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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**Docket No. 20-0488**

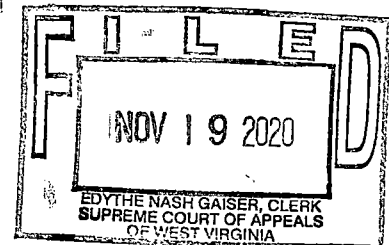
**JOHN KEENER d/b/a MOUNTAINEER INSPECTION  
SERVICES, LLC,**

**Petitioner,**

**v.**

**DALE W. STEAGER, STATE TAX COMMISSIONER  
OF WEST VIRGINIA,**

**Respondent.**



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**RESPONSE BRIEF OF THE WEST VIRGINIA STATE TAX COMMISSIONER**

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Respectfully Submitted By:

**ANDREW L. ELLIS**  
**ASSISTANT ATTORNEY GENERAL**  
W.Va. State Bar No. 10618  
State Capitol  
Building 1, Room 435-W  
Charleston, WV 25305  
Telephone: (304) 558-2522  
Andrew.L.Ellis@wvago.gov

*Counsel for Dale W. Steager,  
State Tax Commissioner of West Virginia*

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## **I. SUMMARY OF ARGUMENT**

The primary issue on appeal is whether or not home inspection services qualify for an exemption from the West Virginia consumers sales and service tax. There are two fundamental principles of West Virginia law underlying this case: (1) tax exemptions are strictly construed against the taxpayer, and (2) if a statute or legislative rule is silent or ambiguous on a specific issue, the administrative agency, in this case the State Tax Department, has discretion to interpret it.

With respect to the first principle, it has been well-established in West Virginia that home inspection services do not qualify for an exemption from the consumers sales and service tax. As discussed below, the applicable statutes and regulations have been in place since the early 1990s or before, and over the years various home inspector service providers have unsuccessfully tried to claim an exemption from the consumers sales and service tax. The insignificant change that the Petitioner relies on to attempt to distinguish this case from prior cases is the fact that home inspectors are now subject to regulation by the State Fire Marshal. Many types of service-providers are subject to regulation, but that has no bearing on whether they qualify for exemption from the consumers sales and service tax. The same applies to home inspection services.

With respect to the second principle, the Tax Department's interpretation and application of the legislative rule that is at issue in this matter should not be substituted. The Tax Department has interpreted the legislative rule to say one thing, and the Petitioner has applied a strained interpretation to say another. Based on the foregoing, this Court should affirm the decision of the Circuit Court determining that home inspection services are not exempt from the consumers sales and service tax and determining that the Tax Department's interpretation of the

legislative rule is permissible, and is the correct and controlling interpretation of the legislative rule at issue.

## **II. STATEMENT REGARDING ORAL ARGUMENT**

The Tax Commissioner requests oral argument pursuant to Rule 19 of the Revised Rules of Appellate Procedure. Rule 19 argument is appropriate as the Petitioner's appeal primarily involves a narrow issue of law.

## **III. STANDARD OF REVIEW**

The standard of review on appeal is well settled. The issue before this Court is a legal question, which is subject to *de novo* review. See Syl. pt. 1, *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000). "An inquiring court-even a court empowered to conduct *de novo* review-must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." *Id.* at 582. Furthermore, "[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Syl. pt. 4, *Security Nat. Bank & Trust Co. v. First W.Va. Bancorp, Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981).

This Court reviews the decisions of a circuit court, when the latter was sitting as an appellate court, under the same standard by which a circuit court is required to review the decision of the lower tribunal or administrative agency in the first instance. *Martin v. Randolph Cnty. Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995).

West Virginia Code § 11-10A-19(f) provides that appeals from the Office of Tax Appeals (hereinafter sometimes referred to as "OTA") shall be governed by the standards set forth in the Administrative Procedures Act. Specifically, West Virginia Code § 29A-5-4(g) provides that:

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

#### IV. ARGUMENT

**A. The Circuit Court of Taylor County correctly concluded that home inspector services do not qualify as professional services under West Virginia law.**

West Virginia imposes a general consumers sales and service tax. *See* W. Va. Code §§ 11-15-1, *et seq.* and 11-15A-1 *et seq.*<sup>1</sup> Accordingly, all sales of tangible personal property and services are subject to consumers sales and service tax. *See* W. Va. Code § 11-15-3. If a vendor fails to collect and remit the consumers sales and service tax, the vendor is personally liable for the tax. *See* W. Va. Code § 11-15-4a. In order to prevent evasion, all sales and services are presumed to be taxable until proven otherwise. *See* W. Va. Code § 11-15-6(b).

