IN THE CIRCUIT COURT OF TAYLOR COUNTY, WEST VIRGINIA

JOHN KEENER, dba,
MOUNTAINEER INSPECTION SERVICES, LLC,

Petitioner,

v.

Civil Action No. 18-P-57
Judge Shawn D. Nines

DALE W. STEAGER, as
STATE TAX COMMISSIONER of WEST VIRGINIA,

Respondent.

FINAL ORDER
DENYING MOUNTAINEER INSPECTION'S PETITION FOR APPEAL, GRANTING THE TAX DEPARTMENT'S CROSS ASSIGNMENTS OF ERROR, AFFIRMING THE DECISION OF THE OFFICE OF TAX APPEALS, IN PART, AND REVERSING THE DECISION OF THE OFFICE OF TAX APPEALS, IN PART

I. INTRODUCTION

The question before the Court is generally, do home inspection services qualify as a professional service under the West Virginia consumers sales tax? The facts are not in dispute in this matter. Mr. John Keener, dba Mountaineer Inspection Services, LLC, (hereinafter, sometimes Mountaineer Inspection) is certified by the WV State Fire Marshal to provide home inspection services. During the audit period, Mountaineer Inspection failed to collect West Virginia consumers sales tax on the services it provided to its customers. The Tax department issued an assessment for $31,137 in consumers sales tax plus interest of $5,048. *See* Final Decision in Administrative Record, Doc. 2 (hereinafter, OTA Decision). Mountaineer Inspection timely filed a Petition for Reassessment with the WV Office of Tax Appeals (hereinafter, sometimes OTA). The parties agreed that an evidentiary hearing was not necessary and submitted legal briefs for review.

Subsequently, the OTA ruled that home inspection services do not qualify as professional services under West Virginia law; that a four-year college degree is not a requirement for a service to be classified as a professional service; and that the legislative rule does not create a mandatory four-part test to determine whether services are professional services,. *See* OTA Decision at Conclusions of Law 13 & 14; at p. 6; and pp. 6-8, respectively. The OTA Decision affirmed the tax assessment. *See* OTA Decision at p. 12.

Both parties properly sought judicial review pursuant to W. Va. Code § 11-10A-19. According to statute, if both the Taxpayer and the State Tax Department appeal an administrative decision from the Office of Tax Appeals to the circuit courts seeking judicial review, the Taxpayer has a right to remove the case to any county in which the activity sought to be taxed occurred. *See* W. Va. Code § 11-10A-19(c)(2)(A). The parties agreed to consolidate the appeal before the Circuit Court of Taylor County and an order was entered to that effect on December 10, 2018. Subsequently, the parties briefed the legal issues and the Court conducted oral argument on December 10, 2019.

The OTA Decision included two separate legal issues. First, the Office of Tax Appeals ruled that home inspection services do not qualify as professional services under West Virginia law. Mountaineer Inspection disagreed with OTA's conclusion on this first legal issue and appealed to the Circuit Court of Taylor County. The Tax Department supports OTA's conclusion on the first legal issue.

However, the Tax Department filed an appeal and cross-assignments of error in the Circuit Court of Kanawha County on the second legal issue. The Tax Department has interpreted the applicable legislative rule to mean that in order to be classified as a professional service, the service provider must have a college degree as a minimum. The OTA Decision before the Court expressly overruled the Tax Department's interpretation of the legislative rule and previous OTA Decisions to

that effect. Furthermore, the OTA Decision ruled that legislative rule does not create a mandatory four-part test for determining whether services qualify as professional services. In essence, the Office of Tax appeals ruled that the test in the legislative rule created a balancing test in which the four factors must be weighed. Mountaineer Inspection supports the OTA Decision on the second legal issue before the Court.

The Court has reviewed the underlying administrative decision, the legal briefs filed by the parties, and heard the arguments of counsel in open court. The Court has reviewed the WV Consumers Sales Tax set forth in W. Va. Code § 11-15-1, *et seq.*, the applicable legislative rule set forth in W. Va. Code R. § 110-15-1, *et seq.*, and the case law from the WV Supreme Court of Appeals.

The Court DENIES the petition for appeal filed by Petitioner Mountaineer Inspection Services and GRANTS the cross-assignments of error raised by the WV State Tax Department. The Court AFFIRMS the decision of the Office of Tax Appeals to the extent that OTA concluded home inspection services are not classified as a professionals service pursuant to W. Va. Code R. § 110-15-8.1.1.1. The Court REVERSES the decision of the Office of Tax Appeals to the extent that OTA concluded the test set forth in the legislative rule in W. Va. Code R. § 110-15-8.1.1.1 does not create a mandatory four-part test. More directly, the test set forth in the legislative rule created a checklist for the Tax Department to review and did not create a balancing test as ruled by the Office of Tax Appeals and argued by Mountaineer Inspection.

