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IN THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA

JOHN SKIDMORE TRUCKING, INC.,

Petitioner

v. CIVIL ACTION NO. 14-C-27

MARK W. MATKOVICH, SUCCESSOR TO CRAIG A. GRIFFITH, AS WEST VIRGINIA STATE TAX COMMISSIONER,

Respondent.

PETITION FOR APPEAL OF ADMINISTRATIVE DECISION

NOW COMES the Petitioner and it does respectfully present its Petition for Appeal pursuant to the provisions of West Virginia Code § 11-10A-19 as follows:

1. This is an appeal of the Final Decision issued by the West Virginia Office of Tax Appeals (hereinafter, "the WVOTA") on January 28, 2014, in a matter entitled **JOHN SKIDMORE TRUCKING, INC., Petitioner v. GRIFFITH, CRAIG A., as STATE TAX COMMISSIONER of WEST VIRGINIA, Respondent,** Docket No. 12-456 CU (hereinafter, "the Administrative Decision"). A copy of the Administrative Decision is attached hereto as Petition Exhibit A.

Kind of Proceeding and Nature of Ruling by WVOTA

2. In an assessment issued against the Petitioner (also referred to hereinafter as "the Taxpayer"), dated October 16, 2012, the Auditing Division of the West Virginia Department of Revenue (referred to herein as the "Auditing Division"), acting under the authority of the Respondent's predecessor as State Tax Commissioner (also referred to hereinafter as "the Commissioner"), asserted that the Taxpayer owed sales and use tax in the amount of $2,387.33, together with interest thereon in the amount of $378.75, for a total due of $2,766.08.

3. Specifically, the Auditing Division alleged that the Taxpayer failed to remit use tax owed as a result of its purchases for use in its business of "security services, bonuses, enrolled agents accounting services, vanities, pressure washer, carpet padding, curtains and other miscellaneous items." *Id.* In response to that allegation, the Taxpayer remitted to the West Virginia State Tax Department (referred to herein as "the Department) the sum of $1,452.08, being the portion of the tax and interest it conceded that it owed.

4. However, at the same time, the Taxpayer challenged the other portion of the use tax that would be imposed on the charges it paid for the services of an enrolled agent in the amount of $1,134, together with interest thereon of $180.00, for a total challenged assessed liability of $1,314.00 (the portion of the proposed liability being thus challenged hereinafter being referred to as "the Assessment").

5. The Assessment covered the periods of January 1, 2009 through August 31, 2012, inclusive (referred to herein as the "Assessment Period").

6. On or about November 15, 2012, the Taxpayer timely filed its petition for reassessment (the "Petition") challenging the Assessment and the Commissioner timely answered.

7. A hearing on the Petition was convened by the Honorable A.M. "Fenway" Pollack, Chief Administrative Law Judge (CALJ) of the WVOTA, in Charleston on March 26, 2013 (hereinafter, "the Hearing").

8. At the Hearing, the Commissioner, through his counsel, presented the testimony of two (2) witnesses and introduced three (3) exhibits into the record. The Taxpayer, through its counsel, presented the testimony of four (4) witnesses, and introduced nine (9) exhibits into the record.

9. Thereafter, pursuant to a briefing schedule established by the CALJ, the parties timely filed their respective briefs, and, on August 2, 2013, the matter was submitted for decision by the CALJ, who, on January 28, 2014, issued the Administrative Decision from which this appeal is taken.

Statement of Facts

10. The Taxpayer is, and was during the Assessment Period, an entity based in Flatwoods, Braxton County, West Virginia, and engaging in a variety of businesses.

11. In the Taxpayer's business, and throughout the Assessment Period, the Taxpayer employed several in-house bookkeepers to provide bookkeeping services.

12. During the Assessment Period, the Taxpayer contracted with Jerry L. Jackson, an enrolled agent and principal of J&L Accounting Services, a sole proprietorship (referred to herein as " the Enrolled Agent"), to provide a variety of tax and accounting services to Taxpayer..

13. The Enrolled Agent's monthly services for the Taxpayer during the Assessment Period included: (a) reviewing and adjusting, as necessary, monthly bookkeeping entries made by the Taxpayer's in-house bookkeeping staff; (b) posting adjusting journal entries for depreciation expenses, wages payable, and changes in the Taxpayer's physical inventories of gasoline and other items; (c) reconciling the Taxpayer's bank statements; (d) preparing and submitting to the Taxpayer monthly balance sheets, profit and loss statements, and statements of cash flow; and (e) preparing all required periodic tax reports, including the Federal Form 941 tax deposit report, the West Virginia tax withholding report, and the local motel tax report.

14. The Enrolled Agent's quarterly services for the Taxpayer during the Assessment Period included preparation of several reports due quarterly, including the Federal Form 941,

Federal Form 940 tax deposit report, West Virginia tax withholding report, and West Virginia Unemployment report.

15. Annually, during the Assessment Period, the Enrolled Agent: (a) provided the Taxpayer's other outside accounting firm, Ernst & Young (hereinafter, "E&Y"), with the Taxpayer's 12th month April 30 (fiscal year) annual balance sheet and profit & loss statements for the purpose of E&Y's preparation of the Taxpayer's annual federal and state income tax returns and its state business franchise tax return; (b) provided E&Y with specific accounting detail which the latter requested for use in preparing the above returns and for the purpose of conducting the due diligence required for preparation of the returns; (c) prepared annually required reports, including the Taxpayer's Forms W-2, IRS Form 940 and IRS Forms 1099-MISC; (d) electronically submitted federal copies of the Taxpayer's Forms W-2 and W-3 to the Social Security Administration as required; (e) prepared special reports and data summaries for, and represented the Taxpayer at, an annual Worker's Compensation and Insurance audit conducted by the Taxpayer's carrier: and, (f) upon completion of the annual tax returns by E&Y, posted all adjusting journal entries provided by E&Y to assure that all records in the Taxpayer's accounting system, properly matched data on the Taxpayer's annual income tax returns filed by E&Y.

16. In addition to the Enrolled Agent's monthly, quarterly, and annually provided services, continually, or as needed during the Assessment Period, the Enrolled Agent: (a) maintained the Taxpayer's chart of accounts in its financial bookkeeping system by adding new accounts and/or modifying old accounts as required and/or as desired by management; (b) provided tax and accounting advice as requested by the Taxpayer's management; (c) provided accounting advice to, and as requested by, the Taxpayer's in-house bookkeeping staff; (d) set up

and maintained employee records in the Taxpayer's payroll software; (e) processed the Taxpayer's bi-weekly payroll checks; (f) prepared and provided payroll summary reports, 401(k) retirement reports and employee wage garnishment reports to the Taxpayer's management; and, (g) represented the Taxpayer at occasional audits by the Auditing Division, including, in real-time and in the presence of the Department's auditor, creating and presenting, to the Commissioner's auditor, various reports showing data he or she requested.

17. Due to the statutorily-mandated inter-relationship of federal and state income and payroll tax laws, and of the related regulations and forms, the Enrolled Agent was required to be well-versed in both state and federal taxation matters.

18. In order to be certified as such, Internal Revenue Service Circular 230, "Regulations Governing Practice Before the Internal Revenue Service" (hereinafter, "IRS Circular 230") provides that the Enrolled Agent had to pass a written examination administered under the oversight of the Internal Revenue Service (hereinafter, "the IRS") and which examination covered issues governing taxation of individuals and businesses as well as practice in front of the IRS.

19. Further, to maintain his status as such, the Enrolled Agent also has to attend a minimum of sixteen (16) hours yearly, and seventy-two (72) hours each three years, of continuing professional education (hereinafter, "CPE").

20. Additionally, the Enrolled Agent has to comply with various IRS regulations or face sanctions so that, if he is shown to be incompetent or disreputable, fails to comply with any regulation under IRS Circular 230 (under the prohibited conduct standards of § 10.52), or, with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client, the Enrolled Agent could be censured, suspended, or disbarred by the IRS.

21. Certified public accountants (hereinafter, in the singular "CPA" and in the plural "CPAs") must, under various state and federal laws, including banking and security statutes, qualify as such in order to render opinions as to various financial statements on which lenders, investors and others rely for their accuracy in describing the financial condition of various entities. However, except for certain standards imposed by IRS Circular 230, qualification as a CPA is not required, under any state or federal law, to engage in any other accounting, bookkeeping or tax work.

22. Certification as such, pursuant to IRS Circular 230, entitled the Enrolled Agent, like attorneys and CPAs, to *unlimited practice rights* before the IRS, meaning they are unrestricted as to which taxpayers they can represent, what types of federal tax matters they may handle, and before which IRS offices they can represent clients, whereas other enrolled practitioners, such as enrolled retirement plan agents and registered tax return preparers, have specifically delineated practice areas. .

23. To satisfy his CPE obligations requirements under IRS Circular 230, the Enrolled Agent attended various seminars, including seminars at which he received credits for presentations by representatives of the Commissioner regarding various state tax laws and issues.

24. The testimony from several witnesses for the Taxpayer at the Hearing revealed that the Enrolled Agent's accounting and tax services, both at the federal, state and local levels, are integral to the preparation of the Taxpayer's federal income tax returns and to the provision of advice on all federal taxes, including income taxes, all of which constitute services clearly covered by IRS Circular 230.

25. Both enrolled agents and CPAs are enumerated persons who are expressly deemed to provide professional services under legislative regulations promulgated by the Commissioner pursuant to the Legislature's enactments.