By statute, the provision of professional services, personal services, and services regulated by the West Virginia Public Service Commission, are excepted from the consumers

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<sup>1</sup> The West Virginia consumers sales and service tax was first imposed as a temporary tax in 1933, and made permanent in 1937. The tax applies to “the furnishing of all services, except professional and personal services, and except those services furnished by corporations subject to the control of the public service commission.” Thus, in general, West Virginia taxes all services, unless an exemption applies. This tax treatment of services is in contrast to the laws of many other states which exempt services from tax in general, unless the legislature of that state expressly says that a service is taxable.



sales and service tax. *See* W. Va. Code § 11-15-8. It is well settled under West Virginia law that exemptions from tax are strictly construed against the taxpayer. This Court has consistently ruled in consumers sales and service tax cases:

“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.” Syllabus Point 4, *Shawnee Bank, Inc. v. Paige*, 200 W.Va. 20, 488 S.E.2d 20 (1997) (citations omitted).

Syl. Pt. 1, *RGIS Inventory Specialists v. Palmer*, 209 W.Va. 152, 544 S.E.2d 79 (2001).

Significantly, the seminal case of *Wooddell v. Dailey*, 160 W.Va. 65, 68, 230 S.E.2d 466, 469 (1976), addressed the similar question regarding whether the services of an interior decorator could be classified as professional services under West Virginia Code § 11-15-8<sup>2</sup>. This Court has squarely ruled, “[h]owever, any such other profession [not plainly contemplated by statute] must be clearly established as a profession by the one who asserts that the services rendered by him in connection therewith are ‘exempt’ or ‘excepted’ and hence not taxable.” *Wooddell v. Dailey*, at 70, 470.

The prior decisions of this Court on this exact point of law were codified by the Legislature in 2009 in West Virginia Code § 11-10-25(a) which states, “...Tax exemptions administered by the Tax Commissioner shall be strictly construed against the taxpayer and for the payment of any applicable tax.” Similarly, a taxpayer who appeals a tax assessment before the Office of Tax Appeals generally carries the burden of proving that he is entitled to relief. *See* W. Va. Code § 11-10A-10(e). Therefore, Mountaineer Inspection, who appealed the assessment

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<sup>2</sup> *Wooddell v. Dailey* was decided in 1977 under the statutory framework in existence at that time. The legislative rule for the consumers sales and service tax was promulgated in 1993. Therefore, the proper analysis must be based on the legislative rule which formally grants limited discretion to the Tax Department to classify additional services as professional services.

to OTA, is required to meet a high bar to prove that its services qualify as professional services for consumers sales and service tax purposes.

The consumers sales and service tax statute does not define the operative term “professional services.” See W. Va. Code § 11-15-2 (definitions). If a statute is silent or ambiguous on a specific issue, the administrative agency, in this case the State Tax Department, has discretion to interpret the statute. See, e.g, Syl. Pt. 4, *Appalachian Power, et al., v. State Tax Department*, cited *infra*. Therefore, the Tax Department promulgated a legislative rule to clarify the ambiguities in the consumers sales and service tax statute.

Under West Virginia law, legislative rules have the full force and effect as law. In the recent decision applying the legislative rule for *ad valorem* property tax, the Supreme Court ruled:

“A regulation that is proposed by an agency and approved by the Legislature is a ‘legislative rule’ as defined by the State Administrative Procedures Act, *W. Va. Code*, 29A-1-2(d) [1982], and such a legislative rule has the force and effect of law.”.

Syl. Pt. 4, *Steager v. CONSOL Energy, Inc.*, 242 W.Va. 209, 832 S.E.2d 135 (2019) (quoting Syl. Pt. 5, *Smith v. W. Va. Human Rights Comm’n*, 216 W.Va. 2, 4, 602 S.E.2d 445, 447 (2004)); see also, Syl. Pt. 2, *Chico Dairy Company, Store No. 22, v. W.Va. Human Rights Commission*, 181 W.Va. 238, 382 S.E.2d 75 (1989) (legislative rules have the full force and effect of law); *Appalachian Power Company, et al., v. State Tax Department*, 195 W.Va. 573, 583, 466 S.E.2d 424, 434 (1995) (legislative rules have the full force and effect of law); See also W. Va. Code § 29A-1-2(e). Consequently, the mandatory requirements set forth in the legislative rule carry the same weight as if they were set forth in a statute.

