REDACTED DECISION – DK# 14-119 RM

BY: HEATHER G. HARLAN, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON MARCH 14, 2017
ISSUED ON OCTOBER 28, 2017

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

CONCLUSIONS OF LAW

1. It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority." *Griffith v. Frontier W. Virginia, Inc.*, 228 W. Va. 277, 288, 719 S.E.2d 747, 758 (2011).

2. W. Va. Code §11-6D-8 vests Respondent with the authority to promulgate rules for the administration of the Alternative Fuel Tax Credit. However, in so doing, "the Tax Commissioner is required to construct his rules so that they are consistent with, and adhere to, the statutory language upon which they are based. *Griffith v. Frontier W. Virginia, Inc.*, 228 W. Va. 277, 289, 719 S.E.2d 747, 759 (2011).

3. "Any rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute." *Griffith v. Frontier W. Virginia, Inc.*, 228 W. Va. 277, 289, 719 S.E.2d 747, 759 (2011).

4. The Interpretation[1], as expressed in the 2012 Schedule[2] fails to comport with the plain language of the Subject Statute,[3] the purpose of which is to promote the use of alternatively-fueled motor vehicles[4].

5. The Interpretation impermissibly limits the plain language of the Subject Statute and is contrary to its intent specifically proscribed by the Legislature in W. Va. Code §11-6D-1, in violation of *Syncor International Corporation v. Palmer*, III, 208 W. Va. 658, 542 S.E.2d 479. It is well settled that "[a] statute or administrative rule, may not, under the guise of "interpretation," be modified, revised, amended or rewritten.

[1] The 2012 Schedule includes additional language at the bottom of page 2, which states, "purchase price means the sales price of the vehicle less the amount deducted therefrom for any vehicle traded in" (hereinafter known as, the "Interpretation"). *See* JE 2, p. 9. (endnote).
[2] West Virginia Schedule AFTC-1, Alternative Fuel Tax Credit, AFTC-1, Rev. 9-11 (hereinafter, the "2012 Schedule").
[3] W. Va. Code § 11-6D-5(a).
[4] See *Martin Distrib. Co., Inc. v. Matkovich*, 238 W. Va. 300, 794 S.E.2d 21, 25–26 (2016).

FINAL DECISION

In 2012, Petitioners, husband and wife and the petitioners herein (the "Petitioners"), purchased a new flex fuel Jeep Grand Cherokee (the "Purchased Vehicle"). As part of this transaction, Petitioners traded their 2010 Cadillac SRX (the "Traded Vehicle"), a portion of which remained financed. Thereafter, Petitioners claimed the alternative- motor fuel tax credit (the "AFTC") on their 2012 West Virginia Personal Income Tax Return, IT-140, Rev. 10-12 (the "2012 Return"). Petitioners claimed the AFTC pursuant to West Virginia Code § 11-6D-1, *et sq*. (2011) (the "2011 Act").

Petitioners were unable to apply the full amount of the AFTC to the 2012 Return, and thus carried over a small portion of such credit to their 2013 West Virginia Personal Income Tax Return, IT-140, Rev. 5-13, portions of which are admitted as joint exhibits (the "2013 Return"). When Petitioners filed the 2013 Return, they provided a copy of that certain motor vehicle purchase agreement (the "Agreement"), by and between Petitioners and an automobile dealership, the automobile dealer (the "Dealer") from whom Petitioners bought the Purchased Vehicle**.**

Sometime after reviewing the Agreement, the State Tax Commissioner of West Virginia (the "Respondent"), reduced the amount of available credit, denied any additional credit for the 2013 Return and instructed Petitioners to repay a substantial portion of the refund received for the 2012 Return.

Petitioners received notice of such reduction by that certain letter, dated April 7, 2014 (the "Inquiry Letter"). It is from the Inquiry Letter, reflecting Respondent's interpretation of W. Va. Code § 11-6D-5(a), that Petitioners herein timely instituted their appeal before this Tribunal. In this appeal, Petitioners' sole argument is that Respondent's interpretation is not supported by the West Virginia Code and runs afoul of the purpose of the AFTC.

Pursuant to a briefing schedule established by this Tribunal, both the Petitioner and the Respondent (collectively, the "Parties" or individually, each "Party") timely submitted their respective briefs. Upon a review of the Parties' arguments, the record submitted for consideration, and the pertinent authorities, this Tribunal sets aside Respondent's recalculation of the available credit, including any applicable interest and penalties and excluding the conceded rebate amount.

FACTUAL AND PROCEDURAL HISTORY

Rather than exercise their statutory right to a hearing and despite this Tribunal's urging, the Parties requested that this Tribunal issue a Final Decision (the "Decision") based upon the entire record in this matter. Such record includes the Parties' briefs, seven (7) jointly submitted exhibits totaling twenty-six (26) pages (the "Joint Exhibits") and the law applicable to this matter.

Based upon the Joint Exhibits, each Party presented proposed findings of fact. Petitioners' Initial Brief in Support of Their Petition for Refund of Personal Income Tax (the "Initial Brief") included sixteen (16) proposed findings of fact. Respondent's Brief (the "Response") included ten (10) proposed findings of fact. To counter the Response, Petitioners filed Petitioners' Reply Brief in Support of their Petition for Refund of Personal Income Tax (the "Reply").

The Response included a reservation of the right to an evidentiary hearing. However, neither party made such a request. Nevertheless, sometime after the conclusion of the briefing schedule, this Tribunal initiated a telephonic conference with the Parties to ensure that neither party wished to elicit factual testimony to aid this Tribunal's determination of the issue presented herein. Neither party availed himself of this opportunity. Instead, the Parties affirmed their decision to proceed on briefs. Based upon the Parties' briefs and upon detailed review of the Parties' jointly submitted exhibits, this Tribunal makes the following factual findings.

A. Findings of Fact

1. Petitioners bought the Purchased Vehicle from Dealer on October 12, 2012. The Parties included the Agreement as Joint Exhibit ("JE") No. 1. *See* JE 1, page 1.[5]

2. It is undisputed that the Purchased Vehicle is a "flex fuel" vehicle. *See* Initial Brief, at *4, Response, at *6, No. 1.

3. Although the Purchased Vehicle registered 227 miles on the odometer, the Parties agreed that for purposes of the controversy herein, it was "new". *See* Initial Brief at *4, Response at *6, No. 1.

4. The Agreement lists the base price of the Purchased Vehicle as $34,460.00 (the "Base Price"). *See* JE 1, p. 2, line 1.

5. Included in the Agreement is Dealer's documentary fee of $125.00 (the "Initial Fee"). *See* JE 1, p. 2, line. 13.

6. The total cash price paid for the Purchased Vehicle was $34,585.00 (the "Total Cash Amount") and represents the Base Price ($34,460.00) plus the Initial Fee ($125.00). *See* JE 1, p.2, line 15.

7. As part of this transaction (the "Subject Transaction"), Petitioners exchanged the Traded Vehicle, valued at $29,276.88. *See* JE 1, p. 2, line 16.

8. The difference between the value of the Total Cash Amount ($34,585.00) and the Traded Vehicle ($29,276.88), is $5,308.12 (the "Total Taxable Amount"). *See* JE 1, p.2, line 17, line 19.

[5] To assist this Tribunal in rendering the Decision, page numbers were inserted on the Joint Exhibits. For purposes of this Decision, the Joint Exhibits will be referenced as follows and as applicable: Joint Exhibit (JE) no., page no. and line no.

9. At the time of the Subject Transaction, Petitioners owed $30,139.33 (the "Financed Amount") on the Traded Vehicle. *See* JE 1, p.2, line 20.

10. The Agreement totals $35,447.45 ("the "Subtotal") and is the sum of the Total Taxable Amount ($5,308.12) and the Financed Amount ($30,139.33). *See* JE 1, p.2, line 21.

11. The Agreement includes various fees for tags, title, lien and transfer, the total of which is $287.16 (the "Other Fees"). *See* JE 1, p. 2, line 30.

