

IN THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA

JOHN SKIDMORE TRUCKING, INC.,

Petitioner,

v.

Civil Action No.: 14-C-027

**Circuit Court Judge: James H. Young, Jr.
Business Court Division**

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

Respondent.

ORDER

On the 4th day of March, 2015, this matter came before the Court for appeal pursuant to the statute. The Petitioner appeared by counsel Michael E. Caryl, Esq., and Catherine A. Delligatti, Esq. The Respondent appeared by counsel, L. Wayne Williams, Esq. Thereupon, the Court proceeded to hear arguments of the parties; and at the conclusion of the same the Court held the matter in abeyance so it may review the parties' briefs. Therefore, the Court upon reviewing the parties' briefs finds and orders as follows:

STANDARD OF REVIEW

"Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995). The Supreme Court of Appeals of West Virginia (West Virginia Supreme Court) did caution the courts that "[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous."

Syl. pt. 4, *Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp., Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981). Additionally, the Court is constrained in its review by the precepts of West Virginia Code § 29A-5-4. With these standards in mind the Court now turns to the case currently before it.

STATEMENT OF FACTS

On October 16, 2012, the Respondent issued an assessment against the Petitioner for the assessment period of January 1, 2009 to August 31, 2012 in the amount two thousand seven hundred and sixty-six dollars and eight cents (\$2,766.08). Of that amount two thousand three hundred and eighty-seven dollars and thirty-three cents (\$2387.33) were sales and use tax the Respondent asserted the Petitioner owed the State of West Virginia and three hundred and seventy-eight dollars and seventy-five cents (\$378.75) was interest on that amount. Of this assessment the Petitioner only challenges one thousand three hundred and fourteen dollars (\$1,314.00) and concedes liability for the remaining portion (which it has previously paid to the West Virginia State Tax Department). On the 15th day of November, 2012, the Petitioner filed a Petition for Reassessment. A hearing was held on the Petition on March 26, 2013 before the Honorable A.M. Pollack, Chief Administrative Law Judge. At that hearing the Administrative Law Judge took testimony and evidence from both parties. In challenging the decision of the West Virginia State Tax Office, the Petitioner asserts that services performed by an enrolled agent when said services are incidental to the duties of an enrolled agent are exempted from the sales and use tax. The West Virginia State Tax Office agrees that enrolled agents are exempted for certain services but has taken a much narrower stance regarding the specific duties that fall within the profession of enrolled agents. Specifically, the West Virginia State Tax Office has

taken the stance that enrolled agents are only exempted from the sales and use tax in the three following situations: (1) presentations to the Internal Revenue Service regarding a client under laws or regulations administered by the Internal Revenue Service, (2) giving federal tax advice to a client regarding laws or regulations administered by the Internal Revenue Service, or representing or preparing to represent a client before the Internal Revenue Service regarding laws or regulations administered by the Internal Revenue Service. At the conclusion of this hearing the Administrative Law Judge instituted a briefing schedule and on January 28, 2014, after the conclusion of the briefing period, the Administrative Law Judge issued a decision in favor of the Respondent from which this appeal is taken.

DISCUSSION

The Court's examination of this case is basically a two part process. First, the Court must determine if Administrative Notice 10-25 as promulgated by the West Virginia Tax Department is proper and legal. Second, the Court must determine if the Administrative Law Judge committed error by relying on Administrative Notice 10-25. If the Court finds that Administrative Notice 10-25 is a legally promulgated rule then great deference must be shown to the Administrative Law Judge's decision, but if the Administrative Notice is not legal then the decision of the Administrative Law Judge will have been based upon an error of law and thus must be reversed.

As a quick overview in West Virginia there are three types of rules- legislative, interpretative, and procedural. In this case the Court is only examining legislative and interpretive rules. "Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law." West Virginia Code §29A-

1-2(d). An interpretive rule on the other hand is “adopted by an agency independent of a delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency’s interpretations, policy or opinions.” West Virginia Code §29A-1-2(c). To paraphrase the West Virginia Supreme Court in *Appalachia Power* the difference between a legislative rule and an interpretive rule is a legislative rule creates a right and thus must be approved by the legislature while an interpretive rule simply clarifies an existing rule or regulation and does not require the approval of the legislature. Accordingly, a legislative rule carries the weight and authority of any other law or statute passed by the legislature, but an interpretive rule does not have the force and effect of a statute or legislative rule as it was never approved by the legislature. See generally *Appalachia Power* at 434, 583.