26. However, pursuant to his agency's policy, and erroneous interpretation of the governing legislative regulations, all as expressed in Administrative Notice 10-25 (hereinafter, "the Notice") the Commissioner presently only excludes, from sales and use tax as professional, charges for services rendered by enrolled agents for which certification as such is expressly required. As a result, the Notice requires the imposition of sale and use taxes on charges made for any other services performed by enrolled agents which, considered alone, may not require enrolled agent certification by the IRS, but which are based on such enrolled agents' knowledge of, and training and expertise in, a wide variety of taxation and accounting matters.

27. By contrast, the Commissioner's policy is that charges for *all* tax services performed by CPAs, *most* of which tax services require no such licensure as a CPA, as well as CPA charges for *many* accounting and bookkeeping services, also not requiring such licensure, are, nonetheless, *all* professional and, thus excluded from the imposition of sales and use tax.

28. The Notice's view of the professional status of enrolled agents has, under the Commissioner's tenure and before, been the result of the inconsistent, perfidious and, occasionally surreptitious, manner by which senior officials of his agency have often attempted to resist, undermine and constrict the scope of the services rendered by enrolled agents which are recognized, by the governing legislative regulations, as being professional services for sales and use tax purposes.

Assignments of Error

29. The CALJ erred in the Administrative Decision by omitting any meaningful discussion, consideration or justification of the Commissioner's policy of disparate treatment between the services of enrolled agents and those of CPAs.

30. The CALJ erred in the Administrative Decision by sustaining the Commissioner's disparate treatment of most services of enrolled agents as non-professional, and, thus, taxable for sales and use tax purposes, by narrowly limiting the scope of enrolled agents' services treated as professional (and, thus, tax exempt) to only those services for which certification as such by the IRS was immediately required, while treating *all* the tax and accounting services performed by CPAs, most of which do *not* require licensure as such, as being professional, and, thus, making the CPAs' charges for the same not subject to sales and use taxes.

31. The CALJ erred in the Administrative Decision by ignoring the *absence* of any distinction between the professional status of enrolled agents and of CPAs in the legislative rules governing that status for sales and use tax purposes.

32. The CALJ erred in the Administrative Decision by failing to apply, to the services of the Enrolled Agent, the Commissioner's own policy that the exclusion, of professional services from the definition of "services" otherwise taxable under the consumers sales tax law, includes all activities which are incidental or integral to the performance of the services that are recognized, by the governing legislative regulations, as professional for such purposes.

33. The CALJ erred in the Administrative Decision in ruling, on the basis of a mistaken interpretation, of the *non-exclusive* standards contained in the legislative rules, and governing the determination of professional status of enrolled agents' services for sales and use

tax purposes, that such standards are exclusive and mandatory and that they do not apply to *any* services of enrolled agents, which fall outside the narrow scope of services for which, he held, IRS certification is immediately required.

34. The immediately preceding error was compounded by the CALJ's failure, in the Administrative Decision, to recognize that the same erroneous interpretation of the governing legislative rule would preclude application of those standards to the many services of CPAs, for which licensure as such is not required, but *all* of which CPA services are, nevertheless, treated as professional by the Commissioner for sales and use tax purposes.

35. The CALJ erred in the Administrative Decision by giving virtually conclusive deference to the Commissioner's exercise, in the Notice, of his generally applicable discretion in interpreting unclear tax laws, without considering the clarity of the legislative rule governing the immediate question of professional status, as expressly described in those same standards, thus precluding both the necessity and legitimacy of the Commissioner's interpretation to the contrary.

36. The CALJ erred in the Administrative Decision by giving virtually conclusive deference to the Commissioner's exercise, in the Notice, of his generally applicable discretion in interpreting unclear tax laws without considering the judicial exceptions to such deference and the evidence in the record supporting the application of those exceptions.

37. The CALJ erred in the Administrative Decision by misapplying the legally technical, but judicially recognized, distinction in rules of construction as between those applied to unclear statutory language, describing and defining the scope of objects subject to the imposition of a tax (in favor of the taxpayer and against the taxing authority), and unclear statutory language, providing a specific exemption for some objects from the imposition of the

tax (in favor of the taxing authority and against the taxpayer claiming the benefit of such exemption).

38. The CALJ erred in the Administrative Decision by sustaining the Assessment and by overruling the Taxpayer's challenge to the same.

Points and Authorities Relied On

39. 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).

40. "Once a regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a *legislative rule* should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious." Syl. pt. 2, *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 472 S.E.2d 411 (1996) (emphasis added).

41. 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*, 230 S.E.2d 466, 469, 160 W. Va. 65, 68 (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)).

42. Only statutes, expressly *exempting certain taxpayers or transactions* from the general 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 Syl. pt. 2, *State ex rel. Lambert v. Carman,* 145 W.Va. 635, 116 S.E.2d 265 (1960).

43. The Commissioner may not, under the guise of interpretation of a tax statute or legislative tax regulation, alter, modify or limit the meaning of such statute or regulation. Syl. pt. 4, *CNG Transmission Corp. v. Craig,* 211 W. Va. 170, 171, 564 S.E.2d 167, 168 (2002) and Syl. pt. 4, *Apollo Civic Theatre, Inc. v State Tax Commissioner,* 223 W.Va. 79, 672 S.E. 2d 215 (2008) (both citing Syl. pt. 1, *Consumer Advocate Div'n v. Public Service Comm'n,* 182 W.Va. 152, 386 S.E.2d 650 (1989)).

44. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view. " *Appalachian Power Co.*, 195 W.Va. 573, 591-592, 466 S.E.2d 424, 442-443 (1995) (internal citations omitted).

45. Services taxable under the consumers sales and service tax do not include professional services as the result of the express exclusion of professional services from the definition of the term "services" for sales tax purposes (hereinafter, "the Exclusion"). W.Va. Code §§11-15-2(b)(18) and 11-15-8.

46. The term "professional services" is not expressly defined in the tax statute, but professional services are described and identified in the governing legislative regulations for purposes of the Exclusion. 110 Code of State Regulations, series 15, § 8.1.1.1.

47. Services provided by CPAs, licensed as such, are included among the occupations which are expressly recognized as professional for purposes of applying the Exclusion. 110 Code of State Regulations, Series 15, §8.1.1.1.

48. Licensure as a CPA is not required of a person rendering any "tax services" (other than federal tax work covered by IRS Circular 230) or any services requiring accounting skills, but not involving the rendering of certain opinions or assurances as to financial statements. W.Va. Code §§ 30-9-26(g)(1) and 30-9-31(a)(2).

49. Services provided by enrolled agents, certified as such by the Internal Revenue Service, are included among the occupations which are expressly recognized as generally professional for purposes of the Exclusion. 110 Code of State Regulations, Series 15, §8.1.1.1.

50. The services provided by the Enrolled Agent here, meet each of the four (4) non-exclusive factors to be considered in determining whether an activity is to be treated as professional for purposes of applying the Exclusion, to-wit: "such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance [of the activity], licensing requirements [for the activity] on the State and national level and the extent of continuing education requirements [for the activity]." 110 Code of State Regulations, Series 15, §8.1.1.1.

51. The scope of services performed by professionals, which are included in the Exclusion, include those other activities which are interrelated and incidental to the rendering of a professional service for which a state or federal license or certification is required, even if such other services would not, alone, be treated as professional if performed outside the context of the rendering of licensed professional services. 110 Code of State Regulations, Series 15, §§36.1 and 8.1.1.1.

52. The services of overseeing financial recordkeeping, preparing financial statements, giving advice about financial and federal and state tax compliance issues, and

preparing federal, state and local tax returns and reports, are all professional services, whether provided by an enrolled agent or a CPA.

53. The Notice, not being a legislative rule, does not carry the force and effect of law. W.Va. Code §29A-3-1 et seq.

54. The Notice *is not* entitled to the deference otherwise afforded an administrative agency's interpretive or procedural rules. *Id.*

55. The Notice, being at odds with each the foregoing legal points and authorities numbered 39. through 54., is, thus, null and void as exceeding the Commissioner's authority to administer, but not to amend, legislative regulations involving state taxation.

56. The services, the Enrolled Agent performed for the Taxpayer the charges for which were the basis for the Assessment here, were professional services and, thus, excluded from the scope of services taxable under the consumers sales and service tax. W.Va. Code §§11-15-2(b)(18) and 11-15-8.

57. Services, which are excluded from the scope of services taxable under the consumers sales and service tax, are likewise, also excluded from the imposition of the use tax. W.Va. Code §§11-15A-1(b)(9), 11-15A-2(c) and 11-15A-3(a)(2) and (4).

Discussion of the Law

West Virginia Code § 11-15A-2 generally imposes a use tax on the use in West Virginia state of tangible personal property, custom software or taxable services. Services not subject to the West Virginia Consumer Sales and Service Tax ("sales tax"), are also not subject to the use tax. W.Va. Code § 11-15A-3(a)(4). Further, it is the express intent of the West Virginia Legislature that the use tax and the sales tax "be complementary laws and wherever possible be construed and applied to accomplish such intent as to the imposition, administration and

collection of these taxes." W. Va. Code § 11-15-1a. Thus, the validity of the Assessment should be analyzed under the statutory framework governing exceptions from the sales tax.