12. Dealer also offered Petitioner a rebate in the amount of $1,500.00 (the "Rebate")[6] toward the Purchased Vehicle. *See* JE 1, p.2, line 31.

13. The Subtotal ($35,447.45) plus the Other Fees ($287.16) minus the Rebate ($1,500.00) equals $34,234.61 (the "Total Consideration Amount"). *See* JE 1, p.2, line 35.

14. The Petitioners claimed the AFTC of $7,500.00 on their 2012 Return, a copy of which is attached hereto as Joint Exhibit 2.[7] *See* JE 2, pp. 3-11.

15. Petitioners calculated the AFTC for 2012 using West Virginia Schedule AFTC-1, Alternative Fuel Tax Credit, AFTC-1, Rev. 9-11 (the "2012 Schedule"). The 2012 Schedule contains four (4) pages. *See* JE 2, pp. 8-11.

16. The AFTC is calculated in Part B of the 2012 Schedule (the "Part B Calculation"). *See* JE 2, p.9, Part B, lines 1-9.

[6] Since Petitioners conceded this issue as it relates to the Rebate, this matter is not before this Tribunal and as such, is not considered in this Final Decision.

[7] The cross-throughs and markups on Exhibit 2 were made by the Petitioners after receiving the 2012 Return Change Letter from Respondent, included in the record as Exhibit 3. Joint Exhibit 2 as originally filed with Respondent contained no such cross-throughs or markups.

17. The Part B Calculation instructs taxpayers to enter the Vehicle Identification Number (VIN) where provided on the 2012 Schedule. Petitioners entered the VIN for the Purchased Vehicle on this line. *See* JE 2, p. 9, line 1.

18. Taxpayers are to denote the alternative-fuel type of any potentially qualifying vehicle for which credit is claimed. Petitioners checked Box "H", ethanol. *See* JE 2, p.9, line 2H.

19. A vehicle registration number is required to ensure proper registration. Petitioners entered the registration number for the Purchased Vehicle on this line. *See* JE 2, p.9, line 3.

20. Taxpayers are to enter the weight of a vehicle to document poundage. Petitioners entered 6,500 lbs. on this line. *See* JE 2, p.9, line 4.

21. Line 5 of the Part B calculation is entitled "new purchase or conversion", and first requires taxpayers to enter the date of purchase, followed by the purchase price. Since the Purchased Vehicle is considered new, Taxpayers entered 10/12/12 as the "date of new purchase". Petitioners entered the Base Price ($34,460.00) as the "purchase price". *See* JE 2, p.9, line 5A.

22. Line 6 is entitled "credit factor," and provides that if the subject vehicle is a new purchase, the value of .35% (35%) should be entered. *See* JE 2, p. 9, line 6.

23. Line 7 is entitled "potential credit" and instructs a taxpayer to multiply the price (line 5A) or the actual cost of conversion (line 5B) by the value on line 6. In arriving at their "potential credit" of $12,061.00, Petitioners multiplied $34,460.00 by .35%. *See* JE, p. 9, line 7.

24. The 2012 Schedule includes additional language at the bottom of page 2, which states, "purchase price means the sales price of the vehicle less the amount deducted therefrom for any vehicle traded in" (hereinafter known as, the "Interpretation"). *See* JE 2, p. 9. (endnote).

25. In calculating the AFTC credit, Petitioners did not deduct the value of the Traded Vehicle ($29,276.88) from the value of the Purchased Vehicle ($34,460.00). See JE 2, p.9.

26. In calculating the "maximum allowable credit", Line 8 of the 2012 Schedule states that "[i]f the Gross Vehicle Weight (from line 4) is less than 26,000 pounds, enter $7,500.00. Otherwise enter $25,000." Petitioners entered $7,500.00 (the "Maximum Allowable Credit"). *See* JE 2, p.9, line 8.

27. Per line 9, of the 2012 Schedule, the "available alternative-fuel motor credit" is obtained by entering the smaller of the value on line 7 (Potential Credit) and the value on line 8 (Maximum Allowable Credit)." Petitioners calculated this value at $7,500.00 (the "Available Alternative-Fuel Motor Credit"). *See* JE 2, p. 9, line 9.

28. Per line 9 of the 2012 Schedule, Petitioners transferred the Available Alternative-Fuel Motor Credit ($7,500.00) to Part A, line 1 of the 2012 AFTC Schedule. *See* JE 2 p.9, line 9; JE 2, p.8, line 1.

29. To arrive at the Total Alternative Fuel Tax Credit Available per line 6 of Schedule 2012 ($7,500.00), Petitioners added line 1 ($7,500.00) to the sum of lines 2-5 ($0.00) of Part A of the 2012 Schedule. *See* JE 2, p.8, line 6.

30. Petitioners transferred the Total Alternative Fuel Tax Credit Available ($7,500.00) to the 2012 Tax Recap Schedule. *See* JE 2, p.7, line 16.

31. Petitioners then transferred the amount from the Tax Recap Schedule ($7,500.00) to line 15 of the 2012 Return. *See* JE 2, p. 7, line 18; JE 2, p. 5, line 15.

32. Petitioners calculated their 2012 refund as 7,053.00 (the "2012 Refund"). *See* JE 2, p. 5, line 30.

33. Line 10 of the 2012 Return shows total taxes due of $7,044.00. *See* JE 2, p.4, line 10.

34. By letter dated February 25, 2013, and bearing Letter Id: "A"_____, Respondent made a "return change" to the 2012 Return (the "2012 Initial Return Change Letter"). JE 3, pp. 12-13.

35. The 2012 Initial Return Change Letter adjusted the amount of the AFTC from $7,500.00 to $7,044.00 (the "First 2012 Adjusted Credit Amount"). This, in turn, changed the 2012 Refund from $7.053.00 to $6,597.00 (the "First 2012 Adjusted Refund"). *See* JE 3, p. 13.

36. The reason given for the First 2012 Adjusted Refund and the First 2012 Adjusted Credit Amount was an "excessive credit" for the AFTC. *See* JE 3, p.13.

37. Petitioners claimed a carryover portion of the AFTC in the amount of $903.00 on their 2013 Return (the "Carryover"). *See* JE 4, p.16, line 15.

38. On April 7, 2014, Respondent issued Letter ID "B"_____, addressed to Petitioners and referencing tax period 12/31/2012 (the "Inquiry Letter"), whereby Respondent reduced the AFTC by $5,755.00, from $7,044.00, the amount originally allowed, to $1,289.00 ("Respondent's Recalculation"). A copy of the Inquiry Letter is included in the record as Joint Exhibit 5, p.19-20 and states:

> The claim you filed for the Alternative Fuel Tax Credit with your 2012 return has been recalculated. As a result of this recalculation, it has been determined that you have received an excessive amount of credit, and the carryover credit claimed on your 2013 return has been denied.
>
> Based on the purchase agreement submitted with your AFTC-1 schedule, the purchase price of the qualified vehicle was determined to be $34,460. This figure was calculated by subtracting the value of $29,277 and the rebate of $1,500 from the cash price of $[][8]34,460. The amount owed on the vehicle you traded in is not taken into consideration when calculating the purchase price, neither are taxes and other fees. The amount of the credit allowed is 35% of the purchase price. With a purchase price of $3,683, the credit amount allowed is $1,289.
>
> Your 2012 return has been updated to reflect the correct amount of $1,289 instead of $7,044 that had originally been claimed. This has created an overpayment of $5,755.
>
> JE 5, p.20.

[8] The figure of $334,460 in the Inquiry Letter obviously represents a typographical error intended to be $34,460.

39. In calculating the purchase price for the Purchased Vehicle, Respondent reduced the Base Price of the Purchased Vehicle ($34,460.00) by the rounded value of the Traded Vehicle ($29,277.00), for the recalculated rounded amount of $5,183.00 (the "Recalculated Purchase Amount"). *See* Response, at *6, No. 7., JE 5, p.20.

