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

PFIZER INC. AND SUBSIDIARIES,

Petitioner Below, Petitioner,

v.

**MATHEW R. IRBY, STATE TAX
COMMISSIONER OF WEST VIRGINIA,**

Respondent Below, Respondent.

ON APPEAL FROM THE INTERMEDIATE COURT OF APPEALS
(CIVIL ACTION NO. 22-ICA-285)

**REPLY BRIEF OF PETITIONER,
Pfizer Inc. and Subsidiaries**

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**PETITIONER'S REPLY BRIEF
IN SUPPORT OF
APPEAL OF RESPONDENT'S ADMINISTRATIVE DECISION**

I. POINTS AND AUTHORITIES

A. PFIZER'S ARGUMENT CONCERNING NET OPERATING LOSS WAS SUFFICIENT TO OFFSET THE TAX DUE WAS TIMELY RAISED.

The Tax Commissioner stated that Pfizer failed to raise the issue of a net operating loss ("NOL") carryover sufficient to offset the tax due. Further, the Tax Commissioner misstated the record when he stated that the Parties did not agree to the fact that there was sufficient NOL carryover to offset the amount of tax liability associated with the findings of the Office of Tax Appeals.

Pfizer filed its Prehearing Statement on March 1, 2021:

Legal and Factual Issue No. 4: The Auditing Division erred as a matter of law in concluding that the taxpayer was not entitled to apply its net operating loss carryover from prior years to the 2015, 2016, and 2017 audit years as provided in W. Va. Code §11-24-6. The Auditing Division also erred in determining that taxpayers had taxable income in 2015, 2016, and 2017 rather than generating NOLs in each of those years. (Appendix Page 427)

As outlined in the supporting schedule that was attached to the Petitioner's Prehearing Schedule (Appendix Page 404), the Petitioner had a West Virginia NOL of \$74,725,569.00 as of December 31, 2014. The Petitioner had the right, under West Virginia Code §11-24-6(d), to use the \$74,725,569.00 NOL carryover to offset any West Virginia taxable income for tax years 2015, 2016, and 2017. Pursuant to the Respondent's Prehearing Statement:

This issue is not a "denial" of net operating losses. The result of the adjustments made by Respondent (both those adjustments identified in sub-issues 1-3, as well as additional adjustments that do not appear to be contested by Petitioner) during the audit changed Petitioner's taxable income and therefore, negated any net operating loss. This is not really a "separate" issue. Once the other issues are

resolved, then any available net operating loss will be calculated, and if any is available, it will be applied.

Also, the amounts at issue for each “sub-issue” have not been calculated by Respondent. Upon resolving those issues, it would be necessary to revisit the calculations for each issue to determine their exact amounts.” (Appendix Page 419)

Therefore, the State Tax Department acknowledges the existence of Petitioner’s NOL carryover, and stated they would adjust any additional liability by application of the NOL carryover.

Per the West Virginia State Tax Department revised work papers (Petitioner’s Opening Brief, Exhibit 1, Page Appendix Page 0277), Petitioner’s West Virginia’s income for 2015 was \$2,299,877.

The West Virginia taxable income would be reduced to \$0 after deducting the NOL carryover. This would leave a NOL carryover to 2016 of \$72,425,692 (\$74,725,569 less \$2,299,877).

Per the West Virginia State Tax Department revised work papers (Petitioner’s Opening Brief, Exhibit 1, Page Appendix Page 0277), the amount of West Virginia taxable income for 2016 was \$8,687,044.

The West Virginia taxable income would be reduced to \$0 after deducting the NOL carryover. This would leave a NOL carryover to 2017 of \$63,738,648 (\$72,425,692 less \$8,687,044).

Per the West Virginia State Tax Department revised work papers (Petitioner’s Opening Brief, Exhibit 1, Page Appendix Page 0277), West Virginia taxable income for 2017 was \$1,415,840.

The West Virginia taxable income would be reduced to \$0 after deducting the NOL carryover. This would leave a NOL carryover to 2018 of \$62,322,808 (\$63,738,648 less \$1,415,840).

In the interest of clarity, the chart below shows the NOL carryover described above.

Calculation of West Virginia NOL Carryover

WV NOL Carryover from 2014	\$74,725,569
2015 – WV Taxable Income (per audit)	\$(2,299,877)
2016 – WV Taxable Income (per audit)	\$(8,687,044)
2017 – WV Taxable Income (per audit)	\$(1,415,840)
Remaining NOL Carryover to 2018	\$62,322,808

Therefore, there is no West Virginia tax due based on the agreement between Respondent and Petitioner that the NOL deductions will be used to adjust any liability resulting from the decision of the case at bar.