II. STANDARD OF REVIEW

The standard of review is clear under West Virginia law. Legal questions before the court are 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). On the other hand, factual findings made by the Tax Department or any other administrative agency receive deference. *See* Syl. Pt. 2, *CB&T Operations Co., Inc. v. Tax Commissioner of State*, 211 W.Va. 198, 564 S.E.2d 408 (2002). Pursuant to W.Va. Code § 11-10A-19(f), Mountaineer Inspection's *Petition for Appeal* must be heard in the same manner as an appeal of a contested case under the Administrative Procedures Act as set forth in W. Va. Code § 29-5A-4. Therefore, this Court's authority to reverse, vacate, or modify OTA's decision is predicated on Mountaineer Inspection's showing that the OTA Decision has prejudiced its substantial rights due to one of the six enumerated grounds in West Virginia Code § 29A-5-4(g). *See Griffith v. ConAgra Brands, Inc.*, 229 W.Va. 190, 194 n.6, 728 S.E.2d 74, 78 n.6 (2012).

III. FINDINGS OF FACT

The Circuit Court adopts the seven findings of fact which were enumerated in the OTA Decision. Neither party has objected to the findings of fact in the OTA Decision.

1. Mountaineer Inspection is a single member LLC. *See* Affidavit of John M. Keener, April 4, 2018.

2. The main business activity of Mountaineer Inspection is home inspection services. *Id.*

3. Mountaineer Inspection's sole member is John M. Keener. *Id.*

4. During the time periods in question in the matter, Mr. Keener was a home inspector, certified by the West Virginia State Fire Marshal's Office. *Id.*

5. During the time periods in question in this matter, it was illegal to perform home inspections for compensation in West Virginia, unless an individual obtained a certification from the

State Fire Marshal. See West Virginia Code § 29-3-5b (2018) and West Virginia Code of State Rules § 87-5-1, *et seq.*, (2006).

6. In order to obtain certification as a home inspector in West Virginia, an individual must have 1) obtained a high school diploma or its equivalent; 2) passed the National Home Inspector Examination, or a comparable examination, as determined by the Fire Marshal; 3) either conducted business as a home inspector for three years prior to the promulgation of Series 5, Title 87, or prove satisfactory completion of at least eighty (80) hours of instruction directly related to the performance of home instruction, as determined by the State Fire Marshal; and 4) maintain and present proof of general liability insurance. [1]

7. In order to maintain certification as a home inspector in West Virginia, an individual must complete sixteen (16) hours of continuing education annually.

IV. HOME INSPECTION SERVICES DO NOT QUALIFY AS PROFESSIONAL SERVICES UNDER WEST VIRGINIA LAW

The Office of Tax Appeals ruled that home inspection services do not qualify as professional services under the consumers sales tax. See Conclusion of Law 13 & 14. Mountaineer Inspection challenges this specific ruling on appeal while the State Tax Department supports the legal conclusion.

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

[1] In 2014, the Legislative Rules regarding certification of home inspectors were amended, to include, among other things, a new certification requirement regarding fingerprinting of applicants. That amendment is not germane to this decision.

By statute, the provision of professional services, personal services, and services regulated by the WV Public Service Commission, are excepted from the consumers sales 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. The West Virginia Supreme Court has consistently ruled in ruled consumers sales 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 the W.Va. Code § 11-15-8[2]. Our Supreme Court squarely ruled, "[h]owever, any such other profession 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, 230 S.E.2d 470.

The decisions of the West Virginia Supreme Court on this exact point of law were codified by the Legislature in 2009 in W. Va. 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 is required to meet a high bar to prove that its services qualify as professional services for consumers sales tax purposes.

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[2] *Wooddell v. Dailey* was decided in 1977 under the statutory framework in existence at that time. The legislative rule for the Consumers Sales 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.

The consumers sales 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 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. 5, *Smith v. W. Va. Human Rights Comm'n*, 216 W. Va. 2, 4, 602 S.E.2d 445, 447 (2004).

Syl. Pt. 4, *Dale W. Steager, WV State Tax Commissioner, et al., v. CONSOL Energy, Inc., dba, CNX Gas Company, LLC, et al.*, 242 W.Va. 209, 832 S.E. 2d 135 (2019); *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); and 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 specifically enumerates thirty-seven services as professional services which are, in turn, excepted from the sales tax. Home inspection services are not expressly classified as professional services for consumers sales tax purposes according to the legislative rule. *See* W. Va. Code R. § 110-15-8.1.1.1.

The WV 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. *See* OTA Decision at Conclusions of Law 8 & 9.

At the Office of Tax Appeals, the Tax Department correctly argued that home inspection services do not meet the requirements to be classified as a professional service for two primary reasons. First, the question had previously been determined that home inspectors do not perform a professional service in two separate administrative decisions. *See* OTA Decision 03-418 C & 03-487 RC (2004 WL 1416147) and Office of Hearings and Appeals Decision 96-098 CS (1998 WL 1048430) in Administrative Record at Document 4. OTA Decision 03-418 C & 03-487 RC, at Conclusion of Law 1, was issued prior to the promulgation of legislative rules by the State Fire Marshal and determined that home inspectors did not meet any section of the mandatory four-part test. Previously, Office of Hearings and Appeals Decision 96-098 CS[3] concluded that home inspectors do not meet the criteria

[3] Administrative decisions from the Office of Hearings and Appeals were decisions from the State Tax Commissioner and issued under his authority. In 2002, the Legislature created the WV Office of Tax Appeals which is a quasi-judicial agency separate and distinct from the State Tax Commissioner and the State Tax

under the legislative rule for the consumers sales tax to be classified as providing a professional service.