40. Respondent further reduced the Recalculated Purchase Amount[9] by the Rebate ($5,183.00-$1,500.00), to arrive at a "final purchase price" of $3,683.00 ("Final Recalculated Purchase Amount"). *See* Response, at *6, No. 7, JE 5, p.20.

41. Respondent then multiplied the "Final Recalculated Purchase Amount" of $3,683.00 by 35 percent to arrive at its "allowable AFTC credit amount" of $1,289.00 ("Respondent's Credit Amount"). *See* Response, at *6, No. 7, JE 5, p. 20.

42. The net effect of the calculations set forth in the Inquiry Letter is that the Petitioners were denied any credit for tax year 2013, and their 2012 credit amount was deemed overpaid by $5,755.00 (the "Overpayment Amount"). *See* Initial Brief, at *3, FN1, Response, at *7, Nos. 9-10, JE 5, p. 20.

43. The Overpayment Amount represents the difference between the Total Taxes Due per line 6 of Schedule 2012 ($7,044.00) and Respondent's Credit Amount ($1,289.00). *See* Initial Brief, at *3, FN1, Response, at * 7, No.8, JE 5, p. 20.

44. The net effect of the Overpayment Amount is an alleged underpayment of personal income tax in the 2012 tax year of $5,755.00 (the "Underpayment Amount"). *See* Initial Brief, at *3, FN1, Response, at *7, Nos. 9-10, JE 5, p. 20.

[9] This amount is essentially the same as the motor vehicle tax. *See* Respondent's Brief, at *6, No. 7.

45. Respondents charged interest on the Underpayment Amount totaling $507.28 (the "Interest Amount"). *See* Initial Brief, at *3, FN1.

46. Respondents charged penalties on the Underpayment Amount totaling $345.36 (the "Penalty Amount"). *See* Initial Brief, at *3, FN1.

47. Respondents allege that Petitioners owed $6,607.64 (the "Total Underpayment Amount"), representing the Underpayment Amount, the Interest Amount and the Penalty Amount. *See* Initial Brief, at *3, FN1, Response, at * 7, No. 10, JE 5, p. 20.

48. The Petitioners paid the Total Underpayment Amount ($6,607.64) under protest prior to initiating this action. *See* Initial Brief, at *3, FN1, Response, at * 7, No. 10.

49. A "Return Change" letter, Letter ID "C"_____ (the "2013 Return Change Letter"), was sent to the Petitioner on April, 7, 2014, changing the balance due by Petitioners and eliminating the amount of AFTC included on the 2013 personal income tax return of the Petitioners. A copy of this letter is included in the record as Joint Exhibit No. 6. *See* JE 6, pp. 21-22.

50. The purpose of the 2013 Return Change Letter is to inform Petitioners that the amount of the refund changed from $292.00, as originally reported (the "the 2013 Refund Amount") to a balance of tax due for 2013 of $611.00 (the "2013 Amount Due"). *See* JE 6, p. 22.

51. The 2013 Refund Amount ($292.00) plus the 2013 Amount Due ($611.00) equals the Carryover Amount ($903.00). *See* JE 6, p. 22.

52. A separate "Return Change" letter, included in the record as Joint Exhibit 7 and identified as Letter ID "D"_____ (the "Second 2012 Letter"), was sent to the Petitioner on April 7, 2014, again changing the amount of refund due to the Petitioners on their 2012 Return. *See* JE 7, p. 24.

53. The purpose of the Second 2012 Letter was to inform Petitioners that the amount of the refund due them changed from $6,597.00 (the 2012 Reported Refund Amount") to $842.00 (the "2012 Adjusted Refund Amount"). *See* JE 7, p. 24.

54. The difference between the 2012 Reported Refund Amount ($6,597.00) and the 2012 Adjusted Refund Amount ($842.00) equals the Overpayment Amount ($5,755.00). JE 7, p. 24.

55. The Overpayment Amount, as reflected in the Inquiry Letter, forms the basis for Petitioners' appeal.

B. Procedural History of the Subject Statute, the Regulation and the Procedure.

A review of the relevant procedural history of the AFTC will aid in understanding the context of this appeal. Further, to the extent that Respondent places reliance upon its interpretive regulation, it is quoted in full. Finally, because it is Respondent's Interpretation of W. Va. Code § 11-6D-5 that Petitioners herein appeal, the Interpretation is referenced repeatedly in this Section and throughout this Decision.

Article 6D of Chapter 11 of the West Virginia Code first became effective in 1996 and expired in 2006. *See* W. Va. Code § 11-6D-1, *et seq.* (1996) (the "1996 Act"). In 2011, the West Virginia Legislature reinstated the AFTC (the "2011 Act"), stating first that:

> [T]he Legislature hereby finds that the use of alternative fuels is in the public interest and promotes the general welfare of the people of this state insofar as it addresses serious concerns for our environment and our state's and nation's dependence on foreign oil as a source of energy. The Legislature further finds that this state has an abundant supply of alternative fuels and an extensive supply network and that, by encouraging the use of alternatively-fueled motor vehicles, the state will be reducing its dependence on foreign oil and attempting to improve its air quality. The Legislature further finds that the wholesale cost of fuel for certain alternatively-fueled motor vehicles is significantly lower than the cost of fueling traditional motor vehicles with oil based fuels.

> However, because the cost of motor vehicles which utilize alternative-fuel technologies remains high in relation to motor vehicles that employ more traditional technologies, citizens of this state who might otherwise choose an alternatively-fueled motor vehicle are forced by economic necessity to continue using motor vehicles that are fueled by more conventional means. Additionally, the availability of commercial and residential infrastructure to support alternatively-fueled vehicles available to the public is inadequate to encourage the use of alternatively-fueled motor vehicles. It is the intent of the Legislature that the alternative-fuel motor vehicle tax credit previously expired in 2006 be hereby reinstated with changes and amendments as set forth herein.
> Therefore, in order to encourage the use of alternatively-fueled motor vehicles and possibly reduce unnecessary pollution of our environment and reduce our dependence on foreign sources of energy, there is hereby created an alternative-fuel motor vehicles tax credit and an alternative-fuel infrastructure tax credit.

Martin Distrib. Co., Inc. v. Matkovich, 238 W. Va. 300, 794 S.E.2d 21, 25–26 (2016) (quoting W. Va. Code § 11-6D-1 (2011)).

For purchases of vehicles occurring between January 1, 2011 and April 15, 2013, the term alternative fuel includes fuel mixtures that contain eighty-five percent or more by volume, when combined with gasoline and with methanol, ethanol or other alcohols. *See* W.Va. Code § 11-6D-2(a)(5) (2011). An alternative fuel motor vehicle means a motor vehicle that as a new or retrofitted or converted fuel vehicle: (1) operates solely on one alternative fuel, (2) is capable of operating on one or more alternative fuels, singly or in combination or (3) is capable of operating on an alternative fuel and is also capable of operating on gasoline or diesel fuel. *See* West Virginia Code § 11-6D-2(b)(2011).

The term "bi-fueled motor vehicle" was added in 2011 and is defined as "the ability of an alternative-fuel motor vehicle to operate on an alternative fuel and another form of fuel." W. Va. Code § 11-6D-2(c)(2011). As alternative fuel was already generally defined to include the use of ethanol, "flex fuel" vehicles, which had become a widely and nearly standard part of motor production, were included in the purchase of bi-fueled motor vehicles.

West Virginia Code § 11-6D-3 (2011) provides that "[t]he tax credits for the purchase of alternative-fuel motor vehicles . . . provided in this article may be applied against the tax liability of a taxpayer imposed by the provisions of either article twenty-one, article twenty-three or article twenty-four of this chapter but in no case may more than one credit be granted for the same alternative-fuel motor vehicle as defined in subdivision (b), section two of this article. . . ." *Id.* A taxpayer becomes eligible for the AFTC if he or she "converts a motor vehicle that is presently registered in West Virginia to operate exclusively on an alternative fuel as defined in subdivision (a), section two of this article." W. Va. Code § 11-6D-4.