The legislative rule at issue specifically enumerates thirty-seven services as professional services which are, in turn, excepted from the consumers sales and service tax. Home inspection

services are not expressly classified as professional services for consumers sales and service tax purposes according to the legislative rule. *See* W. Va. Code R. § 110-15-8.1.1.1.

The West Virginia Legislature has granted limited discretion to the Tax Department to classify additional services as professional services. The legislative rule expressly states that the Tax Department may classify additional activities as professional services if they meet the test set forth in the legislative rule. The legislative rule states in pertinent part:

... 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. The legislative rule clearly lists four factors that the Tax Department must consider in this determination—1) the level of required education, 2) the nature and extent of nationally recognized standards of performance, 3) state and federal licensing requirements, and 4) the extent of continuing education required.

Mountaineer Inspection does not meet any of the requirements to be deemed a professional. First, home inspection services do not fall within the scope of medicine, theology and the practice of law, which were recognized as professions at common law. Second, home inspection services is not listed as a professional service in the legislative rule. Third, home inspection services do not meet the mandatory four-part test set forth in the legislative rule.

If a service business activity has not been designated by the Legislature as “professional” and is not otherwise a profession under common law, then, in order to qualify as a professional service under the legislative rule, the activity must meet all four factors of the mandatory four-

part test outlined in West Virginia Code of State Rule § 110-15-8.1.1.1. Home inspection services fail the mandatory test in significant ways.

(1) **Education:** In order to be certified by the State Fire Marshal who regulates home inspection services the applicant must have a high school diploma or its equivalent. No additional formal education is required. *See* W. Va. Code R. § 87-5-4.1.c. However, the Fire Marshal's rule, West Virginia Code of State Rules § 87-5-4.1.b, refers to completion of at least eighty hours of instruction for inspectors not otherwise grandfathered in on the effective date of the rule.

The Tax Department has long taken the position that a high school diploma or a GED is not sufficient to fulfill the "education factor" requirement. The Fire Marshal's "80 hours of instruction" requirement cannot rise to the level of a professional education. The expected minimum education required in order for an activity to be classified as a professional service is a four-year college degree or its equivalent. The OTA has previously ruled that a relevant degree from an accredited college or university is required. *See, e.g.,* W. Va. Tax Decision 06-340 C, 2007 WL 9617856 (W. Va. Off. Hrg. App, Sept. 28, 2006) discussed *infra*. In addition, W.Va. Tax Dec. 03-418 C, 2004 WL 1416147 (W.Va Off. Hrg. App. March 17, 2004) and W.Va. Tax Dec. 96-098 CS, 1998 WL 1048430, (W.Va Off. Hrg. App. Sept. 21, 1998) determined that home inspectors do not provide a professional service.

While some occupations listed in the legislative rule as providing a professional service do not require any more education than a high school diploma, that does not help Mountaineer Inspection in its argument. The Legislature is free to designate any service as a professional service regardless of the educational requirement. However, the Legislature did not grant unfettered discretion to the Tax Department; the Tax Department must apply the criteria

expressly authorized by the Legislature. For example, there is no specific educational requirement for licensed real estate appraisers. Nevertheless, the Legislature chose to designate these services as professional services under the legislative rule and that designation is binding on the Tax Department. *See* W. Va. Code R. § 110-15-8.1.1.1.

Home inspection services fail part 1, the education requirement, of the four-part test.

(2) **Nature and extent of nationally recognized standards of performance:** In support of its argument, Mountaineer Inspection states that home inspection service providers “must pass a national exam, similar to the boards and bar exams that doctors and lawyers must contend with after completing their degrees.” Petitioner’s Brief, at 12. That is not the case. The National Home Inspector Examination contains 200 multiple-choice questions, and the applicant is given four hours to complete the exam. *See* National Home Inspector Examination FAQ at <https://nationalhomeinspectorexam.org/frequently-asked-questions-2/>. This exam is not at all similar to the bar exam or medical board certification exams. In addition, it should be noted that West Virginia Code of State Rule § 87-5-4.1.a does not exclusively require that an applicant pass the National Home Inspector Examination. Rather, the rule provides for the applicant to pass either the National Home Inspector Examination, or an “other, comparable examination, as determined or designated by the State Fire Marshal.” W. Va. Code R. § 87-5-4.1.a.