At the time of the hearing, it was agreed by the Parties that the only issue still in controversy was the Department’s increase of the Petitioner’s Federal Taxable Income by an alleged foreign source loss under W. Va. Code §11-24-6. Further, it was agreed that the testimony would be limited to the tax year 2015; however, all three tax years were in dispute.

. West Virginia Code § 11-24-6(d) sets forth how the NOL carryover deduction is taken:

(d) Net operating loss deduction. -- Except as otherwise provided in this subsection, there is allowed as a deduction for the taxable year an amount equal to the aggregate of: (1) The West Virginia net operating loss carryovers to that year; plus (2) the net operating loss carrybacks to that year: Provided, That no more than three hundred thousand dollars of net operating loss from any taxable year beginning after the thirty-first day of December, one thousand nine hundred ninety-two, may be carried back to any previous taxable year. For purposes of this subsection, the term “West Virginia net operating loss deduction” means the deduction allowed by this subsection, determined in accordance with Section 172 of the Internal Revenue Code of 1986, as amended.

The Tax Commissioner correctly stated that the amounts and availability of any NOL carryover would not be determined until the taxable income for these years was finalized. Further, the Tax Commissioner would calculate the available NOL carryover and apply it to the tax liability (Appendix Page 419). The Tax Commissioner never applied the NOL carryover, and if they had done so properly, the assessment would have been negated.

The Intermediate Court of Appeal's Scheduling Order required the Petitioner to comply with West Virginia Code § 11-10A-19(e). West Virginia Code § 11-10A-19(e) requires:

(e) The Intermediate Court of Appeals shall hear the appeal as provided in § 29A-5-4 of this code: Provided, That when the appeal is to review a decision or order on a petition for refund or credit, the court may determine the legal rights of the parties, but in no event shall it enter a judgment for money.

The Court's Scheduling Order required the Petitioner to file an adequate bond to secure the performance of the Court's order. West Virginia Code § 11-10A-19(d) requires:

(d) If the appeal is of an assessment, except a jeopardy assessment for which security in the amount thereof was previously filed with the Tax Commissioner, then within 90 days after the notice of appeal is filed, or sooner if ordered by the Intermediate Court of Appeals, the petitioner shall file with the clerk of the Intermediate Court of Appeals a cash bond or a corporate surety bond approved by the clerk. The surety must be qualified to do business in this state. These bonds shall be conditioned upon the petitioner performing the orders of the court. The penalty of this bond shall be not less than the total amount of tax or revenue plus additions to tax, penalties, and interest for which the taxpayer was found liable in the administrative decision of the office of tax appeals. Notwithstanding the foregoing and in lieu of the bond, the Tax Commissioner, upon application of the petitioner, may upon a sufficient showing by the taxpayer, certify to the clerk of the Intermediate Court of Appeals that the assets of the taxpayer are adequate to secure performance of the orders of the court: *Provided*, That if the Tax Commissioner refuses to certify that the assets of the taxpayer or other indemnification are adequate to secure performance of the orders of the court, then the taxpayer may apply to the Intermediate Court of Appeals for the certification. No bond may be required of the Tax Commissioner.

As set forth above, there is no assessment of tax being appealed because the Tax Commissioner stated the loss carryover would be used to adjust any liability. Therefore, there is no requirement for a bond or a certification of assets as contemplated by W. Va. Code § 11-10A-19(d).

Petitioner would like to clarify an argument in Respondent's brief submitted on October 10, 2023. Page 3 of Respondent's brief states that Taxpayer:

“[...] attempts to excuse its neglect by characterizing itself as a ‘small family-owned business’ and ‘impoverished legal entity’ with an ‘inability’ to post bond.”

This is simply not true. Petitioner argued no such thing on pages 7-8 of Petitioner's Brief filed August 25, 2023. Rather, Petitioner cited to a case (i.e., *Frantz*, 211 W. Va. at 193, 564 S.E.2d at 403) in which the petitioner of that case was a “small, family-owned business” and an “impoverished legal entity” with an “inability” “to post bond” (Petitioner's Brief 7-8). It is a mischaracterization of Petitioner's brief to say Petitioner argued they are “a small, family-owned business” (Respondent's Brief, Page 3). As stated on Page 8 of Respondent's own brief it is a matter of both public record and the record of this case that Petitioner is a multinational corporation of considerable size and means. Petitioner was using *Frantz*, 211 W. Va. at 193, 564 S.E.2d at 403, to demonstrate that in the past the Court has held that the Court, and not the Commissioner, has the power to determine whether a taxpayer may contest its tax assessment on the merits.