Second, although the State Fire Marshal had promulgated a legislative rule in 2016, the requirements set forth to be certified as a home inspector do not meet the mandatory four-part test imposed on the Tax Department by the legislative rule for the consumers sales tax. *See* Tax Department's OTA Brief at pp. 5-7. Significantly, the Fire Marshal set minimal educational standards to be certified as a home inspector. An applicant must have "[s]uccessfully completed high school or its equivalent." W. Va. Code R. § 87-5-1.4.1.c.

When a taxpayer asks the Tax Department to classify a service that is not specifically designated as a professional service in the legislative rule, the Tax Department has long taken the position that a high school diploma or a GED is not enough to qualify as providing a professional service. To be classified as providing a professional service, the minimum education required to provide that service must be a four-year college degree or its equivalent.

Before the Office of Tax Appeals, the Tax Department argued that Mountaineer Inspection did not meet the mandatory four-part test set forth in the legislative rule. 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.

Home inspection services fail the mandatory test in significant ways. In order to be certified by the State Fire Marshal the applicant must have a high school diploma or its equivalent. No additional

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Department. *See* W. Va. Code § 11-10A-3. The Office of Tax Appeals has jurisdiction to hear and decide all appeals from assessments issued by the Tax Commissioner. W. Va. Code § 11-10A-8(1).

formal education is required. *See* W. Va. Code R. § 87-5-4.1.c. The Tax Department imposes a requirement that the service provider must have a minimum of a college degree in order to perform the service. Similarly, the Office of Tax Appeals has previously ruled that a relevant degree from an accredited college or university is required. *See, e.g.*, OTA Decision 06-340 C, discussed *infra*. The Tax Department argued as much at the administrative hearing. *See* Tax Department's OTA Brief at pp. 4-5. In addition, Sanitized Decision 03-418 C and Administrative Decision 96-098 CS previously determined that home inspectors do not provide a professional service. *Id.*, at p. 6.

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:
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> 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;
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> 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 (emphasis added). *See* Tax Department's OTA Brief at p. 7. 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, being classified as a professional service.

Furthermore, the Tax Department argued that many services which require expertise in a specific body of knowledge do not qualify as professional services. The Supreme Court ruled in *Wooddell v. Dailey*, 160 W.Va. 65, 70, 230 S. E.2d 466, 70 (1976), "Most 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." *See* Tax Department's OTA Brief at p. 8. 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.

In addition, the legislative rule sets forth a mandatory four-part test to determine whether a service which is not listed as a professional service in the legislative rule should be classified as such for consumers sales tax purposes. The rule states that the Tax Department shall consider such factors as the level of education required, nature and extent of nationally recognized standards of performance, licensing requirements on the state and national level, and continuing education requirements. *See* W. Va. Code R. § 110-15-8.1.1.1., quoted *supra*.

As in most legal cases, the language chosen by the Legislature in drafting a statute or in promulgating a legislative rule is paramount. The Court notes that the legislative rule expressly requires the Tax Department to consider "...the level of education required..." to perform the service. The Court further notes that the legislative rule does not specify how much formal education is required for a service to be classified as a professional service. This silence in the legislative rule regarding the amount of education required is an obvious gap which can be meant only to grant discretion to the Tax Department.

The Tax Department considered all of the factors enumerated by the Legislature and noted the absence of national standards for the service. *See* Tax Department's OTA Brief at p. 8. The absence of requirement of a college degree in order to perform the service was of paramount importance. *Id.*, at 8-10.

Finally, while some occupations listed 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. For example, the Legislature designated licensed real estate appraisers and certified real estate appraisers as providing professional services despite the lack of any formal educational requirements to perform these services. *See* W. Va. Code §§ 30-38A-4 and 30-38A-7. In addition, services provided by licensed real estate brokers are professional services for consumers sales tax purposes while they are only required to have a high school diploma. *See* W. Va. Code § 30-40-1, *et seq*. Nevertheless, the Legislature chose to designate these services as professional services under the legislative rule and that designation is binding on the Tax Department. However, the Legislature did not grant unfettered discretion to the Tax Department; the Tax Department must apply the criteria expressly authorized by the Legislature. *See* Tax Department's OTA Brief at p. 10.

The Office of Tax Appeals 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 tax. *See* OTA Decision at Conclusions of Law 13 & 14. The OTA Decision is affirmed on this first legal issue.