Home inspection services fail part 2, the nature and extent of nationally recognized standards of performance requirement, of the four-part test.

(3) **State and federal licensing requirements:** Mountaineer Inspection argues that because home inspectors are subject to regulation by the State Fire Marshal, they should be deemed professionals for purposes of the consumers sales and service tax. *See* Petitioner’s Brief, at 11, 13. Significantly, the Fire Marshal’s legislative rule allows for the home inspections to be

performed by individuals who are not certified by the State Fire Marshal:

3.1. This rule does not apply to, and a certification is not required for, the following persons:

3.1.a. A person, employed by a governmental entity, who inspects residential dwellings as part of his or her official duties and responsibilities for that entity;

3.1.b. A person performing an inspection of a residential dwelling on behalf of a bank, savings and loan association or credit union for the sole purpose of monitoring the progress of the construction of the dwelling;

3.1.c. A person employed as a residential property manager when conducting inspections as part of his or her duties in that position and when that person does not receive separate compensation for the act of inspecting the residences; or

3.1.d. A person, regulated in another profession, when acting within the scope of that person's license, registration or certificate.

W. Va. Code R. § 87-5-3. Bank employees and residential property managers who are not certified and have not passed the home inspection exam are authorized to perform home inspections under the Fire Marshal's legislative rule. It is hard to imagine a service that can be performed by an individual who has a high school diploma, has not passed an examination on the subject, has not participated in continuing education, and is not certified by the State Fire Marshal, the governing agency, be classified as a professional service.

Many services subject to regulation or which require expertise in a specific body of knowledge do not qualify as professional services. This Court ruled in *Wooddell v. Dailey*, at 70, 470, "[m]ost occupations, trades, businesses or callings require a diversity of knowledge and skill; however, that does not mean that all occupations, trades, businesses, or callings are professions." While automobile mechanics and airline pilots have significant knowledge in their respective disciplines, they do not provide a professional service. The same holds true for home inspectors.

Home inspection services fail part 3, the State and Federal licensing requirement, of the four-factor test.

(4) **Continuing education requirements:** The Fire Marshal's rule requires the completion of 16 continuing education unit hours annually, defined as 1 unit for each 50 minutes of actual instruction. W. Va. Code R. § 87-5-6. The continuing education courses are required to be related directly to health, life safety, construction and maintenance of residential properties, as approved by the Fire Marshal.

In light of this requirement, home inspection services might meet part 4, the continuing education requirement, of the four-part test. However, a service must meet all four factors of the mandatory four-part test outlined in West Virginia Code of State Rule § 110-15-8.1.1.1.

Finally, Mountaineer Inspection argues that it should be considered a professional under West Virginia consumers sales and service tax law because other jurisdictions recognize home inspection services as professional services in various contexts. *See* Petitioner's Brief, at 12. While other states may have designated home inspectors as providing a professional service in various tax or non-tax related contexts, those laws and practices are manifestly **not** binding on the State of West Virginia nor on the West Virginia State Tax Department. The State of Florida has designated home inspectors as providing a professional service in its statutes regulating professions and occupations. *See* Fla. Stat. § 468.83 *et seq.*, (2010). However, this designation was made by the Florida Legislature. For example, Florida statutes state that home inspectors must provide a report "[o]n those systems and components inspected that, in the professional opinion of the inspector, are significantly deficient or near the end of their respective lives." Fla. Stat. § 468.8323, (2010). However, the State of Florida does not specify any formal educational requirement and certainly does not require a four year college degree. *See* Fla. Stat. § 468.8313,

(2010). While the State of Florida has chosen to designate home inspectors as providing a professional service by statute, the West Virginia Legislature has not chosen to do so. Home inspectors from Florida would not pass the four-part test specified in West Virginia Code of State Rules § 110-15-8.1.1.1. Mountaineer Inspection's reference to laws and practices of other states is irrelevant to the question before the Court.