Petitioner would like to bring to the Court's attention a citation error in Respondent's brief.

Page 3 of Respondent's brief states:

Pfizer's arguments gloss over the clear statute that mandates the filing of an appeal bond or an alternative certification of assets in tax appeals. See W. Va. Code § 11-10-19(e).

West Virginia Code § 11-10-19(e) does not exist. Perhaps Respondent meant to cite to West Virginia Code § 11-10A-19(e), and not West Virginia Code §11-10-19(e).

As set forth above, there is no assessment for a tax that is being appealed because the use of the loss carryover that the Tax Commissioner stated would adjust any liability. Therefore, there is no requirement for a bond or a certification of assets as contemplated by West Virginia Code § 11-10A-19(e).

B. BECAUSE THE ASSESSMENT SHOULD HAVE BEEN OFFSET BY THE NET OPERATING LOSS CARRYOVER, THE DISMISSAL FOR FAILURE TO FILE A BOND DEPRIVES THE PETITIONER OF ITS CONSTITUTIONAL RIGHTS.

The Tax Commissioner's argument that an appeal bond was required ignores the fact that the Tax Commissioner acknowledged Petitioner had an NOL carryover (Appendix Page 419) and is attempting to prevent Petitioner's access to the Courts. There is no statutory obligation to post a bond when there is no tax liability. W. Va. Code § 11-10A-19(d).

The Tax Commissioner's reliance on *Purple Turtle, LLC v. Gooden*, 223 W. Va. 755, 760, 679 S.E.2d 587, 592 (2009) (affirming circuit court's dismissal for failure to file certified record in property tax appeal); Syl. Pt. 3, *Rawl Sales & Processing Co. v. Cnty. Comm'n of Mingo Cnty.*, 191 W. Va. 127, 128, 443 S.E.2d 595, 596 (1994) (same); *see also In re S.L.*, 243 W. Va. 559, 566, 848 S.E.2d 634, 641 (2020) (declining to consider untimely appeal of final disposition order in abuse and neglect proceeding) is misplaced. In the case at bar, the bond is not required when there is not a tax liability and, therefore, not a jurisdictional requirement for the Intermediate Court to hear the case.

The Tax Commissioner's continued insistence on a bond when one should not be required flies in the face of the open court's provision set forth in Article III, Section 17 of the West Virginia Constitution. The Commissioner's arguments are without merit and only encourage the violation of Taxpayers' constitutional rights to access the Courts of the State of West Virginia.

C. THE TAX COMMISSION IS EQUITABLY ESTOPPED FROM DENYING THE APPLICATION OF THE NET OPERATING LOSS TO THE TAX LIABILITY CREATED BY THE DECISION OF THE OFFICE OF TAX APPEALS.

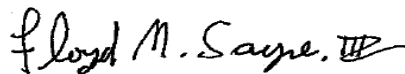
The Tax Commissioner fails to understand the Petitioner's basis for its argument under the doctrine of equitable estoppel. It is not the fact that the appeal bond was not filed, but the fact that if the Tax Commissioner had applied the NOL carryover to the proposed tax liability, there would not be an outstanding balance and, therefore, there would be no requirement for a bond under West Virginia Code §11-10A-19(e).

Similar to the *Hudkins v. State Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007) case, there was an affirmative act that provided the Petitioner with an assurance that its NOL carryover would be applied once the current issues were resolved. The Tax Commissioner should have applied the NOL carryover and is now taking steps to prevent the Petitioner from accessing the courts.

II. CONCLUSION

Based on the evidence in the record and on the preceding points and authorities, it is respectfully submitted that the administrative decision is in error and should be reversed. The assessment should be abated in its entirety.

Respectfully submitted,



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

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v.

No. 23-317

Mathew R. Irby, State Tax

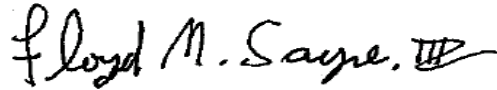
Commissioner of West Virginia,

Respondent Below, Respondent.

CERTIFICATE OF SERVICE

I, Floyd M. Sayre, III, Esquire, do hereby certify that a true and exact copy of the foregoing *Reply Brief Of Petitioner* has been served, November 1, 2023, upon the following, via efile, on the following:

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