

REDACTED DECISION – DOCKET NUMBER 14-026 RPD

**HEATHER G. HARLAN, CHIEF ADMINISTRATIVE LAW JUDGE SUBMITTED FOR
DECISION on FEBRUARY 20, 2015
ISSUED ON AUGUST 7, 2015**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

SYNOPSIS

OFFICE OF TAX APPEALS

CONCLUSION OF LAW

In hearings conducted by the West Virginia Office of Tax Appeals, the taxpayer has the burden of proof.

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

It is well settled that all tax exemptions are strictly construed against the taxpayer claiming the exemption. *Wooddell v. Dailey*, 160 W. Va. 65, 230 S.E.2d 466 (1976); *RGIS Inventory Specialists v. Palmer*, 209 W.Va. 152, 544 S.E.2d 79 (2001).

UNITED STATES SUPREME COURT OF APPEALS

CASE LAW

Under the principles of intergovernmental immunity, the United States Supreme Court struck down as discriminatory, under 4 U.S.C. § 111, a tax scheme that taxed all federal pensions, which at the same time exempted all state pensions. *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989).

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

In *Dodson v. Palmer*, C.A. No. 00-C-AP-10 (Monongalia County Circuit Court W. Va. 2000), the Court applied *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), finding that West Virginia Code Section 11-21-12(c)(6) was unconstitutional as applied to that appellant.

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

The West Virginia Supreme Court of Appeals did not find *Davis* controlling according to the circumstances presented in *Brown v. Mierke*, 191 W. Va. 120, 443 S.E.2d 462 (1994). The test to determine whether the tax scheme is discriminatory against an officer or employee is not merely because the source of the compensation is different, but rather, because of the totality of the circumstances which are present. Those circumstances determine whether the intent of the scheme is to discriminate against employees and former employees of the federal government.

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

In *Brown*, “totality of the circumstances” meant that there was no intent to discriminate where military retirees, who constituted less than four percent of all State government retirees, were treated more favorably than those retired from civilian occupations, as well as retired state employees and teachers, and where such retirees were treated substantially more favorably than those persons retired from the West Virginia Judicial Retirement System.

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

Retired U.S. Marshals, like the military retirees in *Brown*, were treated more favorably than retirees from the West Virginia civilian workforce, as equally as persons retired from the West Virginia Public Employees Retirement System and the West Virginia Teachers Retirement System, and more favorably than retirees from the West Virginia Judicial Retirement System. Therefore, the intent of the West Virginian scheme was not to discriminate against federal retirees but rather to give a very narrow benefit to former state and local employees.

OFFICE OF TAX APPEALS

CONCLUSION OF LAW

Petitioner’s source of pay or compensation alone, absent a showing of other circumstances required by *Brown v. Mierke*, do not provide sufficient evidence that the exemption at issue is discriminatory as applied to the Petitioner.

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

Based upon the specialized circumstances as set forth in *Brown*, we do not find that our decision conflicts with the holding in *Davis*, where a blanket exemption of all state and local employee pensions, while at the same time taxing federal retiree pensions, evidenced Michigan’s intent to discriminate.

OFFICE OF TAX APPEALS

CONCLUSION OF LAW

West Virginia Code Section 11-21-12(c)(6), as applied to the Petitioners, complies with Syl. Pt. 2 of the West Virginia Supreme Court decision in *Brown v Mierke*.

**OFFICE OF TAX APPEALS
CONCLUSION OF LAW**

Petitioners have not met their burden of proof, as set forth in W. Va. Code § 11-10A-10(e), which requires a showing that they are entitled to the strictly construed tax exemption contained in West Virginia Code Section 11-21-12(c)(6).

