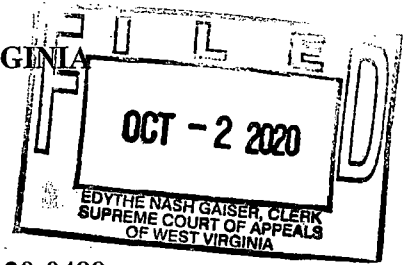


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN KEENER, dba
MOUNTAINEER INSPECTIONS SERVICES, LLC,
Petitioner,

v.
DALE W. STEAGER, as
STATE TAX COMMISSIONER OF WEST VIRGINIA,
Respondent.

Docket No. 20-0488



BRIEF OF AMICUS CURIAE W.V. ASSOCIATION OF HOME INSPECTORS

Brief supporting the positions and argument of Petitioner,
seeking a reversal of the Order of the Circuit Court

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**AMICUS CURIAE BRIEF OF WEST VIRGINIA
ASSOCIATION OF HOME INSPECTORS**

In compliance with Rule 30, WV Rules of Appellate Procedure, West Virginia Association of Home Inspectors (WVAHI) submits the following brief in support of the Petitioner who is seeking reversal of the Circuit Court Final Order.¹

A. Identity of Amicus Curiae.

WVAHI is a domestic non-profit voluntary association registered with the West Virginia Secretary of State in 2001. Association membership consists solely of “home inspectors” certified by the West Virginia State Fire Marshal pursuant to WV Code 29-3-5b(d) and WV Code Reg 87-5-2. There are approximately 60 members of the Association, each of whom is engaged in the profession of home inspection and has a significant vested interest in the outcome of this appeal which seeks to resolve whether compensation derived from home inspection services is subject to consumer sales and service tax and use tax.

¹ No other counsel authorized any part of this brief. No person or entity, other than West Virginia Association of Home Inspectors, made any financial contribution toward the preparation or submission of this brief. The funds of said Association are derived solely from the regular dues paid by its members who are West Virginia certified home inspectors.

B. Statement of the Case.

This case is an appeal of a Circuit Court decision following an appeal of a Tax Appeals Office Final Decision. The sole issue presented is and was whether compensation received for services rendered by West Virginia certified home inspectors is subject to State consumer sales and service tax and use tax. The determination of such issue was dependent, according to the Tax Appeals Office and Circuit Court, on whether the Tax Department abused its discretion in deciding that home inspection services in West Virginia are “nonprofessional” and thus subject to the tax.

The Tax Appeals Decision found that the Tax Department classified “home inspection” services as “nonprofessional” based primarily on its policy that a minimum four (4) year college degree is an educational requirement imposed on a service occupation to be classified by the Tax Department as “professional”, and thus exempt or excepted from the tax. The Tax Appeals Decision rejected the creation and application by the Tax Department of a four (4) year college degree as a prerequisite to be considered a professional service, but concluded that the Tax Department had not abused its discretion in concluding that home inspection services are nonprofessional in nature and subject to the tax.

The Circuit Court affirmed the decisions of the Tax Department and Tax Appeals Office to not exempt or except home inspection services from consumer sales and service tax and use tax, and reversed the Tax Appeals Decision that the Tax Department’s requirement of a four (4) year college degree as a prerequisite to classification as a “profession” was improper.

C. Statement of the Facts.

The case was presented to the lower tribunals on undisputed stipulated facts. To better appreciate the legal issues presented, a brief factual history of home inspection and the regulation thereof may be helpful. Prior to this century, home inspection services in West Virginia were unregulated. No licensure or certification was required of home inspectors, and no statutes or regulations created minimum standards of practice. In the first part of this century, national standards of practice were developed by industry associations, and various state legislatures took steps towards regulating home inspection by adopting many of those standards.

West Virginia commenced implementing such standards and imposing regulatory oversight by first amending WV Code 29-3-5b, placing the authority to set standards for certification and regulation of “home inspectors” with the State Fire Commission. Thereafter, in approximately 2006, legislative rules were submitted by the State Fire Commission and approved by the Legislature which define “home inspection” services and set forth the requirements for obtaining and maintaining certification as a “home inspector”.² WV Code Reg 87-5-1 et. seq.