Petitioners' eligibility for the credit is not in dispute. Rather, Petitioners here challenge Respondent's reading of West Virginia Code § 11-6D-5(a) (the "Subject Statute"), which provides:

> For taxable years beginning on and after January 1, 2011, the amount of the credit allowed under this article for an alternative-fuel motor vehicle that weighs less than twenty-six thousand pounds is thirty-five percent of the purchase price of the alternative-fuel motor vehicle up to a maximum amount of $7,500 or fifty percent of the actual cost of converting from a traditionally fueled motor vehicle to an alternative fuel motor vehicle up to a maximum amount of $7,500. W. Vs. Code § 11-6D-5(a).

W. Va. Code § 11-6D-6 (2011) relates to the amount of the credit for qualified alternative fuel vehicle refueling infrastructure and qualified alternative fuel home refueling infrastructure and was recently applied by the West Virginia Supreme Court of Appeals in *Martin Distrib. Co., Inc. v. Matkovich*, 238 W. Va. 300, 794 S.E.2d 21 (2016).

The 2011 Act provided a duration of availability from the date of its enactment through December 21, 2021. Petitioners bought the Purchased Vehicle within the duration of availability (then December 21, 2021) to claim the credit pursuant to W. Va. Code § 11-6D-7 (2011).[10]

[10] Although the Legislature amended the 2011 Act in 2013, this Tribunal will apply the 2011 Act, as it was in effect at the time of the events giving rise to the instant proceeding.

W. Va. Code § 11-6D-9 (2011) sets forth the following carryover and recapture provisions:

> (a) If the tax credit allowed under this article in any taxable year exceeds the taxpayer's tax liability as determined in accordance with article twenty-one, article twenty-three or article twenty-four of this chapter for that taxable year, the excess may be applied for succeeding taxable years until the full amount of the excess tax credit is used.
> (b) No carry back to a prior taxable year is allowed for the amount of any unused credit in any taxable year.
> (c) A tax credit is subject to recapture, elimination or reduction if it is determined by the State Tax Commissioner that a taxpayer was not entitled to the credit, in whole or in part, in the tax year in which it was claimed by the taxpayer. The amount of credit that flows through to equity owners of a passthrough entity may be recaptured or recovered from either the taxpayer or the equity owners in the discretion of the Tax Commissioner. *Id.*

Critically, to carry out the provisions of the 2011 Act, West Virginia Code § 11-6D-8 (2011) required Respondent to establish certain procedures (the "Statutory Procedure"):

> (a) The Tax Commissioner shall promulgate new rules for the administration of this article consistent with its provisions and in accordance with article three, chapter twenty-nine-a of this code as the Commissioner deems necessary after the effective date of the amendments to this article. Such rules shall include rules relating to the necessary documentation required to be filed in order to take the tax credits allowed in this article.
> (b) Within one year prior to the written expiration of the credit established in this article, the State Tax Commissioner shall provide a written report to the Legislature setting forth the utilization of the credit, the benefit of the credit and the overall cost of the credit. W. Va. Code § 11-6D-8 (2011).

After the 2011 Act became law, Respondent implemented the Interpretation. To reiterate, the specific language of the Interpretation, which forms the basis for this appeal, provides that "[p]urchase price means the sales price of the vehicle less the amount deducted therefrom for any vehicle traded in." JE 2, p.9 (endnote).[11]

[11] Based upon Petitioners' representations, Schedule AFTC-1 was again amended in 2013 to add rebate language to the exclusion from its interpretation of the term purchase price (the "2013 Schedule").

The 2011 Act was amended during the 2013 session to narrow the definition of bi-fueled motor vehicle" to a motor vehicle fueled from two or more tanks, each of which stores a separate type of fuel, which has the ability to operate on an alternative fuel and another form of fuel. *See* W. Va. Code § 11-6D-2(c)(2013). The 2013 amendments further eliminated eligibility for motor vehicles that operate on fuels from other than compressed natural gas, liquefied natural gas or liquefied petroleum gas, occurring on or after April 15, 2013, or conversions of motor vehicles to operate on fuels other than compressed natural gas, liquefied natural gas or liquefied petroleum gas, occurring on or after April 15, 2013. *See* W. Va. Code § 11-6D-7(c)(2013).

For purposes of this Final Decision herein, all references to the 2011 Act, as amended in 2013 shall be referred to as the "2013 Act". The 2013 Act is mentioned herein only by way of procedural history and insofar as Respondent places reliance thereon. To this end, the 2013 Act provides that that the credit shall apply to natural gas-fueled vehicles purchased from April 15, 2013, until the law sunsets on December 31, 2017, and further states:

> The tax credit provided for in this article for the purchase of an alternative-fuel motor vehicle or conversion of a motor vehicle to an alternative-fuel motor vehicle, is not available to and may not be claimed by any taxpayer in, or for, any tax year in which the taxpayer did not own the alterative-fuel motor vehicle for which the claim is filed on the last day of the taxpayer's tax year for which the credit is claimed. W. Va. Code § 11-6D-4(e) (2013).[12]

Citing the above section specifically, Respondent states that "on the heels of this enactment, the Tax Department adopted an interpretive rule that provided clarification on the information necessary to claim a tax credit." Response, at *4, par 4. Respondent's interpretive rule, issued March 22, 2014[13], shall be known hereinafter as the "Regulation".

[12] The 2013 Act further provides that in no case may more than one credit be granted for the same alternative-fuel motor vehicle. W.Va. Code §11-6D-3 (1996, 2011, 2013).
[13] The Regulation's effective date was obtained from the West Virginia Secretary of State's website under the Code of State Rules database at http://apps.sos.wv.gov/adlaw/csr/rule.aspx?rule=110-06D.

Because one of this Tribunal's decisions noted the absence of interpretive rules at the time (*see infra*, p. 25), the Regulation, found in 110 Code of State Rules, §6D, is cited in full:

§110-6D-1. General.

1.1. Scope. -- This legislative rule is intended to explain and clarify the Alternative-Fuel Motor Vehicle Tax Credit as set forth in W. Va. Code §§11-6D-1, *et seq.* This rule repeals and replaces all prior Alternative-Fuel Motor Vehicle Fuel rules.

The Alternative-Fuel Motor Vehicle Tax Credit became effective July 1, 1997 and expired June 6, 2006. W. Va. Code §§11-6D-1, *et seq.*, was amended in 2011, and the Alternative-Fuel Motor Vehicle Tax Credit was reinstated, effective July 1, 2011. The Tax Credit was most recently amended and became effective April 13, 2013.

W. Va. Code §11-6D-1, *et seq.* provides a tax credit for qualified alternative-fuel motor vehicles and qualified alternative-fuel vehicle refueling infrastructures. The credit for qualified alternative-fuel vehicle home refueling infrastructures was eliminated.

1.2. Authority. -- W. Va. Code §11-6D-8(b).

1.3. Filing Date. -- February 20, 2014.

1.4. Effective Date. -- March 22, 2014

1.5. General. -- Repeal and replace.

§110-6D-2. Definitions.

For purposes of this rule, the following terms shall have the meaning ascribed to them in this rule, unless the context in which used clearly requires a different meaning.

2.1. Flex-Fuel means fuel mixtures that contain eighty-five percent or more by volume, when combined with gasoline or other fuels, of the following:

2.1.1. Methanol;

2.1.2. Ethanol; or

2.1.3. Other alcohols;

2.2. "Placed into service" means the date:

2.2.1. A qualified alternative-fuel motor vehicle refueling infrastructure is ready and available to store and dispense alternative fuels into fuel tanks of motor vehicles; or

2.2.2. A qualified alternative-fuel vehicle home refueling infrastructure is ready and available to:

2.2.2.a. Store and dispense alternative fuels into fuel tanks of motor vehicles; or

2.2.2.b. Provide electricity to plug-in hybrid electric vehicles or electric vehicles.