Based on the foregoing, the Circuit Court correctly concluded that Mountaineer Inspection failed to meet its burden of proof and to establish that home inspection services should be classified as professional services under the legislative rule for the consumers sales and service tax.

**B. The Circuit Court of Taylor County correctly concluded that the Tax Department's rule requiring a college degree to be classified as a professional is a permissible exercise of its rule-making authority.**

In contrast to the second assignment of error asserted by Mountaineer Inspection Services, the Circuit Court properly concluded that requiring a college or four-year degree for a service to be classified as a professional service is a permissible exercise of the Tax Department's rule-making authority. Furthermore, the Circuit Court acted within the confines of applicable statutory law when it determined that silence in a legislative rule regarding the amount of education required for a service to be classified as a professional service creates an ambiguity giving the Tax Department the discretion to interpret the legislative rule.

In support of its argument, Mountaineer Inspection asserts that West Virginia Code of State Rule § 110-15-8.1.1.1 is unambiguous. *See* Petitioner's Brief, at 8. That is simply not the case. Contrary to Mountaineer Inspection's argument, the precise level of education necessary for a service to be classified as a professional service by the Tax Department is ambiguous and the Tax Department has discretion to fill in the gap in the legislative rule.



As noted above, the consumers sales and service tax does not define the operative term “professional service”. See W. Va. Code § 11-15-2. In the case of *Wooddell v. Dailey*, cited *supra*, this Court decided whether the services of an interior decorator should be classified as a professional service for consumers sales and service tax purposes. The Court noted that the term “professional service” was not defined in the statutory framework. *Id.*, at 67, 468-469. While *Wooddell v. Dailey* was decided in 1976, the statute in effect today still does not define the key term. The Court expressly ruled:

The absence of such definitions makes it impossible for us to say that this statute is clear and unambiguous. Consequently, there is no room for the application of the well-recognized principle that a statute which is clear and unambiguous should be applied and not construed.

*Wooddell v. Dailey*, at 68, at 469. The Court concluded that the question of what constitutes a professional service for consumers sales and service tax purposes was ambiguous because the statutes did not define the operative term “professional service.”

In 1993, the Tax Department promulgated a legislative rule for the consumers sales and service tax which granted limited discretion to the Tax Department to define the ambiguous term:

2.65. “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. Section 2.65 clearly delegates authority to the State Tax Department to designate additional services as professional services. That point is not in dispute. However, Section 2.65 of the legislative rule does not provide any insight into or define the

parameters of a professional service. The statutory framework and the legislative rule do not provide a meaningful definition for the operative term “professional services.”<sup>3</sup>

The legislative rule lists thirty-seven services that are specifically classified as 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. Persons who provide services classified as nonprofessional for consumers sales and service tax purposes include interior decorators, private detectives/investigators, security guards, bookkeepers, foresters [*sic*], 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....

W. Va. Code R. § 110-15-8.1.1.1.

Home inspection service is not classified by the legislative rule as a professional service.

Therefore, the Tax Department examined the question under the four-part mandatory test set forth in the legislative rule which states in pertinent part:

... 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.

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<sup>3</sup> Contrast the lack of a meaningful definition for “professional services” versus the definition of “personal service” as “...services rendered to the person of an individual...” set forth in West Virginia Code § 11-15-2(b)(12).

W. Va. Code R. § 110-15-8.1.1.1. (emphasis added).

The legislative rule directs the Tax Department to determine whether other activities fall within the scope of professional services and to consider four specific criteria. The key criterion at issue here is the education level required to perform the activity of home inspection. Most significantly, the legislative rule does **not** specify how much education is required for a service to be classified as a professional service by the Tax Department. If the legislative rule identified a specific degree or level of education, then we would know. However, the legislative rule leaves the question open.

The Tax Department's position is premised on the fact that the statute and the legislative rule are ambiguous with regards to the amount of education that is required before the Tax Department can designate a service as a professional service. In *Wooddell v. Dailey*, cited *supra*, the Supreme Court expressly stated that the lack of a statutory definition for "professional services" prevented the Court from concluding that the statute is clear and unambiguous. The legislative rule does not add any clarity regarding the parameters of the type of services that should be classified as professional services. The legislative rule only states that the Tax Department will consider "...the level of education required..." W. Va. Code R. §110-15-8.1.1.1. Thus, the question remains, how much education is required?

