

REDACTED DECISION – DK# 10-036 C – BY – CHRISTOPHER B. AMOS, ADMINISTRATIVE LAW JUDGE – SUBMITTED DECISION ON JANUARY 17, 2012 – ISSUED ON JULY 12, 2012

SYNOPSIS

TAXATION -- PROCEDURE AND ADMINISTRATION -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

CONSUMERS SALES AND SERVICE TAX -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment the burden of proof is upon the Petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code R. § 121-1.63.1 (2003).

CONSUMERS SALES AND SERVICE TAX -- OFFICERS PERSONALLY LIABLE FOR TAX DEFAULT OF CORPORATION -- Officers of an association or corporation “shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed ... may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010).

CONSUMERS SALES AND SERVICE TAX -- OFFICER LIABILITY STATUTE - - Chapter 11 of the West Virginia Code is silent as to how long the Tax Commissioner has to enforce payment against the officers.

CONSUMERS SALES AND SERVICE TAX -- LEGISLATIVE RULES -- It is a function of legislative rules to supply that which the legislature has omitted from statutory enactments. *See* Griffith v. Frontier West Virginia Inc., 228 W. Va. 277, 719 S.E. 2d 747 (2011).

CONSUMERS SALES AND SERVICE TAX -- APPLICABLE LEGISLATIVE RULE -- The legislative rule applicable to officer liability cases is West Virginia Code of State Rules Section 110-15-4a.7.1, which provides that an assessment against officers is considered a proceeding and that the Tax Commissioner has five years to assess officers after the assessment against the corporation has become final.

CONSUMERS SALES AND SERVICE TAX -- AGENCY REGULATIONS MUST BE FOLLOWED -- In the absence of the issuance of a regulation that is inconsistent with, or which alters or limits an agency’s statutory authority, an agency must follow its own rules and regulations. *See e.g.* Griffith supra and In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W. Va. 250, 539 S.E.2d 757 (2000).

CONSUMERS SALES AND SERVICE TAX -- BURDEN OF PROOF MET --

Petitioner has met his burden of proof by showing that the assessment issued against him was barred by the statute of limitations as set forth in West Virginia Code of State Rules Section 110-15-4a.7.1.

FINAL DECISION

On January 5, 2010, the Compliance Division of the West Virginia State Tax Commissioner's Office (Respondent) issued an officer assessment against Petitioner, as a responsible individual of Company A. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of January 31, 1997, through December 31, 1999; for consumers sales and service tax in the amount of \$_____, interest in the amount of \$_____ and additions to tax of \$_____ 00 for a total tax liability of \$_____.

Written notice of the assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked January 20, 2010, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§ 11-10A-8(1) and 11-10A-9 (West 2010).

On July 21, 2011, an evidentiary hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10. At the time of drafting this final decision, the undersigned became aware that there were questions regarding the timeliness of the assessment that forms the basis of this appeal. During a telephonic status conference, the parties were directed to file legal briefs addressing this issue. Thereafter, on January 17, 2012, the matter became ripe for decision.

FINDINGS OF FACT

1. Petitioner, who presently resides in Buckhannon, Upshur County, West Virginia, purchased the building and the corporate assets of Company A in May, 1997; however, he did not operate the business until late May or early July, 1997, because the building was undergoing renovations.

2. Petitioner then operated the business for 15 consecutive months until it was closed at the end of September, 1998.¹ Petitioner had no employees while he conducted business.

3. Petitioner, who was the sole owner and officer of the corporation, operated the business three to four days a week, and sales averaged \$_____ a month.

4. After the business closed, no further sales were made, and Petitioner, who had occupied an apartment in the building, moved away and gained employment elsewhere.

5. Petitioner has been employed as an oil well attendant for Company B since December of 1998.

6. Company A did not file any consumers sales and service tax returns during the time that the Petitioner operated the business.

7. As the sole officer of the corporation, Petitioner was the only one responsible for filing any required tax returns due the State of West Virginia.

8. The Tax Commissioner issued a consumers sales and service tax assessment against Company A and it became final on January 23, 2000.

9. Thereafter, on January 5, 2010, the Tax Commissioner issued an officer liability assessment against the Petitioner, for the period of January 31, 1997, through December 31, 1999.

¹ Respondent did not challenge Petitioner's testimony that the business closed in September, 1998.