V. TAX DEPARTMENT'S CROSS ASSIGNMENTS OF ERROR

In the Tax Department's *Petition for Appeal* which is also before this Court, the Tax Department raised several assignments of error regarding the administrative decision. The errors involve two fundamental issues. First, the Office of Tax Appeals failed to accord proper respect to the discretion specifically granted to the Tax Department to determine whether a college degree is a requirement for a service to be classified as a professional service under the legislative rule. Second, the legislative rule clearly sets forth a mandatory four-part test to be employed by the Tax Department

in making its decision on a case-by-case basis. The OTA Decision reversed on these two specific issues.

A. THE OFFICE OF TAX APPEALS ERRONEOUSLY RULED THAT A COLLEGE DEGREE IS NOT A REQUIREMENT FOR A SERVICE TO BE CLASSIFIED AS A PROFESSIONAL SERVICE

First the Court notes that the Office of Tax Appeals, which issued the decision currently on appeal by Mountaineer Inspection Services, has previously ruled that a college degree is a requirement to be classified as a professional service. As recently as 2006, the Office of Tax Appeals ruled that a four year degree was a requirement to be classified as providing a professional service. In OTA Decision[4] 06-340 C (2007 WL 9617856), Administrative Law Judge Robert Kiefer, (hereinafter, ALJ Kiefer) addressed whether certified electrical inspectors met the requirements for classification as providing professional services. ALJ Kiefer ruled that "The requirement of a four-year college degree that is germane to the activity is one that has been applied by this Office." *Id*, at Conclusion of Law 6 and at p. 17.

This is not a new position. As far back as 2001, in Office of Hearings and Appeals Decision 01-685 C, Administrative Law Judge R. Michael Reed addressed whether licensed remediation specialists provided professional services. ALJ Reed ruled that "... a relevant degree from an accredited college or university is required to satisfy the minimum education element of the four-part test for determining whether a service not explicitly identified as 'professional' in the consumers sales and service tax... legislative regulation..." should be classified as a professional service. *Id* at pp. 3-4.

In overruling previous administrative decisions from the Office of Tax Appeals and its

[4] The Court notes that some administrative decisions available on Westlaw **may** contain a minor error. The Westlaw version of the administrative decision 06-340 C erroneously bears the caption of the Office of Hearings and Appeals instead of the correct caption of the Office of Tax Appeals. However, Administrative Decision 06-340 C was issued on March 27, 2007, five years after OTA was created, and was issued by the Office of Tax Appeals. The version in the administrative record in Document 4 clearly states that the decision was issued by the Office of Tax Appeals.

predecessor, the Office of Hearings and Appeals, Chief Administrative Law Judge Pollack erroneously ruled:

> **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.*

OTA Decision 16-056 CU C at p. 6 (**emphasis added**; *emphasis in original*). The OTA Decision on appeal before this Court is based on a false premise; upon review, the Decision in Docket No. 06-340 C does not "incorrectly state the law." In fact, Docket No. 06-340 C, written by Administrative Law Judge Kiefer specifically states that the requirement of a four year college degree was first established by the State Tax Commissioner's Office of Hearings and Appeals, which was the predecessor to the existing Office of Tax Appeals, and has been followed by the Office of Tax Appeals. *See* Docket No. 06-340 C at pp. 17-18 in OTA Record at Tab 4.

ALJ Kiefer's decision was premised on two factors. First, ALJ Kiefer did not base his decision on a misreading of the law as asserted by Chief ALJ Pollack. ALJ Kiefer based his decision 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... Because it is ambiguous, it is subject to the rules of statutory construction.

OTA Decision 06-240 C at p. 11.

Second, ALJ Kiefer 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. ALJ Kiefer specifically ruled:

> 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 p. 14 (emphasis added). The requirement of a college degree was not based on a misunderstanding of the law as erroneously stated in the decision on appeal before this Court; it was an exercise of permissible and directed discretion by the Tax Commissioner given to specifically fill in a gap in the legislative rule.

In the recent West Virginia Supreme Court decision of *Steager v. CONSOL Energy, Inc.*, cited *supra*, the Court expressly considered the Tax Department's discretion to interpret an ambiguity in a legislative rule. In the context of an ad valorem property tax case, the Court addressed the issue of whether certain post-production expenses should qualify for a deduction in calculating the value of producing oil and gas wells. The Supreme Court ruled "...that the Tax Department's exclusion of these expenses from its average expense calculation is a reasonable construction of the regulation and not facially inconsistent with the enabling statute." *Consol Energy,* ___, 149. The Supreme Court reaffirmed its long held position that the Tax Department is free to fill in the gaps in a statute or, as in *Steager v. Consol* ___, 150, the Tax Department is free to fill in the gaps in a legislative rule.

Earlier, the Supreme Court ruled in *Appalachian Power Company v. State Tax Department*, 195 W.Va. 573, 466 S.E.2d 424 (1995), that the Courts must respect the discretion granted to the Tax Department by the Legislature in performing its duties under the tax statutes.