Pursuant to the provisions of Chapter 11, Article 15 of the West Virginia Code, West Virginia imposes sales tax on all sales of tangible personal property and services, unless such sales are expressly exempt or fall within an exception to the coverage of the tax. "Professional services" are specifically excepted from services subject to sales tax. W.Va. Code § 11-15-8. Although the statute, providing for that exception from the sales tax, does not expressly define the term "professional services," the Legislature has authorized the promulgation of legislative rules (regulations) to "explain and clarify both the West Virginia consumers sales and service tax . . . and the West Virginia use tax . . . ." W.Va. Code St. R. § 110-15-1.

Those regulations explain that the term "professional services" is excluded from sales tax in two separate ways. First they identify a clear and unambiguous list of categories of service providers who are generally recognized as rendering professional services for sales tax purposes (which list includes enrolled agents). In addition, the regulations also identify four (4) non-exclusive factors which the Respondent will consider in determining whether other "activities" of any service providers (i.e particular activities of service providers other than those identified in the foregoing list of professional service providers, *and* particular activities of the listed professionals) are also to be treated as the rendering of professional services for purposes of the Exclusion. Section 8.1.1.1 of Series 15 of Title 110 of the West Virginia Code of State Rules. [1]

[1] Section 2 of the regulations, to which the quoted cross-reference is made, indicates that "'[p]rofessional services' means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in W. Va. Code § 11-15-1 et seq. to be professional. See Section 8.1.1 of these regulations." W.Va. Code St. R. § 110-15-2.65.

Those non-exclusive factors include "such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance [of the activity], licensing requirements [for the activity] on the State and national level and the extent of continuing education requirements [for the activity]." *Id.*

Section 1 of the regulation states that "[p]rofessional services, as defined in Section 2 of these regulations, are rendered by physicians, dentists, lawyers, certified public accountants . . . enrolled agents . . . . " However, not all the services performed by, and not all the activities of, a professional service provider are treated as professional services excluded from sales tax.

Thus, the regulation provides guidance regarding situations wherein professional persons are engaging in activities which are not professional services, and which, thus, are taxable. W.Va. Code St. R. § 110-15-8.1.1.3. The example given is that of a veterinarian providing kennel services. *Id.* While a veterinarian is a listed service provider who renders professional services, the regulation indicates that mere kennel services provided by a veterinarian (or anyone else) are nonprofessional, and thus subject to tax. W.Va. Code St. R. § 8.1.1.1, 8.1.1.3.

However, in publication TSD-368, the Commissioner recently clarified the taxability of kennel services provided by a veterinarian on the basis of the long-held view that the "'professional services' exemption [sic] may also include charges for nonprofessional services but only when these activities are provided as an integral part of the professional ... service." W.Va. State Tax Dept., Sales and Use Tax and Veterinarians, Pub. TSD-368 (rev. 2012). Then, using the boarding of a dog as an example, the TSD indicates that if the dog has a wound (presumably being treated by a veterinarian) requiring it to be immobilized and monitored overnight, the veterinarian's charge for that boarding, or kennel service, will not be subject to sales and use tax as it is a necessary part of a professional treatment procedure. *Id.*

Thus, the Commissioner clarified and refined the regulation's veterinarian example to stand for the rule that services or activities, though, when considered alone are not professional, will be treated as professional for sales tax purposes when they are engaged in or provided in the context of the rendering of an acknowledged professional service, to the performance of which those other services or activities are integral.

Finally, in various other publications, the Department has indicated that the provision of services and goods, *incidental* to the provision of professional services, are also excluded from taxation.[2]

Thus, the line to be drawn when delineating otherwise taxable, nonprofessional services rendered by a professional service provider, rather than excluding from Sales Tax only those services for which licensure is absolutely required, must also exclude from tax the charges for those other services which are integral or incidental to the provision of the acknowledged professional service in question.

Much like the Commissioner's hypothetical veterinarian and doctor, the Taxpayer agrees that, if the Enrolled Agent provided services wholly unrelated to his services as an enrolled agent, they would not be eligible for the Exclusion merely as a result of his status as an enrolled agent. However, none of the services provided by the Enrolled Agent for the Taxpayer in question here, the charges for which the Commissioner would tax, are subject to sales tax because they all are

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[2] *See, e.g.*, W.Va. State Tax Dept., Sales and Use Tax And Attorneys, Pub. TSD-373 (rev. 2011). ("[The] exception to the collection of tax [for legal services] applies to fees charged for incidental aspects of legal services and includes charges for materials which are in used in providing the professional legal service. The exception may also include charges for non-professional services, but only when these activities are provided as an integral part of the professional legal service. Examples – typing of wills, photocopying of tax returns, etc."), *see also*, W.Va. State Tax Dept., Sales and Use Tax and Dentists, Pub. TSD-374 (rev. 2011), W.Va. State Tax Dept., Sales and Use Tax and Doctors, Pub. TSD-377 (rev. 1993).

integral or incidental to the professional services provided by the Enrolled Agent for which his licensure as such is required.

As with the services of the Enrolled Agent, the services of a CPA are generally excluded from the imposition of the Sales Tax. W.Va. Code St. R. § 110-15-8.1.1.1. No limitation on the scope of services, covered by the Exclusion with respect to either of those professions, is expressly stated. *Id.* Further, no difference exists in the language of Section 8.1.1.1 as such language pertains to CPAs and enrolled agents. *Id.* Nevertheless, the CALJ, without a legally valid basis cited in the Administrative Decision, treated CPAs and enrolled agents, and the identical services and activities each provides and engages in as part of his or her profession, differently for purposes of the Exclusion.

In the Administrative Decision, the CALJ reasoned that, because certain services do not explicitly require enrolled agent certification, those services do not fall under the Exclusion. In doing so, he fails to take into account whether such services are integral or incidental to the services for which enrolled agent certification is required.

Thus, both CPAs and enrolled agents are identified as categories of occupations generally rendering professional services under W.Va. Code St. R. § 110-15-8.1.1.1. No limitation is set forth in the regulation regarding the Exclusion as provided either by CPAs or by enrolled agents. However, the same services relating to accounting, when performed by a CPA, are considered by the Commissioner's agency to be excepted from Sales Tax, but when performed by an enrolled agent, are considered by it to be taxable. Because, in the vast majority of cases, the performance of such services by either professional does not require licensure as such, there can be no legitimate justification for such discriminatory treatment. Rather, for purposes of the Exclusion, enrolled agents must be treated as CPAs are treated, and, thus, as with CPAs, the services of

enrolled agents, which are integral and/or incidental to those services for which enrolled agent licensure is required, must also fall within the Exclusion.

The Enrolled Agent's oversight of financial recordkeeping and preparation of financial statements based on those records are services which readily fall within the Exclusion because they are integral to preparing federal tax returns, an acknowledged professional service. Indeed, acknowledging that the preparation and filing of documents before the IRS is part of the definition of "practice before the Internal Revenue Service" contained within Section 10.2(a)(4) of IRS Circular 230, the preparation of federal tax returns by an enrolled agent is a professional service, even recognized in the Notice, to be one of three (3) activities falling within the Exclusion.[3]

Specifically, in its purported interpretation of Section 10.2(a)(4) of IRS Circular 230, prong (1) of the Notice refers to oral or written presentation to the IRS of documents, correspondence and communications, directly relating to rights, privileges, or liabilities of a client, including preparation for such presentation and preparation and filing of business or individual tax returns. *Id.* Here, not only does the Enrolled Agent prepare certain federal tax returns, but he also oversees financial recordkeeping and prepares financial statements, both of which services are integral to his preparation of the Taxpayer's federal employment tax returns and to the federal income tax returns prepared for the Taxpayer by E & Y. Thus, such services

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[3] (1) Oral or written presentation to the Internal Revenue Service its officers or employees of documents, correspondence and communications, directly relating to the rights, privileges, or liabilities of a client of the enrolled agent, under laws or regulations administered by the Internal Revenue Service. This includes preparation for any such presentation and preparation and filing of business or individual Federal tax returns with the Internal Revenue Service, including schedules, forms and other required Federal return documents, amended returns, claims for refund, and affidavits on behalf of a client.

West Virginia State Tax Department Administrative Notice 10-25, XXVII W.Va. Reg. 1705 (September 17, 2010).

either are, or are integral to, services identified within prong one of the Notice, and consequentially, within the Exclusion.

The Enrolled Agent, as one who is certified to practice before the IRS, in terms of skill, knowledge and adherence to applicable rules of ethics and practice, such "practicing" encompasses all matters that pertain to the preparation of documents which immediately relate to anything that may legally affect a potential tax liability at the federal level. Here, the Enrolled Agent's services of preparing financial statements provide the primary data for, and thus are integral to, the preparation of Taxpayer's federal tax return, and, accordingly, fall within the Exclusion.

Additionally, in creating and assembling such tax-related data and giving such oral or written advice, the Enrolled Agent is professionally obligated to know and adhere to the requirements of the IRS, as to which requirements, as an enrolled agent, he is certified as being fully knowledgeable. As further explained below, the Enrolled Agent's oversight of financial recordkeeping and preparation of financial statements also required him to comply with the requirements of IRS Circular 230, or face sanctions. Thus, because the oversight of financial recordkeeping and preparation of monthly financial statements serve as a primary basis for preparation of Taxpayer's federal tax returns, these services provided by the Enrolled Agent are non-severable from the professional services provided by E & Y and should be recognized as professional services provided by enrolled agents. The Administrative Decision's holding to the contrary is, accordingly, erroneous and ought to be overruled and reversed.