DISCUSSION

Neither party disputes the relevant facts in this matter. There was a default by the corporation by not properly remitting consumers sales and service taxes. Thereafter, on January 5, 2010, the Respondent issued an officer assessment against the Petitioner based upon his position as president during the period January 31, 1997, through December 31, 1999. As the only officer of the corporation, the Petitioner is, pursuant to West Virginia Code Section 11-15-17, clearly liable for the unpaid tax debts of the corporation. Section 17, allows the Tax Commissioner, upon the default of a corporation, to, seek payment from the officers, and that they “shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010). However, Section 17 of Article 15, Chapter 11 is silent as to how long the Tax Commissioner has to enforce payment against the officers of a corporation that has defaulted. In fact, all of Chapter 11 is silent as to this point. As a result, the Tax Commissioner has, as the Legislature has authorized him to do, promulgated a legislative rule to flesh out the circumstances surrounding assessments against officers. *See Griffith v. Frontier West Virginia Inc.*, 228 W.Va. 277, 719 S.E.2d 747 (2011) (the function of legislative rules is to supply that which the Legislature has omitted from statutory enactments).

Section 4a of Series 15, Title 110 of the West Virginia Code of State Rules contains extensive direction regarding the liability of the officers of a defaulted corporation. We are concerned in this matter with Subsection 4a.7.1 which states:

An assessment against officers is considered to be a proceeding for the collection of the tax liability of the corporation or association. If the liability of the corporation or association is determined to be due by an assessment which has become final, an assessment against an officer must be made within five years after the assessment against the corporation or association has become final. If the liability of the corporation is determined to be due by methods provided by law other than an assessment, an assessment against an officer must be made within five years after the date on which the corporation or association filed its annual return, or if no annual return is required, five years after the latest periodical return required to be filed in any year is filed.

W. Va. Code R. § 110-15-4a.7.1 (1993). It is undisputed that the officer liability assessment that forms the basis of this matter was issued beyond five years after the default of the corporation. As a result, resolution of this matter should be as simple as ruling that the Tax Commissioner failed to bring the assessment at issue within the five years mandated by Section 4a.1.7, and, as such, it was untimely. However, the Tax Commissioner argues that he has ten years to issue assessments such as the one against the Petitioner in this matter.

The Tax Commissioner relies on both, Section 4a.1.7 and West Virginia Code Section 11-10-16, which states:

Where assessment is issued.--Every proceeding instituted by the tax commissioner for the collection of the amount found to be due under an assessment which has become final of any tax, additions to tax, penalties or interest imposed by this article or any of the other articles of this chapter to which this article is applicable, irrespective of whether such proceeding shall be instituted in a court or by utilization of other methods provided by law for the collection of such tax, additions to tax, penalty or interest, shall be brought or commenced within ten years after the date on which such assessment has become final.

W. Va. Code Ann. § 11-10-16(a) (West 2010). The Tax Commissioner argues that Section 16(a) clearly and unambiguously gives him ten years to institute proceedings to collect amounts found to be due after an assessment has become final, and because Section 4a.7.1 makes officer

liability assessments “proceedings” he had ten years to issue the assessment in this matter. However, the Tax Commissioner never mentions, let alone presents any arguments regarding what is the import of the second sentence of Section 4a.7.1, the one that states officer liability assessments must be brought within five years. The Tax Commissioner relies on Dalton v. U.S., 816 F.2d 971 (4th Cir. 1987) as standing for the proposition that if there is a conflict between a regulation and a statute, the statute controls. The Tax Commissioner has correctly stated the general proposition of law regarding conflicts between statutes and regulatory provisions. *See e.g. Griffith, supra* (an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority).

The problem with the Tax Commissioner’s argument is that it supposes a conflict between West Virginia Code Section 11-10-16 and Section 4a.7.1 of the Consumers Sales and Service Tax Regulations, when no such conflict exists. As stated above, West Virginia Code Section 11-10-16, as well as the entirety of Chapter 11 is silent as to how long the Tax Commissioner has to bring an officer liability assessment and that is why the Tax Commissioner promulgated Section 4a.7.1, to flesh out that what the Legislature has not addressed. In Section 4a.7.1, the Tax Commissioner has clearly and unambiguously given himself or herself five years, after the corporation’s assessment has become final, to issue an officer liability assessment. The Tax Commissioner would undoubtedly argue that Section 4a.7.1 also treats officer liability assessments as proceedings to collect a debt, and pursuant to West Virginia Code Section 11-10-16, when the Tax Commissioner institutes such proceedings, he or she has ten years to do so. However, the circular logic in this argument is flawed, because the Tax Commissioner is essentially saying “to the extent that it leads me to West Virginia Code Section 11-10-16, I like

Section 4a.7.1, but to the extent it limits me to five years, Section 4a.7.1 should be ignored, because it is in conflict with West Virginia Code Section 11-10-16.”

In his brief to this Tribunal, the Tax Commissioner offers no authority for the proposition that the second sentence of Section 4a.7.1 can be ignored. In fact, under West Virginia law, the opposite conclusion must be drawn. As discussed in Frontier, *supra*, absent the issuance of a regulation that is inconsistent with, or which alters or limits an agency’s statutory authority, an agency must follow its own rules and regulations.

