



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

October 24, 2014

By Hand Delivery

Rory L. Perry II, Clerk of the Court
West Virginia Supreme Court of Appeals
1900 Kanawha Boulevard, East
Building 1, Room E-317
Charleston, West Virginia 25305

Re: *John Skidmore Trucking, Inc. v. Mark W. Matkovich, State Tax Commissioner*
Civil Action No. 14-C-27
Braxton County Circuit Court

Dear Mr. Perry:

Enclosed please find the original and five copies of the *West Virginia State Tax Department's Reply Memorandum Opposing Skidmore Trucking's Motion to Refer Tax Appeal to the Business Court Division*.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "L. Wayne Williams".

L. Wayne Williams
Assistant Attorney General

LWW/jdh
Enclosures

cc: The Honorable Thomas H. Keadle
The Honorable Susan F. Lemon
Michael E. Caryl, Esq.
Catherine Wilkes Delligatti, Esq.
Business Court Division

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN SKIDMORE TRUCKING, INC.

Petitioner,

v.

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

Respondent.

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

**WEST VIRGINIA STATE TAX DEPARTMENT'S
REPLY MEMORANDUM OPPOSING
SKIDMORE TRUCKING'S MOTION TO REFER TAX APPEAL
TO THE BUSINESS COURT DIVISION**

**PATRICK MORRISEY
ATTORNEY GENERAL**

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

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN SKIDMORE TRUCKING, INC.

Petitioner,

v.

MARK W. MATKOVICH,
WEST VIRGINIA STATE
TAX COMMISSIONER,

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

Respondent.

WEST VIRGINIA STATE TAX DEPARTMENT'S
REPLY MEMORANDUM OPPOSING
SKIDMORE TRUCKING'S MOTION TO REFER TAX APPEAL
TO THE BUSINESS COURT DIVISION

Petitioner John Skidmore Trucking, Inc., (sometimes hereinafter, Skidmore Trucking) filed a *Motion to Refer Tax Appeal to the Business Court Division* (hereinafter *Motion to Refer*) before the West Virginia Supreme Court of Appeals on September 30, 2014.

The Tax Department opposes the *Motion to Refer* for three simple reasons. First, the referral to the Business Court Division is not contemplated under the Rules of Appeal for Administrative Decisions adopted by the Supreme Court. Skidmore Trucking challenged a tax assessment issued by the State Tax Department for delinquent consumers sales tax. The West Virginia Office of Tax Appeals affirmed the assessment which was timely appealed by Skidmore Trucking to the Circuit Court of Braxton County. See OTA Decision at p. 22 (copy attached as Exhibit 1). Appeals of decisions issued by the Office of Tax Appeals are subject to judicial review pursuant to W. Va. Code § 11-10A-19. The statute provides that the circuit court shall

hear the appeal as provided in W. Va. Code § 29A-5-4 governing contested cases. *See* W. Va. Code § 11-10A-19(f).

The Rules of Procedure for Administrative Appeals specifically govern the judicial review for contested cases. *See* Rule 1(a) and (c), Rules of Procedure for Administrative Appeals. Rule 1(a) specifically states that the scope of the Rules of Procedure for Administrative Appeals "...govern[s] the procedures in all circuit courts for judicial review of final orders or decisions from an agency in contested cases governed by the Administrative Procedures Act, W. Va. Code § 29A-5-1 *et seq.*" The Rules of Procedure for Administrative Appeals do not explicitly or implicitly authorize judicial review of administrative agency decisions in the Business Courts. The reason is obvious; administrative agency decisions are generally routine and do not raise complex business issues. The issue on this appeal is whether all services provided by Enrolled Agents are professional services or only the services for which the individual must be an Enrolled Agent. *See* attached OTA Decision at Conclusions of Law 8 and 12.

Second, referring this case to the Business Court Division would dilute the significance of the definition of "business litigation" under Rule 29.04 of the Trial Court Rules for the Business Court Division. The case involves an assessment of less than \$2,500.00 in consumers sales tax. While Rule 29.04 does allow for the Business Courts to handle "complex tax appeals," the case before the court is a simple judicial review of an administrative decision applying the legislative rules for the consumers sales tax. This case concerns W. Va. Code R. § 110-15-8.1.1.1 (defining professional services) and Administrative Notice 10-25 regarding the scope of services provided by an Enrolled Agent and the extent to which those services may be classified as professional for consumers sales tax purposes. *See* attached OTA Decision at Conclusions of law 7 and 13. The Circuit Courts of this State have been more than adequate to review the

application of legislative rules and administrative notices issued by the Tax Department or any other State agency.