The services performed by the Enrolled Agent, relating to preparing the Taxpayer's West Virginia income, franchise, employer withholding, and sales and use tax returns, are also integral to the preparation of the Taxpayer's federal tax returns, and thus fall within the Exclusion, and

specifically within prong (1) of the test delineated in the Notice regarding the preparation of federal tax returns. Both the procedural and substantive interplay between federal tax forms and regulations and the state tax rules are extensive, and the processes involved in the preparation of federal and state tax returns are often interdependent. In fact, as part of the Auditing Division's field audit procedure, it relies heavily on federal tax returns when examining state business franchise tax returns.

The Enrolled Agent also prepares periodic reports for the federal and state payroll tax deposits and quarterly reports, including both federal and state withholding tax reports and both federal and state unemployment tax reports. Further, the Enrolled Agent prepares annually required reports, such as employer forms W-2, W-3 and IRS Forms 940 (Annual Federal Unemployment Tax Return) and 1099-MISC (for payments to various persons other than employees throughout the year). *Id.* In order to prepare such reports, the Enrolled Agent must be well-versed in both state and federal taxation matters.

Further still, the substantive interplay between state and federal taxation is such that several taxes, such as the West Virginia Corporation Net Income Tax, are "conformity taxes," meaning that they utilize federal taxable income as a starting point to determine West Virginia taxable income and generally adopt federal definitions for most of the terms relevant to both federal and state taxation. *See, e.g.*, W.Va. Code St. R. § 110-24-1. Indeed, the base of the West Virginia business franchise tax expressly is taken from the balance sheets which must accompany federal corporation and partnership income tax returns. W.Va. Code § 11-23-3(b)(2). Conversely, many federal returns use amounts that have been initially calculated for purposes of state returns.

For example, a corporation will receive a credit for state unemployment tax paid to a state unemployment fund on its federal Form 940, and the amount of federal unemployment tax owed will vary depending on whether state unemployment taxes have been fully and timely paid. If a corporation's state unemployment experience rate is lower than 5.4%, it may receive an additional credit in the amount of the difference between actual state unemployment tax payments and the payments a corporation would be required to pay with a 5.4% state experience rate. Finally, the amount of federal unemployment tax owed by a corporation may vary depending on whether any taxable wages paid were excluded from state unemployment tax, so the amount of *taxable* state unemployment wages must be calculated before the Federal Form 940 may be completed.

Due to the interdependence of federal and state tax regulations and forms, the preparation, of state income, franchise, employer withholding, and sales and use tax returns, is integral to the preparation of the Taxpayer's various federal tax returns. As noted, even though no CPA licensure is required to perform any of those services, the Commissioner's policy provides that sales tax would not be charged since those services are integral to the preparation of various federal returns and would, thus, fall within the Exclusion if performed by a CPA. Thus, identical services, provided by an enrolled agent in those same circumstances must, as a matter of law, be treated identically for sales tax purposes. The Administrative Decision's holding to the contrary is, thus, unsupported in law and ought to be reversed.

The Enrolled Agent also provides the Taxpayer with federal and state tax advice, via telephone, e-mail, or written memo. Just as with financial recordkeeping and preparation of West Virginia income, franchise, employer withholding, property, sales and use tax returns, which are services integral to the professional service of providing federal tax returns, the services of

providing advice regarding such matters are integral to the professional service of providing advice on federal tax matters. As noted above, many West Virginia taxes operate interdependently with federal taxes. Thus, positions taken on tax returns in regard to West Virginia taxes can affect the amount and reporting of, as well as positions taken in regard to, the Taxpayer's federal taxes.

Such conclusions logically flow from the simple consideration that, given the wide variety of arrangements which can influence the amount of one's federal, state and local tax liabilities, taxpayers can be expected to turn for advice on such matters to those who, due to their skill, knowledge, experience and formal, legal certification, are demonstrated experts on all such taxes, including the preparation of tax returns evidencing the effect of such arrangements. Thus, as Section 10.2(a)(4) of IRS' Circular 230's definition of the scope of tax practice, which it regulates for federal tax purposes, expressly includes providing advice on such matters, the service of providing such advice is rooted in the experience and certification provided an enrolled agent and thus falls within the Exclusion. The Administrative Decision's conclusion to contrary is, therefore, legally erroneous and ought to be reversed and overruled.

As established above, enrolled agents are specifically, and without qualification, enumerated persons who provide professional services under the applicable legislative regulations. However, even if enrolled agents were not expressly listed as such, most of their services would still be recognized as professional for sales tax purposes upon application of the factors set forth in the governing legislative regulation to determine whether certain activities of both listed, and other non-listed occupations, are also to be similarly recognized. Specifically, most activities of enrolled agents would satisfy each of the following four non-exclusive factors the Commissioner is required to consider in making a determination whether services fall within

the Exclusion, to-wit: 1) the level of education required for the activity, 2) the nature and extent of nationally recognized standards for performance of the activity, 3) the existence of licensing requirements on the State and national level, and 4) the extent of continuing education requirements to engage in the activity. W.Va. Code St. R. § 110-15-8.1.1.1.

Though no particular educational requirement to be an enrolled agent is set forth in IRS Circular 230, it is apparent that, to obtain and maintain certification as an enrolled agent, a high level of education in the subjects to which it is directed must be acquired in order to satisfy both the initial testing and the successful completion of CPE requirements. Thus, under IRS Circular 230, the IRS will certify, as an enrolled agent, an applicant who *shows special competence in tax matters* by written examination administered by or under the IRS's oversight.

The referenced examination covers issues governing taxation of individuals and businesses as well as practice in front of the IRS. Thus, for an applicant to become an enrolled agent he or she must demonstrate substantial knowledge of subjects, ranging, among others, from preliminary work necessary to prepare tax returns, basis calculations for various assets, advice to give a taxpayer, with an injured spouse, on applicable rules, and retirement planning, filing requirements for partnerships, 'C' corporations, 'S' corporations and limited liability companies, analysis of business financial records, and complex issues specific to accounting for inventory and depreciation.

As noted by the Cabell County Circuit Court in *VHS v. Paige*, No. 92-P-69 (August 19, 1992), the enrolled agent in that case "had, and obviously had to have, a substantial educational background to pass the required examination. Arguments that an uneducated enrolled agent could theoretically pass the test . . . are vacuous." (Emphasis added.) Thus, although no specific educational attainment (e.g a bachelor of science degree in accounting) is required in order to

become an enrolled agent, extensive education in tax and accounting subjects is, inherently, necessary in order to pass the subject examination.

Beyond education, the other factors, considered to determine whether services are professional for purposes of the Exclusion, track closely the requirements with which an enrolled agent must comply in order to maintain his or her status as such. Specifically, enrolled agents must not only 1) comply with nationally recognized standards of performance as set forth by the IRS (i.e., comply with the necessary standards of performance contained in IRS Circular 230), but also 2) be licensed by the IRS and 3) comply with continuing education requirements as set forth in IRS Circular 230 (72 hours per three year period)..

Thus, in addition to the fact that, pursuant to the express terms of the Exclusion, enrolled agents are specifically enumerated persons who provide professional services, under other the "case-by-case" provisions of the Exclusion, most activities of enrolled agents also meet all of the separate standards expressed there to constitute professional services. Accordingly, the failure of the Administrative Notice to even apply those standards to the activities of the Enrolled Agent constitutes reversible error.

Despite the existence of clear and unambiguous legal authority, addressing the exclusion of the services of enrolled agents from imposition of the sales tax, the Commissioner issued, and the CALJ's Administrative Decision relied on, the Notice which erroneously purports to impose its own, limiting, interpretation on the governing statute and legislatively-approved regulations, in an attempt to severely and arbitrarily limit the scope of an enrolled agent's services which are covered by the Exclusion.

In referring to the services of an enrolled agent which are within the scope of practice before the IRS described in Section 10.2(a)(4) of IRS Circular 230, the Notice lists three

categories of services provided by enrolled agents which it deems to be professional, and thus within the terms of the Excluson. They include, in summary: 1) oral or written presentation to the IRS, its officers or employees; 2) rendering of written or oral Federal tax advice to a client; and 3) representing a client at conferences, hearings and meetings with the IRS, its officers or employees (hereinafter, "the listed professional services").[4] Per the Notice, to be treated as professional for Sales Tax purposes, each of the above activities must directly relate to the rights, privileges, or liabilities of a client under laws or regulations administered by the IRS. The Notice's analysis of Enrolled Agent's services is erroneous because it fails to account for the many services of the Enrolled Agent that are, in various ways, covered by, or integral or incidental to, services covered by IRS Circular 230.

The services of an enrolled agent, which fall within the practice of his or her profession, cannot legitimately be so strictly narrowed by the Commissioner's interpretation when clear legislative and regulatory authority expressly addresses the exclusion of such professional services in far broader terms. Rather, legislative regulations, duly approved by the West Virginia

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[4] (1) Oral or written presentation to the Internal Revenue Service its officers or employees of documents, correspondence and communications, directly relating to the rights, privileges, or liabilities of a client of the enrolled agent, under laws or regulations administered by the Internal Revenue Service. This includes preparation for any such presentation and preparation and filing of business or individual Federal tax returns with the Internal Revenue Service, including schedules, forms and other required Federal return documents, amended returns, claims for refund, and affidavits on behalf of a client.

(2) The rendering of written or oral Federal tax advice to a client of the enrolled agent directly relating to the rights, privileges, or liabilities of the client under laws or regulations administered by the Internal Revenue Service.