§110-6D-3. Transition Rules.

3.1. Alternative Fuel Vehicles. Alternative fuel motor vehicles capable of running on ethanol, Flex-Fuel, Natural gas hydrocarbons and derivatives, Hydrogen, Coal-derived liquid fuels, and Electricity must have been purchased after December 31, 2010 and prior to April 15, 2013, and are subject to the following rules:

3.1.1. An original bill of sale or some other indicia of purchase must have been issued after December 31, 2010 and prior to April 15, 2013. The bill of sale or other indicia of purchase must contain all information related to the consideration paid for the vehicle, including the amount of any trade-in or rebate claimed by the purchaser.

3.1.2. Payment for the vehicle, which may include any financing arrangement, must be completed after December 31, 2010 and prior to April 15, 2013.

3.1.3. The purchaser of the vehicle must have taken possession of the vehicle after December 31, 2010 and prior to April 15, 2013.

3.2. Qualified Alternative Fuel Vehicle Home Refueling Infrastructure. The purchase and installation of qualified alternative fuel vehicle home refueling infrastructure must have been purchased after December 31, 2010 and prior to April 15, 2013, and is subject to the following rules:

3.2.1. An original bill of sale or some other indicia of purchase must have been issued after December 31, 2010 and prior to April 15, 2013.

3.2.2. Payment for the installation of the infrastructure, which may include any financing arrangements, must be completed after December 31, 2010 and prior to April 15, 2013.

3.2.3. There must be some other overt act or indicia of installation of the infrastructure started after December 31, 2010 and prior to April 15, 2013, which may include:

3.2.3.a. A building permit, where available;
3.2.3.b. The required notification provided in W. Va. Code §11-3-3a.
3.2.3.c. Any other indicia the Tax Commissioner deems acceptable.

3.2.4. Additionally, to claim the credit, the taxpayer must include with an application:

3.2.4.a. A listing of each purchased item including compression equipment, storage tanks, and dispensing units for alternative fuel at the point where the fuel is delivered, together with copies of invoices for each item;

3.2.4.b. A statement, signed by the taxpayer, stating that the property is installed and located in this state; and

3.2.4.4. A statement, signed by the taxpayer, stating that no credit has been previously claimed by any taxpayer on the cost of such property.

3.3. Qualified Alternative Fuel Vehicle Commercial Refueling Infrastructure. The purchase and installation of qualified alternative fuel vehicle commercial refueling infrastructure is subject to different credit qualification and calculation criteria depending on when the infrastructure is placed into service.

3.3.1. When the purchase and installation of qualified alternative fuel vehicle commercial refueling infrastructure is purchased, installed, and placed into service after December 31, 2010 and prior to January 1, 2014, the following rules apply:

3.3.1.a. The amount of credit available will be fifty percent of the total costs, up to a maximum of $250,000, directly associated with the construction or purchase and installation of the alternative fuel vehicle commercial refueling infrastructure.

3.3.1.b. However, if the alternative fuel vehicle commercial refueling infrastructure is generally accessible for public use, the amount of credit available will be fifty percent of the total costs, up to a maximum of $312,500, directly associated with the construction or purchase and installation of the alternative fuel vehicle commercial refueling infrastructure.

3.3.2. When the purchase and installation of qualified alternative fuel vehicle commercial refueling infrastructure is purchased, installed, and placed into service after January 1, 2014 but prior to January 1, 2018, the following rules apply:

3.3.1.a. The amount of credit available will be twenty percent of the total costs, per facility, up to a maximum of $400,000, directly associated with the construction or purchase and installation of the alternative fuel vehicle commercial refueling infrastructure.

3.3.3. When the purchase and installation of qualified alternative fuel vehicle infrastructure begins prior to January 1, 2014, but is not completed and placed into service until after January 1, 2014, the taxpayer may choose to fall under the rules provided in either 3.3.a. or 3.3.b., but no taxpayer shall be eligible to claim a credit under both sections for the same alternative fuel vehicle commercial refueling infrastructure.

3.3.4. For purposes of this rule, the following items will be determinative of when the alternative fuel vehicle commercial refueling infrastructure began:

3.3.4.a. The date of the original bill of sale or some other indicia of purchase;

3.3.4.b. The payment for the installation of the infrastructure, which may include any financing arrangements; and

3.3.4.c. The completion of some other overt act or indicia of installation of the infrastructure, which may include:

3.3.4.c.1. A building permit, where available;
3.2.4.c.2. The required notification provided in W. Va. Code §11-3-3a
3.2.4.c.3. Any other indicia the Tax Commissioner deems acceptable.

Referring specifically to the Regulation, Respondent states that "[t]he general purpose of such a requirement was to determine the actual purchase price of the vehicle, less trade-in or rebate, as those items were not to be included in the purchase price." Respondent's Brief, at *5.

This Tribunal is called upon to determine whether Respondent's Interpretation of the meaning of the term "purchase price" comports with the plain meaning of the Subject Statute. For the reasons set forth herein, this Tribunal holds that it does not. Prior to turning to that analysis, however, we will review the applicable legal standards in this matter.

APPLICABLE LEGAL STANDARDS

A. Standard of Review

The sole issue in this case concerns proper interpretation and application of the AFTC as provided in the Subject Statute. The standard of review applicable to this matter states:

> In an administrative appeal from the decision of the West Virginia Office of Tax Appeals, this Court will review the final order of the circuit court pursuant to the standards of review in the State Administrative Procedures Act set forth in W. Va. Code, 29A-5-4(g) [1988][14]. Findings of fact of the administrative law judge will not be set aside or vacated unless clearly wrong, and, although administrative interpretation of State tax provisions will be afforded sound consideration, this Court will review questions of law de novo. Syllabus point 1, *Griffith v. ConAgra Brands, Inc*., 229 W.Va. 190, 191, 728 S.E.2d 74, 75 (2012).

Matkovich v. CSX Transportation, Inc., 238 W. Va. 238, 793 S.E.2d 888, 891 (2016), cert.., denied sub nom. Steager v. CSX Transp., Inc No. 16-1251, 2017 WL 1398954 (U.S. Oct. 2, 2017) The Court further held that "[t]he same standard set out in the State Administrative Procedures Act, W.Va. Code, 29A-1-1, *et seq.*, is the standard of review applicable to review of the Tax Commissioner's decisions under W.Va. Code, 11-10-10(e)." *Preston Memorial Hosp. v. Palmer, 2003,* 578 S.E.2d 383, 213 W.Va. 189 (2003) (quoting Syl. Pt. 3, in part, *Frymier-Halloran v. Paige,* 193 W.Va. 687, 458 S.E.2d 780 (1995).

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[14] W. Va. Code § 29A-5-4 defines the scope of judicial review as follows:

> (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; or
> (4) Affected by other error of law; or
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion
> or clearly unwarranted exercise of discretion.

Importantly, the Court reminds this Tribunal that "with respect to the precise legal issues before us., i.e., the interpretation and application of a statute and a rule, we have held that '[i]nterpreting a statute or an administrative rule of regulation presents a purely legal question subject to *de novo* review.'" Syl. Pt. 1, *Griffith v. Frontier W. Virginia, Inc.*, 228 W. Va. 277, 719 S.E.2d 747 (2011) (quoting Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia,* 195 W.Va. 573, 466 S.E.2d 424).

B. Burden of Proof

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. West Virginia Code § 11-1-2. Here, Petitioner bears the burden of proof in challenging the presumptive correctness of Respondent's action.

Regarding the burden of proof, West Virginia Code § 11-10A-10(e) states that that "[e]xcept as otherwise provided by this code or legislative rules, the taxpayer or Petitioner has the burden of proof". *See also Woodell v. Dailey,* 230 S.E.2d 466 (W. Va. 1976); *See also* 121 Code of State Rules, 1, §63,1.