Third, Skidmore Trucking argues that the judicial review is proceeding far too slowly and that referral to the Business Courts Division would increase the speed of obtaining a decision. However, this argument is fallacious. The Supreme Court previously assigned this case for judicial review to Senior Status Judge Keadle. The case only needs a briefing schedule which Judge Keadle can issue immediately once the Motion to Refer is resolved by the Court. If Skidmore Trucking were truly concerned with unnecessary delay, then Skidmore Trucking would have already filed its initial brief with the Circuit Court instead of seeking a fourth judge for this case. Transferring this case to the Business Court Division will not speed the decision in any way, shape, or form.

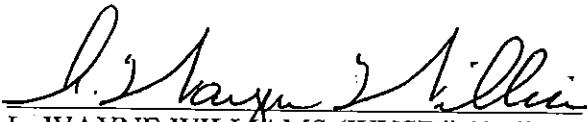
WHEREFORE, the West Virginia State Tax Department prays the Supreme Court deny Skidmore Trucking's *Motion to Refer Tax Appeal to the Business Court Division*.

Respectfully submitted,

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

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL



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

Telephone: (304) 558-1666
Fax: (304) 558-1670
A. M. "FENWAY" POLLACK
CHIEF ADMIN. LAW JUDGE

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

JOHN SKIDMORE TRUCKING, INC.,
Petitioner,

y.

**GRIFFITH, CRAIG A., as
STATE TAX COMMISSIONER of
WEST VIRGINIA,
Respondent**

DOCKET NO. 12-456 CU

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 is 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 \$378.75¹, 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

the same conclusions regarding statutory construction and legislative rules. This Tribunal finds it helpful to lay out the analyses as a series of steps.

- Is the statute silent or ambiguous with respect to the issue to be decided or the question to be answered?
- Can the silence or ambiguity be resolved by ascertaining the Legislature's intent, for example through review of Legislative history or review of the overarching design of the statute?
- Has the Legislature given the agency or agency head the authority to promulgate rules to fill in the gaps in the statute?
- Are the rules that the agency has drafted properly promulgated legislative rules that have been through legislative review, both through the rule making committee and the full Legislature? If the answer is yes, the rule has the force and effect of law.²
- Does the legislative rule, as written, flow rationally from the statute? Or put another way, is the agency's rule arbitrary, capricious, or manifestly contrary to the statute at issue?
- If the agency's rule is not arbitrary, capricious, or manifestly contrary to the statute then a reviewing court must afford deference to the agency's interpretation of the statute (through the rule).

Applying the tests above to the facts of this case tells us the following: 1) all of Chapter 11 of the West Virginia Code is silent as to what the term "professional services" means; 2)

² Some of the cases discuss whether the rule was passed as part of omnibus legislation. See Appalachian Power Co. v. State Tax Dep't of W. Virginia; Griffith v. Frontier W. Virginia, Inc. supra. However, those discussions are not relevant to our analysis.

neither Legislative history nor the overarching design of West Virginia Code Section 11-15-8 answers the question before us; 3) the Legislature has clearly given the Tax Commissioner the statutory authority to promulgate rules for use in enforcing and applying West Virginia's tax laws. See W. Va. Code Ann. § 11-10-5 (West 2010); 4) Title 110, Series 15 of the West Virginia Code of State Rules is a properly promulgated Legislative Rule that has the force and effect of law; 5) Sections 2.65 and 8.1.1 of Title 110, Series 15 flow rationally from West Virginia Code Section 11-15-8 in that they attempt to fill in the Legislature's silence regarding professional services. Additionally, Sections 2.65 and 8.1.1 are not arbitrary or capricious; 6) we must afford deference to the way the Tax Commissioner has interpreted West Virginia Code Section 11-15-8 through the adoption of Sections 2.65 and 8.1.1.

The conundrum faced by this Tribunal is laid out above. Under West Virginia law, we must give deference to the Tax Commissioner's interpretation of West Virginia Code Section 11-15-8. The question becomes, do we have to give deference to the Tax Commissioner's interpretation of Sections 2.65 and 8.1.1? Interestingly, the Tax Commissioner has, in writing, interpreted Sections 2.65 and 8.1.1. In 2010, then Tax Commissioner Craig A. Griffith issued Administrative Notice 10-25, which seeks to answer the question before this Tribunal, namely, what activities by an enrolled agent fall under the sales and use tax exception in 11-15-8.