FINAL DECISION

On November 15, 2013, the Tax Account Administration Division of the West Virginia State Tax Commissioner's Office, (hereafter, the "Respondent"), denied Petitioners (hereafter, the "Petitioners") Schedule M modifications on their 2010 and 2011 amended personal income tax returns. Thereafter, on January 10, 2014, the Petitioners timely filed their "petition for refund" with this Tribunal, The West Virginia Office of Tax Appeals (sometimes referred to herein as "OTA"). *See* W. Va. Code §§ 11-10A-8(2) and 11-10A-9(a)-(b).

PROCEDURAL HISTORY

In their petition for refund, the Petitioners argued that Mr. A's pension as a United States Marshal should be exempt under West Virginia Code Section 11-21-12(c)(6) because that same code section exempts pensions paid to retired West Virginia law enforcement officials, retired West Virginia firefighters, retired West Virginia state police and retired West Virginia deputy sheriffs.

Prior to the hearing, Petitioners filed a "Motion for Summary Judgment" with this Tribunal, asking us to declare that income to be tax exempt. Because we concluded that this Tribunal, as a part of the executive branch of government, lacked subject-matter jurisdiction to declare a statute unconstitutional, we denied Petitioners' "Motion for Summary Judgment" and dismissed the

matter from our docket. The Petitioners, by counsel, timely appealed this Tribunal's "Order of Dismissal" to the Circuit Court of Mercer County, West Virginia.

On October 28, 2014, the Honorable Derek C. Swope, Judge of the Circuit Court of Mercer County, West Virginia, ordered that this matter be remanded to this Tribunal. Because of the detailed nature of Judge Swope's findings and directives, we have recited the pertinent portions of that Order, to wit:

16. The Petitioners have argued before this Court that the refund issue will be determined by the United States Supreme Court decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) and similar cases based on the intergovernmental tax immunity doctrine codified as 4 U.S.C. § 111. The Tax Department has argued that the refund issue will be determined by the West Virginia Supreme Court decision in *Brown v. Mierke*, 191 W. Va. 120, 443 S.E.2d 462 (1994) *cert. denied* 513 U.S. 877 (1994) *sub nom Brown v. Paige*, which reviewed W. Va. Code § 11-21-12(c)(6) in a *Davis v. Michigan* challenge.

17. At this time, the Court concludes that the applicable law governing this case is the West Virginia Supreme Court decision in *Brown v. Mierke* and, in particular, Syl. Pt. 2 which states:

Challenges to a state tax scheme under 4 U.S.C. § 111 can succeed only when one purpose of the challenged scheme is shown to discriminate against the officer or employee because of the **source** of pay or compensation. In determining whether such discrimination exists, a court will look to the totality of the circumstances to ascertain whether the intent of the scheme is to discriminate against employees or former employees of the federal government.

(Emphasis in original.) The record from the Office of Tax Appeals contains no factual development whatsoever regarding the totality of the circumstances concerning whether the intent behind W. Va. Code § 11-21-12(c)(6) discriminates against federal retirees based upon the source of the pay.

18. It is well settled that when a circuit court conducts judicial review of a decision issued by an administrative agency, the reviewing court is limited to the evidentiary record developed before the administrative agency. *See Frymier-Halloran v. Paige*, 193 W. Va. 687, 458 S.E.2d 780 (1995) at Syl. Pt. 3 ("...the focal point for judicial review should be the administrative record, not some new

record made initially in the reviewing court.”) *see also Delmer Workman v. Workmen’s Compensation Commission, et al.*, 160 W.Va. 656, 662, 236 S.E.2d 236, 240 (1977) (Without such record findings of an administrative agency, the Court, on judicial review, is greatly at sea without a chart or compass in making its determination and adjudication as to whether the agency decision is plainly right or clearly wrong.)

WHEREFORE, the Court:

1. Remands this matter to the West Virginia Office of Tax Appeals for further proceedings pursuant to W. Va. Code § 29A-5-4(g).

2. The Office of Tax Appeals is directed to conduct an evidentiary hearing on the *Petition for Refund* as required pursuant to W. Va. Code §§ 11-10A-10(a) and 29A-5-1.

