

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN SKIDMORE TRUCKING, INC.,

Petitioner,

v.

Braxton County Circuit Court
Civil Action No. 14-C-27
The Honorable Thomas H. Keadle

MARK W. MATKOVICH, WEST
VIRGINIA STATE TAX
COMMISSIONER,

Respondent.

MOTION TO REFER TAX APPEAL TO THE BUSINESS COURT DIVISION

Respectfully submitted by:

Michael E. Caryl, Esquire
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Petitioner's Counsel

September 30, 2014

MOTION TO REFER TAX APPEAL TO THE BUSINESS COURT DIVISION

NOW COMES the Petitioner and, by counsel, it respectfully moves this Court to refer the above-styled case to the Business Court Division pursuant to Rule 29.06 of the West Virginia Trial Court Rules. In support of this Motion, the Petitioner further states:

Introduction

1. This action, involving longstanding and highly contentious issues, and presently pending in the Circuit Court of Braxton County, West Virginia, is an appeal presenting complex tax matters of significance to the operations of all Enrolled Agents practicing in West Virginia and to transactions between those Enrolled Agents and the many small businesses for whom they provide tax services.

2. West Virginia's Business Court Division is designed to address the "complex nature of litigation involving highly technical commercial issues." W. Va. Code § 51-2-15(a). By adopting West Virginia Trial Court Rule 29, the Supreme Court of Appeals of West Virginia has provided a process for efficiently managing and resolving litigation involving commercial issues and disputes between businesses. W.Va. Tr. Ct. R. 29.01.

3. Any party may seek to refer "Business Litigation" to the Business Court Division by filing a Motion to Refer to the Business Court Division with the Clerk of the Supreme Court of Appeals of West Virginia, identifying the nature of the action sought to be referred, the basis for the request and whether additional related actions are pending or may be filed in the future. W. Va. Tr. Ct. R. 29.06(a)(1)-(2).

4. To qualify for referral to the Business Court Division, a matter must be "Business Litigation," as defined by Trial Court Rule 29.04(a). Business Litigation is litigation in which: (1) "the principal claim or claims involve matters of significance to the transactions,

operations, or governance between business entities,” (2) “the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the needs for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable,” and (3) the principal claim or claims are not of the types listed in West Virginia Trial Court Rule 29.04(a)(3). W. Va. Tr. Ct. R. 29.04(a).

5. The present matter satisfies all elements of “Business Litigation” as defined by Trial Court Rule 29.04(a). The principal claim will affect both the operations of businesses that provide services by multitudinous Enrolled Agents as well as transactions between the Enrolled Agents and the hundreds of small businesses they serve throughout West Virginia. The long and contentious history behind this decades-long controversy, as well as the technical issues surrounding both the applicability of a well-recognized, statutory exception to sales and use tax, in general, and the need for familiarity with the services provided by and training and operations of Enrolled Agents, certified as such by the Internal Revenue Service, in particular, warrant referral to the Business Court Division. That is the case, because specialized treatment and expertise in the areas of sales and use taxation and of the professional services provided by Enrolled Agents are likely to improve the expectation of a reasonable and fair resolution of the controversy. Finally, this tax appeal, being one made complex by the Commissioner’s convoluted, inconsistent, and contradictory interpretations of the law governing exceptions from sales and use tax, is, thus, among those eligible to be referred to the Business Court Division. W.Va. Tr. Ct. R. 29.04(a)(3) (“provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.”)

6. There currently are no known related actions pending. However, the Commissioner's strict new interpretation of the professional exception to the imposition of sales and use tax on services provided by Enrolled Agents leaves a high probability of related actions in the future. That is particularly so because, as explained below, that interpretation is sharply at odds with both a prior ruling of the Circuit Court of Cabell County, which the Commissioner chose not to challenge before this Court, and the plain intent of applicable legislative regulations.