West Virginia Code § 11-15-8 exempts professional services from the consumers sales and service tax. The West Virginia Tax Department has promulgated legislative rules to determine what is and is not professional services. West Virginia Code of State Rules §110-15-8.1.1.1 specifically list “enrolled agents” as providing professional services which are exempt from the consumers sales and service tax. This rule which was proposed by the West Virginia Tax Department was approved by the legislature. To further clarify the tax liability of enrolled agents the West Virginia State Tax Department issued Administrative Notice 10-25. Administrative Notice 10-25 sets out three services that enrolled agents render which are exempted from the consumers sales and service tax. Specific details on these services are not really necessary but it is enough to simply state that the only exempted services that an enrolled agent can offer which are exempt from the consumer sales and use tax involves the enrolled

agent interacting with the Internal Revenue Service or advising a client regarding the Internal Revenue Service.

As stated previously legislative rules are those voted on by the state legislature and carry the full force and effect of state law. *Appalachia Power* at 434, 583. “An Administrative Notice can either be an ‘interpretative rule’ or a ‘procedural rule’ depending on its context.” *State of West Virginia ex rel. James H. Paige, Secretary, Department of Tax and Revenue v. Honorable Herman Canady, Jr., et al*, 189 W.Va. 650, 655; 434 S.E.2d 10,15 (1993). As Administrative Notice 10-25 is seeking to simply clarify a legislative rule it is classified as an interpretative rule and thus does “not have the force of law” nor is it “irrevocably binding on ...the court.” *Appalachia Power* at 434, 583.

It is the opinion of Court that West Virginia Code of State Rules §110-15-8.1.1.1 and Administrative Notice 10-25 are inconsistent and for the following reasons the Court will not give deference to Administrative Notice 10-25. Since West Virginia Code of State Rules §110-15-8.1.1.1 carries the weight of law the Court will look to the rules of statutory construction to determine whether it needed further interpretation. The West Virginia Supreme Court stated in *Elder* that “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Syl. pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). The Supreme Court of West Virginia has likewise stated that if a statute is ambiguous it is necessary for the courts to construe it before attempting to apply it to a case. *Griffith v. Frontier West Virginia, Inc.*, 228 W.Va. 277, 719 S.E.2d 747 (2011).

West Virginia Code of State Rules § 110-15-8.1.1.1, states in its entirety that,

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. Persons who provide services classified as nonprofessional for consumers sales and service tax purposes include interior decorators, private detectives/investigators, security guards, bookkeepers, foresters, truck driving schools, hearing aid dealers/fitters, contractors, electricians, musicians, and hospital administrators; the foregoing listing is not all-inclusive but intended as containing examples of trades and occupations. 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.

The language that the West Virginia Tax Department appears to be focused on is “[t]he determination as to whether other activities are “professional” in nature will be determined by the State Tax Division on a case-by-case basis.” This is evident as Administrative Notice 10-25 spends a great deal of time discussing the licensing and testing of “enrolled agents” But it is the opinion of the Court that the West Virginia Tax Department has taken this language out of context and has thus attempted to create an ambiguity where none exist. The Legislature in passing West Virginia Code of State Rules § 110-15-8.1.1.1 explicitly stated that services provided by an “enrolled agent” were professional in nature and thus not subject to the consumers sales and use tax. Additionally, it is very clear that the language that Administrative Notice 10-25 is fixated on applies to the sentence directly preceding it. West Virginia Code of

State Rules § 110-15-8.1.1.1 midway through list a string of occupations that are not to be considered professional but then states that this list is not exhausted. The remaining portion of that rule starting with the language previously quoted in this paragraph is to assist the West Virginia State Tax Department in classifying an occupation that is not listed as professional or nonprofessional elsewhere in the rule. Additionally, West Virginia Code of State Rules § 110-15-2.65 states, “[p]rofessional service’ means and includes ... any activity determined by the West Virginia Legislature in W.Va. Code §11-15-1 et seq. to be professional.” By the West Virginia Legislature’s passing of West Virginia Code of State Rules § 110-15-8.1.1.1 it is exceedingly clear that enrolled agents provide a professional service and are entitled to whatever tax consequences or benefits flow from such designation. Accordingly, West Virginia Code of State Rules § 110-15-8.1.1.1 was not in need of interpretation and Administrative Notice 10-25 only took a rule that was clear on its face and made it unclear.

