SANITIZED DECISION – DOCKET NOS. 04-487 TSE & 04-542 TSE – BY R. MICHAEL REED – SUBMITTED ON APRIL 29, 2005 FOR DECISION ON SUBJECT-MATTER JURISDICTION – ISSUED APRIL 29, 2005

SYNOPSIS

TOBACCO MASTER SETTLEMENT AGREEEMENT -- ENFORCEMENT -- MONEY PENALTY IMPOSED BY STATE TAX COMMISSIONER -- OFFICE OF TAX APPEALS LACKS SUBJECT-MATTER JURISDICTION TO REVIEW -- The West Virginia Office of Tax Appeals does not have any subject-matter jurisdiction to review the State Tax Commissioner's imposition of a money penalty pursuant to the provisions of W. Va. Code § 16-9D-8(a) [2003], relating to, among other things, selling cigarettes not on the directory of brands of cigarettes approved for stamping and sale in this State under the enforcement provisions of the Tobacco Master Settlement Agreement. Neither the section of the West Virginia Office of Tax Appeals Act conferring subject-matter jurisdiction on this limited-jurisdiction, executive branch tribunal, specifically, W. Va. Code § 11-10A-8(1)-(6) [2002], nor the statutory section on the enforcement of the Tobacco Master Settlement Agreement by imposing a money penalty for certain violations of that Agreement, set forth in W. Va. Code § 16-9D-8(a) [2003], confer the subject-matter jurisdiction in question, either explicitly or implicitly.

FINAL ORDER
DISMISSING, with PREJUDICE, PETITIONS FOR REVIEW, FOR LACK OF SUBJECT-MATTER JURISDICITION

The Internal Auditing Division of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") imposed a money penalty against the Petitioner. This penalty imposition was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 16-9D-8(a) [2003] of the West Virginia Code, relating to enforcement of the Tobacco Master Settlement Agreement.

This penalty imposition was for the period of September, 2003 through February, 2004. Written notice of this penalty imposition was served on the Petitioner.

Also, Commissioner (by the Unit) imposed a second monetary penalty against the Petitioner, under the same statutory authority mentioned above. This penalty imposition was for the period of March, 2004 through May, 2004. Written notice of this penalty imposition was served on the Petitioner..

Thereafter, by mail the Petitioner filed with this tribunal, the West Virginia Office of Tax Appeals, a separate petition for review of each of the two impositions of the money penalty.

Subsequently, notice of a hearing on the two petitions for review was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003). The parties submitted excellent post-hearing memoranda of law on the issues of law, on the merits, raised by them.

On March 31, 2005, pursuant to the provisions of the *Rules of Practice and Procedure Before the West Virginia Office of Tax Appeals*, specifically, 121 C.S.R. 1, §§ 50.3, 50.3.1, and 50.3.4 (Apr. 20, 2003), the undersigned Chief Administrative Law Judge issued his Notice of Intent to Enter a Final Order Dismissing, with Prejudice, the Petitions for Review in this matter, for Lack of Subject-Matter Jurisdiction.

The parties thereafter timely filed written comments concerning that Notice of Intent to Dismiss. This tribunal has thoroughly reviewed these comments and is now ready to rule.

FINDINGS OF FACT

Our disposition of the pure issue of law on the subject-matter jurisdiction of this tribunal to review money penalties of the type involved in this matter does not involve any material factual issues.

DISCUSSION

While the parties raise, and capably argue, several interesting issues on the merits in this matter of first impression, the only issue that this tribunal has the authority to address is one which the Chief Administrative Law Judge of this tribunal raised on his own motion (*sua sponte*), s*ee* 121 C.S.R. 1, §§ 50.3 & 50.3.1 (Apr. 20, 2003) (*Rules of Practice and Procedure Before the West Virginia Office of Tax Appeals*), specifically: Does this tribunal have jurisdiction with respect to the subject matter involved here? The short answer is: no.

W. Va. Code § 11-10A-8(1)-(6) [2002] confers the following subject-matter jurisdiction upon the West Virginia Office of Tax Appeals:

> The office of tax appeals has exclusive and original jurisdiction to hear and determine all:
> (1) Appeals from tax assessments issued by the tax commissioner pursuant to article ten of this chapter;
> (2) Appeals from decisions or orders of the tax commissioner denying refunds or credits for all taxes administered in accordance with the provisions of article ten of this chapter;
> (3) Appeals from orders of the tax commissioner denying, suspending, revoking, refusing to renew any license or imposing any civil money penalty for violating the provisions of any licensing law administered by the tax commissioner;
> (4) Questions presented when a hearing is requested pursuant to the provisions of any article of this chapter which is administered by the provisions of article ten of this chapter;
> (5) Matters which the tax division is required by statute or legislatively approved rules to hear, except employee grievances filed pursuant to article six-a, chapter twenty-nine of this code; and

> (6) Other matters which may be conferred on the office of tax appeals by statute or legislatively approved rules.

