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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2022 JUN 22 PM 2:50

TAX ANALYSTS,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Plaintiff,

v.

Civil Action No. 22-P-80

The Honorable Tera L. Salango

THE HONORABLE MATTHEW IRBY,
West Virginia States Tax Commissioner,

Defendant.

ORDER GRANTING MOTION TO DISMISS

On May 11, 2022, Plaintiff Tax Analysts, by its attorneys, Zachary R. Rosencrance and Cornish F. Hitchcock, and Defendant The Honorable Matthew R. Irby, West Virginia States Tax Commissioner, by Assistant Attorney General, William C. Ballard, appeared a hearing on the Defendant's *Motion to Dismiss*. Based upon the briefing filed by the parties and the arguments made during the hearing, the Court **FINDS** as follows:

1. On July 29, 2021, Plaintiff sent a letter to the West Virginia Tax Department (herein "Tax Department") requesting:

The current version of all field audit manuals and audit training manuals in the formats (electronic or otherwise) in which they are maintained. The request covers not only manuals that are designated as such, but also training materials or continuing education materials related to audits.

2. Plaintiff's request was made pursuant to the West Virginia Freedom of Information Act, West Virginia Code §§ 29B-1-1, *et seq.* ("FOIA").

3. On November 1, 2021, the Tax Department denied Plaintiff's FOIA Request based on the specific exemption for the disclosure of the Tax Department audit materials under West Virginia Code § 11-10-5d(b)(5)(B). In its response, the Tax Department stated that:

Disclosure of the information contained in the records could reasonably be expected to educate potential tax evaders on how to circumvent state tax laws by revealing the techniques and procedures used by auditors in reviewing taxpayer records to verify if a taxpayer has remitted the proper amount of tax to the Tax Department.
4. In its Complaint, Plaintiff alleges that "the exemptions cited by the Department provides no basis to withhold the requested records" and the "Defendant's denial to produce the requested records violates FOIA."
5. Under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, Plaintiff's Complaint should be dismissed if it appears that Plaintiff can prove no set of facts in support of its claim which would entitle it to relief. Syl. pt. 3, *Bowden v. Monroe Cnty. Comm'n*, 232 W. Va. 47, 47, 750 S.E.2d 263, 264 (2013).
6. Because a Rule 12(b)(6) motion is designed to weed out unfounded suits, the ultimate test under Rule 12(b)(6) is whether the plaintiff can prove any set of facts that would entitle him or her to the relief requested. *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978); *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996).
7. For purposes of a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, the factual allegations of the Complaint must be taken as true. See *John W. Lodge Distrib. Co.* at 603. This Court is not bound, however, to accept any party's posited statutory interpretations or proffered conclusions of law. *State ex rel. Perdue v. Nationwide Life Ins. Co.*, 236 W.Va. 1, 5-6, 777 S.E.2d 11, 15-16 (2015)

(citing to *W.Va. Human Rights Comm'n v. Garretson*, 196 W.Va. 118, 123, 468 S.E.2d 733, 738 (1996)).

8. The West Virginia FOIA states that “[e]very person has a right to inspect or copy any public record of a public body in this state, except as otherwise expressly provided by section four of this article.” W. Va. Code 29B-1-3(a).
9. Section of the West Virginia FOIA states that “[t]here is a presumption of public accessibility to all public records, subject only to the following categories of information which are specifically exempt from disclosure under this article: . . . Information specifically exempted from disclosure by statute[.]” W. Va. Code § 29B-1-4(a)(5).
10. Section 11-10-5d(b)(5)(B) of the Tax Procedure and Administration Act (W. Va. Code § 11-10-5d(b)(5)(B)) states that “[n]othing in the preceding sentence, or in any other provision of this code, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination or data used or to be used for determining such standards.”
11. The Legislature has specifically exempted from disclosure the Tax Department’s “standards used or to be used for the selection of returns for examination or data used or to be used for determining such standards.” W. Va. Code § 11-10-5d(b)(5)(B).
12. The Supreme Court of Appeals has upheld agencies’ refusal to disclose documents protected from disclosure by statute (*i.e.*, other parts of the West Virginia Code). Syl. pt. 1, *St. Mary’s Medical Center, Inc. v. Steel of West Virginia, Inc.*, 240 W.Va. 238 (2018) (“The West Virginia Freedom of Information Act, W.Va. Code, 29B-1-4(a)(5) [2015], which excepts from public accessibility ‘information specifically exempted from disclosure by statute,’ incorporates the investigative exemption from disclosure of

information set forth in the West Virginia Antitrust Act, W.Va. Code, 47-18-7(d) [1978].