In the second half of Administrative Notice 10-25, the West Virginia State Tax Department examined West Virginia Code of State Rules § 110-15-8.1.1.3. In pertinent part it states “[p]rofessional persons...who engage in activities which are not professional services shall collect consumers sales and service tax on such sales or services.” West Virginia Code of State Rules § 110-15-8.1.1.3. As previously stated Administrative Notice 10-25 sets out only three situations where an enrolled can offer services which are exempt from the consumers sales and service tax. All three situations either require interaction with Internal Revenue Service or advising a client in regards to Internal Revenue Service policy. The Court finds persuasive the Petitioner’s comparisons to certified public accounts. The two professions share many similarities and the Tax Commissioner has not chosen to put an arbitrary limit on which duties

performed by certified public accounts are professional. Both professions are specific listed in West Virginia Code of State Rules § 110-15-8.1.1.1 as professional services and should be treated in like manner. Administrative Notice 10-25 did offer some examples of non-professional services that a professional could render which would not be considered a professional service. But those examples are of little benefit to the Court as they tend to be services that no rational individual would consider related to the profession. Such as a physician's running a bookkeeping or real estate management business; or a veterinarian boarding animals when not providing them medical care. Therefore, the Court is of the opinion that the position of the West Virginia State Tax Department as announced in Administrative Notice 10-25 is not only clearly erroneous but also arbitrary and capricious.

Therefore for the above reasons, the Court finds that Administrative Notice 10-25 was promulgated in excess of the authority granted the West Virginia State Tax Department; and thus is void and without precedential authority.

Since the Court has found that Administrative Notice 10-25 is void and without precedential authority it must now determine what effect this has on the decision of the Administrative Law Judge's decision. Judicial review of a decision of the Administrative Law Judge is governed by West Virginia Code § 29A-5-4 which states, in pertinent part, [i]t shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are: (4) [a]ffected by other error of law." The Administrative Law Judge in reaching his decision committed the same error that the Tax Commissioner committed when promulgating Administrative Notice 10-25. Both offices began their analysis with the

proposition that West Virginia Code of State Rules § 110-15-8.1.1.1 is unclear or ambiguous. The Tax Commissioner's unfounded belief that West Virginia Code of State Rules § 110-15-8.1.1.1 is ambiguous lead the West Virginia State Tax Department to promulgate Administrative Notice 10-25 which this Court has already found to be void. Due to the Administrative Law Judge's belief that that West Virginia Code of State Rules § 110-15-8.1.1.1 was ambiguous he gave deference to the administrative notice promulgated by the Tax Commissioner which he should have done if West Virginia Code of State Rules § 110-15-8.1.1.1 was indeed ambiguous. But as the Court has previously stated it does not share the opinion of the Commissioner or the Administrative Law Judge that West Virginia Code of State Rules § 110-15-8.1.1.1 is ambiguous. Accordingly, the Administrative Law Judge's reliance on Administrative Notice 10-25 is misplaced. After a careful reading of the Administrative Law Judge's Order of January 28, 2014, it is evident that the decision was based upon the erroneous position that West Virginia Code of State Rules § 110-15-8.1.1.1 is ambiguous and the voided administrative notice.

Therefore, it is the opinion of the Court that the Petitioner's rights were substantially prejudiced by the Administrative Law Judge's Order of January 28, 2014, which was affected by an "other error of law," thus the Order of January 28, 2014, is reversed and overruled, and the assessment by the West Virginia State Tax Office of the Petitioner's tax liability and interest is hereby vacated.


All accordingly which is ORDERED and DECREED.

Enter this 6th day of April, 2015.

ORDER
ENTER:


HONORABLE JAMES H. YOUNG, JR.

JUDGE OF THE SUPREME COURT
COUNTY OF BRAXTON, W. VA.

I, Susan Lemon, Circuit Clerk, do hereby certify that the foregoing is a true and accurate copy of an Order of record in my office in _____
Order book no. _____ at page _____ as taken from the records.
Given under my Hand this 7th day of April, 2015

SUSAN LEMON, pb
CIRCUIT CLERK