This Court has previously defined an ambiguous statute as:

Indeed, this Court has held that "[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning."

*Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted); *Davis Memorial Hospital v. West Virginia State Tax Com'r*,

222 W.Va. 677, 682-683, 671 S.E.2d 682, 687-688 (2008). *See also Hereford v. Meek*, 132 W.Va. 373, 386, 52 S.E.2d 740, 747 (1949). The legislative rule does not answer the question before the Court. The list of services specifically identified as professional services by the West Virginia Legislature in Section 8.1.1.1. of the legislative rule runs the gamut from physicians, surgeons, and psychiatrists, who are required to have post college degrees, to licensed real estate brokers who are required to only have a high school diploma. The Legislature simply did not specify how much education is required before the Tax Department can determine that a service is a professional service.

Since the Legislature did not state how much education is required, the Tax Department has discretion to fill in the gap in the legislative rule. As the Court recently reiterated:

Rather, “[t]he rule[s] of construction ... [apply] only when the Legislature has blown an uncertain trumpet. If ambiguity or silence does not loom, the occasion for preferential interpretation never arises.”

*Steager v. CONSOL Energy, Inc.*, 242 W.Va. 209, 832 S.E.2d 135 (2019)(citing *W. Va. Health Care Cost Review Auth.*, 196 W.Va. 326, 337, 472 S.E.2d 411, 422 (1996)). With respect to the amount of education required for a service to be classified as a professional service by the Tax Department, the Legislature’s trumpet is either silent or has blown uncertainty. Therefore, the Tax Department properly used its discretion regarding the level of education that is required. Before the Tax Department will classify an additional service as a professional service, the activity must require a four-year college degree by the service provider.

In addition, Mountaineer Services argues that the Tax Department’s exercise of discretion to require a four-year college degree prior to designating a service as a professional service is contrary to the legislative rule. In short, Mountaineer Inspection argues that the Legislature could have specified that a professional service requires that the service provider must have a

college degree and chose not to do so. *See* Petitioner’s Brief, at 8-9. That is a true statement; however, the Legislature did **not** specify the amount of education required.

Mountaineer Inspection’s argument, if taken to its ultimate conclusion, would have the Court accept the premise that a person with any level of education could meet the professional educational requirement if the Legislature did not specify otherwise, in every case, addressing every possible service activity. The test in the legislative rule simply states that the Tax Department will consider “...the level of education required for the activity...” W. Va. Code R. § 110-15-8.1.1.1. As argued above, the open question of how much education is required renders the legislative rule ambiguous, but not unreasonable, in this respect.

Courts have long recognized that each word of a statute must be given some effect and a statute must be construed in accordance with the import of its language. *See Wooddell v. Dailey*, cited *supra*, at 68, 469; *see also* Syl. Pt. 6, *Davis Mem’l Hosp. v. State Tax Comm’r*, 222 W.Va. 677, 671 S.E.2d 682 (2008) (“A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.” (quoting Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999))). The same holds true when the courts consider the language of a legislative rule. Consequently, the Legislature mandated that the Tax Department must consider the amount of education required before a service can be designated a professional service. If the Legislature had concluded that a high school diploma was sufficient for a service to be designated as a professional service, then the Legislature, in passing the Tax Commissioner’s legislative rule, would have only issued a three-part test. The level of education required to perform the activity would have been omitted from the legislative rule and the Tax Department would not have discretion to consider this issue.

Furthermore, Mountaineer Inspection has erroneously stated the Tax Department's argument. *See* Petitioner's Brief, at 7. The Tax Department does not argue that the statute or the legislative rule require that a service must be performed by a practitioner with a minimum of a college degree. The Tax Department argues that the legislative rule delegates the authority to the Tax Department to classify additional activities as professional services based upon the mandatory four-part test set forth in West Virginia Code of State Rules § 110-15-8.1.1.1. While the legislative rule lists four factors that the Tax Department must consider on a case-by-case basis, one factor is ambiguous. The legislative rule states that the Tax Department must consider the level of education required to perform the service; however, the legislative rule does not specify how much education is required before the Tax Department can classify the service as a professional service. As argued above, the ambiguity lies in the amount of education required before the Tax Department can designate a service as a professional service.