3. The Office of Tax Appeals shall make detailed findings of fact and set forth conclusions of law regarding whether W. Va. Code § 11-21-12(c)(6) complies with Syl. Pt. 2 of the West Virginia Supreme Court decision in *Brown v. Mierke*.

4. The Office of Tax Appeals shall decide all issues related to the *Petition for Refund* except for the constitutionality of W. Va. Code § 11-21-12(c)(6).

5. If either party believes that a decision on the *Petition for Refund* should **not** be governed by *Brown v. Mierke*, then that party shall put forth the argument and support its alternative legal theory at the OTA hearing.

6. Once the final decision is issued, then both parties shall be able to seek judicial review, if they choose to do so, as set forth in W. Va. Code §§ 11-10A-18 and 11-10A-19.

On January 23, 2015, an evidentiary hearing was held, at the conclusion of which the Tax Commissioner, by counsel, requested the opportunity to file post-hearing briefs. Petitioners’ counsel consented to that request. Both parties then agreed to submit simultaneous briefs within fourteen (14) days with responses due within ten (10) business days thereafter.

While this Tribunal does not have jurisdiction to deem the statute in question unconstitutional, we are called upon here to answer the question of whether the statute is discriminatory as applied to Petitioners. We hold that it is not for the reasons set forth herein.

FINDINGS OF FACT

1. Petitioner Mr. A is a former West Virginia County Deputy Sheriff, a Deputy U.S. Marshal, and a U.S. Marshal who retired from the U.S. Marshals Service on March 31, 2008. He began his federal employment in 1987.

2. During his tenure with the U.S. Marshals Service, Mr. A was enrolled in the Federal Employee Retirement System (hereafter, the “FERS”). Under FERS, Mr. A paid into social security and therefore, can receive social security benefits.

3. In October of 2013, Petitioners submitted amended tax returns for tax years 2010 and 2011, claiming a Schedule M adjustment exempting Mr. A’s retirement income for income tax purposes pursuant to West Virginia Code Section 11-21-12(c)(6).

4. On November 19, 2013, Respondent denied Petitioners the exemption. This refusal was predicated upon the Respondent’s acquiescence to the ruling in the case of *Dodson v. Palmer* C.A. No. 00-C-AP-10 Monongalia County, West Virginia Circuit Court (2000).

5. In the *Dodson* decision, the Circuit Court of Monongalia County applied *Davis v. Michigan Department of Treasury*, 489 U. S. 803 (1989), and determined that under the doctrine of inter-governmental tax immunity, federal law enforcement officers, whose duties were not significantly different than those of a small group of retirees, namely West Virginia State police officers and firefighters, should receive the same tax exemption since both were unable to collect

social security benefits. The Circuit Court of Monongalia County found that the only significant difference between Mr. Dodson and the state police officers and firefighters was the source of the pension payments or compensation.

6. Since the *Dodson* decision, this Tribunal has granted the exemption to only those federal law enforcement officers who retired and could not receive social security benefits. Those law enforcement officers, like Mr. A, who retired under FERS and paid into social security were denied the exemption.

7. It has been shown in this proceeding that some of the state and local law enforcement officers who qualified for the tax exemption on their pensions, as set forth in West Virginia Code Section 11-21-12(c)(6), paid into social security and can collect social security benefits.

8. Petitioner began working as a West Virginia deputy sheriff in 1976 and left that employment in 1987. Mr. A paid into social security while employed as a deputy sheriff.

9. Teresa Miller, Deputy Executive Director and Chief Operating Officer for the Consolidated Public Retirement Board (the "CPRB"), testified on behalf of the Respondent.

10. Mrs. Miller testified that the CPRB oversees nine (9) pension plans for the benefit of all State employees and some municipal employees.

11. Based upon the testimony of Mrs. Miller and the exhibits submitted by the Respondent, deputy sheriffs account for one-half of one-percent of all retired State employees for plan years 2010, 2011, and 2012.

12. Retired deputy sheriffs received an average monthly pension payment in the amount of \$2,349.00 as of June 30, 2010, and \$2,195.00 as of June 30, 2011. The average monthly

salary paid to deputy sheriffs at the time of retirement was \$3,659.00 as of June 30, 2010, and \$3,722 as of June 30, 2011.

13. Mr. A received an initial gross monthly retirement benefit of \$3,926.00 when he retired in 2008 as a U.S. Marshal.

14. Deputy Sheriffs who retired under the Deputy Sheriffs' Retirement System in 2008 with comparable service, here twenty five (25) years, received an average monthly retirement benefit of \$1,611.00.

15. According to the Petitioners, Mr. A also receives a FERS Annuity Supplement of \$801.00 per month since he retired prior to age 62. This supplement will be discontinued once Mr. A becomes eligible for social security benefits.

16. Mr. A's monthly pension and FERS supplement total \$56,724.00 per year.

17. Mr. A testified that his pension was based upon the highest three-year average salary (also known as the "high-3") during his employment in the U.S. Marshal Service, which was \$_____ per year; however, that amount was adjusted downward due to his election to provide survivor benefits to his wife.

18. Mrs. Miller testified that to the best of her knowledge, no deputy sheriff was paid \$100,000.00 or more per year.

19. Mr. A receives more in pension benefits than West Virginia deputy sheriffs earn on average while on active duty. Further, Mr. A receives more in retirement than do all West Virginia State troopers with the rank of first lieutenant and below while serving on active duty.

20. The parties have agreed that should Petitioners receive the pension exemption set forth in West Virginia Code Section 11-21-12(c)(6), the amount of their combined refund for tax

years 2010 and 2011 would total \$_____. Applicable interest would be computed on that from the date the original claim for refund was received.

BURDEN OF PROOF

The governing law provides that in a hearing before the West Virginia Office of Tax Appeals, the taxpayer has the burden of proof. Further, it is well established that exemptions from taxation are strictly construed against the person claiming the exemption. *See RGIS Inventory Specialists v. Palmer*, 209 W. Va. 152, 433 S.E.2d 79, Syl. Pt. 1 (2001).

DISCUSSION

As directed by Judge Swope's remand order, the primary issue for determination is whether West Virginia Code Section 11-21-12(c)(6) is consistent with Syl. Pt. 2 of the West Virginia Supreme Court's decision in *Brown v. Mierke*, 191 W. Va. 120 (1994), *cert denied sub nom Brown v. Paige*, 513 U.S. 877 (1994). The tax exemption under consideration is as follows:

(c) *Modifications reducing federal adjusted gross income.* – There shall be subtracted from federal adjusted gross income to the extent included therein:

(6) Retirement income received in the form of pension and annuities after the thirty-first day of December, one thousand nine hundred seventy-nine, under any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System, including any survivorship annuities derived from any of these programs, to the extent includable in gross income for federal income tax purposes;

W. Va. Code § 11-21-12(c)(6).

In its remand Order, the Circuit Court found that *Brown v. Mierke*, is the applicable law governing this case. Specifically, the Circuit Court, quoting *Brown*, held that:

Challenges to a state tax scheme under 4 U.S.C. § 111 can succeed only when one purpose of the challenged scheme is shown to discriminate against the officer or employee because of the **source** of pay or compensation. In determining whether

such discrimination exists, a court will look to the totality of the circumstances to ascertain whether the intent of the scheme is to discriminate against employees or former employees of the federal government.

Remand Order at, *4-5, Par. 5 (quoting *Brown v. Mierke*, 191 W. Va. 120, Syl. Pt. 2 (1994)) (Emphasis in original).