(3) Representing a client at conferences, hearings and meetings with the Internal Revenue Service its officers or employees, if the conferences, hearings and meetings directly relate to the rights, privileges, or liabilities of a client of the enrolled agent, under laws or regulations administered by the Internal Revenue Service. This includes preparation for such conferences, hearings and meetings. West Virginia State Tax Department Administrative Notice 10-25, XXVII W.Va. Reg. 1705 (September 17, 2010).

Legislature, have the force and effect of law and clearly define an enrolled agent as providing professional services without any of the limitations the Commissioner would impose or the CALJ, in the Administrative Decision, would ratify. W.Va. Code St. R. § 110-15-8.1.1.1, *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W.Va. 573, 585, 466 S.E.2d 424, 436.

As a legislative rule, Section 8.1.1.1 of the Code of State Rules, is entitled to more than mere deference; it is entitled to controlling weight as having the force and effect of law. *Id.* Conversely, the Notice is entitled to little, if any, weight, as it constitutes a mere statement of policy set forth by the Commissioner which was issued outside the requirements of the West Virginia Administrative Procedures Act[5], and particularly Article 3 therein, governing all administrative rule making. Moreover, the Notice also does not even carry the weight of an interpretive rule, which, though not adopted with the same formality or scrutiny as a legislative rule, and, thus not carrying nearly the compelling status as a legislative rule, is generally entitled to certain deference by the courts.

Furthermore, "[a] an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. pt. 4, *CNG Transmission Corp. v. Craig*, 211 W. Va. 170, 171, 564 S.E.2d 167, Syl. pt. 4, *Apollo Civic Theatre, Inc. v. State Tax Com'r*, 223 W.Va. 79, 672 S.E.2d 215 (2008), (both citing Syl. pt. 1, *Consumer Advocate Div'n v. Public Service Comm'n*, 182 W.Va. 152, 386 S.E.2d 650, (1989)).

While the Commissioner's statement of policy manifested in the Notice fails to rise to even the status of an agency's interpretive rule, judicial bodies may consider that an agency's interpretation, if based on its experience and informed judgment, is a legitimate source of

[5] *See generally,* Chapter 29A of the West Virginia Code.

guidance in the application of laws the agency is directed to execute. Thus, in most, normal circumstances the Commissioner's substantive position, described in the Notice, would merit some degree of consideration in addressing the issues presented here.

However, here, it is evident that even if the Notice were a properly promulgated interpretive rule, it would fail the tests of whether such it should be entitled to be given any weight. Under those tests, the weight to be given an agency's position expressed in an interpretive rule will depend on 1) the thoroughness evident in its consideration of the subject matter, 2) the validity of its reasoning, 3) its consistency with earlier and later pronouncements, and 4) all those factors which give it power to persuade, if lacking power to control. *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (1995) (see also *Hornbeck v. Caplinger*, 712 S.E.2d 779, 785, 227 W.Va. 611, 617 (2011)). Upon applying those tests to the Notice here, it is clear that it should be given no weight as to whether the Enrolled Agent's services fall within the Exclusion.

First, there is a pervasive lack of thoroughness evident in the Notice's analysis of the subject matter. Thus, the Notice fails to consider whether certain services which are performed by the an enrolled agent (other than those it lists) are integral to professional services provided under an enrolled agent's licensure. Further, the disparate treatment afforded CPAs and enrolled agents, which the Notice neither acknowledges nor attempts to reconcile, is, thus, unjustified. The services of enrolled agents, which, though integral or incidental to the listed professional services, but which the Notice construes as falling outside the Exclusion, are identical to services performed, and activities engaged in, by a CPA, for which no CPA licensure is required, but for which the Commissioner does not charge sales tax.

Second, the validity of the Notice's conclusions is questionable, considering the absurd example it offers to justify the extremely strict limitation it would place upon the scope of services provided by an enrolled agent which it would treat as professional. Thus, the example employed by the Notice, in justifying its purported modification of governing authority, compares allegedly non-professional (i.e. taxable) services by an enrolled agent, such as oversight of financial recordkeeping and preparation of various financial statements and state tax returns, with *real estate management business* services provided by a *physician.*

The Notice's example is obviously flawed in that it fails to even meaningfully discuss or analyze whether financial recordkeeping and preparation of various financial statements and state returns are services integral to preparing federal returns and rendering advice regarding federal tax matters. Indeed, an enrolled agent is subject to sanctions for violations of IRS Circular 230 committed while providing financial recordkeeping services and preparing financial statements and, logically, due to the interplay between advice given in regard to state tax matters and the impact positions taken, as a result of such advice, may have on federal tax returns, on the Enrolled Agent's preparation of state returns.

Specifically, IRS Circular 230 states, at § 10.52(a)(4) that the Enrolled Agent could be sanctioned for "[g]iving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury . . . knowing the information to be false or misleading. Facts or other matters contained in testimony, *Federal tax returns, financial statements . . . and any other document* or statement, written or oral, are included in the term "'information.'")(emphasis added). Conversely, real estate management is so entirely unrelated to any services for which a medical license is required, that a physician's negligence in mismanagement of real estate cannot possibly affect his or her medical licensure in

any manner, whatsoever, much less in the way that violations of IRS Circular 230 could cause revocation of an enrolled agent's certification. Thus, the comparison used in the Notice to limit the scope of an enrolled agent's professional services for Sales Tax purposes, and, thus to modify statutory and regulatory authority under the guise of its interpretation, relies on patently invalid reasoning which is flawed to the point that the Notice should have been afforded no persuasive value by the CALJ in the Administrative Decision.

Third, the Notice lacks consistency with earlier and later pronouncements, or lack of pronouncements, on the question. In 1992, the Circuit Court of Cabell County, West Virginia, entered an Order in *VHS, Inc. v. Paige*, No. 92-P-69, in which the Court found that because the principal of the petitioner therein ("Smith") was an enrolled agent, the bookkeeping and tax consulting services provided by Smith were excepted from taxation. As the services provided by Smith took place before the 1992 legislative approval of Section 110-15-8.1.1.1 (and, specifically, the inclusion of enrolled agents as persons providing professional services), the Circuit Court analyzed the taxability of Smith's services under the four (4) separate and nonexclusive factors to determine professional services, then set forth in the regulations and, much like the above analysis, found that, under such standards, Smith's services were professional and thus not subject to Sales Tax.

Further, during the time in which the Auditing Division assessed the petitioner in *VHS, Inc.*, the Commissioner's agency also proposed regulations listing enrolled agents as persons who only provide services classified as nonprofessional. However, before approving the rest of the regulation, the Legislature overtly rejected and overruled the Commissioner's view of the professional status of enrolled agents, by amending the regulation to expressly list them as persons providing professional services. Also, after the Circuit Court Order adverse to the

Commissioner's position was issued in *VHS, Inc.*, his agency had the right to appeal the decision to the West Virginia Supreme Court of Appeals. However, no further judicial review of the Circuit Court's ruling was sought by the Commissioner's agency, thus implying its acquiescence in the Circuit Court's holding.

Additionally, the Commissioner's agency has issued several publications providing guidance for professionals and indicating when and for what services Sales Tax must be collected. In each of these publications, some revised before and some revised after the Notice, the rule, that services or goods that are incidental to or integral to the provision of professional services fall within the Exception, was expressly reaffirmed.

These publications, when considered alongside the Notice, show a lack of consistency because the Notice fails to acknowledge that many services provided by an enrolled agent are incidental to or integral to the professional services that clearly fall within the enrolled agent's licensure.[6] Although those publications are no more binding than the Notice, they do provide statements, ranging in revision dates from 1993 to 2012, made by the Commissioner's agency, both before and after the issuance of the Notice, which clearly state its position that services provided by a professional person, which are *integral to the performance of licensed professional services*, are also within the Exclusion.

Thus, the Commissioner's agency's failure to appeal the adverse ruling in *VHS, Inc.*, combined with the various publications it has issued, acknowledging the non-taxability of services integral to professional services, all show a lack of consistency with both earlier and

[6] *See, e.g.*, Notice at 5 ("Only the following services provided by enrolled agents are non-taxable for purposes of the consumers sales and service tax and use tax. All other services provide [*sic*] by an enrolled agent are typically taxable"); Notice at 6 ("Bookkeeping services, accounting services, and any other service provided by an enrolled agent, other than those specifically listed in this notice as excepted are taxable unless a statutory exemption or exception other than the professional services exception of West Virginia Code § 11-15-8 applies.")

later pronouncements, weigh strongly against the CALJ's giving any persuasive effect to the Notice in the Administrative Decision.

The mischief which the Respondent's Notice has engendered is vividly exposed in the immediate case. Thus, at the Hearing, the Auditing Division's tax unit supervisor testified her auditors "look at the other professionals to make sure that what they are doing is in their realm of what we feel is their professional field" and if a professional is "doing something completely outside of that field, such as a physician who is mowing grass," that service is taxable.

Conversely, the Notice's narrow interpretation of what constitutes non-professional (i.e. taxable) services of an enrolled agent, including accounting and tax return services clearly within the realm of an enrolled agent's professional field, belies the distorted and arbitrary basis of the Auditing Division's reliance on the Notice, when its staff uses real estate management services, or even the service of mowing grass, as functionally comparable examples of non-professional services provided by a physician.

Not only does the Notice attempt to improperly modify the governing legal authority, but it would do so by using a disingenuously deceptive example. The Notice states:

> Enrolled agent certification does not authorize the enrolled agent to represent a client before the West Virginia Office of Tax Appeals or before any West Virginia Circuit Court or the Supreme Court of Appeals of West Virginia.
>
> We note parenthetically that section 121-1-17 of the Code of State Rules, the procedural rules of practice and procedure before the West Virginia Office of Tax Appeals, refers to representation of a petitioner before the Office of Tax Appeals by "***virtually any . . . adult person***" through an executed power of attorney. Enrolled agents are among the named examples. This rule does not confer professional services status to an enrolled agent's representation of a petitioner before the Office of Tax Appeals.

> Enrolled agent representation of a petitioner before the Office of Tax Appeals is **taxable** under the West Virginia consumers sales and service tax and use tax.

Notice at 5 (emphasis in original).

Thus, the Notice implies that, while enrolled agent certification provides the agent with unlimited practice rights before the IRS (and, though not mentioned, practice rights afforded exclusively to enrolled agents, CPAs, and attorneys), anyone may represent a taxpayer before the WVOTA, and thus, although enrolled agents are among named examples of persons who may represent a taxpayer, the enrolled agent certification is not required for, and thus bears no significance on the taxability of, such state tax controversy representation.

While the Notice alludes to this issue by its disclaimer, what it misleadingly fails to include in its example is the fact that enrolled agents, along with all other professionals, except attorneys, are severely limited in their representation of taxpayers before the WVOTA, lest they be sanctioned for the unauthorized practice of law.[7]

The Department's use of rules for representation of a taxpayer before WVOTA, as an example of a taxable service, impliedly because no licensure is required to do so, is, thus, extraordinarily misleading. The language in the Notice initially makes clear that services under IRS Circular 230 are non-taxable because enrolled agent licensure is required for practice before the IRS (unless one is licensed as a CPA or attorney), but then would mislead the reader into thinking that enrolled agents have as much right to represent a taxpayer before OTA as any adult person. Thus, the Notice makes a seemly attempt to exploit a false contrast between the fact that the highly regulated rules governing representation before the IRS make such is non-taxable professional service, while, because, it misleading states, anyone can represent a taxpayer before

[7] Notice at 6 ("**DISCLAIMER**: Nothing in this administrative notice or the professional service exception may be construed as authorizing persons who are not members of the bar to practice law" (emphasis in original)); *See, generally,* W.Va. Code St. R. § 121-1-17.

WVOTA, such representation before WVOTA is a taxable, nonprofessional service. Taken on its own, without consideration of the rules of practice before WVOTA, the reader is intentionally misled into thinking that enrolled agents are providing a nonprofessional service still related to taxation, when in reality, if an enrolled agent were able to represent a taxpayer before WVOTA at all, the enrolled agent's role would be no more than as a fact witness. Thus, the Notice's attempt to use the taxability of an enrolled agent's "practice" before WVOTA to imply that, consequently, services provided in relation to state taxation matters are taxable, is a baseless and deceitful attempt to justify the conclusions reached there.

The fact that the Commissioner would engage in such sophistry, and resort to such a disingenuous analogy, to enable him to designate services of an enrolled agent as taxable, in *contravention of clear and unambiguous statutory and regulatory authority*, reveals the lack of legitimate authority for his position. This, alone, should have, but clearly did not, preclude the CALJ's heavy reliance on the reasoning of the Notice, based on deference to the Commissioner's role to interpret ambiguous tax laws.

Thus, in light of the false logic and unauthorized narrowing of the professional services exception contained in the Notice, the CALJ should then have found that, because the Notice attempted to modify existing statutory and regulatory authority in contravention of established authority, it was inherently erroneous, and his failure to do so is reversible error.

Moreover, though the Notice, as a mere statement of policy, may be entitled to certain deference, the absence of the factors on which such deference turns (thorough consideration, valid reasoning and consistency of application) irrefutably establish that the CALJ should not have afforded the Notice any power of persuasion.

If interpretation of a statute is necessary due to its ambiguity or lack of clarity or completeness, the rule that, one consideration in determining its meaning is the consistent and long-standing construction placed upon such a statute by the executive agency whose duty it is to enforce such law, has a natural and well-recognized corollary. Syl. pt. 2, *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 472 S.E.2d 411 (1996), *see also Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W.Va. at 591-592, 466 S.E.2d at 442-443. Thus, if such an agency's construction of the subject law has not been consistent, then such deference is not justified. *Appalachian Power Co.*, 195 W.Va. at 591-592, 466 S.E.2d at 442-443 (acknowledging that an agency interpretation in conflict with its earlier interpretation "is entitled to considerably less deference than a consistently held agency view", (citing *Good Samaritan Hosp. v Shalala*, 508 U.S. 402, 417, 113 S.Ct. 2151, 2161 (1993)) and specifying that "the Tax Commissioner is not irrevocably bound to his own precedents, *so long as he gives a reasoned explanation for the departure*" (internal citation omitted) (emphasis added)).

Indeed, if, as here, where the overt manner and tenor of the executive agency's actions have been to persistently oppose the clear objects of the Legislature's words in the governing regulation, such deference is all the more illegitimate as a guide to the meaning of those words.

Here, the Commissioner's agency is, and has for more than twenty years, been aware that the intent of the Legislature was to treat the services of enrolled agents as professional for sales tax purposes, and that the only West Virginia court addressing the issue found that the services of an enrolled agent do fall within the Exclusion. Nevertheless, in 1992, when proposing legislative rules, the Commissioner's agency asked the West Virginia Legislature's Rule-making Review Committee (the Committee) to expressly classify certain occupations, including enrolled agents,

as non-professional. However, after discussion with various individuals, including the General Counsel for the National Society for Enrolled Agents and several individuals from the Department, as well as a letter submitted by the National Society of Accountants, the Committee rejected the agency's position and voted unanimously to expressly classify enrolled agents as professional, rather than as non-professional. It is noteworthy that the immediate personal reaction to the rejection of their position on the question, by the agency's representatives present at the Committee's meeting, was overtly negative and disrespectful toward the Committee.

The West Virginia Public Accountants Association (hereinafter, "the WVPAA" is an professional accounting organization, of which twenty to twenty-five percent of its members are enrolled agents. At the Hearing, the long-serving executive director of the WVPAA testified as to the inconsistent interpretation and enforcement of the applicable regulation by the Auditing Division over the past twenty years, and of his attempts to obtain clarity regarding its position on the issue. He further testified about a meeting in the fall of 2009 with the Commissioner's immediate predecessor, Mr. Griffith, who was at the time Deputy State Tax Commissioner. At that meeting, Mr. Griffith was provided a copy of the order from the 1992 Cabell County case, ruling that sales tax should not be collected on services of enrolled agents because their work constituted professional activities. At the conclusion of that meeting, Mr. Griffith agreed that sales tax should not be collected on the services of enrolled agents, due to their professional status, and that a written notice of that position should be issued by his agency

Shortly thereafter, however, in 2010, the Notice was issued, signed by Mr. Griffith, then serving as Commissioner, and asserting a completely opposite conclusion as to the scope of the Exclusion as it related to enrolled agents. Moreover, as a general practice, the Commissioner's agency had regularly provided to the WVPAA, for circulation to its members, copies of all such

administrative notices. However, in the case of this Notice, the WVPAA's records contain no indication of it having received a copy of the same from the Commissioner's agency.

Additionally, at a seminar sponsored by the WVPAA, held on September 19, 2010, a representative of the Commissioner's agency participated as an invited presenter on state tax developments relevant to that audience, but the agency's representative did not discuss or make any reference to the Notice. Such a failure to mention, much less discuss, the Notice which solely and exclusively addressed the taxability of services of enrolled agents under the sales tax, and which had been filed by the Commissioner with the West Virginia Secretary of State a mere six (6) days beforehand, in a CPE program designed to cover Administrative Notices issued in 2009 through 2010 for members of the WVPAA, many of whom are enrolled agents, literally reeks of nefarious motives, to-wit: 1) perpetuation of the agency's on-going resistance of the Legislature's clearly intended extension of the Exclusion to the activities of enrolled agents and 2) advancing its effort to impose a stricter and unduly narrow definition of "professional services" solely applicable to enrolled agents, and not to CPAs.

Further demonstrating the inconsistency of the Commissioner's position on this question, in 2005, the Taxpayer was assisted and represented by the Enrolled Agent in connection with a state tax audit, and at that time, the application of the Exception to the Enrolled Agent's charges for *all* his services was not questioned. Likewise, counsel representing the Commissioner at the Hearing also acknowledged such inconsistency by admitting that the evidence there further bolstered the view that there has been ongoing confusion over the Exclusion's application to the services of enrolled agents.

Thus, the Notice, being only the most recent example of the Commissioner's agency's long-fought campaign to alter and limit the scope of the Exclusion intended by the Legislature to

apply to enrolled agents, should have be afforded no weight by the CALJ in ascertaing that intent. Moreover, by the Notice and the decades' long pattern of opposition by the Commissioner's agency to that intent (though interrupted occasionally by inconsistent actions), the agency may be said to "protest too much" and, thus, in effect, to confirm the broader scope of the Exclusion as applied to the activities of enrolled agents.

Both the governing statute and regulation in question clearly and unambiguously support the conclusion that an enrolled agent's services are professional, and, thus, are not subject to Sales Tax. Moreover, as noted by the CALJ at the Hearing, that conclusion is based on a statutory *exception from the general coverage* of the sales tax for professional services and, not on a *specific exemption from tax of a class of transactions otherwise generally covered.* Thus, even if the applicable legal authority were ambiguous on the taxability question (which it is not), because the legal authority at issue involves an exclusion from the coverage of tax, rather than an exemption, any such ambiguity is to be strictly construed in favor of the Taxpayer's position that the Enrolled Agent's services are professional, and, thus, fall within the Exclusion.