7. As the record of this matter reveals, the hostility and excessively antagonistic actions taken by the West Virginia State Tax Department, evidence a decades-long institutional pique regarding the central issue here, which warrants the expedient but thorough attention that transfer to the Business Court Division will provide.

Factual Background

8. Specifically, 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"), arising out of an assessment of use tax relating to services provided by an Enrolled Agent.

9. The Auditing Division of the West Virginia Department of Revenue, in an assessment issued against the Petitioner, asserted that the Petitioner 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.

10. 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, on the charges for all the identified services except those of the Enrolled Agent.

11. However, in the face of the newly strict and extremely limited interpretation the Commissioner has given the statutory exception from sales and use tax for professional services provided by Enrolled Agents, 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”).

12. Thus, on or about November 15, 2012, the Taxpayer timely filed its petition for reassessment (the “Petition”) challenging the Assessment on the basis that the professional services provided by the Enrolled Agent were, in fact, professional and thus statutorily excepted from the imposition of sales tax, and the Commissioner timely answered.

13. 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.

14. 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.

15. After filing the Petition for appeal from the Administrative Decision, and in lieu of filing a bond with the Clerk, the Petitioner approached the Commissioner's counsel to inquire whether the Commissioner would consider certifying that the assets of the Petitioner are adequate to secure performance of the orders of the court, in accordance with W.Va. Code § 11-10A-19(e). However, the Commissioner refused to even consider certifying that the assets of the Petitioner, a well-known and established business operation in Braxton County, were sufficient to satisfy a ruling for the State in the amount of \$2,766.08. Consequently, the Petitioner timely posted the necessary appeal bond in cash.

16. Despite the filing of the cash appeal bond, the Petitioner continues to face harassment from the Commissioner's Department in the form of legally premature collection actions. Specifically, after filing the appeal bond, the Petitioner received notice of a lien having been recorded against it in May of this year. Fortunately, upon the Petitioner's request to his counsel, the Commissioner released the lien. However, on August 8, 2014, the Petitioner again received written notice from the Department that liens and distress warrants arising out of the Assessment were being filed. Further, in early September, despite the Braxton County Circuit Court's direction that the Department desist from further collection efforts, and the assurances of the Commissioner's counsel that it would, the Petitioner received yet another false Statement of Account giving notice of legally premature liens and distress warrants to collect the Assessment.

The unfortunate delay in adjudication supports referral to the Business Court Division.

17. The unfortunate delay in adjudication of this matter speaks directly to the need for referral to what Madam Chief Justice has referred to as the "rocket docket" of the

Business Court Division to obtain a “more expeditious and judicious resolution of disputes for business litigants.” Judge Christopher C. Wilkes, *West Virginia’s New Business Court Division: An Overview of the Development and Operation of Trial Court Rule 29*, W. Va. Law., January-March 2013, at 40, n.16; Andrea Lannom, *WV Business Court Approved*, The State Journal, Oct. 11, 2012, <http://www.statejournal.com/story/19515660/wv-business-court-approved>.

18. By letter dated August 14, 2014, the Commissioner’s counsel requested that Judge Facemire recuse himself because he is related to the family of the Petitioner’s principal (albeit not to a degree that requires recusal under Canon 3, Section E.(1)(d) of the Code of Judicial Conduct). *See* Letter from L. Wayne Williams to the Honorable Richard Facemire, attached hereto as Exhibit A. Consequently, an Order was entered on August 21, 2014, recusing Judge Facemire and appointing the Honorable Jack Alsop to hear this matter. *See* Order attached hereto as Exhibit B.

19. Subsequently, Judge Alsop voluntarily recused himself from presiding in this matter. By Administrative Order entered September 9, 2014, the Honorable Thomas H. Keadle was appointed to hear the case. *See* Administrative Order, attached hereto as Exhibit C.