> Under *Chevron,* we may not impose our own construction of the statute. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the

> Court is whether the Tax Commissioner's answer is based on a *permissible construction* of the statute. *Chevron,* 467 U.S. at 843, 104 S.Ct. at 2782, 81 L.Ed.2d at 703. Given the competing policy concerns behind the statute and the industries affected, the language of the statute suggests the Legislature intended the Tax Commissioner to strike the appropriate balance of the goals of the statute in defining "net generation available for sale."

Appalachian Power at 591, 466 S.E.2d 442 (emphasis in original); *see* also Syl. Pt. 5, *In re Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000) (The exercise of discretion granted to the Tax Commissioner will not be disturbed upon judicial review absent a showing of abuse of discretion). The Supreme Court buttressed this respect for the use of an agency's discretion with the requirement that "...the critical concern of the reviewing court is that the agency provide a coherent and reasonable explanation of its exercise of discretion...." *Appalachian Power* at 589, 466 S.E.2d. at 440 (quoting *MCI Telecommunications Corp. v. Federal Communications Comm'n,* 675 F.2d 408, 413 (D.C.Cir.1982)).

Furthermore, the Supreme Court has ruled that the interpretation of statutes by bodies charged with their administration should be given great weight. Syl. Pt. 3, *Shawnee Bank v. Paige*, cited *supra. See also Griffith v. Frontier West Virginia, Inc.*, 282 W. Va. 277, 719 S.E.2d. 747 (2011). In *Frymier-Halloran v. Paige,* 193 W. Va. 687, 695, 458 S.E.2d 780, 788, the Supreme Court ruled "...it is evident that courts will not override administrative decisions of whatever kind, unless the decisions contradict some explicit constitutional provisions or right, are the results of flawed process, or are fundamentally unfair or arbitrary." Quoted with approval in *Appalachian Power* at 589, 466 S.E.2d. at 440. As a result, the decision of an administrative agency is entitled to great weight from the both the legislature and the courts. *Frymier-Halloran* at 694, 458 S.E.2d at 787.

Similarly, the West Virginia Supreme Court recently affirmed the Circuit Court's reversal of a decision of the Office of Tax Appeals in the case of *Ashland Specialty Company, Inc., v. Steager*, 241 W. Va. 1, 818 S.E.2d 827 (2018), *cert.* denied ___ S. Ct. ___, 2019 WL 536929. In *Ashland Specialty*

the Supreme Court ruled that the Tax Department acted within the discretion granted to it by statute when it assessed a penalty that fell within the statutory guidelines and that the Office of Tax Appeals failed to accord proper respect to the Tax Department's exercise of discretion. *Id.* at 829, 831 & 833.

As ALJ Kiefer noted, the legislative rule is silent regarding what level of education is required for a service to be classified as a professional service under the legislative rule for the consumers sales tax. In addition, ALJ Kiefer's decision that the service provider must have a college degree established a bright line to provide guidance for future taxpayers. OTA Docket No. 06-340 C at p. 14.

In expressly overruling Conclusion of Law 6 in ALJ Kiefer's decision, Chief ALJ Pollack chose to reject the Tax Department's permissible construction of the legislative rule that a four year college degree is a requirement for a service to be classified as a professional service. Contrary to the clear law on this question, Chief ALJ Pollack chose to substitute his judgment for that of the Tax Commissioner and to reject a long held logical and rational position of both the Tax Commissioner and the Office of Tax Appeals as expressed in several previous decisions. The Supreme Court has consistently ruled that a reviewing a court cannot simply impose its own construction of a statute when reviewing a legislative rule. The Court must ask whether the agency's position is based on a permissible construction of the statute. *See, e.g.*, Syl. Pt. 4, *Appalachian Power,* cited *supra.*

Reversals by the Office of Tax Appeals as in the case before this Court constitute a violation of law, are in excess of statutory authority, constitute an abuse of discretion, are made upon unlawful procedures, affected by other errors of law, and/or are arbitrary and capricious in violation of W. Va. Code § 29A-5-4(g). The Circuit Court reverses the OTA Decision and reinstates the requirement that in order to be classified as a professional service for consumers sales tax purposes, that the service must require the minimum of a college degree under the four-part mandatory test, and should remain that

way until and unless new rules are promulgated or the Tax Department chooses to amend its policy (***i.e. its discretion***).

B. THE OFFICE OF TAX APPEALS ERRONEOUSLY USED ITS JUDGMENT TO RE-WRITE THE EXPRESS LANGUAGE IN THE LEGISLATIVE RULE.

The Office of Tax Appeals also chose to revise the clear language set forth in the legislative rule and ruled that the Legislature failed to establish a "true four-part test". The OTA Decision ruled:

> This Tribunal is of the opinion that Section 8.1.1.1 is a clear grant of discretion to the Tax Commissioner. The Legislature could have given the Tax Commissioner the discretion to add other activities to the list, but at the same time controlled the conditions. To do this it could have said:
>
> > The determination as to whether other activities are "professional" in nature **shall** be determined on a case-by-case basis. When making a determination as to whether other activities fall within the "professional" classification, the Tax Commissioner **shall** consider
> >
> > 1) _____
> > 2) _____
> > 3) _____
> > 4) _____
>
> To be clear, even if Section 8.1.1.1 contained the language above, it would still be a grant of discretion to the Tax Commissioner, but we would have a true four-part test.

