

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Howard J. Harper d/b/a Chuck's
Cigarettes & Vending, Petitioner Below,
Petitioner**

FILED

June 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-1044 (Randolph County 11-AA-1)

**West Virginia Department of Revenue,
State Tax Department and Craig A. Griffith,
West Virginia Tax Commissioner, Respondent
Below, Respondent**

MEMORANDUM DECISION

Petitioner Howard J. Harper, doing business as Chuck's Cigarettes and Vending, appeals the Circuit Court of Randolph County's "Final Order Dismissing Petition for Appeal" entered on June 7, 2011. The circuit court affirmed the December 29, 2010, decision of the West Virginia Office of Tax Appeals ["OTA"] that had affirmed the decision of the West Virginia Tax Commissioner to revoke petitioner's business registration certificate. On appeal, petitioner is represented by attorney Vincent L. Trivelli. Respondents, the West Virginia Tax Department and its Commissioner Craig A. Griffith, are represented by attorney L. Wayne Williams.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On November 17, 2010, the State Tax Department served petitioner with a notice of intent to revoke his business registration certificate for petitioner's failure to remit taxes. Petitioner was notified that a hearing would be held before the OTA on December 10, 2010, where he could appear and show cause why his business registration certificate should not be revoked.

West Virginia Code § 11-12-5(b)(1) [2010]¹ provided as follows:

¹ West Virginia Code § 11-12-5 was amended in 2011, but the 2010 version was in effect when the Commissioner revoked petitioner's business registration certificate.

(b) Revocation or suspension of certificate.

(1) The Tax Commissioner may cancel or suspend a business registration certificate at any time during a registration period if: . . .

(C) The registrant willfully refused or neglected to pay any tax, additions to tax, penalties or interest, or any part thereof, when they became due and payable under this chapter, determined with regard to any authorized extension of time for payment.

(D) The registrant neglected to pay over to the Tax Commissioner on or before its due date, determined with regard to any authorized extension of time for payment, any tax imposed by this chapter which the registrant collects from any person and holds in trust for this State.

At the administrative hearing before the OTA, the Tax Department presented evidence that as of December 6, 2010, petitioner owed the State of West Virginia \$964,331.33 in back taxes, additions to taxes, penalties, and interest. The unpaid taxes were primarily tobacco taxes, but also included consumer sales taxes, combined sales and use taxes, and a small amount for employee withholding taxes. The Tax Department also presented evidence that petitioner was the subject of seven unreleased tax liens totaling \$394,535.10.² These tax liens were recorded in 2005, 2006, and 2010. This evidence was presented through the testimony of Tax Department Revenue Agent Hudson Yates and through written summary tables that Yates prepared. Yates's testimony and summary tables were admitted into evidence without objection by petitioner.

At the administrative hearing, petitioner appeared *pro se* with the assistance of a non-lawyer representative, his secretary Darlene Felton. Ms. Felton testified that petitioner did not owe as much in tobacco taxes as the State Tax Department claimed, but the administrative law judge ruled that this hearing was not the forum in which to challenge assessments and liens that had previously become final. Some of the delinquency assessments and tax liens had been final for several years. Ms. Felton admitted that she and petitioner had never filed any petitions for reassessment to challenge the assessments.

After the hearing, the OTA affirmed the Commissioner's revocation of petitioner's business registration certificate. Petitioner obtained counsel and appealed to circuit court. After a hearing, the circuit court also affirmed. Petitioner now appeals to this Court. We apply the following standard of review:

In an administrative appeal from the decision of the West Virginia Office of Tax Appeals, this Court will review the final order of the circuit court pursuant to the standards of review in the State Administrative Procedures Act set forth in W.Va. Code, 29A-5-4(g) [1988]. Findings of fact of the administrative law judge will not

² The \$394,535.10 in recorded liens was included in the \$964,331.33 overall tax liability.

be set aside or vacated unless clearly wrong, and, although administrative interpretation of State tax provisions will be afforded sound consideration, this Court will review questions of law *de novo*.

Syl. Pt. 1, *Griffith v. Conagra Brands, Inc.*, No. 11-0252, 2012 WL 1912637 (W.Va., May 24, 2012).

I.

In his first assignment of error, petitioner argues that the OTA erroneously found that he repeatedly and willfully converted tax money to his own personal use. Petitioner argues that the record does not support this finding. The Tax Department argues that a fair reading of the OTA decision would be that the administrative law judge was only concluding that petitioner was delinquent on these taxes.

Upon a review of the pertinent statute, we conclude that even assuming that the “willful conversion to personal use” finding was in error, it would not warrant reversal. There did not need to be a willful conversion to petitioner’s personal use before the Tax Commissioner could revoke or suspend petitioner’s business registration certificate. All that was required by West Virginia Code § 11-12-5(b)(1)(C) [2010] was that petitioner “willfully refused or neglected to pay” a tax, addition to tax, penalty, interest, or any part thereof when it became due and payable. All that was required by West Virginia Code § 11-12-5(b)(1)(D) [2010] was that petitioner “neglected to pay” a trust tax on or before its due date. Under the applicable standard of review, and in light of the multiple unpaid assessments and liens, there was sufficient evidence to satisfy the statutory requirements for revocation.