20. The original proposed Scheduling Order called for the Petitioner’s Initial Brief to be due September 5, 2014, with oral argument scheduled for October 15, 2014. With the recusal of Judge Facemire and subsequent recusal of Judge Alsop, although approximately six months have passed since this action was filed (by Order entered March 31, 2014), no Scheduling Order has been entered providing a briefing schedule and date for oral argument.

21. The delay in adjudication is all the more troubling given that a controversy, nearly identical to the instant case, was resolved in 1992 by the Circuit Court of Cabell County, which ruled that services provided by Enrolled Agents are professional services

that are not subject to sales tax under common law or under either Title 110, Series 15, Section 8.1.1.1 of the Code of State Rules, both before and after the Rule's 1989 amendment, which specifically includes Enrolled Agents as persons who provide sales and use tax excepted professional services. *VHS, Inc. v. James H. Paige*, Civil Action No. 92-P-69 (attached hereto as Exhibit D). No appeal was made from the *VHS, Inc.* decision by the Commissioner. Further, importantly, despite a search of public records, no notice of nonacquiescence appears to have been issued by the Commissioner's predecessor at the time reflecting any disagreement with, or intention not to follow, the *VHS, Inc.* decision, as was his right under W.Va. Code § 11-10-10a. Thus, until the Commissioner's recent strict interpretation of the applicability of the exclusion from sales and use tax for professional services, there had been no definitive, written indication by his Department of its refusal to follow the *VHS, Inc.* ruling.

The complexities created both by the variation of the Commissioner from legally established precedent, as well as the disparate treatment of Enrolled Agents as compared with Certified Public Accountants, warrant referral to the Business Court Division.

22. Despite the legally final judicial resolution of a nearly identical controversy by the Circuit Court of Cabell County, more than twenty years ago, which was not appealed by the Commissioner, in the midst of which the Legislature amended the governing legislative regulation to effectively codify the rule, that Enrolled Agents provide professional services which are excepted from sales and use tax, the Commissioner, now, would assert that the great majority of services provided by an Enrolled Agent are, in fact, taxable.

23. Further, the Commissioner has created a complexity associated with the taxability of professional services of Enrolled Agents when considering the disparity in his treatment between the purported taxability of many professional tax services provided by Enrolled Agents, as compared to the exception of virtually all tax services provided by Certified Public Accountants ("CPAs").

24. No limitation is expressly stated on the exclusion from taxability for services provided either by Enrolled Agents or by CPAs, and no difference exists in the regulation governing the professional services exception as such language pertains to CPAs and Enrolled Agents. W.Va. Code R. § 110-15-8.1.1.1. However, an unjustifiable distinction is created by the Commissioner due to his treatment of professional services provided by Enrolled Agents and CPAs.

25. The Commissioner has advocated an extremely strict interpretation of what services provided by an Enrolled Agent are considered professional, and thus not subject to sales and use tax. Essentially, the position taken by the Commissioner requires an Enrolled Agent to prove that each service rendered is explicitly professional. Meanwhile the Commissioner's auditor admitted on the record that she would consider all services provided by CPAs as excluded from the imposition of sales and use tax merely as a function of the CPA's classification as professional.¹


26. The CALJ held that the authority governing the taxability of professional services was ambiguous, purportedly requiring him to defer to the Commissioner's convoluted, inconsistent, and contradictory interpretation of what is, in reality, a straightforward regulation clearly delineating an exception to sales and use taxation for professional services provided by Enrolled Agents. This directly flies in the face of the facts that the Legislature distinctly and purposefully created an exception from sales and use taxability for professional services provided by Enrolled Agents, and the Circuit Court of Cabell County correctly found no ambiguity exists that would require deference to any such interpretation by the Commissioner.

¹ When asked at the hearing held by the CALJ whether, if she were auditing a CPA, rather than an Enrolled Agent, would the process be the same (specifically, if she would review services the CPA has provided that could not be performed without certification, and consider those services excepted, but assume every other accounting service provided by the CPA would be taxable), the Commissioner's auditor responded that a "CPA is classed as professional, so all of their services are exempt." Tr. 113:6-10.