Fortunately, the Appalachian Power Court answers the question above. In footnote 13, it states "[W]e would also go to step two of *Chevron* in the unlikely event that we found that a legislative rule, valid in all respects, was itself ambiguous as to its intent or meaning." Appalachian Power, at n: 13. The "step two of *Chevron*" reference refers to Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) a U.S. Supreme Court decision that Justice Cleckley termed "watershed" in the area of

judicial deference to regulatory agencies. It is not necessary to conduct an in depth analysis of the Chevron decision, because Justice Cleckley has done that for us. Regarding "step two" he has this to say "[U]nder this second stage, a court must examine the agency's interpretation to see how it relates to the statute. This examination involves a high degree of respect for the agency's role." Appalachian Power, at 587, 588, 438, 439.

When a legislative rule is constitutionally acceptable, only an unambiguous conflicting statute, contradictory legislative history, a defect in the rulemaking process, evidence of bias or abuse of power, or some other startling revelation of fact would overcome the clearly erroneous burden and justify this Court's interference with an agency's legitimate rulemaking authority.

Id., at 589, 440.

Here, as stated above, we have an ambiguous rule, and the question is how much deference do we give to the Tax Commissioner's interpretation of this rule (through administrative Notice 10-25). The above quoted language from Appalachian Power tells us to give great deference or "a high degree of respect" to his or her interpretation unless certain factors are present. We do not find the relevant factors to be present in this case. There is no unambiguous conflicting statute, legislative history or evidence of bias or abuse of power by the Tax Commissioner.

In this case, we have the Tax Commissioner's interpretation of the ambiguous rule committed to paper, in Administrative Notice 10-25 (hereinafter "AN 10-25"). In AN 10-25 the Tax Commissioner relies heavily upon the definition of practice before the Internal Revenue Service, as contained in the IRS regulations.

Practice before the Internal Revenue Service comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations

include, but are not limited to, preparing documents; filing documents; corresponding and communicating with the Internal Revenue Service; rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and representing a client at conferences, hearings, and meetings.

31 CFR § 10.2(a)(4) (2011). Based upon this definition, AN 10-25 lays out three activities that the Tax Department considers to be practice before the IRS.

1) Oral or written presentation to the Internal Revenue Service its officers or employees of documents, correspondence and communications, directly related 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 related 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.

AN 10-25 goes on to explain that all other activities performed by enrolled agents will be considered subject to the sales and use tax.

This Tribunal believes that 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. We find as such based primarily upon one fact. That fact is the omission of accountants from the list of professions in Section

8.1.1.1.³ The one thing the parties in this matter agree upon is the nature of the work that was performed by the EA for the Petitioner, as laid out in finding of fact No. 7 above. All of that work was accounting work, which clearly, according to Section 8.1.1.1, is not a professional service. Perhaps it is clear, but we will state here that the Tax Commissioner takes the position that none of the work described in fact No. 7 above falls within his definition of practice before the IRS.

In summation, the Legislature has said professional services are not subject to sales and use taxes. The Legislature left it up to the Tax Commissioner to fill in the silence regarding what is and is not a professional service. The Tax Commissioner filled the silence by creating a list of professions that will generally be considered to be performing professional services. However, the Tax Commissioner has also said that when people in those professions are not performing professional services, tax must be paid on those services. The Legislature has approved this regulatory scheme. This regulatory exception from sales and use tax does not apply to accounting services. As a result, it is reasonable for the Tax Commissioner to say to an enrolled agent, sales and use tax must be paid when you are performing accounting services, as opposed to appearing before the IRS.

Despite our ruling, we do not want to give the impression that we have given the Petitioner's arguments short shrift. In its briefs, the Petitioner creates a test to see if an enrolled agent's activities should be characterized as professional.⁴ The test relies on three Tax Department publications, AN 10-25, TSD-368, and TSD-373. TSD-368 concerns sales and use tax and veterinarians. The publication discusses (among other things) boarding services and

³ The list of professions in Section 8.1.1.1 includes both certified public accountants and public accountants. However, the enrolled agent who performed the work in this matter is neither a CPA nor a public accountant.

⁴ The test we are speaking of is a compilation of arguments made in the Petitioner's initial brief and its reply brief. These two briefs are quite voluminous, clocking in at 48 and 25 pages respectively. Nonetheless, we believe our synthesis of the Petitioner's main argument is a fair characterization.

explains that normally boarding services provided by a vet's office are not considered a professional service but when the boarding is an "integral" part of the professional service, the service is exempt. The example used in the publication to define "integral" is when an animal must be boarded overnight because of a medical procedure the vet performed. TSD-373 concerns sales and use tax and attorneys. This publication mentions (without discussion) how fees charged for incidental aspects of legal services would also be covered by the exception to sales and use tax in West Virginia Code Section 11-15-8.