Under the current statutory and regulatory scheme, to be qualified for certification a “home inspector” is required to complete high school or its equivalent, pass a national or comparable exam, and have either three (3) years of prior experience or 80 hours of approved instruction. WV Code Reg 87-5-4. Dwelling components for which the inspector must have extensive knowledge include: “heating system, cooling system, electrical system, plumbing system, structural components, foundation, roof covering,

² A “legislative rule has the force and effect of law”. Smith v. W.Va. Human Rights Comm’n, 216 W.Va. 2, 4, 602 S.E., 2d 445, 447 (2004).

exterior and interior components and site aspects as they affect the dwelling.” WV Code Reg 87-5-2.5.e. Certification is subject to annual review and conditioned upon completion of sixteen (16) Continuing Education Units annually, and requires proof of minimum liability insurance coverage. WV Code Reg 87-5-4 and 6.

Home inspectors are obligated to fully inspect readily accessible itemized building components and then promptly provide a written report to the client. WV Code Reg 87-5-11.1. The home inspection report, as the Legislature stated in WV Code Reg 87-5-2.5e, sets forth the home inspector’s “professional opinion of the condition of a building ...” (emphasis added).

D. Argument Summary.

- (1) Requiring a four (4) year college degree, as a condition for classification as a “professional” service provider exempt or excepted from consumer sales and use tax, violates the clear legislative intent that factors other than a college degree be considered.
- (2) The Legislature clearly and unequivocally defined home inspection services as “professional”, and thus compensation derived from performing home inspection services is not subject to consumer sales and use tax.
- (3) Alternatively, the Tax Department abused its discretion in failing to classify home inspection services as “professional” and exempt from consumer sales and use tax, when legislation characterizes such services as professional and all other factors support classification of such services as professional.

E. Argument.

(1) Four (4) Year Degree Requirement.

The authority of the Tax Department to collect consumer sales and service tax and use tax is derived from WV Code 11-15-1 et. seq. Services subject to taxation include “all nonprofessional activities engaged in for other persons for consideration ...” WV Code 11-15-2(b)(18). Expressly excepted from the tax are “professional” services. WV

Code 11-15-8: It is presumed that services are subject to the tax unless and until the service provider meets its burden of proving otherwise. WV Code 11-15-6.

WV Code Reg 110-15-8 repeats that consumer sales and service tax and use tax is applicable to all services except “professional” services. The regulation proceeds to specify those professional services excepted from the tax. Thirty-seven specific occupations are identified as professional service providers excepted from the tax, including “registered professional court reporters”, “licensed real estate appraisers,” and “licensed real estate brokers”, none of whom are required to possess a college degree.

The regulation further provides that classification of other business activities as “professional” is to be either by an amendment by the Legislature to W.Va. Code 11-15-1 et. seq. to expressly name such service provider as a “professional”, or by Tax Department decision on a case-by-case basis.³ In making decisions on a case-by-case basis, the Tax Department is mandated to consider, at a minimum, each of four (4) general factors. Code Reg 110-15-8.1.1.1.

WV Code Reg 110-15-8.1.1.1 states that the Tax Department “will consider such things as” educational requirements, standards of performance, licensure, “and” continuing education requirements. (Emphasis added). In this case, the only factor the Tax Department and Circuit Court indicated needed to be considered was the lack of a requirement of a four (4) year college degree. As a result, the mandate that at a minimum all four (4) of the general factors must be considered was not met, and accordingly as minimum relief the Circuit Court decision should be reversed and remanded with instructions that all stated factors should be considered.

³ Amending WV Code 11-15-1, et seq., is illogical, as nowhere in the Article is any particular profession classified as either professional or nonprofessional. Only WV Code Reg 110-15-8.1.1.1 identifies specific occupations as “professional”.

Given that several occupations not requiring four (4) year college degrees have been classified in the regulation as "professional", and that the regulation does not expressly limit educational achievement to formal accredited college instruction, a four (4)-year college degree bears little relevance to objective minimum qualifications for home inspectors. Home inspectors are required to possess extensive knowledge of the structural and working components (HVAC, plumbing, electrical) of a residential dwelling, obtained through instruction, experience, and knowledge and familiarity with national standards adopted by our State Fire Commission for which certified home inspection candidates are stringently tested. (See, WV Code Reg 87-5-15 through 23, identifying the numerous components about which a home inspector must possess detailed knowledge). One need not attend a college to acquire the extensive knowledge necessary to competently perform every professional occupation. Knowledge can be obtained through various educational means.