See OTA Decision 16-056 CU at p. 7 (emphasis in OTA Decision). Contrary to the ruling from the Office of Tax Appeals, the Legislature established a "true four-part test" in the legislative rule.

The Office of Tax Appeals incorrectly framed the legal issue in order to correct alleged deficiencies in the legislative rule. *See* W. Va. Code § 11-10A-8. OTA ruled that:

> This Tribunal is of the opinion that such phrasing [in the legislative rule] gives the Tax Commissioner broader discretion, and that the question before us is, has the Tax Commissioner abused the discretion he has been granted.

See OTA Decision 16-568 CU at p. 8. In addition, the Office of Tax Appeals resorted to an "abuse of discretion" discussion to rewrite the legislative rule and to substitute the judgment of the Office of Tax

Appeals in lieu of the Tax Department's application of the legislative rule. The OTA Decision viewed the language in the legislative rule as creating a balancing test in which the four factors must be given proper weight and balanced accordingly. The final decision being subject to review under an abuse of discretion standard.

This action taken by the Office of Tax Appeals raises a simple question. Does the legislative rule create a checklist for the Tax Department to employ or does the legislative rule create a balancing test? Must the service meet all four criteria set forth in the legislative rule? Or will it be sufficient for a service to excel at one or two criteria while failing to meet the remaining criteria?

The Tax Department argues that the service must meet all four criteria set forth in the legislative rule. In short, the Tax Department views the test as checklist which must be met. On the other hand, the Office of Tax Appeals advocates for a balancing test in which it will determine whether the Tax Department has accorded sufficient weight to each of the four factors. *See* OTA Decision at Conclusions of Law 11, 12 & 13.

Mountaineer Inspection argues that the Tax Department has failed to accord sufficient weight to the requirements by the State Fire Marshal which include passing the National Home Inspector Examination to be certified as a home inspector. Mountaineer Inspection argues that the Tax Department has reduced the test to a single factor—the fact that a high school diploma is the only formal education required to be certified as a home inspector. As noted above, the Tax Department has long concluded that a professional service requires a four-year college degree at a minimum. Consequently, Mountaineer Inspection argues that the Tax Department has failed to give adequate weight to the other factors in its favor including passing the National Home Inspector Examination and the extensive amount of continuing education which is required. In short, Mountaineer Inspection argues that the Tax Department has abused its discretion and has failed to properly balance the factors

in the test. *See* Mountaineer Inspection Brief at pp. 11-17. Mountaineer Inspection agrees with the Office of Tax Appeals that the test should be a balancing test; nevertheless, Mountaineer Inspection argues that OTA incorrectly balanced the test when it ruled that the Tax Department did not abuse its discretion by concluding that home inspection services are not professional services.

There are two legal issues at play. First, whether the Tax Department has properly applied the legislative rule when the language in the rule is clear and unambiguous. Second, whether the Tax Department has correctly interpreted ambiguous language in the legislative rule when the rule is not clear and unambiguous.

As the Supreme Court has consistently ruled, clear and unambiguous language must be applied and is not subject to statutory interpretation.

> 9. "Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984)*. The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage." Syl. Pt. 3, *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

Syll. Pt. 9, *Steager v. Consol, supra* (emphasis in original). It is well settled that the terms will and shall have a mandatory impact. Therefore, the Tax Department must use the four-part test set forth in the legislative rule.

Furthermore, the discussion in the OTA Decision before the Court is speculative. The OTA Decision posits that the Tax Department should consider additional factors beyond the four factors set forth in the legislative rule. However, the OTA Decision does not identify any additional factors which would be germane to the question of home inspection services. The discussion in the OTA Decision is

a *non sequitur* because Mountaineer Inspection has not argued that a fifth factor exists which should be considered in its situation. The Court concluded that the Tax Department cannot add a new criteria to the test which is not enumerated in the legislative rule.

The legislative rule does not specify whether the four-factor test is a checklist or a balancing test. 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.

When a statute is silent on a particular issue, the agency has discretion regarding how to resolve the ambiguity. *See Steager v. CONSOL*, and *Appalachian Power*, discussed *supra*. The Tax Department views the test as a checklist. The service must meet all four criteria; the failure to meet one of the criteria prohibits viewing the test as a balancing test. Mountaineer Inspection is a good example regarding why the test must be a checklist. The Tax Department has properly interpreted the rule as requiring a college degree for a service to be classified as a professional service. Mountaineer Inspection, obviously, fails to meet that criteria since the State Fire Marshal only requires a high school diploma or a GED for certification as a home inspector. Even though Mountaineer Inspection meets two of the remaining four criteria[5], the service at issue does not require a college degree. Regardless of whether home inspectors exceed other criteria by a wide margin, home inspectors are not required to have a college degree. Therefore, they do not meet all four criteria on the checklist.