The Petitioner used these three publications to create its own test for when an enrolled agent is performing a professional service. First, like the Tax Commissioner, the Petitioner uses the federal definition of practice before the IRS as discussed in AN 10-25. The Petitioner pays close attention to the terms "all matters" and "connected" and suggests a broad reading of the terms. Next, the Petitioner takes the terms "integral" and "incidental" from the publications discussed above. Using these terms, the Petitioner's test essentially says that all matters connected with the EA practice before the IRS, either those that are integral or incidental, should be excepted from the sales and use tax. Putting this test into practice, the Petitioner argues that because of the high degree of interconnectivity between state and federal taxes, the work done by the EA for the Petitioner is either integral or incidental to the Petitioner's federal tax work.

We find this argument to be unpersuasive for a variety of reasons. First and foremost, the Petitioner argues that laws imposing taxes are to be strictly construed against the taxing authority. That statement by the Petitioner is correct, but West Virginia Code Section 11-15-8 does not just impose the consumers sales and service tax on services, it goes on to except certain services from that tax. This case is about that exception. The Tax Commissioner, in his brief, directs us to the case of Wooddell v. Dailey, which clearly states that "a tax law under which a

person claims an exemption is strictly construed against the person claiming the exemption". Wooddell v. Dailey, 160 W.Va. 65, 68, 230 S.E.2d 466, 469 (1976). The Tax Commissioner is correct in his citation to the Wooddell decision, and that point of law has been restated many times by the West Virginia Supreme Court of Appeals in the years since. See e.g. Ballard's Farm Sausage, Inc. v. Dailey, 162 W. Va. 10, 17, 246 S.E.2d 265, 269 (1978); Shawnee Bank, Inc. v. Paige, 200 W. Va. 20, 21, 488 S.E.2d 20, 21 (1997); Davis Mem'l Hosp. v. W. Virginia State Tax Com'r, *supra*.

So in this case, we have a "double whammy" against the Petitioner, a statute creating an exception to a tax that must be strictly construed against it, and an agency's interpretation of an ambiguous statute/regulation that we believe must be afforded deference. We therefore reject the Petitioner's contention that all the work done by the EA must be excepted from sales and use tax because it is connected to, and integral or incidental to his IRS work. We instead construe AN 10-25 strictly against the Petitioner and give deference to the Tax Commissioner's interpretation of Section 8.1.1. As stated above, the Tax Commissioner has interpreted Section 8.1.1 by narrowly defining practice before the Internal Revenue Service, as laid out in AN 10-25.

Another reason we are not persuaded by the Petitioner's argument is because taken to its logical conclusion, it leads to an absurd result. The Petitioner argues that we should adopt its test, and find that everything done by the EA is either integral or incidental to the IRS work done by the accounting firm. According to the Petitioner, the reason everything is either integral or incidental is because all taxes (state and federal) are highly interconnected. If we were to adopt this view, then every time an EA is doing regular accounting work it would be excepted from sales and use tax. However, when a regular accountant would be doing the same work, it would be taxable. This scenario is clearly not what the Tax Commissioner and the West Virginia

Legislature contemplated when drafting and approving Section 8.1.1 because accountants are not one of the professions listed therein. The absurd result would come about by businesses such as the Petitioner in this matter just hiring EAs to do their accounting work in order to avoid paying sales tax.

Another problem with the Petitioner's argument is that no matter how expansively one is to interpret "connected to" "integral" and "incidental" there is no way all of the work done by the EA is even remotely connected to IRS practice. For example, the EA prepares for and represents the Petitioner at their annual worker's compensation and insurance audits. The EA also prepares the Petitioner's local motel tax reports. To argue that these activities are "connected with" the activities of the accounting firm that does in fact appear before the IRS on the Petitioner's behalf is too much of a stretch. Therefore, if we take it as a given that not everything done by the EA is connected to the IRS work, then it begs the question, who will decide what is connected enough and what is not? Additionally, what standard would be used? Are the local motel tax reports connected enough because they involve taxes? The Petitioner's argument gives the Tax Commissioner two equally unpalatable choices, either call all the accounting work done by an EA excepted, or create a byzantine test to figure out what is sufficiently connected and what is not. This Tribunal does not believe that either scenario is contemplated under West Virginia law.