(underlining emphasis added by this tribunal)

Paragraph (2), involving appeals from tax refunds or credits, obviously does not confer subject-matter jurisdiction on this tribunal in this type of matter. An examination of each of the other paragraphs of W. Va. Code § 11-10A-8 [2002] clearly discloses that none of them confers subject-matter jurisdiction on the West Virginia Office of Tax Appeals in a matter, like this one, involving review of the State Tax Commissioner's imposition of a money penalty, under W. Va. Code § 16-9D-8(a) [2003], to enforce the Tobacco Master Settlement Agreement. This examination of W. Va. Code § 11-10A-8 [2002] follows.

Paragraph (1): This type of matter does not involve, as required under this paragraph, a tax assessment, even though the money penalty to enforce the Tobacco Master Settlement Agreement is imposed and collected "in the manner" that tax is assessed and collected.

Paragraph (3): The money penalty imposed here does not necessarily involve any licensing law administered by the State Tax Commissioner. For example, the money penalty clearly may be imposed against someone who is not registered to do business in this State at the time the money penalty is imposed and who, therefore, has no business registration certificate to revoke or to suspend.

Paragraph (4): The questions presented in this type of matter about the abatement or reduction of the money penalty imposed under W. Va. Code § 16-9D-8(a) [2003] do not arise when a hearing is requested under any article of chapter 11, the chapter of the West Virginia Code on most state taxation. Instead, chapter 16 is involved.

Paragraph (5): The State Tax Division is not required -- by statute or legislative regulation -- to "hear" this matter, only to impose and collect the money penalty authorized by W. Va. Code § 16-9D-8(a) [2003].

Paragraph (6): No other statute, or legislative regulation, confers subject-matter jurisdiction on the West Virginia Office of Tax Appeals to review a money penalty imposed by the State Tax Commissioner under W. Va. Code § 16-9D-8(a) [2003]. For example, W. Va. Code § 16-9D-8(a) [2003], which authorizes the money penalty involved here, does not mention the West Virginia Office of Tax Appeals or article 10A of chapter 11 of the West Virginia Code, which is the West Virginia Office of Tax Appeals Act, enacted in the year 2002.

While we understand that persons, like the Petitioner, should be entitled to an independent review of the imposition of a money penalty under W. Va. Code § 16-9D-8(a) [2003], this limited-jurisdiction, executive-branch tribunal may not simply "assume" that role. Under the existing, clear statutes, this tribunal obviously may not legislate a new manner, or suggest the appropriate existing manner, for the Petitioner, or similarly situated persons, to obtain an independent review of the imposition of the money penalty.

CONCLUSION OF LAW

Based upon all of the above it is **HELD** that the West Virginia Office of Tax Appeals does not have any subject-matter jurisdiction to review the State Tax Commissioner's imposition of a money penalty pursuant to the provisions of W. Va. Code § 16-9D-8(a) [2003], relating to, among other things, selling cigarettes not on the directory of brands of cigarettes approved for stamping and sale in this State under the enforcement provisions of the Tobacco Master Settlement Agreement. Neither the

section of the West Virginia Office of Tax Appeals Act conferring subject-matter jurisdiction on this limited-jurisdiction, executive branch tribunal, specifically, W. Va. Code § 11-10A-8(1)-(6) [2002], nor the statutory section on the enforcement of the Tobacco Master Settlement Agreement by imposing a money penalty for certain violations of that Agreement, set forth in W. Va. Code § 16-9D-8(a) [2003], confer the subject-matter jurisdiction in question, either explicitly or implicitly.

.DISPOSITION

WHEREFORE, it is the **FINAL ORDER** of the Chief Administrative Law Judge of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the **PETITIONS** for **REVIEW** are **DISMISSED, with Prejudice**, and this matter is removed from the docket.

This tribunal notes the objection of the Petitioner to this Final Order of Dismissal and directs the Executive Director to serve a copy of this Final Order on counsel of record for both parties.