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[5] The Tax Department has argued that home inspectors have no apparent national standards of performance. *See* Tax Department's Reply Brief in the Circuit Court at pp. 12-13; Tax Department's Brief Opposing Petition for Appeal in the Circuit Court at pp. 8-9; and Tax Department's OTA Brief at p. 8.

Furthermore, the legislative rule does not say that a service can be classified as a professional service if it meets two or three of the express criteria. The rule says that the Tax Department "will consider" the four enumerated criteria. A balancing test changes the language in the legislative rule. A balancing test means that a service which excels in one or two factors, could be classified as a professional service even though it fails the remaining criteria. The Tax Department's interpretation of the legislative rule flows logically from the language in the rule and is a permissible construction of the statutory requirements and the legislative rule. Accordingly, the Tax Department's interpretation of the rule as a checklist falls within its discretion under West Virginia law.

Since the legislative rule requires the Tax Department to consider the four specific factors, the legislative rule imposes a mandatory four-part test. The Tax Department has properly exercised the discretion granted under the legislative rule and interpreted the rule as four-part checklist. Therefore, services must meet all four criteria in order to be classified as a professional service for consumers sales tax purposes. The Office of Tax Appeals has erroneously substituted its judgment in place of the Tax Department's exercise of discretion by re-writing the legislative rule to create a balancing test. Such actions by the Office of Tax Appeals constitute a violation of law, are in excess of statutory authority, made upon unlawful procedures, affected by other errors of law, and are arbitrary and capricious, in violation of W. Va. Code § 29A-5-4(g).

To the extent that the OTA Decision ruled that the legislative rule does not create a mandatory four-part test, the decision is reversed.

VI. CONCLUSIONS OF LAW

The Court relied on the following conclusions of law in deciding this case.

1. West Virginia imposes a general consumers sales tax. *See* W. Va. Code § 11-15-1, *et seq*. All sales of tangible personal property and services are subject to consumers sales tax. *See* W. Va.

Code § 11-15-3. If a vendor fails to collect and remit the consumers sales tax, the vendor is personally liable for the tax. *See* W. Va. Code § 11-15-4a.

2. In order to prevent evasion, all sales are presumed to be taxable until the proven otherwise. *See* W. Va. Code § 11-15-6(b).

3. Under West Virginia law exemptions from tax are strictly construed against the taxpayer. The West Virginia Supreme Court has consistently ruled in consumers sales 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).

4. The consumers sales tax statute does not define the operative term "professional services". *See* W. Va. Code § 11-15-2 (definitions).

5. If a statute is silent or ambiguous on a specific issue, the administrative agency, has discretion to interpret the statute.

> If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W.Va.Code, 29A–4–2 (1982).

Syl. Pt. 4, *Appalachian Power Company, et al., v. State Tax Department*, 195 W.Va. 573, 583, 466 S.E. 2d 424, 434 (1995).

6. Under West Virginia law, legislative rules have the full force and effect as law.

> "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. 5, *Smith v. W. Va. Human Rights Comm'n*, 216 W. Va. 2, 4, 602 S.E.2d 445, 447 (2004).

Syl. Pt. 4, *Dale W. Steager, WV State Tax Commissioner, et al., v. CONSOL Energy, Inc., dba, CNX Gas Company, LLC, et al.*, 242 W.Va. 209, 832 S.E. 2d 135 (2019); *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); and *Appalachian Power Company, et al., v. State Tax Department*, cited *supra*.

7. The legislative rule to the consumers sales tax specifically enumerates thirty-seven services which are classified as professional services and are, in turn, excepted from the sales tax. *See* W. Va. Code R. § 110-15-8.1.1.1.

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

9. The WV Legislature has granted limited discretion to the Tax Department to classify additional services as professional services. 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.

10. 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. *See* W. Va. Code R. § 110-15-8.1.1.1.

11. When a taxpayer asks the Tax Department to classify a service that is not specifically designated as a professional service in the legislative rule, the Tax Department has long taken the position that a high school diploma or a GED is not enough to qualify as providing a professional

service. According to the Tax Department, to be classified as providing a professional service, the minimum education required to provide that service must be a four-year college degree or its equivalent.

12. The Office of Tax Appeals has previously ruled that a college degree is a requirement to be classified as a professional service. In OTA Decision 06-340 C (2007 WL 9617856), Administrative Law Judge Robert Kiefer addressed whether certified electrical inspectors met the requirements for classification as providing professional services. ALJ Kiefer ruled that "The requirement of a four-year college degree that is germane to the activity is one that has been applied by this Office." *Id.* at Conclusion of Law 6 and at p. 17.

13. As far back as 2001, in Office of Hearings and Appeals Decision 01-685 C, Administrative Law Judge R. Michael Reed ruled that "... a relevant degree from an accredited college or university is required to satisfy the minimum education element of the four-part test for determining whether a service not explicitly identified as 'professional' in the consumers sales and service tax... legislative regulation..." should be classified as a professional service. *Id* at pp. 3-4.