It is further noted that the Circuit Court expressed confusion in its Final Order as to what constitutes "home inspection". In concluding that imposition of a four (4) year college degree requirement was appropriate, the Circuit Court mistakenly characterized "inspections" excepted from home inspector certification in Code Reg 87-5-3 as justification for requiring a college degree. (See, Final Order, June 4, 2020 p. 10). Home inspection is clearly defined by applicable regulations, can only be performed by a certified home inspector, and is a significantly more technical and thorough process of inspecting and reporting than the exempted "inspections" cited by the Circuit Court in its opinion. No one is suggesting that inspections performed by persons not meeting the

qualifications for home inspection certification, and not being certified, should be exempt from consumer sales and service tax and use tax.

(2) Legislative Designation of Home Inspection Services as Professional.

The issues presented on appeal are clearly questions of law or involve interpretation of a statute. Accordingly, a *de novo* standard of review is to be applied.

Apollo Civic Theater v. State Tax Comm'r, 223 W.Va. 79, 672 S.E. 2d 215 (2008) (Syl. Pt. 1); Bluestone Paving, Inc. v. Tax Commissioner, 214 W.Va. 684, 591 S.E. 2d 242 (2003) (Syl. Pt. 2). When conducting such review:

Where a particular construction of a statute would result in an absurdity, some other construction, which will not produce such absurdity, will be made. (Citation omitted). Bluestone Paving, Inc., *supra.*, Syl. Pt. 5

“As a general rule, statutes imposing taxes are construed strictly against the taxing authority and liberally in favor of the taxpayer.” Ballard’s Farm Sausage, Inc. v. Dailey, 162 W.Va. 10, 246 S.E. 2d 265 (1978) (Syl. Pt. 2).

WV Code 11-15-2(b)(18) explicitly provides that the only “services” subject to consumer sales tax are “nonprofessional activities”. WV Code 29-3-5b(d) delegated to the State Fire Commission the authority to proposed legislative rules regarding home inspectors, and a legislatively-approved rule expressly states that the primary activity of home inspectors is to provide a “professional” opinion regarding the condition of a dwelling and its components. WV Code Reg 87-5-2.5e.

Under such circumstance, the WVAHI contends that compliance with WV Code 11-15-8.1.1.1 is not the exclusive method of determining whether a service is professional or nonprofessional for tax purposes. To suggest that the only means by which the Legislature can describe a service as “professional” is to amend WV Code 11-

15-1, et. seq., is absurd. Nowhere in such Article is any occupational activity or service classified as either “professional” or “nonprofessional” for purposes of consumer sale and service tax or use tax, and it makes no sense that the statute would be amended to identify a particular occupational service as such.

WV Code Reg 87-5-2.5.e. reflects the Legislature’s intent to define home inspection as a professional service. Home inspection includes both visual analysis of the structure and components, and rendering the inspector’s “professional” opinions regarding the condition of such structure and components in a written report. (See, Code Reg 87-5-2.5.f.) To provide “professional” opinions, the inspection (visual analysis) must be performed professionally.

While the Legislature may delegate to an administrative agency the power to make rules and regulations to implement a statute, such rules and regulations may not be inconsistent with or limit the statute’s application, and may not be construed in a manner contrary to the clear language of the statute. Apollo Civic Theatre v. State Tax Comm’r. 233 W.Va. 79, 672 S.E. 2d 215 (2008) (Syl. Pts 3 and 5). Here, WV Code Reg 11-15-8.1.1.1 limits the ability of the Legislature to expressly classify a service occupation as “professional” for tax purposes by requiring an amendment of specific tax statute and precluding such legislative classification in other statutes or approved legislative rules regulating the service occupation.

