BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DAVID M. HAMMER &
EUPHEMIA KALLAS,

Petitioner, below Petitioner,

v. **Case Number: 15-0869**

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

Respondent below Respondent.

PETITIONER'S BRIEF

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I. RULING FROM WHICH APPEAL IS TAKEN

This appeal is taken from the Final Order of the Circuit Court of Jefferson County, entered August 3, 2015 (the "Final Order"). The Final Order affirming the decision of the Office of Tax Appeals.

II. STATEMENT OF THE NATURE OF THE CASE

David M. Hammer and Euphemia Kallas live in Shepherdstown, West Virginia (referred to herein as "Petitioners").

David M. Hammer and Euphemia Kallas installed alternative fuel refueling infrastructure at their home located in Shepherdstown, West Virginia, in the amount of $56,870.00. David M. Hammer and Euphemia Kallas timely filed a return claiming a Qualified Alternative Fuel Vehicle Home Refueling Infrastructure Tax Credit in the amount of $10,000.00.

By Notice of Assessment dated October 2, 2012, the Tax Commissioner denied the credit and notified David M. Hammer and Euphemia Kallas of a deficiency in his personal income tax in the amount of $10,000.00

The Petitioner timely filed a petition with the West Virginia Office of Tax Appeals (hereinafter "OTA"), appealing the Denial. The Petition was assigned Docket Nos. 12-489-P-M by OTA.

The Petition For Reassessment Claim was based the installation of Qualified Alternative Fuel Vehicle Home Refueling Infrastructure and the credit allowed under West Virginia Code § 11-6D-1 et seq. The amount of the Claim represented the amount of credit allowed for the installation of the infrastructure.

A hearing on the Petition was convened by the Honorable A.M. "Fenway" Pollack, Chief Administrative Law Judge (CALJ) of this West Virginia Office of Tax Appeals (referred to

herein as the "OTA"), in Martinsburg, WV on July 30, 2013 (referred to herein as the "Hearing").

At the Hearing, the Commissioner, through its counsel, introduced two (2) exhibits into the record and had no witnesses. The Taxpayer, through its counsel, presented the testimony of four (4) witnesses, and introduced eleven (11) exhibits into the record..

By an administrative decision dated December 9, 2014, the West Virginia Office of Tax Appeals rendered an administrative decision adverse to the Petitioner and in favor of the State Tax Commissioner of the State of West Virginia ("the Respondent") in which it affirmed in part an assessment for personal income tax.

III. PROCEEDINGS BELOW

The Petitioner timely filed its Petition for Appeal of the decision of the Office of Tax Appeals denying the Petition for Refund based upon the Tax Credit for Qualified alternative fuel vehicle refueling infrastructure.

The Parties filed briefs in support of their positions and the court determined that oral argument was not warranted on the Petitioners' appeal and rendered a decision on the record denying the Appeal and affirming the decision of the Office of Tax Appeals.

The Petitioner request that the Court reverse the decision of the Circuit Court of Jefferson County of West Virginia affirming the decision of the Office of Tax Appeals denying the Petition of Refund

IV. STANDARD OF REVIEW

This Court reviews the decisions of a circuit court, when the latter was, itself, 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*

Cty Bd. Ed., 195 W. Va. 297, 465 S.E.2d 399 (1995); *Corliss v. Jefferson Cty. Bd. of Zoning Appeals, 214 W. Va. 535, 591 S.E.2d 93 (2003); Webb v. W. Va. Bd. of Med., 212 W. Va. 149, 569 S.E.2d 225 (2002)* (per curiam).

The statute, providing for the appeal of the Administrative Decision in this case, states that the circuit court "shall hear the appeal as provided in [West Virginia Code § 29A-5-4, a/k/a The State Administrative Procedures Act or SAPA]." West Virginia Code § 11-10A-19 (f). The referenced SAPA provides, in pertinent part, as follows:

(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 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. West Virginia Code § 29A-5-4.

In construing the language of an earlier statute governing comparable appeals ("the circuit court will determine anew all questions submitted to it on appeal from the determination of the tax commissioner," [West Virginia Code § 11-10-10 (e)], this Court has expressly relied on and followed the foregoing provisions of the SAPA. Specifically, in the leading case addressing the standard of review in appeals of this nature, the Court has held that, as a result of a long line of earlier rulings, the circuit court was limited to a clearly erroneous and abuse of discretion standard for review of [the agency's] findings, unless the incorrect legal standard was

applied." *Frymier-Halloran v. Paige, 193 W. Va. 687, 458 S.E.2d 780 (1995)*, syl. pt. 3 (Emphasis added.)