14. ALJ Kiefer's decision was premised on two factors. First, ALJ Kiefer based his decision 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... Because it is ambiguous, it is subject to the rules of statutory construction.

OTA Decision 06-240 C at p. 11.

15. Second, ALJ Kiefer 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. ALJ Kiefer specifically ruled:

> 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 p. 14 (emphasis added).

16. The Supreme Court ruled in *Appalachian Power Company v. State Tax Department*, 195 W.Va. 573, 466 S.E.2d 424 (1995), that the Courts must respect the discretion granted to the Tax Department by the Legislature in performing its duties under the tax statutes.

> Under *Chevron,* we may not impose our own construction of the statute. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the Tax Commissioner's answer is based on a *permissible construction* of the statute. *Chevron,* 467 U.S. at 843, 104 S.Ct. at 2782, 81 L.Ed.2d at 703. Given the competing policy concerns behind the statute and the industries affected, the language of the statute suggests the Legislature intended the Tax Commissioner to strike the appropriate balance of the goals of the statute in defining "net generation available for sale."

Appalachian Power at 591, 466 S.E.2d. at 442 (emphasis in original); *see* also Syl. Pt. 5, *In re Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000) (The exercise of discretion granted to the Tax Commissioner will not be disturbed upon judicial review absent a showing of abuse of discretion).

17. The Supreme Court stated this respect for the use of an agency's discretion with the requirement that "...the critical concern of the reviewing court is that the agency provide a coherent and reasonable explanation of its exercise of discretion...." *Appalachian Power* at 589, 466 S.E.2d. at

440 (quoting *MCI Telecommunications Corp. v. Federal Communications Comm'n*, 675 F.2d 408, 413 (D.C.Cir.1982)).

18. Furthermore, the Supreme Court has ruled that the interpretation of statutes by bodies charged with their administration should be given great weight. *See* Syl. Pt. 3, *Shawnee Bank v. Paige*, cited *supra*. *See also Griffith v. Frontier West Virginia, Inc.*, 282 W.Va. 277, 719 S.E.2d 747 (2011). In *Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788, the Supreme Court ruled "...it is evident that courts will not override administrative decisions of whatever kind, unless the decisions contradict some explicit constitutional provisions or right, are the results of flawed process, or are fundamentally unfair or arbitrary." Quoted with approval in *Appalachian Power* at 589, 466 S.E.2d. 440.

19. The legislative rule does not specify whether the mandatory four-factor test used to determine whether a service should be classified as a professional service is a checklist or a balancing test. The rule is silent on this specific point. *See* W. Va. Code R. § 110-15-8.1.1.1 (quoted in full in Conclusion of Law 9, *supra*).

20. The Tax Department views the mandatory four-part test as a checklist. Therefore, the Tax Department concluded that a service must meet all four criteria; the failure to meet one of the criteria prohibits viewing the test as a balancing test. However, the rule expressly states that the Tax Department "will consider" the four enumerated criteria. *See* W. Va. Code R. § 110-15-8.1.1.1.

21. Furthermore, the legislative rule does not state whether a service can be classified as a professional service if it meets two or three of the four express criteria yet fails to meet the remaining criteria. *See* W. Va. Code R. § 110-15-8.1.1.1.

22. The Tax Department's interpretation of the legislative rule flows logically from the language in the rule and is a permissible construction of the statutory requirements and the legislative rule. *See Appalachian Power* at 591, 466 S.E.2d. at 442 (quoted *supra,* in Conclusion of Law 16).

VII. DISPOSITION

Wherefore, the Court **DENIES** the petition for appeal filed by Petitioner Mountaineer Inspection Services and **GRANTS** the cross-assignments of error raised by the WV State Tax Department.

The Court **AFFIRMS** the decision of the Office of Tax Appeals to the extent that OTA concluded home inspection services are not classified as a professionals service pursuant to W. Va. Code R. § 110-15-8.1.1.1.

The Court **REVERSES** the decision of the Office of Tax Appeals to the extent that OTA ruled that the test set forth in the legislative rule in W. Va. Code R. § 110-15-8.1.1.1 is not a mandatory four-part test. In short, the test set forth in the legislative rule created a checklist for the Tax Department to review and did not create a balancing test as ruled by the Office of Tax Appeals and argued by Mountaineer Inspection.

The objections of all parties are noted for the record and preserved.

The Clerk of the Circuit Court is directed to transmit a true copy of this Final Order to counsel of record at the addresses listed below.

It is so **ORDERED**.

Entered: 06-04-2020

Shawn D. Nines

Shawn D. Nines, Judge
Circuit Court of Taylor County

A TRUE COPY FROM THE RECORD

ATTEST: VONDA M. RENEMAN
CLERK OF THE CIRCUIT COURT OF TAYLOR COUNTY, WEST VIRGINIA

BY: Tabitha Weaver, Deputy