II.

In his second assignment of error, petitioner argues that the OTA erroneously found that he had defaulted on payment plan agreements. He argues that the record does not support this finding. In particular, petitioner points to a discussion at the administrative hearing where the revenue agent was asked to speculate on the date of a default. The Tax Department argues that even though the agent could not remember a particular date, there was still sufficient evidence in the record that petitioner defaulted on his payment plans more than once.

The administrative law judge permitted Ms. Felton to address the issue of whether petitioner was current on the payment plans. However, applying the applicable standard of review for factual findings, we cannot conclude that the OTA was clearly wrong on this issue. Even disregarding the instance of speculation about a date, the revenue agent still testified that petitioner was in default on payment plans, and the agent’s testimony and summary tables set forth the amount of the delinquencies. We cannot conclude that Ms. Felton’s evidence contradicted the Tax Department’s evidence.

III.

Petitioner next asserts that it was error to affirm the revocation because the Tax Department presented evidence of the various delinquencies through the use of summary tables, without providing any substantive evidence that the summaries were accurate or what underlying facts existed to support the summaries. The Tax Department responds that OTA hearings are informal proceedings to which the Rules of Evidence do not apply, and that a summary table is a type of document that the Tax Department creates and relies upon in its normal course of business. After reviewing the transcript of the administrative hearing, we find no reversible error. While petitioner possibly could have challenged the admissibility of these summaries, the fact remains that, during the hearing, his representative Ms. Felton expressly had no objection to their admission.

Petitioner incorporates into this assignment of error his allegation that the administrative law judge erred by disregarding Ms. Felton's testimony that petitioner did not owe all of the taxes that the Tax Department said he owed. However, petitioner does not dispute that the Tax Department issued various assessments against him for these amounts; that he never filed any petitions for reassessment; and that tax liens were recorded against him. Some of the tax delinquencies originated several years earlier. West Virginia Code § 11-10-8(a) provides that an assessment shall become final and conclusive of the taxpayer's liability, and not subject to administrative or judicial review, unless the taxpayer files a petition for reassessment within sixty days. Rather than filing a petition for reassessment, Ms. Felton testified that she telephoned somebody within the Tax Department and hoped that "once [a particular tobacco tax assessment] goes through to Charleston and they see how ridiculous the amount is compared to what we purchase, they will do some type of an internal audit[.]" We agree with the OTA that a taxpayer cannot collaterally challenge what is already a final and conclusive tax assessment in the context of a hearing on the revocation of a business registration certificate.

IV.

In his fourth assignment of error, petitioner argues that the OTA erred by permitting him to participate in the administrative proceeding without the benefit of legal counsel. Petitioner argues that he and Ms. Felton did not understand the nature of the proceedings and were unable to adequately respond. The OTA's rules permit a taxpayer to appear *pro se* or by a non-lawyer representative, however, the rules also provide that "[w]here a party attempts to represent himself or herself and, in the opinion of the office of tax appeals there is a serious question as to such party's competence to do so, the office of tax appeals, if it deems justice so requires, may continue the case until appropriate steps have been taken to obtain an adjudication of the question by a court having jurisdiction so to do, or may take such other action as it deems proper." W.Va. C.S.R. § 121-1-17.2. Upon a review of the administrative hearing transcript, we find no reversible error. Petitioner had the right to appear *pro se*, and the transcript does not suggest a serious question of his competency to do so. Petitioner also asserts that he asked for a continuance of this hearing, but no request is reflected in the appendix record he submitted on appeal.

V.

Last, petitioner argues that the OTA violated its own procedural rules by not requiring the filing of a petition to revoke his business registration certificate, not requiring the parties to file stipulations, and by not holding a pre-hearing conference. Petitioner cites to West Virginia Code of State Rules §§ 121-1-21, -47, and -49. With regard to the filing of a petition, the Tax Department asserts that it fully complied with the requirements of West Virginia Code § 11-12-5(b)(4) [2010] by giving petitioner written notice of its intent to revoke for failure to pay taxes, and by setting the time and place where petitioner could appear to show cause why the certificate should not be revoked. Moreover, the Tax Department asserts that under Rule § 121-1-47.1.1, stipulations are only required “to the fullest extent to which complete or qualified agreement can or fairly should be reached[,]” and there is no indication that stipulations could even be reached in this case. The Tax Department also states that pursuant to Rule § 121-1-49.1, a prehearing may be waived by the administrative law judge. The Tax Department argues that West Virginia Code § 11-12-5(b)(5) [2010] provides for an expedited process to revoke a business registration certificate, requiring only a twenty day period between the revocation notice and the hearing. Upon a review of this issue, we find no reversible error.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh