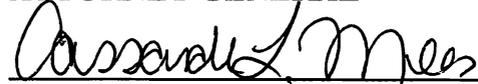
The Petitioners are attempting to read language into a tax credit that the Legislature did not write. The tax credits before the Court do not provide a tax credit for solar panels used to generate electricity from sunlight; the tax credits only apply to property that is used to store or dispense alternative 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(f) 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 Jefferson 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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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-0859

LOUIS A. LARROW, et al.

Petitioners, below Petitioners,

v.

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

Respondent, below Respondent.

CERTIFICATE OF SERVICE

I, Cassandra L. Means, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Tax Commissioner's Response Brief" was served by depositing the same, postage prepaid in the United States Mail, this 19th day of January, 2016, addressed as follows:

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