27. This frustrating unwillingness on the Commissioner's part to recognize established precedent, thus making complex the issues of the application of professional services exception to sales and use tax, and where the proverbial line may be drawn in excepting tax services provided by Enrolled Agents, combined with the delay in adjudication caused by the recusal of both judges currently presiding in the Petitioner's home county, and the continual harassment by the Commissioner's Department, despite the filing of a cash appeal bond, warrant referral to the Business Court Division in order to obtain an expedient but fair and reasonable resolution of the controversy.

28. In accordance with Rule 29.06 of the West Virginia Trial Court Rules, this Motion has identified the nature of the action, the basis for the Petitioner's request for referral to the Business Court Division, and whether additional related actions are pending or may be filed. Further, a copy of the Petition and docket sheet are attached to this Motion. No answer to the Petition has been filed by the Respondent.

WHEREFORE, the Petitioner respectfully MOVES, pursuant to Rule 29 of the West Virginia Trial Court Rules, for referral of this matter to the Business Court Division.



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Petitioner's Counsel

EXHIBIT A



RECEIVED
8/18/14

State of West Virginia
Office of the Attorney General
Tax & Revenue, Court of Claims and Transportation Division

Patrick Morrissey
Attorney General

(304) 558-2522
Fax (304) 558-2525

August 14, 2014

The Honorable Richard A. Facemire
Chief Judge, 14th Judicial Circuit
Braxton County Courthouse
300 Main Street
Sutton, West Virginia 26601

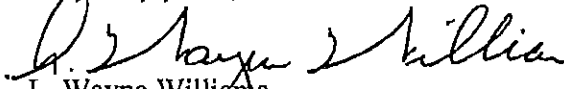
Re: *John Skidmore Trucking, Inc. v. Matkovich*
Civil Action No.: 14-C-27
Circuit Court of Braxton County

Dear Judge Facemire:

At the status conference on August 12, 2014, you advised the parties that John Skidmore is a relative of yours. It is my recollection that Mr. Skidmore is your cousin. In addition, you stated that you would voluntarily recuse yourself if either party objected. I have reviewed this matter with my client and the Tax Department asks that you recuse yourself from presiding in this case. The Tax Department makes this request out of an abundance of caution and to preclude any potential errors on appeal.

I appreciate your consideration in this matter.

Very truly yours,


L. Wayne Williams
Assistant Attorney General

LWW/jdh

cc: Jan Mudrinich, Esq.
Michael E. Caryl, Esq.

EXHIBIT B

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,

Respondents.

ORDER
RECUSING THE HONORABLE RICHARD FACEMIRE
AND APPOINTING THE HONORABLE JACK ALSOP

At a status conference on August 11, 2014, the Honorable Richard Facemire advised the parties that he is related to John Skidmore, the owner of the Petitioner. The Court allowed the parties to consider the issue of recusal. Counsel for the Petitioner stated that the Petitioner had no objection to Judge Facemire.

Subsequently, Counsel for the Tax Department consulted with his client. The Tax Department requested Judge Facemire's recusal out of an abundance of caution and to preclude any extraneous issues should the circuit court decision be appealed.

The Court has considered the Tax Department's request and has concluded that recusal is in the best interest of the parties based upon the facts of this case.

Therefore, the Honorable Richard Facemire is recused from this case.

The case is reassigned to the Honorable Jack Alsop.

The Clerk of the Circuit Court is directed to transmit a true copy of this Order to the Honorable Jack Alsop and the counsel of record at the addresses listed below.

It is so ORDERED.