A petitioner can satisfy its burden by a preponderance of the evidence. As this Tribunal previously noted "'[p]roof by a preponderance of the evidence requires only that a party satisfy the court . . . by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.'" W. Va. Admin. Div. No. 06-604 MFE (July 16, 2007) (quoting *Jackson v. State Farm Mutual*, 215 W. Va. 634, 640, 600 S.E.3d 346, 352 (2004)).

With these principles in mind regarding the standard of review and burden of proof, we now discuss the proper legal analysis in this matter.

DISCUSSION

Petitioners' sole argument is that "[t]he Respondent's Interpretation of West Virginia's Alternative Fuel Tax Credit is Not Supported by the West Virginia Code, and Runs Afoul of the Purpose of the Credit." Initial Brief, at *11 (headnote). Respondent counters that "[a]ny argument set forth by Petitioners is in clear contravention of the plain meaning of the Act [sic] must fail before the Office of Tax Appeals." Respondent's Brief, at *9 (citing *Appalachian Power v. State Tax Department of West Virginia,* 195 W. Va. 573, 466 S.E. 2d 424 (1995)).

To reiterate, the Interpretation states that "[p]urchase price means the sales price of the vehicle less the amount deducted therefrom for any vehicle traded in" *See* JE 2, p. 9. (endnote). Through the Interpretation, Respondent reads the Subject Statute (11-6D-5(a)) as excluding traded vehicles and dealer rebates from "purchase price", a term undefined by statute, for purposes of calculating the AFTC. Petitioners argue the Interpretation is contrary to law and legislative intent.

This Tribunal must analyze Petitioners' direct challenge to the Interpretation pursuant to the principles enunciated by the West Virginia Supreme Court of Appeals in *Appalachian Power* and its progeny. In that case, Justice Cleckley, writing for the Court, identified one pertinent question as "whether the clear language of W. Va. Code, 11-13-2n, precludes the Tax Department's interpretation of the power companies' tax burdens as embodied in 110 W. Va. C.S.R. 13, §1A.2.11."[15] *Appalachian Power Co.*, 195 W. Va. at 581, 466 S.E.2d at 432.

Similarly, the issue here is whether the clear language of the Subject Statute (W. Va. Code §11-6D-5(a)) precludes Respondent's reading thereof, as expressed in the Interpretation (the "Question Presented"). For the reasons set forth herein, this Tribunal holds that it does.

[15] The second question presented, inapplicable here, was whether that regulation impermissibly differentiates between like entities and thereby violates equal protection principles.

Proper analysis of the Question Presented necessarily begins with a determination of whether the Legislature has directly spoken to the specific issue at hand. As the Court explained,

> 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.

Griffith v. Frontier W. Virginia, Inc., 228 W. Va. 277, 288, 719 S.E.2d 747, 758 (2011) (quoting Syl. pt. 3, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995)) (emphasis added). Critically, neither party here argues that the Subject Statute, W. Va. Code §11-6D-5(a), itself is unclear. Rather, Petitioners argue that Respondent's Interpretation was improperly promulgated and ascribes a meaning to purchase price that restrictively amends the Subject Statute. Thus, Respondent's characterization of the issue as "what constitutes purchase price under the Alternative Fuel Credit Act."[16] is misplaced.

Indeed, the precise question at issue is the Question Presented[17] (whether the clear language of the Subject Statute precludes Respondent's reading thereof, as expressed in the Interpretation.[18] ("Purchase price means the sales price of the vehicle less the amount deducted therefrom for any vehicle traded in")). In the case at hand, the Legislature has not addressed the Question Presented. Thus, this Tribunal now proceeds to consider whether the Interpretation is valid and is consistent with the Subject Statute. *See id.* In this regard, the Court held that:

[16] Respondents Brief, at *3, par. 1, line 1.
[17] *See supra*, page 24.
[18] *See supra*, page 8.

> 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).

Griffith v. Frontier W. Virginia, Inc., 228 W. Va. 277, 288, 719 S.E.2d 747, 758 (2011) (quoting Syl. pt. 4, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424.) (emphasis supplied). Accordingly, to answer the Question Presented, this Tribunal must first consider whether the Interpretation is valid and if so, whether Respondent's definition of purchase price therein is based upon a permissible construction of the Subject Statute. With respect to the validity (as opposed to the reasonableness) of the Interpretation, Petitioners cite a previous decision of this Tribunal, wherein the then Chief Judge of this Tribunal commented on the absence of administrative regulations for the AFTC. *See* Petitioners' Brief, *14, n.6 ("As noted by Judge Pollack in W. Va. Admin. Div. No. 12-453 P-M (December 9, 2014), proposed interpretive rules were drafted for the AFTC, but 'never released for public comment, let alone adopted.'"). Further discussion is warranted here to aid in understanding the procedural context of both the Regulation and the Interpretation. The Statutory Procedure mandates:

> (a) The Tax Commissioner shall promulgate new rules for the administration of this article consistent with its provisions and in accordance with article three, chapter twenty-nine-a of this code as the Commissioner deems necessary after the effective date of the amendments to this article. Such rules shall include rules relating to the necessary documentation required to be filed in order to take the tax credits allowed in this article.
>
> (b) Within one year prior to the written expiration of the credit established in this article, the State Tax Commissioner shall provide a written report to the Legislature setting forth the utilization of the credit, the benefit of the credit and the overall cost of the credit.
>
> W. Va. Code § 11-6D-8 (2011) (emphasis supplied).

On November 8, 2013,[19] Respondent filed the Regulation (interpretive rule 110 C.S.R. 6D) with the West Virginia Secretary of State. The comment period for the Regulation expired on December 9, 2013.[20] The Regulation was filed in final form on February 22, 2014.[21] The Regulation became effective on March 22, 2014.[22] Inasmuch as the Regulation was enacted subsequent to the date Petitioners bought the Subject Vehicle, the Regulation is invalid as applied to Petitioners.

Turning to the validity of the Interpretation, the procedural history demonstrates that sometime after the 2011 Act became law, Respondent implemented the Interpretation.[23] Petitioners argue that "[i]f the Respondent had promulgated an interpretive or legislative rule to provide guidance on the AFTC article, it would not have been permitted to restrictively amend the definition of purchase price for calculating the AFTC, and the Respondent is certainly not permitted to accomplish such a revision through his AFTC schedule." Petitioners' Brief, at *14.

Before turning to the question of whether the Interpretation comports with the Subject Statute, this Tribunal must analyze whether the Interpretation is a valid interpretive rule on its face. The West Virginia Supreme Court of Appeals' pronouncement in *Hornbeck v. Caplinger*, 227 W. Va. 611, 712 S.E.2d 779 (2011) is instructive in this analysis. In *Hornbeck,* the Court determined whether the lower courts were correct in finding that the overdue child support allocation procedure at issue there was a proper exercise of the authority delegated to the Bureau of Child Support Enforcement.

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[19] The date that Respondent filed the Regulation was obtained from the West Virginia Secretary of State's website under the Code of State Rules database at http://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=9308.

[20] *See id*., p.17, note 13 (referring to http://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=9308 for date).

[21] *See id.*, p.17, note 13 (referring to http://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=9308 for date).

[22] *See id.*, p.17, note 13 (referring to http://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=9308 for date).

[23] *See supra*, page 8, no. 24 (quoting JE 2, p. 9 (endnote)).

In making such a determination, the *Hornbeck* Court stated: "we begin our analysis by first establishing the classification of the rule so as to determine the level of deference the agency's action should be afforded." *Hornbeck v. Caplinger*, 227 W. Va. 611, 616, 712 S.E.2d 779, 784 (2011) (citing *Appalachian Power Co.*, 195 W.Va. at 573, 583, 466 S.E.2d, 424, 434 (1995)). As the Court explained,

> (c) "Interpretive rule" means every rule, as defined in subsection (i) of this section, adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests. An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the exercise of private rights or privileges nor to confer any right or privilege provided by law and is not admissible in any administrative or judicial proceeding for such purpose, except where the interpretive rule established the conditions for the exercise of discretionary power as herein provided. However, an interpretive rule is admissible for the purpose of showing that the prior conduct of a person was based on good faith reliance on such rule. The admission of such rule in no way affects any legislative or judicial determination regarding the prospective effect of such rule. Where any provision of this code lawfully commits any decision or determination of fact or judgment to the sole discretion of any agency or any executive officer or employee, the conditions for the exercise of that discretion, to the extent that such conditions are not prescribed by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove such conditions[.]