In Frymier-Halloran, this Court also recited the general rule that questions of statutory interpretation are to be judicially reviewed on a de novo basis. It then observed further that the clearly erroneous standard, generally applicable to proceedings such as this, does not protect even factual findings made on the basis of incorrect legal standards. Id. at fn. 13. Rather, the Court stated that where an appellant, such as the Petitioner here, can demonstrate that an administrative decision in a contested case was based on a mistaken impression of the applicable legal principle, those findings "will be accorded diminished respect on appeal." Id.

In this appeal, it is the Petitioner's contention that the Administrative Decision and the Circuit Court's Final Order were based on a clearly erroneous interpretation and application of West Virginia Code § 11-6D-1 et seq, and that the effect of that erroneous interpretation was to, effectively, deny the Petitioners' refund request. Thus, the Final Order was erroneous and ought to be reversed and overruled.

Accordingly, the Petitioner respectfully urges this Court to "review anew" the Circuit Court's Final Order affirming the Administrative Decision.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request an oral argument under Rule 20 of the *Revised Rules of Appellate Procedure* Petitioners believes that the decisional process would be significantly aided by oral argument.

VI. STATEMENT OF FACTS

1. David M. Hammer and Euphemia Kallas installed a 9.4 kilowatt roof mounted solar system which consisted of 40 235 watt panels, 40 Enphase micro-inverters and one AV electric vehicle charging stations. (Hammer Tr. page 11)

2. The total cost for the installation of the alternative fuel vehicle refueling infrastructure was $56,870. (Hammer Tr. page 12)

3. On March 12, 2011, the West Virginia Legislature enacted SB 465 to be effective on July 1, 2011, which created the tax credit for Qualified alternative fuel vehicle refueling infrastructure West Virginia Code § 11-6D-6.

4. After the passage of SB 465, Brian Romine, CPA reviewed the bill and wanted to discuss the applicability of SB 465 as it relates to his clients including Mountain View Solar Company. (Joint Tr. page 34)

5. In August of 2011, Mr. Romine contacted Mr. John Montgomery, (Attorney Supervisor, Technical Unit, Legal Division, State Tax Department), to seek clarification on what types of components would qualify as part of the infrastructure. (Joint Tr. page 34)

6. During the August, 2011, conversation Mr. Montgomery, indicated he felt like Mr. Romine was on the right track with the interpretation, but asked him to send what he called a letter of clarification to him, which was faxed in early September of 2011. (Joint Tr. page 34)

7. Mr. Romine faxed a letter dated September 2nd, 2011, to Mr. Montgomery requesting clarification concerning the use of solar energy as qualified alternative fuel refueling infrastructure credit. (Petitioner's Exhibit 1)

8. Mr. Montgomery failed to respond to the letter.

9. Mr. Romine saw Mr. Montgomery in September, 2011, at the West Virginia Tax Institute in Pipestem, West Virginia, where Mr. Montgomery requested additional information. (Joint Tr. page 36)

10. Mr. Romine complied with his request and faxed a second letter on October 19, 2013. (Petitioner's Exhibit 2)

11. After faxing the letters to Mr. Montgomery, Mr. Romine had a phone conversation with Mr. Montgomery concerning the use of in-grid storage. (Joint Tr. page 39)

12. Mr. Montgomery thought that we were on the right track and that in-grid storage would help to qualify the infrastructure for the storage component, and that the solar panels would also be included as part of the infrastructure for alternative-fuel refueling infrastructure. (Joint Tr. page 39)

13. Mr. Romine stated his clients were really anxious to get some additional guidance so that they could have installation complete before the end of the year in order to qualify for the tax credit. Mr. Montgomery said that the department would publish interpretive rules and stated that he was on the right track with the way we were interpreting it and the examples that I had given in a couple of letters that I had sent to him. (Joint Tr. page 39)

14. In March, 2012, Mr. Romine received a copy of interpretive rules that Mr. Montgomery had described. (Petitioner's Exhibit 4)

15. The interpretive rules that were promulgated by the department provided that refueling infrastructure included solar systems. (Petitioner's Exhibit 4)

16. On July 24, 2012, a meeting was held with the general counsel of the tax department, Mr. Morton, along with representatives of Mountain View Solar Company and several legislators. (Joint Tr. page 41)

17. At the meeting the department it was discussed about the sizing of the systems need to charge a vehicle that was driven between 10,000 and 12,000 miles per year. (Joint Tr. page 41)

18. It was determined that average size of such a system would be four to six kilowatts. (Joint Tr. page 41).

19. Based upon this information, Mr. Morton was not concerned about the Alternative Fuel Home Refueling Infrastructure Credit for solar. (Joint Tr. page 41).

20. At this meeting Mr. Morton requested that Mountain View Solar provide a formula that could be used to allocate the installations for nonresidential installations. (Joint Tr. page 41)

21. Mountain View Solar prepared a safe harbor formula for the department based upon the discussions from the July 24, 2012 meeting. (Petitioner's Exhibit 5)

22. At the conclusion of the meeting, Mr. Morton indicated that the Department would provide guidance to the taxpayers with an administrative notice within a month. (Joint Tr. pages 44 and 45)

23. Mr. Romine continued to follow up the department in August, attempting to determine if they needed any additional information or questions concerning the safe harbor formula. (Joint Tr. page 45)

24. The department failed to provide the guidance that was promised and on September 12, 2012, a second meeting was held with representatives of the Department, Mountain View Solar and the legislature. (Joint Tr. page 45)

25. At this meeting the Tax Department appeared to have a change of position with the non-home refueling but that the home refueling infrastructure was not a problem. They requested that Mr. Sayre write a letter requesting rules and an advisory assistance letter. (Joint Tr. page 47)

26. After receipt of the letter from Mr. Sayre, Mr. Morton issued a letter indicating that the Department had determined that there was not a credit for non- residential installation and severely restricted the use of the residential infrastructure credit to:

> Purchase, construction and installation costs for qualified home infrastructure property that is **exclusively** dedicated to providing electricity to plug-in hybrid electric vehicles or electric vehicles, in West Virginia, owned by the tax credit applicant, will qualify for the tax credit without regard to whether the property is solar power related or not.
>
> West Virginia Code § 11-6D-2 (f) is quoted above.
>
> Section 11-6D-2(f) specifies the "qualified alternative fuel vehicle home refueling infrastructure" property as:
>
> compression equipment, storage tanks,
> dispensing units.
>
> Solar panels cannot store or dispense electrical power, therefore they do not qualify for the alternative fuel vehicle **home** refueling infrastrucre tax credit, set forth in West Virginia Code § 11-6D-1 et seq. However, the "dispensing units" for "providing **electricity** to plug-in hybrid electric vehicles or **electric** vehicles" will qualify.
>
> Purchase, construction and installation costs for the following will typically qualify for the qualified alternative fuel vehicle home refueling infrastructure tax credit for providing electricity to plug-in hybrid electric vehicles or electric vehicles:
>
> Electric car charging stations, including plugs, sockets (other than standard domestic wall sockets), cables, circuit wiring, safety equipment, grid interface equipment, including smart grid equipment, current sensors and monitors, feedback sensors and sensor wires and other apparatus and equipment exclusively used to provide electricity to plug-in hybrid electric vehicles or electric vehicles, in West Virginia" . (Joint Exhibit 5)

27. Subsequent to the issuance of the letter from Mr. Morton the department issued a revised AFTC-1. (Petitioner's Exhibit 9)

28. The revised AFTC-1 added 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)

29. The exclusion of solar panels was not in the original AFTC-1 that was issued for tax year 2011. (Petitioner's Exhibit 3 and 9)

30. Based upon communications with the tax department, instructions for the original AFTC-1 and a review of the statute, Mr. Romine was able to determine that more likely than not that the installation of the refueling infrastructure by the Petitioners would qualify for the Tax Credits and he advised his clients that they could take the credit..

31. Mr. Mark Ballantine is a developer and owner of solar electric facilities and a consultant to renewable energy companies in the Mid-Atlantic United States. (Joint Tr. page 9)

32. Mr. Ballantine is familiar with solar electrical alternative energy refueling infrastructures created by solar power. (Joint Tr. page 9)

33. A functioning solar electric facility consists of solar modules that are arranged in strings of up to, say, 8 to 10 to 12 modules each that are combined to feed into what's called an inverter, which converts the direct current electricity that's produced by the solar modules into alternating current electricity that is typically used in the recharging stations and by consumers. Part of the system includes meters for measuring the amount of electricity produced. And there's typically an interconnection with the grid (Joint Tr. page 10)

34. A typical system would connect to the grid through the host. And the host would be the owner of the system that would have the system installed on their facility. That system is typically connected to car charging stations, the utility distribution panel within the facility, and ultimately, like I said, to the power grid. (Joint Tr. page 10)

35. Solar panels are made up of individual solar cells. As the sunlight hits the cells it excites the electrons and they are dispensed at the end of the solar panel that go into the system. (Joint Tr. page 11)

36. After the electricity is dispensed from the solar panel it travels through wiring into panels then to an inverter to convert the current from direct current to alternating current. (Joint Tr. page 11)

37. Once converted it travels to a meter to measure the amount of electricity coming off the solar array then into a distribution panel. And the distribution panel has another meter between itself and the grid. Typically, the electrons coming off of the inverter travel to the host facility, which would include the car charging station and for general consumption at the facility. (Joint Tr. pages 11 and 12)

38. Storage in grid storage happens when the solar array is dispensing electricity during hours of sunshine and a vehicle is not a the charging station, then the electrons pass through the meter into the electric grid system, which will actually have the effect of spinning backwards. So the analogy is it's very similar to, say, a bank account where when it's producing more than is being consumed, it registers a credit to the meter. And when the facility consumes more than the solar electric facility is generating, then the meter spins the opposite direction. Essentially, it's a temporary means of storage for those electrons. (Joint Tr. pages 12 and 13)

39. When a plug in vehicle comes to a recharging station during the day it would be taking the electrons off the solar electric facility. And if it's charging during non-daylight hours it would be consuming electrons off the grid. (Joint Tr. page 13)

40. The grid storage acts as a storage tank. (Joint Tr. page 13)

VII. ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT'S AFFIRMATION OF THE ADMINISTRATIVE DECISION IS CLEARLY ERRONEOUS AND IS BASED ON AN INCORRECT LEGAL STANDARD IN CONCLUDING THAT ONLY A PORTION OF THE INFRASTRUCTURE PURCHASED AND INSTALLED BY THE PETITIONER'S 'QUALIFIED ALTERNATIVE FUEL VEHICLE HOME REFUELING INFRASTRUCTURE" DID NOT QUALIFY FOR THE CREDIT

2. THE CIRCUIT COURT'S AFFIRMATION OF THE ADMINISTRATIVE DECISION IS CLEARLY ERRONEOUS AND IS BASED ON AN INCORRECT LEGAL STANDARD AND OR FACTUAL FIND IN CONCLUDING THAT SOLAR PANELS DO NOT "STORE" ELECTRICITY, NOR DO THEY "DISPENSE" OR PROVIDE ELECTRICITY TO ELECTRIC VEHICLES, AS THOSE TERMS ARE USED IN WEST VIRGINIA CODE SECTION 11-6D-2(F).

VIII. DISCUSSION OF LAW

1. THE CIRCUIT COURT'S AFFIRMATION OF THE ADMINISTRATIVE DECISION IS CLEARLY ERRONEOUS AND IS BASED ON AN INCORRECT LEGAL STANDARD IN CONCLUDING THAT ONLY A PORTION OF THE INFRASTRUCTURE PURCHASED AND INSTALLED BY THE PETITIONER'S 'QUALIFIED ALTERNATIVE FUEL VEHICLE HOME REFUELING INFRASTRUCTURE" DID NOT QUALIFY FOR THE CREDIT.

Statutes which are clear and unambiguous in their meaning and application are to be applied and not construed. Syl. pt. 1, *State ex rel. Hardesty v. Aracoma - Chief Logan No. 4523, Veterans of Foreign Wars of U.S., Inc., 147 W. Va. 645, 129 S.E.2d 921, 922 (1963).*

The West Virginia Legislature enacted SB 465 in the 2011 regular session. West Virginia Code § 11-6D-2 (a). Set forth the definition of an alternative fuel.