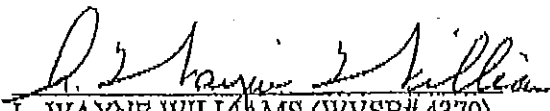
Entered:

21 August 2014

Richard Facemire, Judge
Circuit Court of Braxton County

8/21/14

Prepared by:



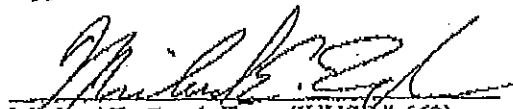
L. WAYNE WILLIAMS (WVSB# 4370)
ASSISTANT ATTORNEY GENERAL
1900 Kanawha Boulevard, East
Building 1, Room W-435
Charleston, West Virginia 25305
304-558-2522

Received

AUG 20 2014

HONORABLE RICHARD A. FACEMIRE
FOURTEENTH JUDICIAL CIRCUIT

Approved as to form:



Michael E. Caryl, Esq. (WVSB# 662)
Bowles Rice, LLP
P.O. Drawer 1419
Martinsburg, WV 25402-1419
Counsel for Skidmore Trucking, Inc.

Copy to:

The Honorable Jack Alsop
Webster County Courthouse
2 Court Square
Webster Springs, WV 26288

EXHIBIT C

RECEIVED
2/15/15

SEP 10 '14 11:43

ADMINISTRATIVE ORDER

SUPREME COURT OF APPEALS OF WEST VIRGINIA

RE: RECALL OF THE HONORABLE THOMAS H. KEADLE TO ACTIVE SERVICE TO PRESIDE IN THE CIRCUIT COURT OF BRAXTON COUNTY, FOURTEENTH JUDICIAL CIRCUIT, IN THE PROCEEDING OF JOHN SKIDMORE TRUCKING, INC. V. MARK W. MATKOVICH, CASE NO. 14-C-27

The Honorable Jack Alsop, Chief Judge of the Fourteenth Judicial Circuit, has advised the Chief Justice of the Supreme Court of Appeals that the above-styled proceeding was transferred to his docket following the voluntary recusal of the Honorable Richard A. Facemire, Judge of the Fourteenth Judicial Circuit.

Chief Judge Alsop has further advised the Chief Justice that he wishes to recuse himself voluntarily from presiding in the above-styled proceeding.

The Chief Justice, upon review of the reasons for the recusal, deems the same to be warranted.

IT IS, THEREFORE, ORDERED, that the Honorable Thomas H. Keadle, Senior Status Judge, be, and he hereby is, recalled for temporary assignment to the Circuit Court of Braxton County, in the Fourteenth Judicial Circuit, under the provisions of Article VIII, §§ 3 and 8 of the Constitution of West Virginia and W.Va. Code § 51-9-10 for the purpose of presiding in said proceeding.

IT IS FURTHER ORDERED, that the Circuit Clerk of Braxton County record this Order in the Office of the said Clerk and provide copies of the same to all parties of record or their counsel.

IT IS FURTHER ORDERED, that the Circuit Clerk of Braxton County forward to Senior Status Judge Keadle copies of such documents and materials in the Clerk's Office as directed by him.

ENTERED: SEPTEMBER 9, 2014

Robin Jean Davis, C.J.
ROBIN JEAN DAVIS
Chief Justice

STATE OF WEST VIRGINIA
COUNTY OF BRAXTON
I, Susan Lemon, Circuit Clerk, do hereby certify that the foregoing is a true and accurate copy as an Order of record in the office of the Circuit Clerk.
Order Book No. _____ at page _____ taken from the records.
Given Under My Hand this 10 day of Sept 2014
Susan Lemon
CIRCUIT CLERK

EXHIBIT D

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

VHS, INC., d/b/a/ Padgett
Business Services of West
Virginia, a W.Va. corporation,
Petitioner,

At a regular term of Circuit Court continued and held in and for
the County of Cabell, State of West Virginia, at the Court House
thereof on the 19 day of August, 1992
the following order was made and entered

Vs.