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 professional status of enrolled agents were ambiguous, which they are not, the Commissioner's interpretation of them in the Notice violates the well-established doctrine that laws imposing taxes must be construed strictly against the State. Thus, any ambiguity in how the statute is applied should be resolved in favor of the Taxpayer. *See*, Syl. pt. 2, *Baton Coal Co. v. Battle,* 151 W. Va. 519, 153 S.E.2d 522 (1967); *State ex rel. Battle v. B. & O. R.R.,* 149 W. Va. 810, 143 S.E.2d 331 (1965) and *In re Glessner's Estate*, 146 W. Va. 282, 118 S.E.2d 873 (1961).

When the language of the law, governing the general application or non-application of the tax to a particular class of taxpayers or transactions, is found to be ambiguous, the West Virginia Supreme Court has consistently held that such ambiguities are to be strictly construed against the taxing authority and in favor of the taxpayer. *See*, *Doran Associates, Inc. v. Paige*, 195 W. Va. 115, 464 S.E.2d 757 (1995); *Ohio Cellular RSA Limited Partnership v. Board of Public Works,* 198 W. Va. 416, 481 S.E.2d 722 (1996); Syl. pt. 2, *Ballard's Farm Sausage, Inc. v. Dailey*, 162 W. Va. 10, 246 S.E.2d 265 (1978); *In re: Evans' Estate,* 156 W. Va. 425, 194 S.E.2d 379 (1973).

Indeed, the West Virginia Supreme Court even more broadly expressed this doctrine in a case relating to the health care provider tax, stating that where "the statute to be interpreted concerns taxation, we usually construe the tax law in a manner that is favorable to the subject taxpayer." *Coordinating Council for Independent Living, Inc. v. State Tax Commissioner*, 209 W. Va. 274, 281, 546 S.E.2d 454, 461 (2001). That view is also found in a plethora of case law from other states which consistently hold that statutory exclusions of categories of subjects from

the general scope of taxation, rather than exemptions of specific objects from taxation, are to be construed strictly in favor of the taxpayer.[8]

Accordingly, even if the words of the legislative regulations addressing the terms of the Exclusion were open to more than one plausible interpretation, regarding whether they operates to preclude the imposition of the Sales Tax on the services the Enrolled Agent performed for the Taxpayer, which they are not, as tax laws, their words ought to be construed in a manner favorable to the Taxpayer.

Consequently, as the Taxpayer is not contending that the Enrolled Agent's services are *exempt* from imposition of the Sales Tax due to any specific exemption; but, rather, that they fall within the *Exclusion* to the Sales Tax, the statutory language must be construed, if construction were necessary, in a manner favorable to Taxpayer (e.g. to clarify that the definition of "professional services" includes all services integral to and incidental to the services in question).[9]

Thus, application of the rule, requiring construction of a scope-of-taxation provision in a taxpayer's favor, here mandates adoption of a broad definition of the professional services provided by the Enrolled Agent to, thus, include services integral or incidental to services clearly falling with IRS Circular 230, as well as related services for which, if performed negligently, he

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[8] See, e.g., *Rossi v. Com.*, 20 Pa. Cmwlth. 517, 522, 342 A.2d 119, 122 (1975); *Matter of New York Life Ins. Co. v. State Tax Commn*, 80 A.D.2d 675, 676, 436 N.Y.S.2d 380, 382 aff'd sub nom. *Matter of Metropolitan Life Ins. Co. v. State Tax Commn.*, 55 N.Y.2d 758, 431 N.E.2d 970 (1981); *Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. 215, 222, 210 S.E.2d 199, 204 (1974) ("An exclusion, by definition, from the taxable event should be strictly construed against the State . . . It is not an exemption of a favored activity, first brought within the meaning of the taxing provision. It is an original fixing of the outer boundaries of the activity to be taxed.")

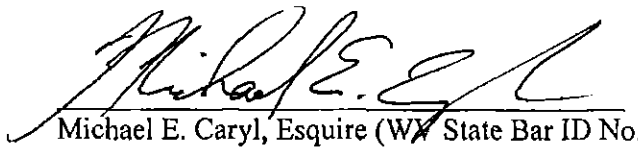
[9] "The provisions of this article apply not only to selling tangible personal property and custom software, but also to the furnishing of all services, *except professional and personal services* . . . . " W.Va. Code § 11-15-8.

could be professionally sanctioned. Thus, such services should be construed to fall within the Exclusion.

The CALJ's failure, to fully appreciate the important and well-recognized distinction between an exception to, and the Exclusion from, the scope of taxation, on the one hand, and an exemption from the tax, on the other (though his comments during the Hearing suggested appreciation of the same), led him, in the Administrative Decision, to erroneously apply the rule of strict construction against the Taxpayer based on the latter.

WHEREFORE, the Petitioner prays that this Petition be filed, that the Administrative Decision of the West Virginia Office of Tax Appeals, which upheld the Assessment of the Petitioner's use tax liability and the imposition of interest, be reversed and overruled and that the Petitioner be awarded its costs and attorney fees in this matter.

John Skidmore Trucking, Inc.,
Petitioner
By Counsel



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Petition Exhibit A

WEST VIRGINIA OFFICE OF

TAX APPEALS

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A. M. "FENWAY" POLLACK
CHIEF ADMIN. LAW JUDGE

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

JOHN SKIDMORE TRUCKING, INC., Petitioner,	)	**DOCKET NO.** 12-456 CU
v.	)	
GRIFFITH, CRAIG A., as **STATE TAX COMMISSIONER** of **WEST VIRGINIA,** Respondent	)	

ADMINISTRATIVE LAW JUDGE:	A. M. "Fenway" Pollack
PETITIONER'S COUNSEL:	Michael E. Caryl, Esq.
RESPONDENT'S COUNSEL:	Rebecca L. Rodak, Esq.
EVIDENTIARY HEARING HELD:	March 26, 2013 Charleston, West Virginia
SUBMITTED FOR DECISION:	August 2, 2013

SYNOPSIS

TAXATION
SUPERVISION
GENERAL DUTIES AND POWER OF COMMISSIONER

It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. §11-1-2 (West 2010).

TAXATION
PROCEDURE AND ADMINISTRATION
COLLECTION OF TAX

"The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable." W. Va. Code Ann. §11-10-11(a) (West 2010).

TAXATION
USE TAX
TAX ON VALUE OF PROPERTY USED OR CONSUMED IN THIS STATE

"An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article." W. Va. Code Ann. §11-15A-2(a) (West 2010).

TAXATION
USE TAX
EXEMPTIONS

Article 15A goes on to explain that services which are not subject to West Virginia consumers sales tax are also specifically exempted from use tax. *See* W. Va. Code Ann. §11-15A-3(a)(4) (West 2010).

TAXATION
CONSUMERS SALES AND SERVICE TAX
FURNISHING OF SERVICES INCLUDED; EXCEPTIONS

One type of service that it excepted from West Virginia's consumers sales tax is professional services. *See* W. Va. Code Ann. §11-15-8 (West 2010).

OFFICE OF TAX APPEALS
CONCLUSION OF LAW

Professional services is not defined in Chapter 11 of the West Virginia Code.

TAXATION
CONSUMERS SALES AND SERVICE TAX

The Tax Commissioner has promulgated rules, which do define professional service. "'Professional service' means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in W. Va. Code '11-15-1 et seq. to be professional. See Section 8.1.1 of these regulations." W. Va. Code R. §110-15-2.65 (1993).

LEGISLATIVE RULE DEPARTMENT OF TAX AND REVENUE
CONSUMERS SALES AND SERVICE AND USE TAX
PROFESSIONAL SERVICES

Section 8.1.1.1 of Title 110, Series 15 of the West Virginia Code of State Rules attempts to identify certain professional services that are provided by certain occupations. However, Section 8.1.1.1 is not clear and unambiguous in this regard. Specifically, Section 8.1.1.1 does not identify what services provided by enrolled agents are professional and what are not.

LEGISLATIVE RULE DEPARTMENT OF TAX AND REVENUE
CONSUMERS SALES AND SERVICE AND USE TAX
PROFESSIONAL SERVICES

Section 8.1.1.3 of Title 110, Series 15 states that not all services provided by the professions in Section 8.1.1.1 are excepted from collecting sales and use tax.

TAXATION
CONSUMERS SALES AND SERVICE TAX
FURNISHING OF SERVICES INCLUDED; EXCEPTIONS

There is ambiguity in both the West Virginia Code and in the Legislative Rules regarding which services provided by an enrolled agent are professional and which are not. This ambiguity cannot be resolved by ascertaining the Legislature's intent or review of the overarching design of West Virginia Code Section 11-15-8.

OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The Tax Commissioner in this matter has adopted a previous administration's interpretation of these ambiguous provisions by his reliance on Administrative Notice 10-25.

OFFICE OF TAX APPEALS
CONCLUSION OF LAW

Administrative Notice 10-25 attempts to clarify when an enrolled agent is providing professional services and when they are not. Specifically, the Notice describes three activities that the Tax Commissioner considers to be practice before the IRS, and therefore excepted from the collection of sales and use tax.