An administrative agency is, of course, obligated to “follow and apply its rules and regulations in existence at the time of agency action.” *Appalachian Power*, 195 W. Va. at 583 n. 8, 466 S.E.2d at 434 n. 8. *See also* syl. pt. 1, *Powell v. Brown*, 160 W.Va. 723, 238 S.E.2d 220 (1977) (“[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.”); syl. pt. 4, *Black v. State Consol. Public Retirement Bd.*, 202 W. Va. 511, 505 S.E.2d 430 (1998); *Burns v. Dials*, 180 W. Va. 623, 378 S.E.2d 665 (1989); syl. pt. 1, *Trimboli v. Board of Educ. of Wayne County*, 163 W. Va. 1, 254 S.E.2d 561 (1979).

In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W. Va. 250, 256, 539 S.E.2d 757, 763 (W.Va., 2000). Here, at the time the officer liability assessment was issued against the Petitioner, the Tax Department had a properly promulgated legislative rule, which gave it five years to issue the assessment.

While not arguing it directly, the Tax Commissioner suggests that Section 4a.7.1 is inconsistent with West Virginia Code Section 11-10-16 or that it limits his ten-year authority under West Virginia Code Section 11-10-16. The problem with this argument is that the Tax Commissioner has not **issued** a rule that is inconsistent with or alters his statutory authority. In fact, it seems clear from the Tax Commissioner’s brief in this matter that the opposite has happened. The Tax Commissioner points out that until 1993, West Virginia Code Section 11-10-

16 provided the same five-year limitations on collection actions as Section 4a.7.1 provides for officer liability assessments. As a result, at the time of **issuance**, Section 4a.7.1 was not inconsistent with or limiting of the Tax Commissioner's statutory authority under West Virginia Code Section 11-10-16. Of course this discussion presupposes that part of the Tax Commissioner's statutory authority in issuing officer liability assessments comes from West Virginia Code Section 11-10-16, which in fact is incorrect. As cited above, that statutory authority is contained in West Virginia Code Section 11-15-17. However, even if one were to find that West Virginia Code Section 11-10-16 provides statutory authority for officer liability assessments, there was no inconsistency or limitation of statutory authority until 1993, when the five year period in Section 16 was changed to ten years. Simply put, for whatever reason, the Tax Commissioner in 1993 neglected to seek a legislative change to Section 4a.7.1 to keep it in harmony with Section 16. It is also unclear why subsequent Tax Commissioners have never sought to reconcile the two provisions. Nor is it clear why the current Tax Commissioner is now, nineteen years after Section 16 was modified, seeking to have the modification apply to officer liability assessments.² Whatever the case, this Tribunal is unable and unwilling to rewrite a properly promulgated legislative rule, and therefore, the assessment issued against the Petitioner must be vacated.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

² In 1993 the limitations period for officer liability assessments was addressed by the West Virginia Supreme Court of Appeals in *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E. 2d 697 (2008). However, the holding in *Schmehl* is not helpful to our determination because the Court did not address or discuss the applicability of West Virginia Code Section 11-10-16.

2. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment the burden of proof is upon the Petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code R. § 121-1.63.1 (2003).

3. Officers of an association or corporation “shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed ... may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010).

4. Chapter 11 of the West Virginia Code is silent as to how long the Tax Commissioner has to enforce payment against the officers.

5. It is a function of legislative rules to supply that which the legislature has omitted from statutory enactments. *See* Griffith v. Frontier West Virginia Inc., 228 W. Va. 277, 719 S.E. 2d 747 (2011).

6. The legislative rule applicable to officer liability cases is West Virginia Code of State Rules Section 110-15-4a.7.1, which provides that an assessment against officers is considered a proceeding and that the Tax Commissioner has five years to assess officers after the assessment against the corporation has become final.

7. In the absence of the issuance of a regulation that is inconsistent with, or which alters or limits an agency’s statutory authority, an agency must follow its own rules and regulations. *See e.g.* Griffith supra and In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W. Va. 250, 539 S.E.2d 757 (2000)

8. Petitioner has met his burden of proof by showing that the assessment issued against him was barred by the statute of limitations as set forth in Section 4a.7.1 of Title 110, Series 15 of the West Virginia Code of State Rules.

DISPOSITION

WHEREFORE, it is the Final Decision of the West Virginia Office of Tax Appeals that the consumers sales and service tax assessment issued against the Petitioner, as a responsible officer of Company A for the period January 31, 1997, through December 31, 1999, in the aggregate amount of \$_____, including interest and additions to tax, should be and hereby is **VACATED** in its entirety.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
George V. Piper³
Administrative Law Judge

Date Entered

³Administrative Law Judge, Christopher B. Amos, heard this matter. However, Judge Amos is no longer employed with the West Virginia Office of Tax Appeals; as a result, the decision was written by Administrative Law Judge, George V. Piper.