In accordance with the *Hornbeck* analysis, it is well settled that interpretive rules "do not create rights but merely clarify an existing statute or regulation ... [and thus] need not go through the legislative authorization process." *Id*. at 617, 785 *(quoting Appalachian Power Co.,* 195 W.Va. at 583, 466 S.E.2d at 434.

The Hornbeck Court further addressed the level of deference affording interpretive rules of administrative agencies, stating:

> Although they are entitled to some deference from the courts, interpretive rules do not have the force of law nor are they irrevocably binding on the agency or the court. They are entitled on judicial review only to the weight that their inherent persuasiveness commands.
>
> *Id.* Although the weight of inherent persuasiveness appears to be an oblique standard, its meaning was further addressed in *Appalachian Power* by reliance on the following excerpt from the United States Supreme Court's decision in *General Electric Company v. Gilbert*, 429 U.S. 125, 141–42, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976):
> " 'We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " (internal citation omitted).
> *Appalachian Power Co.*, 195 W.Va. at 583, 466 S.E.2d at 434. Naturally, these criterion would all need to be weighed against the backdrop of the agency acting within the limits of its legislatively delegated authority.

Hornbeck v. Caplinger, 227 W. Va. at 615–17, 712 S.E.2d at 783–85. At issue is whether the Interpretation is valid and if so, whether Respondent's definition of purchase price therein is based upon a permissible construction of the Subject Statute. As the Court stated time and again,

> "[i]t is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority." *Syllabus point 3, Rowe v. West Virginia Department of Corrections*, 170 W.Va. 230, 292 S.E.2d 650 (1982).
> Syl. pt. 6, *Simpson v. West Virginia Office of Ins. Comm'r*, 223 W.Va. 495, 678 S.E.2d 1 (2009).

Griffith v. Frontier W. Virginia, Inc., 228 W. Va. 277, 288, 719 S.E.2d 747, 758 (2011).

Respondent is the statutory official charged with the enforcement of the tax laws of this State. W.Va.Code § 11–1–2 states: "[I]t shall be the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies, whether of the State or of any county, district or municipal corporation thereof, are faithfully enforced.").

Moreover, the Legislature has vested the Tax Commissioner with the authority to promulgate rules to provide guidance as to the interpretation and application of the State's tax laws. *See* W. Va.Code § 11–10–5 (1986) (Repl.Vol.2008) ("The Tax Commissioner may make all needful rules and regulations for the taxes to which this article [West Virginia Tax Procedure and Administration Act] applies as provided in the State Administrative Procedures Act in chapter twenty-nine-a [§§ 29A–1–1 et seq.] of this code[.]"). Therefore, it is clear that Respondent, by virtue of the Statutory Procedure in W. Va. Code §11-6D-8, had the authority to promulgate rules to administer the AFTC. However, in so doing, "the Tax Commissioner is required to construct his rules so that they are consistent with, and adhere to, the statutory language upon which they are based. *Griffith v. Frontier W. Virginia, Inc.*, 228 W. Va. 277, 289, 719 S.E.2d 747, 759 (2011) (quoting) *See* Syl. pt. 6, *Simpson,* 223 W.Va. 495, 678 S.E.2d 1. In other words,

> "[a]ny rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute." Syllabus point 4, *Maikotter v. University of West Virginia Board of Trustees/West Virginia University,* 206 W.Va. 691, 527 S.E.2d 802 (1999).
> Syl. pt. 7, *Simpson,* 223 W.Va. 495, 678 S.E.2d 1. *Accord* Syl. pt. 5, *Appalachian Power Co.,* 195 W.Va. 573, 466 S.E.2d 424 (" ' "Rules and Regulations of ... [an agency] must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect in the ... [agency's] Rules and Regulations that it has in the statute." Syl. pt. 4, *Ranger Fuel Corp. v. West Virginia Human Rights Commission,* 180 W.Va. 260, 376 S.E.2d 154 (1988).' Syl. pt. 2, in part, *Chico Dairy Company v. Human Rights Commission,* 181 W.Va. 238, 382 S.E.2d 75 (1989).").
>
> *Griffith v. Frontier W. Virginia, Inc.*, 228 W. Va. 277, 289, 719 S.E.2d 747, 759 (2011).

In determining the validity and reasonableness of the Interpretation and in keeping with the principles espoused in *Appalachian Power*, the specific statutory language at issue is contained in W. Va. Code § 11–6D–5(a)(2011) (the "Subject Statute"):

> (a) For taxable years beginning on and after January 1, 2011, the amount of the credit allowed under this article for an alternative-fuel motor vehicle that weighs less than twenty-six thousand pounds is thirty-five percent of the purchase price of the alternative-fuel motor vehicle up to a maximum amount of $7,500 or fifty percent of the actual cost of converting from a traditionally fueled motor vehicle to an alternative fuel motor vehicle up to a maximum amount of $7,500. *Id (emphasis supplied).*

The Subject Statute does not define the term "purchase price". Further, this term is undefined in the Regulation, effective March 22, 2014.[24] As previously noted, the Regulation was adopted by Respondent for "clarification on the information necessary to claim a tax credit."[25] Indeed, the term "purchase price" is defined only in Respondent's Interpretation[26], the validity of which Petitioners question.

Noting the absence of the term "purchase price" in the Subject Statute, Petitioners first argue that this Tribunal should look to West Virginia's use tax, which is based on the "purchase price" of tangible personal property, custom software and services used in West Virginia. *See* "Petitioners' Initial Brief in Support of Their Petition for Refund of Personal Income Tax" (the "Initial Brief", at *12) (citing W. Va. Code § 11-15A-2; W. Va. Code § 11-15A-1(b)(6); WV CSR W. Va. Code § 110-15-2.68.). To this end, Petitioners quote the regulations governing use tax, which state that:

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[24] *See supra*, p. 17, note 13.
[25] *See supra*, p. 17.
[26] *See* Joint Exhibit 2, 2012 Schedule, at page 2 ("purchase price means the sales price of the vehicle less the amount deducted therefrom for any vehicle traded in").

> "Purchase price" means the total amount for which tangible personal property or a taxable service is sold, valued in money, whether paid in money or otherwise and does not include the amount of any other tax simultaneously imposed on the transaction or any cash discounts allowed and taken (except the amount of any term discounts). *Id.*

Petitioners point out that under the Streamlined Sales Tax Article in the West Virginia Code, "purchase price" means the measure subject to the sales or use tax and has the same meaning as sales price. W. Va. Code § 11-15B-2(46). The Streamlined Sales Tax Article's definition of "sales price," under W. Va. Code § 11-15A-2(b)(49), for purposes of West Virginia's consumer sales and service tax and use tax is as follows:

> (A) "Sales price" means the measure subject to the tax levied under [the sales and use tax articles, Chapter 11, article 15 and Chapter 11, article 15A] and includes the total amount of consideration, including cash, credit, property and services, for which personal property and services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for the following:
>
> (i) The seller's cost of the property sold;
> (ii) The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller and any other expense of the seller;
> (iii) Charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
> (iv) Delivery charges; and
> (v) Installation charges.
>
> (B) "Sales price" does not include:
>
> (i) Discounts, including any cash, term or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale;
> (ii) Interest, financing and carrying charges from credit extended on the sale of personal property, goods or services, if the amount is separately stated on the invoice, bill of sale or similar document given to the purchaser; or
> (iii) Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill or sale or similar document given to the purchaser.