(a) "Alternative fuel" includes:

(1) Compressed natural gas;

(2) Liquefied natural gas;

(3) Liquefied petroleum gas;

(4) Ethanol;

(5) Fuel mixtures that contain eighty-five percent or more by volume, when combined with gasoline or other fuels, of the following:

(A) Methanol;

(B) Ethanol; or

(C) Other alcohols;

(6) Natural gas hydrocarbons and derivatives;

(7) Hydrogen;

(8) Coal-derived liquid fuels; and

(9) Electricity, including electricity from solar energy. (emphasis added)

West Virginia Code § 11-6D-2 (f) further defines:

"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.

The fact that the Petitioner installed equipment that could dispense electricity, including electricity from solar energy is indisputable. Further, the only evidence of record establishes that Solar Panels, wiring, inverter boxes, meters and the plug in are all used for the dispensing of the electricity from solar energy.

West Virginia Code § 11-6D-4 established the eligibility of the Petitioner for the credit.

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 or qualified alternative fuel vehicle home refueling infrastructure that is capable of dispensing alternative fuel for alternative-fuel motor vehicles.

The only evidence of record establishes that the equipment installed is capable of dispensing of alternative fuel for an alternative fuel motor vehicle. No were in the statute does it require that a taxpayer to construct a dedicated storage and dispensing facilities exclusively

designed for the fueling of an alternative fuel motor vehicle nor does it require that at the time of installation that the Petitioner have an alternative fuel motor vehicle.

In the interpretation of a statute, the legislative intention is the controlling factor; and the intention of the legislature is ascertained from the provisions of the statute by the application of sound and well established canons of construction. Syllabus Point 2, *Meadows v. Wal-Mart Stores, Inc., 207 W. Va. 203, 530 S.E.2d 676 (1999).*

The legislature provided its intent in the passage of SB 465:

West Virginia Code § 11-6D-1. Legislative findings and purpose.

Consistent with the public policy as stated in section one, article two-d, chapter twenty-four of this code, the Legislature hereby finds that the use of alternative fuels is in the public interest and promotes the general welfare of the people of this state insofar as it addresses serious concerns for our environment and our state's and nation's dependence on foreign oil as a source of energy. The Legislature further finds that this state has an abundant supply of alternative fuels and an extensive supply network and that, by encouraging the use of alternatively-fueled motor vehicles, the state will be reducing its dependence on foreign oil and attempting to improve its air quality. The Legislature further finds that the wholesale cost of fuel for certain alternatively-fueled motor vehicles is significantly lower than the cost of fueling traditional motor vehicles with oil based fuels.

However, because the cost of motor vehicles which utilize alternative-fuel technologies remains high in relation to motor vehicles that employ more traditional technologies, citizens of this state who might otherwise choose an alternatively-fueled motor vehicle are forced by economic necessity to continue using motor vehicles that are fueled by more conventional means. Additionally, the availability of commercial and residential infrastructure to support

alternatively fueled vehicles available to the public is inadequate to encourage the use of alternatively-fueled motor vehicles. It is the intent of the Legislature that the alternative fuel motor vehicle tax credit previously expired in 2006 be hereby reinstated with changes and amendments as set forth herein. Therefore, in order to encourage the use of alternatively-fueled motor vehicles and possibly reduce unnecessary pollution of our environment and reduce our dependence on foreign sources of energy, there is hereby created an alternative-fuel motor vehicles tax credit and an alternative-fuel infrastructure tax credit. (emphasis added)

It is the clear intent of the legislature to encourage the construction of both commercial and residential infrastructure because it recognized that the inadequate infrastructure discouraged the use of alternative-fueled motor vehicles. The legislature did not state in its intent that there was an abundance of alternative energy vehicles and we needed the infrastructure, they knew to encourage the use of alternatively-fueled motor vehicles, and thus reducing the state's dependence on foreign oil and attempting to improve the state's air quality that you had built it (infrastructure) so they would come.

It is a cardinal rule of statutory construction that a statute should be construed as a whole, so as to give effect, if possible, to every word, phrase, paragraph and provision thereof, but such rule of construction should not be invoked so as to contravene the true legislative intention. Syllabus Point 9, *Vest v. Cobb, 138 W.Va. 660, 76 S.E.2d 885 (1953)*, Syllabus Point 3, *Meadows v. Wal-Mart Stores, Inc., 207 W. Va. 203, 530 S.E.2d 676 (1999)* (emphasis added).

The governing statute clearly and unambiguously support the conclusion that the Petitioner is entitled to tax credit, even if the applicable legal authority were ambiguous on the eligibility question (which it is not), because the legislative intent was designed to foster or promote some social good (reduction on the dependency on foreign oil and improve air quality),

any such ambiguity is to be strictly construed in favor of the Petitioner's position that the Petitioner is entitled to tax credit.

Generally, tax statutes, defining the scope of taxable objects, are, if requiring construction, strictly construed in favor of taxpayers and against the taxing authority. *Wooddell v. Dailey, 160 W. Va. 65, 68, 230 S.E.2d 466, 469 (1976)* (citing *State ex rel. Battle v. Baltimore and Ohio Railway Co., 149 W.Va. 810, 143 S.E.2d 331 (1965)*, cert. denied, 384 U.S. 970, 86 S.Ct. 1859, 16 L.Ed.2d 681 (1966)). On the other hand, statutes expressly exempting certain taxpayers or transactions from the scope of taxable objects, if requiring construction, are strictly construed against the taxpayer claiming the benefit of such an exemption. Syl. Pt. 2, *State ex rel. Hardesty v. Aracoma - Chief Logan No. 4523, Veterans of Foreign Wars of U.S., Inc., 147 W. Va. 645, 129 S.E.2d 921, 922 (1963)* (citing Point 2, Syllabus, *State ex rel. Lambert v. Carman, 145 W.Va. 635, 116 S.E.2d 265 (1960).*

Here, even if the statute and legislative regulations governing the applicability of the credit were ambiguous, which they are not, the Respondent's interpretation of them in the letter dated November 2, 2012, violates the well-established doctrine that laws designed to foster or promote some social good any such ambiguity is to be strictly construed against the state. Thus, any ambiguity in how the statute is applied should be resolved in favor of the Petitioner. *Andy Brothers Tire Co. v. State Tax Commissioner, 233 S.E.2d 137 (W. Va. 1977).* This view was reaffirmed in 1990. *Brockway Glass Co., Inc. v. Caryl, 394 S.E.2d 524 (W. Va. 1990).*

Because the statute and the clear legislative intent show that SB465 was designed to foster or promote some social good therefore any such ambiguity is to be strictly construed against the state. Because the statue was not clear on the requirement of a dedicated storage and

dispensing facility them the statute must be interpreted in favor of the taxpayer. *Andy Brothers Tire Co. v. State Tax Commissioner, 233 S.E.2d 137 (W. Va. 1977).*

2. THE CIRCUIT COURT'S AFFIRMATION OF THE ADMINISTRATIVE DECISION IS CLEARLY ERRONEOUS AND IS BASED ON AN INCORRECT LEGAL STANDARD AND OR FACTUAL FIND IN CONCLUDING THAT SOLAR PANELS DO NOT "STORE" ELECTRICITY, NOR DO THEY "DISPENSE" OR PROVIDE ELECTRICITY TO ELECTRIC VEHICLES, AS THOSE TERMS ARE USED IN WEST VIRGINIA CODE SECTION 11-6D-2(F)..

The fact that the Petitioners installed equipment that could dispense electricity, including electricity from solar energy is indisputable. Further the only evidence of record establishes that Solar Panels, wiring, inverter boxes, meters and the plug in are all used for the dispensing of the electricity from solar energy.

West Virginia Code § 11-6D-4 established the eligibility of the Petitioners for the credit.

> 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 or qualified alternative fuel vehicle home refueling infrastructure that is capable of dispensing alternative fuel for alternative-fuel motor vehicles.

The Court incorrectly concluded that the infrastructure had to store the electricity produced. West Virginia Code § 11-6D-4 clearly states that for a taxpayer to be eligible for the credit they must purchase or construct infrastructure that is capable of dispensing alternative fuel for alternative fuel motor vehicles. There is not a requirement that it has to also store the electricity.

West Virginia Code § 11-6D-2 (a) (9) states that electricity, including electricity from solar energy, are defined as alternative fuel for purposes of the tax credit.

Further West Virginia Code § 11-6D-2 (f) defines qualified alternative fuel vehicle home refueling infrastructure.

> "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.

The clear intention of the legislature was to be inclusive of property that would qualify for the credit by use of the clause "including, but not limited to".

The Tax Commissioner wants to limit the credit for a limited portion of the property installed. The only evidence presented at the hearing established that to dispense alternative fuel from solar electricity the Petitioners installed a 4.7 kilowatt roof mounted solar system which consisted of 20 235 watt panels, 20 Enphase micro-inverters and one AV electric vehicle charging station.