At the outset, this Tribunal finds that the plain language of West Virginia Code § 11-21-12(c)(6) does not permit the Petitioner to take the above exemption because as the record reflects, Mr. A is a retired United States Marshal rather than a retired West Virginia law enforcement official and thus, is not, under a plain reading of the statute, entitled to an exemption on his personal tax return.¹

The Circuit Court of Mercer County directed this Tribunal to instruct that if either party believes that *Brown v. Mierke* is not determinative to the outcome of this matter, that party shall put forth the argument and support its alternative theory at the hearing before this Tribunal. Urging the Court to rely upon *Davis v. Michigan*, 489 U.S. 803 (1989), the Petitioners here argue that the Respondent's denial of the exemption above to Petitioner amounts to a violation of 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity.

In essence, the Petitioners here argue that *Brown* conflicts with *Davis*, and thus, should be overruled. To the contrary, *Brown*, which involves the same exemption before this Tribunal, was decided nearly five years after *Davis* and in that case, the taxpayers there, who were unsuccessful, attempted to seek judicial review by the United States Supreme Court, which was denied. While this Tribunal is mindful that the denial of certiorari is not tantamount to an endorsement of the

¹ Mr. A, like most retirees from state employment, is entitled to a \$2,000.00 exemption from State income tax. In addition to receiving equal treatment as compared with most retired State employees, Mr. A receives better treatment than members of the judicial retirement plan and public sector employees.

lower ruling, it tends to bolster the Respondent's argument that *Brown* does not conflict with *Davis*, and accordingly, should remain intact on appellate review.

Indeed, the Court's holding in *Davis* comports with the holding of the West Virginia Supreme Court in *Brown*. To that end, the *Davis* Court examined Michigan's blanket exemption of state worker's retirement income, in contrast with the lack of an exemption for state retirees. Michigan's exemption for state retirees, with no exemption for federal retirees, is quite different from the personal income tax exception under review sub judice, inasmuch as Michigan's blanket exemption for retirement income of state workers, in contrast with the lack of exemption for federal workers, evidences a clear intent to discriminate *against* federal workers, which is the primary reason that the Court struck down Michigan's statute in *Davis*. Thus, the totality of the circumstances in *Davis* demonstrated a clear intent to discriminate against all federal employees. In contrast, such intent to discriminate was lacking in the tax scheme in *Brown* based on the statutory and factual differences. Accordingly, *Brown* neither ignores nor contradicts *Davis*.

More specifically, in the *Davis* case, unlike this case, the issue involved whether it is discriminatory to tax pensions paid to all federal employees where similarly situated state and local government retirees were exempt from such tax. The United States Supreme Court ruled in the affirmative, holding that the Michigan Income Tax Act violated the principles of intergovernmental tax immunity because it favored state and local retirees at the expense of federal retirees. *See Davis*, 489 U.S. 803, 817 (1989).

Subsequent to *Davis*, the West Virginia Supreme Court addressed this issue in *Brown v. Mierke*, 191 W. Va. 120, 443 S.E.2d 462 (1994), cert. denied *sub nom Brown v. Paige*,

513 U.S. 877 (1994).² In *Brown*, several retired United States military officers and enlisted personnel challenged the exemption in W. Va. Code §11-21-12(c)(6). The plaintiffs in *Brown* wanted the full amount of their pension income to be exempt from West Virginia state income tax in the same manner as retired state law enforcement officers and firefighters. The West Virginia Supreme Court of Appeals viewed the statutory framework in its entirety when deciding the issue of intergovernmental tax immunity. To reiterate:

Challenges to a state tax scheme under 4 U.S.C. § 111 can succeed only **when one purpose of the challenged scheme is shown to discriminate against the officer or employee because of the source of pay or compensation.** In determining whether such discrimination exists, a court will look to the totality of the circumstances to ascertain whether the intent of the scheme is to discriminate against employees or former employees of the federal government.

Brown v. Mierke, 191 W. Va. 120 (1994), Syl. Pt. 2. (Emphasis supplied). The Court went on to hold that:

However, West Virginia's scheme differs from the Michigan and Kansas schemes invalidated by the Supreme Court in that there is no intent in the West Virginia scheme to discriminate *against* federal retirees; rather, the intent is to give a benefit to a very narrow class of former state and local employees.

Brown, at 124, 467. (Emphasis in original).

The *Brown* Court focused on a very narrow class of "favored" retirees. In the case at hand, Teresa Miller, Deputy Executive Director and Chief Operating Officer for the Consolidated Public Retirement Board (the "CPRB"), testified that some deputy sheriffs belong to the Public Employee

² In 1994, Deputy Sheriffs were not members of the law enforcement class who received a total exemption from personal income tax of their pension benefits. The State created the Deputy Sheriffs Retirement System in 1998 and added Deputy Sheriffs to the exception in West Virginia Code Section 11-21-12(c)(6) in 1998.

Retirement Plan, while the remainder are members of the West Virginia Deputy Sheriffs Retirement System. According to Respondent's Exhibits admitted to evidence in the hearing on this matter, the West Virginia Deputy Sheriffs Retirement System had 250 retirees in the 2010 Plan Year, 272 retirees in the 2011 Plan Year, and 283 in the 2012 Plan Year. According to Mrs. Miller's testimony and the Respondent's Exhibits, deputy sheriffs constitute quite a small percentage of State retirees. More specifically, the testimony here reveals that retired deputy sheriffs comprise less than one half of one percent of all West Virginia State government retirees for the three plan years, while in *Brown*, the retirees comprised approximately four percent of all State retirees. See *Brown*, at 123, 465. Thus, the percentage of "favored" State retirees at issue here is less than half the percentage present in *Brown v. Mierke*.

Importantly, the Court's decision in *Brown* was based primarily upon three factors. As the Court explained,

In the case before us, three facts conclusively demonstrate that no calculated plan exists to discriminate against retired military personnel based upon the **source** of their income: (1) retired military personnel are treated *more* favorably than West Virginians who have retired from civilian occupations; (2) retired military personnel are treated equally with all persons from the West Virginia Public Employees Retirement System and the West Virginia Teachers Retirement System; and (3) along with state employees and teachers, military retirees are treated *substantially more favorably* than persons retired from the West Virginia Judicial Retirement System.

Brown v. Mierke, 191 W. Va. 123, 125, 443 S.E.2d 462, 467 (1994) (emphasis added in bold; italics emphasis in original).

As the Respondent demonstrated through testimony and in briefing, the exemption here meets the three (3)-factor test enunciated by the West Virginia Supreme Court of Appeals. First, retired United State Marshals and all federal retirees are treated more favorably than State residents

who retire from the civilian workforce. To be clear, West Virginia Code Section 11-21-12(c)(6) contains no exemption from personal income tax for individuals who retire from private industry. Further, U.S. Marshals and all federal retirees can exempt \$2,000.00 in pension income from State taxation under West Virginia Code Section 11-21-12(c)(5). At the hearing in this matter, Mr. A admitted that the Respondent allowed him to claim the exemption of \$2,000.00 in pension income received by all federal retirees. Indeed, the Respondent notified the Petitioners, by letter dated November 15, 2013, that their request for an exemption of all income paid to Mr. A was denied but that Mr. A can exempt \$2,000.00 from income as a federal retiree. Accordingly, Mr. A was treated more favorably than all retirees from the civilian workforce.

Secondly, retired U.S. Marshals receive identical tax treatment as retired employees of the Public Employees Retirement System (“PERS”) and Teachers Retirement System (“TRS”) under State law. All federal retirees and all West Virginia State and local government retirees receive an exemption from State income tax for the first \$2,000.00 of pension income. *See* W. Va. Code §11-21-12(c)(5). The Respondent’s Exhibit showing the Notice of Return Change from the Tax Department to the Petitioners reveals that the Respondent permitted a deduction of \$2,000.00 in each year as a modification to Schedule M. Respondent’s counsel represented to this Tribunal that lines 37 and 38 of the West Virginia personal income tax return, found on Schedule M, contain parallel exemptions, which authorize a deduction from income for \$2,000.00 paid to West Virginia retirees and \$2,000.00 paid to federal retirees. Thus, Mr. A received the same deduction under the West Virginia income tax law as every State retiree receives under PERS and TRS.