Such limitation violates the clear language of WV Code 11-15-8 limiting liability for consumer sales and service tax to “all nonprofessional” services, where the Legislature has expressly characterized home inspection as “professional” in WV Code Reg 87-5-2.5. Simply put, compliance with Code Reg 11-15-8.1.1.1 cannot be the sole

means for classifying an occupation as a “professional” service provider exempt from consumer sales and service taxation, particularly where such regulation both limits the manner by which the Legislature may classify a service as professional and authorizes the Tax Department to exercise unfettered discretion to classify a service provider as nonprofessional without first considering any specific standards or criteria.

In Apollo Civic Theater v. State Comm’r, the Court ruled that it would be “the final authority on issues of statutory construction” of WV Code 11-15-2(b) (18) and related sections. Id., Syl. Pt. 5. The Court proceeded to construe the statute exempting or excepting “professional” services from consumer sales and service tax and use tax, and a legislative rule of the Tax Commissioner defining “health and fitness” activities exempt from the tax as only physical health and excluding mental or spiritual health. (See, WV Code Reg 110-15D-3.7). The theater taxpayer argued that “health and fitness” contained in the Code was ambiguous and should be construed broadly to include mental and spiritual health, despite the limiting language in the legislative rule. The Court agreed, stating that the legislative rule must conform to the Legislature’s intent. Apollo Civic Theatre, 673 S.E. 2d at 221. The Court struck down the limiting and restrictive language in the legislative rule, and broadly define the phrase “health and fitness” in the statute, resulting in the taxpayer being exempt from the tax.

Similarly, in this case the Legislature has expressly limited those activities subject to consumer service tax to “nonprofessional” services. The legislative rules attempting to list and/or define “professional” services identifies a diverse group of occupations and otherwise grants to Tax Department broad, unfettered discretion to exclude other occupations as professional without following clear guidelines or standards. In the

absence of clear criteria which would allow for an objective evaluation of whether an activity is either a professional or nonprofessional service, the taxpayer is at the mercy of a Tax Department who has substantially restricted and limited those who may qualify as a professional service provider. Such result runs counter to the intent of the Legislature as expressed in WV Code 11-15-2 and 8, and WV Code Reg 87-5-2.e., that home inspection is a profession. Accordingly, the Circuit Court opinion should be reversed with directions that home inspection services performed by a certified home inspector are not subject to consumer sales and service tax or use tax.

3. The Tax Department Abused Its Discretion.

The statutory and regulatory scheme for imposing consumer sales and service tax on business activity delegates to the Tax Department unrestricted discretion to exclude, on a case-by-case basis, certain businesses as professional for consumer tax purposes. The general criteria the legislative rule requires that the Tax Department consider are broad, vague, ambiguous and lacking in any specifics which would permit an objective assessment for determining appropriate business classification. WV Code Reg 110-15-8.1.1.1. Accordingly, strict construction of the legislative rule, and liberal application in favor of the taxpayer, is warranted.

While it may be difficult to assess whether the Tax Department abused its discretion where specific standards are lacking, it becomes clear that the Tax Department's decision was arbitrary and capricious when the four general factors set forth in the legislative rule are considered.⁴ Code Reg 110-15-8.1.1.1. The Tax

⁴ "In general, an abuse of discretion occurs when a material fact deserving weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the [lower] court makes a serious mistake in weighing them". Gentry v. Magnum, 195 W.Va. 512, 520 466 S.E. 2d 171, 179 (1995).

Department unquestionably relied on an improper factor when it disqualified home inspection from consideration as professional services because a college degree was not required for certification. The legislative intent is clearly to the contrary. The legislative rule expressly classifies several service occupations as professional despite a college degree not being a precondition for licensure, and it does not otherwise state or imply that any particular formal educational degree is required as a precondition to being classified as a professional service.

The Tax Department similarly ignored the Legislature's characterization of home inspection services as "professional" in WV Code Reg 87-5-2.5e., and gave little to no weight to the non-traditional educational requirements, to nationally recognized standards for performance, to licensing requirements, and to continuing education requirements set forth in the home inspection regulations. WV Code Reg 87-5-1 et seq. lists the multiple areas of specialized knowledge a home inspector must possess to obtain certification, including structural and foundational, electrical, plumbing, HVAC and site condition of dwellings, garages and outbuildings.⁵ The regulations require that to obtain certification, one must pass the "National Home Inspector Examination" offered by the national board, or other comparable exam approved by the State Fire Marshal. WV Code Reg 87-5-4.a. Without becoming sufficiently educated on the myriad of national standards covering dwellings, foundations, structural components and utility components, successfully completing the examination would not be possible. It does not appear the Tax Department assigned any weight to such factor.