The investigative exemption is mandatory in specifying that the Attorney General ‘shall not’ make public the name or identity of a person whose acts or conduct he investigates or ‘the facts’ disclosed in the investigation.”).

13. The Tax Department’s field audit manuals are the standards by which the Tax Department selects returns to be audited and how the Tax Department’s auditors are to conduct those audits (*i.e.*, the “standards used . . . for the selection of returns.”).
14. Audits performed by the Tax Department entail matching of account numbers, verification cross checks of transaction records (not only records of the taxpayer under examination but transaction records of the purported recipients or sources of the underlying invoiced transaction), examination of so called “fraud check” information, verification of written, computer and mechanical records to confirm claimed accounting and business billings, and charges or claimed deductions, exemptions or tax credits.
15. The Tax Department has interpreted the language of West Virginia Code § 11-10-5d(b)(5)(B) to protect all of its field audit manuals from disclosure, because the methods by which tax returns are selected for audit and the process by which returns are to be audited cannot be logically separated.
16. Case law is clear that the Tax Department’s interpretations of the West Virginia Code it is charged with administering are “given great weight unless clearly erroneous.” Syl. pt. 3, *Keener v. Irby*, 245 W. Va. 777, 865 S.E.2d 519 (2021).
17. The Supreme Court of Appeals has held that in reviewing an agency’s construction of a statute it is charged with administering, courts are to consider two separate questions: whether the Legislature’s intent is clear and whether the agency’s construction of the

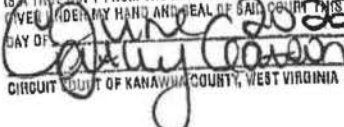
statute is permissible. *Appalachian Power v. State Tax Dept. of W. Va.*, 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (quoting *Sniffin v. Cline*, 193 W. Va. 370, 373-74, 456 S.E.2d 451, 454-55 (1995)).

18. Agencies are empowered to perform administrative and executive functions. To do so, they often must construe and interpret their statutory and regulatory authority to fit the circumstances of a particular case. Of course, the Tax Department may not modify or rewrite statutes “under the guise of ‘interpretation.’” Syl. pt. 5, *Steager v. Consol Energy, Inc.*, 242 W.Va. 209, 213, 832 S.E.2d 135, 137 (2019).
19. Courts should “examine [such] regulatory interpretations” with “appropriate deference to agency expertise and discretion.” *W. Va. Emp’rs’ Mut. Ins. v. Bunch Co.*, 231 W. Va. 321, 332, 745 S.E.2d 212, 223 (2013).
20. As long as the agency has acted “consistent with the plain meaning of [its]” statutes, *id.*, its “longstanding, consistent interpretation[s]” are “entitled to judicial deference.” *Amedisys W. Va. v. Pers. Touch Home Care of W. Va.*, 245 W. Va. 398, ___, 859 S.E.2d 341, 358 (2021).
21. The Court **FINDS** Tax Department has reasonably interpreted West Virginia Code § 11-10-5d(b)(5)(B) to mean that the methodologies by which it selects returns for auditing is within the same category of information as the methodologies by which the Tax Department carries out its audits (*i.e.*, the requested audit manuals) – and therefore protects from disclosure all documents related to the Tax Department’s auditing processes, including those requested by Plaintiff.
22. Because the Legislature has foreclosed the relief that Plaintiff seeks in this case, its Complaint is **DISMISSED WITH PREJUDICE**.

23. That the Clerk provide a certified copy of this Order to counsel of record.

Entered on this the 20th day of June 2022.


The Honorable Tera L. Salango

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF June 2022 23rd

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 