Third, Mr. A receives more in pension benefits than West Virginia deputy sheriffs earn on average while on active duty. Moreover, Mr. A receives more in retirement than do all West

Virginia State troopers with the rank of first lieutenant and below while serving on active duty. Finally, retired U.S. Marshals receive more favorable tax treatment than retirees from the West Virginia Judicial Retirement System who cannot claim the \$2,000.00 exemption under West Virginia Code Section 11-21-12(c)(5). Additionally, unlike the facts in *Barker v. Kansas*, 203 U.S. 594 (1994), cited by Petitioners in their brief, West Virginia adopted an exemption subsequent to *Brown*, which exempts the first \$2,000.00 in retirement income paid to all members of the federal armed forces. *See* W. Va. Code §11-21-12(c)(7). Accordingly, the Tax Department has met the three factors, which the West Virginia Supreme Court of Appeals found to be conclusive in *Brown*.

Notably, Mr. A testified at the hearing before this tribunal that his pension from the U.S. Marshal Service is calculated based upon the highest three-year average salary he earned while working. The Petitioners' Exhibits reflect that Mr. A's "high-3" average salary was \$134,244.00 per year. Further, Mrs. Miller's uncontroverted testimony is that no active duty West Virginia deputy sheriff earns \$100,000 or more per year.³

The West Virginia Supreme Court determined in *Brown v. Mierke*, 191 W. Va. 120 (1994), that whether a tax statute discriminates against an officer or employee based upon the source of that pay must be determined by an examination of the totality of the circumstances. *Brown*, at Syl. Pt. 2. As the Respondent aptly noted, the totality of circumstances before this Tribunal demonstrates that the exemption set forth in Code Section 11-21-12(c)(6) does not violate the principle of intergovernmental immunity or the *Davis* decision. The Taxpayers have failed to

³ The Petitioners reliance upon and citation to the dicta contained in *Jefferson County, Alabama v. Acker*, 527 U.S. 423 (1999) is unpersuasive and easily distinguishable from the case at bar.

prove any intent by West Virginia to discriminate against federal retirees as espoused by the West Virginia Supreme Court in *Brown v. Mierke*.

It is well settled that Petitioners alone have the burden of proof to show that they are entitled to the exemption concerning the federal pension received by Mr. A. See W. Va. Code § 11-10A-10(e). Further, it is a well-settled law that tax exemptions are strictly construed against the taxpayer claiming such exemption. See *Wooddell v. Dailey*, 160 W. Va. 65, 230 S.E.2d 466 (1976); *RGIS Inventory Specialists v. Palmer*, 209 W. Va. 152, 544 S.E.2d 79 (2001).

Petitioners argue that the tax exemption should be applicable to Mr. A because of United States Supreme Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). The doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, provides that "[t]he United States consents to the taxation of pay or compensation for personal service by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against its officer employee because of the source of the pay or compensation.⁴ In the case at hand, an examination of the totality of circumstances, as required by Syllabus Point 2 of *Brown v. Mierke*, simply do not evidence any intent to discriminate against Mr. A because of his source of pay. Petitioners have not met their burden of proof. Based upon examination of the entire record and for all of the reasons contained herein, the Respondent's denial of the claimed refunds to the Petitioners was proper and is hereby AFFIRMED.