⁵ Not surprisingly, a comparison of a list of licensed civil engineers to a list of certified home inspectors will reveal that several home inspectors are also engineers.

Further, it does not appear that the Tax Department properly considered and weighed the extent of nationally recognized standards for home inspection, and the incorporation of much of those standards in the State Fire Marshal's regulations. In 2006, the American Society of Home Inspectors (ASHI), a national association, published standards of practice and a code of ethics, much of which was adopted by the State Fire Marshal when drafting the approved legislative rules regulating home inspection. The regulations require satisfactory completion of an exam on "national" standards to qualify for certification as a home inspector. It appears the Tax Department failed to acknowledge and adequately weigh the existence, and adoption in our regulations, of national home inspection standards.

The certification required by the State Fire Marshal is the equivalent of licensure, and is conditioned on successful completion of the national standards exam, substantial prior experience (3 years or 80 hours of specialized instruction), high school diploma or equivalent, and liability insurance coverage. WV Code Reg 87-5-4. Annual renewal of certification requires annual completion of 16 hours of continuing education. WV Code Reg 87-5-6. Such requirements do not deviate substantially from those imposed on architects, engineers, attorneys and various health care providers, all of whom are recognized as professionals. Further, as with other professionals, home inspectors are subject to answering complaints filed with, and subject to disciplinary action taken by, the State Fire Marshal who oversees the profession. WV Code Reg 87-5-28.

Fundamental fairness requires that the assessment and determination of whether an occupational activity is a professional service be based on objective standards, not subjective criteria applied by a State agency which have not been approval by the

Legislature. Similarly situated occupations should be treated similarly by regulatory agencies. Here, from and after the passage and implementation approximately fifteen (15) years ago of strict qualifications and standards for home inspection, home inspectors have been subject to strict and comprehensive licensing requirements, broad and comprehensive practice standards, and thorough regulatory oversight substantially similar to those imposed on many other recognized professions.

Home inspection, as it currently exists in this State, objectively meets the definition for "professional" classification in WV Code Reg 110-15-8.1.1.1. Broad specialized knowledge is required, which can best be obtained through an educational process which does not necessarily require a college degree. National standards have existed for well over a decade, most of which have been incorporated into our State regulations and the formal examinations which home inspector candidates must successfully complete. Licensing or certification is required, along with liability insurance coverage, annual continuing education, and disciplinary oversight by a State agency.

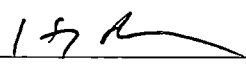
Having met reasonable objective standards for the classification of home inspection as a "professional" service, the Tax Department's refusal to so acknowledge was arbitrary, capricious and an abuse of discretion. Accordingly, the decision of the Circuit Court should be reversed and remanded with instructions to exempt or except home inspection services from consumer sales and service tax and use tax.

F. Conclusion.

The precondition of requiring a college degree imposed by the Tax Department upon occupations seeking classification as a "professional" service provider for consumer

sales and service tax and use tax purposes is contrary to legislative intent, unduly restrictive and limiting, arbitrary and capricious, and thus unenforceable. The Legislature clearly expressed its intent that home inspection be considered a "professional" service in approved home inspection legislative rules, which should be controlling in classifying home inspection for consumer sale and service tax and use tax purposes. Alternatively, an objective analysis and assessment of the factors applicable to Tax Department case-by-case classification of a business as professional or nonprofessional requires that home inspection be classified as professional service.

WEST VIRGINIA ASSOCIATION
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CERTIFICATE OF SERVICE

I, Henry R. Glass, III, Counsel for Petitioner, do hereby certify that I served or caused to be served true and exact copies of the foregoing *AMICUS CURIAE BRIEF OF WEST VIRGINIA ASSOCIATION OF HOME INSPECTORS* upon the following, by emailing and by U.S. Mail a true copy thereof to the following individuals, on this 5th day of October, 2020.

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