Mr. Ballantine and Mr. Williams testified that the solar panels dispense electrons that go into the Petitioner's infrastructure. After the electricity is dispensed from the solar panel, it travels through wiring into panels then to an inverter to convert the current from direct current to alternating current. Once converted it travels to a meter to measure the amount of electricity coming off the solar array then into a distribution panel the electrons coming off the inverter travel to the host facility, which would include the car charging station. This is the only evidence concerning what property is needed to dispense electricity from solar; the Tax Commissioner chose not to provide evidence to this point.

The statue 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. Limiting the credit to the only, the charging station may be correct if you are using electricity from the grid, however to use electricity generated by solar requires the wiring, meters connections, panels and inverters that the Commissioner scoffs.

The Commissioner wants to read into the repeal of the Credit as a rejection of the intent of the legislature to promote social welfare, but the plain language of the statue clearly states why the state was offering the credit.

The legislature provided its intent in the passage of SB 465:

> West Virginia Code § 11-6D-1. Legislative findings and purpose.
>
> Consistent with the public policy as stated in section one, article two-d, chapter twenty-four of this code, the Legislature hereby finds that the **use of alternative fuels is in the public interest and promotes the general welfare of the people of this state insofar as it addresses serious concerns for our environment and our state's and nation's dependence on foreign oil as a source of energy.** The Legislature further finds that this state has an abundant supply of alternative fuels and an extensive supply network and that, by encouraging the use of alternatively-fueled motor vehicles, the state will be reducing its dependence on foreign oil and attempting to improve its air quality. The Legislature further finds that the wholesale cost of fuel for certain alternatively-fueled motor vehicles is significantly lower than the cost of fueling traditional motor vehicles with oil based fuels.
>
> However, because the cost of motor vehicles which utilize alternative-fuel technologies remains high in relation to motor vehicles that employ more traditional technologies, citizens of this state who might otherwise choose an alternatively-fueled motor vehicle are forced by economic necessity to continue using motor vehicles that are fueled by more conventional means. **Additionally, the availability of commercial and residential infrastructure to support alternatively fueled vehicles available**

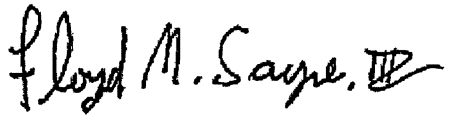
> **to the public is inadequate to encourage the use of alternatively-fueled motor vehicles.** It is the intent of the Legislature that the alternative fuel motor vehicle tax credit previously expired in 2006 be hereby reinstated with changes and amendments as set forth herein. **Therefore, in order to encourage the use of alternatively-fueled motor vehicles and possibly reduce unnecessary pollution of our environment and reduce our dependence on foreign sources of energy, there is hereby created an alternative-fuel motor vehicles tax credit and an alternative-fuel infrastructure tax credit.** (Emphasis added)

Because the statute and the clear legislative intent show that SB465 was designed to foster or promote some social good therefore any such ambiguity is to be strictly construed against the state. *Andy Brothers Tire Co. v. State Tax Commissioner,* 233 S.E.2d 137 (W. Va. 1977).

IX. PRAYER FOR RELIEF

WHEREFORE, based upon the evidence in the record and the authorities cited herein, the Petitioners respectfully submits that, based on the evidence in the record of this matter and on the foregoing points and authorities, it is respectfully submitted that the Final Order affirming the ruling of the West Virginia Office of Tax Appeals denying the Petition for Refund is in error, and as such, it should be reversed.

DAVID M. HAMMER &
EUPHEMIA KALLAS,
Petitioner
By Counsel



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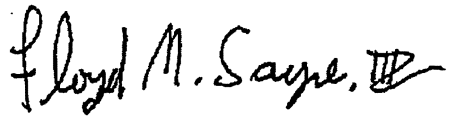
CERTIFICATE OF SERVICE

I, Floyd M. Sayre, III, Counsel for the Petitioners, do hereby certify that a true and exact copy of the foregoing **PETITIONER'S BRIEF,** was duly served by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this the 4th day of December 2015, addressed as follows:

Cassandra Lynn Means, Esquire
Assistant Attorney General
1900 Kanawha Boulevard, East
Building 1, Room W-435
Charleston, West Virginia 25305



Floyd M. Sayre, III