CIVIL ACTION NO. 92-P-69

JAMES H. PAIGE,
Secretary,
West Virginia Department of
Tax and Revenue, and
PRISCILLA GAY, Hearing
Examiner,
Respondents.

ORDER

This matter came before this Court on appeal from a decision of an administrative hearing examiner of the Department of Tax and Revenue. The Petitioner and taxpayer, VHS. Inc., by counsel, and the Secretary, were represented by counsel: Paul A. Ryker for Petitioner, and the Secretary by the office of the Attorney General. The parties briefed the matters at issue to this Court and appeared to present oral argument on June 22, 1992. Based upon the pleadings, the transcript of the evidence produced at the administrative hearing of June 12, 1990, and the oral argument and briefs of the parties, the Court has found and does hereby set forth its following findings and conclusions:

FINDINGS OF FACT

1. It is undisputed that the taxpayer, VHS. Inc., is a close corporation, incorporated and doing business in West Virginia, and that it conducts business largely through the efforts of its principal Vernon H. Smith.

2. The taxpayer was doing business at and over the dates covered by the assessment of the Department in this matter, namely April, 1988, through November, 1989.

3. The taxpayer renders some bookkeeping services as well as some "tax consulting" services to individual and business clients.

4. At the times at issue, as covered by the assessment, the applicable tests, at law, to determine whether or not a particular business service was "professional" and, if so, not subject to the West Virginia Consumer Sales and Service Tax under Chapter 11, Article 15, Section 3 of the West Virginia Code, came from, in the first instance, then-existing administrative regulations. Under Title 110, Series 15, Section 2.55, the regulations providing operative definition as to what would qualify as "professional", read as follows:

"Professional service" means and includes an activity recognized as professional under common law, its natural and logical derivatives, and any expansion of the terms made by the West Virginia Legislature. See Section 8.1.1.1 of these regulations.

Reference to Section 8.1.1.1 further provides:

Professional services, as defined in Section 2 of these regulations, are rendered by physicians, dentists, lawyers, certified public accountants, public accountants, optometrists, engineers, registered professional nurses, veterinarians, physical therapists, ophthalmologists, chiropractors and licensed real estate brokers. Generally, the Tax Department will only recognize as "professional" the activities indicated as such on Chapter 30 of the West Virginia Code. The determination as to whether other activities are "professional" in nature will be deter-

mined on a case-by-case basis. 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.

5. The Petitioner claims that it is not subject to collection and remittance of the tax. The Court finds that Vernon Smith is an enrolled agent. As such the Court finds that the evidence has established that:

- a. Vernon Smith complied with national uniform requirements imposed by the Internal Revenue Service in order to qualify as an enrolled agent.
- b. Those standards include the requirement that, for those not "grandfathered in", one must pass a nationally-administrated test, given on the same date, with a passing rate of one-third or less. Furthermore, the candidate must successfully pass all parts of the examination within two years, or begin the process anew. The evidence is substantial that successful completion of this examination would be extremely unlikely if the candidate was not well educated in the areas of taxation and accounting.
- c. Having attained the status of "enrolled agent" from the IRS, upon completion of the examination process, one may serve as an advocate for a taxpayer, and may appear in the place of the taxpayer in all proceedings before the IRS. As such, the enrolled agent is on an equal footing with CPA's and attorneys in that

respect. (See Treasury Department Circular No. 230 (Rev. 3-86).

- d. The qualified enrolled agent must maintain continuing education requirements, which are national and uniform; and which call for 72 hours of continuing education and within a three-year period, with no less than 16 hours in any one year.
- e. The evidence also demonstrates that the enrolled agent is subject to a kind of "disbarment" by the IRS should misconduct or incompetence be demonstrated.
- f. The taxpayer, VHS., Inc., by consideration of Vernon Smith, through whom its business activity is performed, has met and maintained all applicable standards to become, and continues to act as, an enrolled agent.
- g. The taxpayer timely filed a petition for reassessment in this matter and an administrative hearing was conducted on June 12, 1990.
- h. The Respondents proffered amendments to the applicable regulations in December, 1991, to the West Virginia Legislature. In those regulations the revised Section 8.1.1.1 sought to cite an enrolled agent as an example of a "non-professional" business activity. However, the Legislature amended the regulation and specifically cited enrolled agents as a professional activity. It was during the legislative review of the proposed amended regulations that the administrative decision, adverse to the taxpayer, was rendered on or about December 30, 1991.
- i. The taxpayer paid the disputed amount, pending this review, to the Respondents, in the sum of \$1,426.44 on November 8, 1991.