In overruling previous administrative decisions from the Office of Tax Appeals, OTA erroneously ruled in the case before the Court:

Unfortunately, all of the Office of Tax Appeals decisions relied upon by the parties in this matter incorrectly state the law. In no way shape or form does Section 8.1.1.1 state that in order for an activity to be considered professional it must be performed by someone with a four-year degree. Therefore, Conclusion of Law 6, in Docket No. 06-340 C is **expressly overruled**.

*Mountaineer Inspection Services, LLC v. W.Va. State Tax Comm'r*, W.Va. Tax Decision 16-056-CU-C, 2018 WL 11232380 \* 6 (W.Va. Off. Hrg. App. June 18, 2018) (emphasis in original).

The Tax Department premised its argument on a previous administrative decision issued in W. Va. Tax Decision 06-340 C. W. Va. Tax Decision 06-340 C was premised on two factors. First, it was based on the specific language of the legislative rule:

The statute and the legislative rule under consideration in this matter are both silent as to what constitutes professional services. It is not clear and

unambiguous. Because it is ambiguous, it is subject to the rules of statutory construction.

W. Va. Tax Decision 06-340 C, 2007 WL 9617856, 14 (W. Va. Off. Hrg. App, Sept. 28, 2006).

This conclusion regarding the statute is consistent with *Wooddell v. Dailey*, quoted *supra*.

Second, W. Va. Tax Decision 06-340 C examined whether the Tax Commissioner's interpretation of the legislative rule that a four-year college degree was required for a service to be classified as a professional service was a reasonable interpretation of an ambiguous statute and legislative rule:

The requirement that in order to qualify as a profession an occupation must satisfy the educational requirement of a four-year college degree **is one that was established by the State Tax Commissioner's Office of Hearings and Appeals**. This tribunal, the West Virginia Office of Tax Appeals, is independent of the State Tax Commissioner. Decisions issued by the Tax Commissioner's Office of Hearings and Appeals are not precedents that are binding on this Office. **However, this Office has chosen to continue to adhere to this educational requirement because it is one that is reasonable in light of the purposes and goals that the Legislature attempted to achieve in enacting the statute and approving the legislative rule.** A minimum requirement of a four year degree that is germane to the activity (plus the other requirements of the legislative rule) is one that tends to divide professions from mere trades or skilled occupations.

*Id.*, at 17-18 (emphasis added). The requirement of a college degree was not based on a misunderstanding of the law, as erroneously stated by OTA in this case; it was an exercise of discretion by the Tax Commissioner to fill in a gap in the legislative rule.

Furthermore, Mountaineer Inspection argues that the Court should reject the exercise of discretion granted by the Legislature in a legislative rule to the Tax Department to fill in the gap or ambiguity regarding the minimum education requirement. Rather, Mountaineer Inspection argues that dicta in an administrative decision from 1990 is determinative of the issue. Specifically, Mountaineer Inspection argues that the Tax Department's exercise of discretion was

erroneous because “... the failure to meet the guidelines is not ultimately determinative of whether the individual may be classified as a professional.” *See* Petitioner’s Brief, at 7, quoting W. Va. Tax Decision 90-4709 CS, 1996 WL 490339, \*3 (W. Va. Off. Hrg. App, Jan. 1, 1996). Significantly, Mountaineer Inspection omitted the remainder of that sentence which states “...such a failure is given great weight.”<sup>4</sup> *Id.* Ironically, in W. Va. Tax Decision 90-4709 CS, the Office of Hearings and Appeals ruled that the Taxpayer did not provide a professional service; consequently, the language on which Mountaineer Inspection relies is mere dicta.

Finally, Mountaineer Inspection argues that the college degree requirement contradicts the list of enumerated services that do not require a college degree. *See* Petitioner’s Brief, at 8-9. Tax policy is exclusively the province of the Legislature. *See Killen v. Logan County Commission*, 170 W. Va. 602, 606, 295 S.E.2d 689, 693 (1982) (overruled, in part, on other grounds, in Syl. Pt. 5, *In Re Tax Assessment of Foster Foundation’s Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (2008)). Tax exemptions are a matter of legislative grace. *See Shawnee Bank v. Paige*, 200 W.Va. 20, 27, 488 S.E.2d 20, 27 (1997). While the West Virginia Legislature is free to designate any service as being exempt from consumers sales and service tax, the Tax Department is not. As argued above, if the Legislature had wanted to exempt services that can be performed with only a high school diploma as professional services, the Legislature would have said so. The Tax Department must operate within the boundaries of the limited authority delegated to it under the legislative rule. Therefore, the Tax Department requires that a service must require at a minimum a four-year college degree before the Tax Department will designate other activities as a professional service. In the case before the Court,