⁴ The doctrine of inter-governmental immunity was also applied in *Barker v. Kansas*, 503 U.S. 594 (1992), to invalidate a *Kansas* tax scheme which sought to tax military retirees, while at the same time exempting all state and local pensions, as well as most federal pensions. The Court again found that the *Kansas* scheme failed to pass the test of "whether the inconsistent tax treatment is directly related to, and justified by significant differences between the two classes." *Id.*

CONCLUSIONS OF LAW

1. In hearings conducted by the West Virginia Office of Tax Appeals, the taxpayer has the burden of proof.

2. It is well settled that all tax exemptions are strictly construed against the taxpayer claiming the exemption. *Wooddell v. Dailey*, 160 W. Va. 65, 230 S.E.2d 466 (1976); *RGIS Inventory Specialists v. Palmer*, 209 W.Va. 152, 544 S.E.2d 79 (2001).

3. Under the principles of intergovernmental immunity, the United States Supreme Court struck down as discriminatory under 4 U.S.C. § 111, a tax scheme that taxed all federal pensions which at the same time exempted all state pensions. *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989).

4. In *Dodson v. Palmer*, C.A. No. 00-C-AP-10 (Monongalia County Circuit Court W. Va. 2000), the Court applied *Davis*, finding that West Virginia Code Section 11-21-12(c)(6) was unconstitutional as applied to that appellant.

5. The West Virginia Supreme Court of Appeals did not find *Davis* controlling in *Brown v. Mierke*, 191 W. Va. 120, 443 S.E.2d 462 (1994). The test to determine whether the tax scheme is discriminatory against an officer or employee is not merely because the source of the compensation is different, but rather, because of the totality of the circumstances which are present. Those circumstances determine whether the intent of the scheme is to discriminate against employees and former employees of the federal government.

6. In *Brown*, “totality of the circumstances” meant that there was no intent to discriminate where military retirees, who constituted less than four percent of all State government

retirees, were actually treated more favorably than those retired from civilian occupations, as well as retired state employees and teachers, and where such retirees were treated substantially more favorably than those persons retired from the West Virginia Judicial Retirement System.

7. Retired U.S. Marshals, like the military retirees in *Brown*, were treated more favorably than retirees from the West Virginia civilian workforce, as equally as persons retired from the West Virginia Public Employees Retirement System and the West Virginia Teachers Retirement System, and more favorably than retirees from the West Virginia Judicial Retirement System. Therefore, the intent of the West Virginian scheme was not to discriminate against federal retirees but rather to give a very narrow benefit to former state and local employees.

8. Mr. A's source of pay or compensation alone, absent a showing of other circumstances required by *Brown v. Mierke*, do not provide sufficient evidence that the exemption at issue is discriminatory as applied to Petitioners.

9. Based upon the specialized circumstances found in *Brown*, we do not find that our decision conflicts with the holding in *Davis*, where a blanket exemption of all state and local employee pensions, while at the same time taxing federal retiree pensions, evidenced Michigan's intent to discriminate.

10. West Virginia Code Section 11-21-12(c)(6), as applied to the Petitioners, complies with Syl. Pt. 2 of the West Virginia Supreme Court decision in *Brown v Mierke*.

11. Petitioners have not met their burden of proof, as set forth in W. Va. Code § 11-10A-10(e), which requires a showing that they are entitled to the strictly construed tax exemption contained in West Virginia Code Section 11-21-12(c)(6).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the Petitioners' petition for refund of West Virginia personal income tax for the tax years 2010 and 2011 in the amount of \$_____ should be and is hereby **DENIED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Heather G. Harlan⁵
Chief Administrative Law Judge

By: _____
George V. Piper
Administrative Law Judge

Date Entered

⁵ Chief Administrative Law Judge, A. M. "Fenway" Pollack, heard this matter; however, he is no longer with the West Virginia Office of Tax Appeals. Judge Piper, who wrote portions of this decision, attended the January 23, 2015 evidentiary hearing. Chief Administrative Law Judge Heather G. Harlan was appointed subsequent to the evidentiary hearing on this matter and wrote the majority of this decision.