CONCLUSIONS OF LAW

1. The taxpayer met its burden of proof at the administrative hearing that it qualified as rendering "professional services" and that it was therefore exempt from collecting and remitting the Consumers Sales and Services Tax. Whether viewed under the criteria of Title 110, Series 15, Section 8.1.1.1 of the applicable regulations under the pre-1989 or the post-1989 amendment of the same, the conclusion is the same. Specifically, those regulations require certain considerations to be given to a taxpayer claiming such a "professional" status and the Court hereby determines that the evidence has established that the taxpayer, per its principal Vernon Smith:

- a. Did possess a substantial educational background, and that, due to the testing requirements in order to become an enrolled agent, had to have a substantial attainment of education in the folds of accounting and taxation;
- b. That there are not only existent, but a stringent nationally-recognized---indeed federally-policied---standards for performance of an enrolled agent's activities.
- c. That "licensing" or qualification of enrolled agents is uniform and nationally applied per the federal Internal Revenue Service; and
- d. That this taxpayer and enrolled agents generally are also subject to well-defined continuing education requirements, nationally.

Thus, under every such consideration, the taxpayer has met its burden of proof.

Even if the Court were to explore the "common law", as was provided in the pre-1989 version of 8.1.1.1, the only such authority, Wooddell v. Dailey, 168 W.Va. 65, 730 S.E.2d 466 (1977), contains tests under which the Petitioner also qualified as "professional" by, at least, a preponderance and clear weight of the evidence.

2. The Respondent Hearing Examiner's decision, in stressing that the consideration of "education" of the testing applicant is the most important of all considerations, is arbitrary, capricious and not supported by the clear language of the regulations, themselves. Neither those regulations, nor Wooddell raise any one of the "factors" or "considerations" to a higher level of import than any of the others. As noted, the Petitioner, per Vernon Smith, had, and obviously had to have, a substantial educational background to pass the required examination. Arguments that an uneducated enrolled agent candidate could theoretically pass the test (and somehow survive the continuing education and IRS policing requirements) are vacuous. To so hold was clearly wrong in view of the reliable, probative and substantial evidence on the whole record and was a clear abuse of discretion.

3. While not bound to follow the action of the legislature, the Court nevertheless concludes, as a matter of law, that the legislature has precisely and specifically rejected the arguments of the Respondents and has legislated enrolled

agents as entitled to exempt professional status from March, 1992.

Accordingly, the Court rules as follows:

IT IS HEREBY ADJUDGED, ORDERED and DECREED that the ruling of the Respondents be set aside and held for naught; that the Petitioner be and hereby is held to be engaged in the rendering of "professional services" and therefore exempt from, and not liable for, collecting and remitting the tax which is the subject of the assessment and this proceeding; and that the Petitioner be fully refunded all of the amounts paid to the Respondents, to date, under Chapter 11, Article 10, Section 9 of the West Virginia Code.

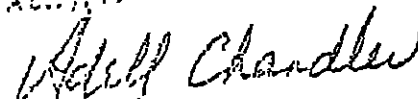
ORDER /S/ ALFRED E. FERGUSON
ENTER: _____
 JUDGE

These Findings and Conclusions prepared by:



Paul A. Ryker
Attorney for Petitioner
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Huntington, WV 25701

A COPY TO:


Circuit Clerk