LEGISLATIVE RULE DEPARTMENT OF TAX AND REVENUE
CONSUMERS SALES AND SERVICE AND USE TAX
PROFESSIONAL SERVICES

The Tax Commissioner's interpretation of Section 8.1.1 of Title 110, Series 15 of the Code of State Rules, is entitled to deference, because Administrative Notice 10-25 flows rationally from the ambiguous regulation. This is due to the fact that the Notice clarifies that accounting services provided by enrolled agents are not excepted from sales and use taxes and accounting services are also not one of the services that are excepted in Section 8.1.1.1.

TAXATION
WEST VIRGINIA OFFICE OF TAX APPEALS
HEARING PROCEDURES

In proceedings before the West Virginia Office of Tax Appeals the burden of proof is upon the Petitioner. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010).

WEST VIRGINIA SUPREME COURT OF APPEALS
CASE LAW

"Where a person claims an exemption from a law imposing a license or tax, such law is strictly construed against the person claiming the exemption" *See* Syl. Pt. 5 Davis Memorial Hosp. v. West Virginia State Tax Com'r, 222 W.Va. 677, 671 S.E.2d 682 (2008); Syl. Pt. 1 RGIS Inventory Specialists v. Palmer, 209 W.Va. 152, 544 S.E.2d 79 (2001); Syl. Pt. 4 Shawnee Bank, Inc. v. Paige, 200 W.Va. 20, 488 S.E.2d 20 (1997).

OFFICE OF TAX APPEALS
CONCLUSION OF LAW

We strictly construe West Virginia Code Section 11-15-8 and Sections 2.65 and 8.1.1 of Title 110, Series 15 of the West Virginia Code of State Rules against the Petitioner and afford deference to the Tax Commissioner's interpretation of those statutory and regulatory provisions.

OFFICE OF TAX APPEALS
CONCLUSION OF LAW

As a result, the Petitioner has not met its burden of showing that the assessment issued against it was contrary to West Virginia law, clearly wrong or arbitrary and capricious.

FINAL DECISION

On October 16, 2012, the Auditing Division of the West Virginia State Tax Commissioner's Office (Tax Department or Respondent) issued an Audit Notice of Assessment against the Petitioner. This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq*, of the West

Virginia Code. The assessment was for combined sales and use tax for the period January 1, 2009, through August 31, 2012, for tax in the amount of $2,387.33, and interest in the amount of $378.75, for a total assessed tax liability of $2,766.08. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, on November 19, 2012, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010).

Subsequently, notice of a hearing on the petition was sent to the Petitioner, and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10, after which the parties filed legal briefs. The matter became ripe for a decision at the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Petitioner is a West Virginia corporation, located in Braxton County.

2. Sometime in 2012 the Petitioner's books and records were audited by an auditor with the West Virginia State Tax Department.

3. As a result of that audit, an assessment for combined sales and service and use tax was issued against the Petitioner.

4. The assessment was for unreported and unremitted use tax on various items used in the course of the Petitioner's businesses. Included in this list of items was the Petitioner's use of an enrolled agent's accounting services.[1]

[1] An enrolled agent is a person, usually with a math or accounting background, whom has passed an examination and fulfilled other requirements, thus allowing them to represent taxpayers before the Internal Revenue Service.

5. At some point, the Petitioner paid part of the assessment, but argued that use tax was not owed on the accounting services provided by the enrolled agent (hereinafter the "EA").

6. As of March 2013, the amount in controversy was $1,134.00 in use tax, with interest of approximately $180.00.

7. Petitioner's Exhibit 1 summarizes the work done by the EA, and states:

> **MONTHLY**
> 1. Review, and adjust as necessary, monthly bookkeeping entries made by JSTI employee bookkeepers
> 2. Post adjusting journal entries for depreciation expense, for wages payable and for changes in physical gasoline inventory sold at JSTI service station
> 3. Reconcile JSTI bank statements
> 4. Prepare and submit to management monthly balance sheets, profit/loss statements and statements of cash flow
> 5. Prepare all monthly required reports including the IRS 941 tax deposit, the WV Sales/Use tax report, the WV tax withholding report and the local motel tax report
>
> **QUARTERLY**
> 1. Prepare all quarterly required reports including the IRS Form 941 report, the IRS 940 tax deposit report, the WV tax withholding report and the WV Unemployment report
>
> **ANNUALLY**
> 1. Provide accounting firm Ernst & Young (E&Y) with the 12th month April 30 (fiscal year) annual JSTI balance sheet and profit & loss statements for the purpose of preparing the annual JSTI federal and state income tax returns and the state business franchise tax return
> 2. Provide accounting firm Ernst & Young with specific accounting detail specifically requested by them for their use in preparing the above returns and for the purpose of their practicing due diligence as required for preparation of the returns
> 3. Prepare annually required reports including the employee Forms W-2, IRS Form 940 and the IRS Forms 1099-MISC
> 4. Electronically submit federal copies of Forms W-2 and W-3 to the Social Security Administration as required
> 5. Prepare special reports and data summaries for, and represent JSTI at, the annual Worker's Comp and insurance audit
> 6. Upon completion of the annual tax returns by E&Y, post all tax adjusting journal entries provided by E&Y to assure that all

business. The tax can either be collected by the entity selling the property or providing the service or the Petitioner can pay it directly to the West Virginia Tax Department pursuant to West Virginia Code Section 11-15A-2, which states:

> "An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article."

W. Va. Code Ann. § 11-15A-2(a) (West 2010). The argument in this matter comes about as the result of the Petitioner's insistence that the services provided by an enrolled agent are not taxable because they are professional services. Reaching the statutory and regulatory provisions relied on by the Petitioner takes a few moves. We start with Section 3 of Article 15A, which states that services which are not subject to West Virginia consumers sales tax are also specifically exempted from use tax.

> (a) The use in this state of the following tangible personal property, custom software and services is hereby specifically exempted from the tax imposed by this article to the extent specified:
>
> (4) Tangible personal property, custom software or services, the sale of which in this state is not subject to the West Virginia consumers sales tax

W. Va. Code Ann. §11-15A-3(a)(4) (West 2010). Article 15 relates to West Virginia's consumers sales and service tax and Section 8 states that sales tax must be collected when providing services, but it also provides an exception for professional and personal services. "The provisions of this article apply not only to selling tangible personal property and custom software, but also to the furnishing of all services, except professional and personal services . . . ." W. Va. Code Ann. §11-15-8 (West 2010). Professional services is not defined in Chapter 11, so we must turn to Title 110, Series 15 of the West Virginia Code of State Rules which contains

the legislative rules for combined consumers sales and service and use tax. There, professional service is defined as: "'Professional service'" means and includes an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in W. Va. Code 11-15-1 et seq. to be professional. See Section 8.1.1 of these regulations." W. Va. Code R. §110-15-2.65 (1993). Enrolled agent services are not an activity recognized as professional at common law, nor has the Legislature determined their activities to be professional in Section 15 of Chapter 11. However, in Section 8.1.1 of Series 15, Title 110 of the Code of State rules, the Tax Department has listed enrolled agents as one of the groups that renders professional services.

> Professional services, as defined in Section 2 of these regulations, are rendered by physicians, dentists, lawyers, certified public accountants, public accountants, optometrists, architects, professional engineers, registered professional nurses, veterinarians, licensed physical therapists, ophthalmologists, chiropractors, podiatrists, embalmers, osteopathic physicians and surgeons, registered sanitarians, pharmacists, psychiatrists, psychoanalysts, psychologists, landscape architects, registered professional court reporters, licensed social workers, enrolled agents, professional foresters, licensed real estate appraisers and certified real estate appraisers licensed in accordance with W. Va. Code '37-14-1 et seq., nursing home administrators, licensed professional counselors and licensed real estate brokers . . . . The determination as to whether other activities are "professional" in nature will be determined by the State Tax Division on a case-by-case basis unless the Legislature amends W. Va. Code '11-15-1 et seq. to provide that a specified activity is "professional." When making a determination as to whether other activities fall within the "professional" classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements.

W. Va. Code R. §110-15-8.1.1.1 (1993). Section 8 goes on to clarify that when a professional performs services that are not professional, the exception from taxes is not applicable. "Professional persons who make sales of tangible personal property or who engage in activities which are not professional services shall collect consumers sales and service tax on such sales or services. For example, kennel services provided by a veterinarian are subject to tax." *Id* at 8.1.1.3.

Section 2.65 and Section 8.1.1.1 of the regulations are clearly circular; each referring the reader to the other to define what is a professional service. The idea that **all** the activities done by the listed professions are professional services is belied by the existence of Section 8.1.1.3. As a result, we find ourselves in the midst of what the West Virginia Supreme Court of Appeals has described as an unlikely event. *See* Appalachian Power Company v. State Tax Department of West Virginia, 195 W.Va. 573, 586, 466 S.E.2d 424, 437, n. 13 (1995) (a legislative rule, valid in all respects, being ambiguous to its intent or meaning is an unlikely event). Unlikely or not, Section 8.1.1.1 does not clearly explain when and when not an enrolled agent is performing a professional service. Therefore, our next question becomes, under West Virginia law, how are we to construe Section 8.1.1.1?

Three cases from the West Virginia Supreme Court of Appeals guide us most of the way towards an answer to the question. Those cases are Appalachian Power Co. v. State Tax Dep't of W. Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995); Davis Mem'l Hosp. v. W. Virginia State Tax Com'r, 222 W. Va. 677, 671 S.E.2d 682 (2008); Griffith v. Frontier W. Virginia, Inc., 228 W. Va. 277, 719 S.E.2d 747 (2011). These three decisions all examine, at length, the interplay between statutes and agency regulations. Generally, they all follow the same analysis and reach