The Petitioner's final argument⁵ is that the EA's work meets the "other activities" test contained in Section 8.1.1.1. The rule states that the Tax Department will determine whether activities are professional on a case-by-case basis and in making the determination will consider, among other things: 1) the level of education required for the activity, 2) the nature and extent of

⁵ The Petitioner's briefs also suggest, but do not explicitly argue, that it has suffered an equal protection violation because of the way the Tax Commissioner treats certified public accountants.

nationally recognized standards for performance, 3) licensing requirements on the State and national level, and 4) the extent of continuing education requirements. W. Va. Code R. §110-15-8.1.1.1 *Supra*.

The Petitioner argues that the EA's activities clearly meet this four part test. Specifically, that an EA has to have a certain level of education, performs under nationally recognized standards and has licensing and continuing education requirements. While all of this is true, it is only true when the EA is appearing before the IRS. The rest of the time, when the EA is performing regular accounting duties, he or she does not meet this four part test, and, as discussed above, that is why accountants are not listed in Section 8.1.1.1. Therefore, this argument does not assist us in the determination that must be made in this case.

CONCLUSIONS OF LAW

1. 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).

2. "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).

3. "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).

4. 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).

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

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

7. 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).

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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).

15. "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).

16. 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.

17. 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.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner 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 should be and hereby is **AFFIRMED**.

Pursuant to West Virginia Law, interest accrues on the assessments until the liabilities are fully paid. See W. Va. Code Ann. §11-10-17(a) (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS

By: 

A. M. "Fenway" Pollack
Chief Administrative Law Judge


Date Entered

APPEAL PROCEDURES

Any aggrieved party may appeal from this decision with an appropriate West Virginia circuit court within sixty days of the date of service of the decision in accordance with the procedure set forth at West Virginia Code Section 11-10A-19. The Office of Tax Appeals may not be named as a party to the appeal, but must be provided with a copy of the filed petition for judicial review.

West Virginia Code Section 11-10A-19(e) also provides that if the appeal is of an assessment, except a jeopardy assessment for which security in the amount thereof was previously filed with the Tax Commissioner, then within ninety days after the petition for appeal is filed, or sooner if ordered by the circuit court, the petitioner shall file with the clerk of the circuit court a cash bond or a corporate surety bond approved by the clerk.

Within fifteen (15) days after receipt of this written notice of the appeal from the appellant, or within such further time as the circuit court may allow, the West Virginia Office of Tax Appeals will prepare and transmit to the circuit court a certified copy of the entire record in the matter. The West Virginia Office of Tax Appeals will, at the time of transmittal to the Circuit Court: (1) send to the parties a detailed index of the record; (2) send to the appellant a bill, payable within thirty days, for the reasonable costs of preparing the record; and (3) upon payment of such record preparation costs, send to the parties a certified copy of the entire record. Information about this procedure is available in the Rules of Practice of Procedure before the West Virginia Office of Tax Appeals, at W.Va. C.S.R. § 121-1-86.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN SKIDMORE TRUCKING, INC.

Petitioner,

v.

MARK W. MATKOVICH,
WEST VIRGINIA STATE
TAX COMMISSIONER,

Respondent.

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

CERTIFICATE OF SERVICE

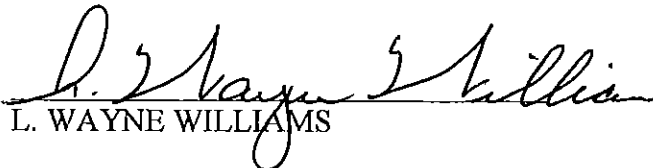
I, L. Wayne Williams, Assistant Attorney General and counsel for Respondent Mark W. Matkovich, State Tax Commissioner, do hereby certify that a true copy of the foregoing *West Virginia State Tax Department's Reply Memorandum Opposing Skidmore Trucking's Motion to Refer Tax Appeal to the Business Court Division* was served upon the following by depositing a copy of the same in the United States mail, first-class postage prepaid, this 24th day of October 2014, addressed as follows:

Michael E. Caryl, Esq.
Catherine Wilkes Delligatti, Esq.
Bowles Rice, LLP
P.O. Drawer 1419
Martinsburg, WV 25402-1419

The Honorable Susan F. Lemon
Braxton County Courthouse
300 Main Street
Post Office Box 486
Sutton, WV 22601-1313
Braxton County Circuit Clerk

The Honorable Thomas H. Keadle
Braxton County Circuit Court
Braxton County Courthouse
300 Main Street
Sutton, WV 26601

Business Court Division
Berkeley County Judicial Center
380 West South Street, Suite 2100
Martinsburg, WV 25401


L. WAYNE WILLIAMS