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<sup>4</sup> The entire sentence relied upon by Mountaineer Inspection reads: “While failure to meet the guidelines is not ultimately determinative of whether an individual may be classified as a “professional”, such failure is given great weight.”



the Tax Department accorded great weight to the fact that home inspection service providers are not required to have a college degree in order to perform the service. The rule authorized by the Legislature created a mandatory four-part test and home inspection services do not meet the criteria enumerated by the Legislature for the Tax Department to classify the additional activity as a professional service.

**C. The Circuit Court of Taylor County correctly concluded that West Virginia Code of State Rules § 110-15-8.1.1.1 (1993) is a mandatory four-part test.**

Mountaineer Inspection argues that West Virginia Code of State Rule § 110-15-8.1.1.1 does not create a mandatory four-part test for the Tax Department to consider, and instead the legislative rule creates a non-exclusive list of four factors which must be considered when determining whether a service is to be classified as professional.

The language in the legislative rule is clear.

... 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. (emphasis added). The legislative rule states that the Tax Department will consider the level of education required to perform the service, the nature and extent of nationally recognized standards of performance, licensing requirements, and the extent of continuing education requirements. The use of the verbs “will consider” means that it must consider the enumerated four factors, and therefore creates a four-part test. Mountaineer Inspection’s argument that the legislative rule creates a non-exclusive list of four factors is a *non*

*sequitur* because Mountaineer Inspection has failed to identify a fifth item for the Tax Department to consider beyond the four factors listed in the legislative rule.

Mountaineer Inspection argues that the use of the phrase “will consider such things as” indicates that the legislative rule creates a list of factors for consideration, and if the Legislature wanted to create a four-part test, the rule would have been written to include mandatory language such as “including but not limited to” or “shall.” *See* Petitioner’s Brief, at p. 10. The legislative rule does indeed contain mandatory language: will consider. Replacing the word “will” with “shall,” as Mountaineer Inspection has suggested, creates the exact same result for purposes of statutory construction. The Circuit Court correctly concluded that West Virginia Code of State Rule § 110-15-8.1.1.1 creates a mandatory four-part test for the Tax Department to consider.

## **VI. CONCLUSION**

The Decision of the Circuit Court of Taylor County complies with West Virginia law. Therefore, the State Tax Commissioner requests that this Honorable Court affirm the decision of the Circuit Court which determined that home inspection services are not exempt from the consumers sales and service tax and the Tax Department permissibly and correctly interpreted the legislative rule at issue.

Respectfully submitted,

**DALE W. STEAGER,  
STATE TAX COMMISSIONER,**

By Counsel

**PATRICK MORRISEY  
ATTORNEY GENERAL**

A handwritten signature in black ink, appearing to read "Andrew L. Ellis", is written over a horizontal line.

**ANDREW L. ELLIS (WVSB# 10618)  
ASSISTANT ATTORNEY GENERAL  
Attorney General's Office  
Building 1, Room W-435  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305  
304-558-2522**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0488

JOHN KEENER d/b/a MOUNTAINEER INSPECTION SERVICES, LLC,

Petitioner,

v.

DALE W. STEAGER,  
STATE TAX COMMISSIONER  
OF WEST VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I, Andrew L. Ellis, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Response Brief of the West Virginia State Tax Commissioner" was served by depositing the same, postage prepaid in the United States Mail, this 19th day of November, 2020, addressed as follows:

Ronald G. Kramer, Esq.  
Kramer Legal Group, PLLC  
Post Office Box 882  
Bridgeport, WV 26330-0882  
Counsel for Petitioner

Allison S. McClure, Esq.  
McClure Law PLLC  
215 S. 3<sup>rd</sup> Street, Suite 902  
Clarksburg, WV 26301  
Counsel for Petitioner

Henry R. Glass, III, Esq.  
Glass Law Offices  
5215 MacCorkle Ave, SW  
South Charleston, WV 25309  
*Counsel for Amicus Curiae*

  
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ANDREW L. ELLIS