Petitioners then examine the measure of the 5% excise tax that the Division of Motor Vehicles ("DMV") imposes on purchases of motor vehicles under W. Va. Code § 11-15-3c(b), which also relies on the definition of "sales price," as defined in W. Va. Code § 11-15B-2. In doing so, they specifically note that the five percent tax collected by the DMV contains a proviso that states "so much of the sale price or consideration as is represented by the exchange of other vehicles on which the tax is imposed by this section [or W. Va. Code § 17a-3-4] has been paid by the purchaser shall be deducted from the total actual sales price paid for the motor vehicle, whether the motor vehicle be new or used." Initial Brief, at *13.

Citing one of this Tribunal's previous decisions, Petitioners argue that such a proviso represents a divergence from the methodology that "sales price" is typically calculated in West Virginia and demonstrates that the Legislature understands that "sales price" includes the value of property traded. Initial Brief at *13 (citing W. Va. Admin. Dec. No. 12-453 (P-M) ("The Legislature is presumed to be familiar with all the laws it has created.") and quoting *Charleston Gazette v. Smithers*, 232 W. Va. 449, 752. S.E.2d 603, 621 (2013) ("it is a settled principle of statutory construction that courts presume the Legislature drafts and passes statutes with full knowledge of existing law)."

Relying upon guidance from the express definitions of purchase price in the sales and use tax law, Petitioners conclude that (1) for purposes of sales and use tax, the purchase price refers to monetary payment or payments made "otherwise," and the total value of consideration includes property exchanged for property for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise and (2) the definition of "purchase price" for purposes of the sales and use tax includes both cash payments and property traded in exchange for new property.

Respondent's Brief in Response to Petitioner's Initial Brief (the "Response") opens by providing this Tribunal with a history of the AFTC after Petitioners bought the Purchased Vehicle, explaining that "[r]ecognizing the unintended consequence of making a substantial portion of motor vehicles sold in this state eligible for this credit, the Act was amended again during the 2013 session to narrow the definition of 'bi-fueled motor vehicle' to 'a motor vehicle fueled from two or more tanks, each of which stores a separate type of fuel, which has the ability to operate on an alternative fuel and another form of fuel.'" Respondent's Brief, at * 4.

Citing the seminal case of *Appalachian Power, et al. v. West Virginia State Tax Commissioner,* 195 W. Va. 573; 466 S.E.2d 424 (1995), Respondent counters that "[p]etitioners attempt to circumvent their burden of proof by arguing the statute has a socioeconomic benefit and, therefore, should be construed broadly. However, the statute in question does not clearly and unambiguously support Petitioners' position. Any argument set forth by Petitioners is in clear contravention of the plain meaning of the Act must fail before the Office of Tax Appeals." Response, at *9.

In support of this argument, Respondent first discusses the termination of the AFTC as of April 13, 2013, for the type of vehicle purchased here. Respondent then reasons that "[e]ven if the tax credit before this Court had any intended socioeconomic benefit, the Legislature rejected this experiment after two years. Therefore, the Court should not extend this tax credit beyond its contemplated statutory bounds when the credit in question has been subsequently terminated by the Legislature." Response, at *9-10. Respondent then quotes W. Va. Code § 11-10-14(k)(2003), which provides that. "when an erroneous refund has been issued or an erroneous credit established, the Tax Commissioner may proceed to investigate and make an assessment, or institute a civil action to recover the amount of refund or credit." Response, at *10.

Respondent asks this Tribunal to make specific reference the Amended Act (W. Va. Code § 11-6D-9(d) (2013), which provides that a tax credit is subject to recapture, elimination or reduction if it is determined by the State Tax Commissioner that a taxpayer was not entitled to the credit, in whole or in part, in the tax year in which it was claimed by the taxpayer. Response, at *10. That determination presumes, of course, that the taxpayer in question was not entitled to the credit in the first instance. Indeed, Respondent recognizes as much in the very next sentence when it states that "Respondent is not disputing the eligibility of the Petitioners' new flex fuel 2012 Jeep Grand Cherokee, purchased on or about October 2012, for the AFTC credit. The sole issue in this matter is what constitutes the purchase price of the 2012 Jeep Grand Cherokee for purposes of the AFTC credit." Response, at 10.

In its determination of what constitutes the purchase price, Respondent declares that "[t]he partial denial of the credit in this matter was due to rebates and trade-ins being deducted from the purchase price when the credit was calculated by the Respondent. The relevant statute is clear that credit is based upon purchase price." Response, at *10. Respondent then cites the 2013 Act, stating that West Virginia Code §11-6D-5 provides:

> For taxable years beginning on and after January 1, 2011, but prior to termination or cessation of this credit as specified in this article, the amount of the credit allowed under this article for an alternative-fuel motor vehicle that weighs less than twenty-six thousand pounds is thirty-five percent of the purchase price of the alternative-fuel motor vehicle up to a maximum amount of $7,500 or fifty percent of the actual cost of converting from a traditionally fueled motor vehicle to an alternative-fuel motor vehicle up to a maximum amount of $7,500.

Moreover, the clarity of the Subject Statute cannot fully be determined without examining the 2011 Act and the accompanying legislative intent in its enactment because " [a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl Pt. 2, *State v. Epperly*, 135

W. Va. 877, 65 S.E.2d 488 (1951)." The West Virginia Supreme Court recently undertook such an examination in its recent pronouncement of *Martin Distrib. Co., Inc. v. Matkovich*, 238 W. Va. 300, 794 S.E.2d 21, 25–26 (2016). This Tribunal will now review *Martin.*

The West Virginia Supreme Court of Appeals was recently called upon to determine whether certain petitioners in four consolidated appeals were entitled to an alternative fuel infrastructure tax credit pursuant to W. Va. Code § 11-6D-4(c). *See Martin Distrib. Co., Inc. v. Matkovich*, 238 W. Va. 300, 794 S.E.2d 21, 25–26 (2016). While *Martin* involved the *eligibility requirements* for the AFTC, as set forth in § 11-6D-4, as opposed to the issue presented here, i.e., the meaning of the term "purchase price" in determining the *amount of the credit* pursuant to W. Va. Code § 11-6D-5(a), the Court's analysis is nonetheless instructive and indeed, precedential. To this end, the *Martin* Court first examined the specific statute at issue, noting that

> Under this code section, "[a] taxpayer is eligible to claim the credit against tax provided in this article if he or she: .... (c) Constructs or purchases and installs qualified alternative fuel vehicle refueling infrastructure or qualified alternative fuel vehicle home refueling infrastructure that is capable of dispensing alternative fuel for alternative-fuel motor vehicles." The term "alternative fuel" is defined in W. Va. Code § 11-6D-2(a)(9) (2011) as "[e]lectricity, including electricity from solar energy."

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Then, the *Martin* Court turned to the Legislative findings and purpose of the 2011 Act:

> [T]he Legislature hereby finds that the use of alternative fuels is in the public interest and promotes the general welfare of the people of this state insofar as it addresses serious concerns for our environment and our state's and nation's dependence on foreign oil as a source of energy. The Legislature further finds that this state has an abundant supply of alternative fuels and an extensive supply network and that, by encouraging the use of alternatively-fueled motor vehicles, the state will be reducing its dependence on foreign oil and attempting to improve its air quality. The Legislature further finds that the wholesale cost of fuel for certain alternatively-fueled motor vehicles is significantly lower than the cost of fueling traditional motor vehicles with oil based fuels.

> However, because the cost of motor vehicles which utilize alternative-fuel technologies remains high in relation to motor vehicles that employ more traditional technologies, citizens of this state who might otherwise choose an alternatively-fueled motor vehicle are forced by economic necessity to continue using motor vehicles that are fueled by more conventional means. Additionally, the availability of commercial and residential infrastructure to support alternatively-fueled vehicles available to the public is inadequate to encourage the use of alternatively-fueled motor vehicles. It is the intent of the Legislature that the alternative-fuel motor vehicle tax credit previously expired in 2006 be hereby reinstated with changes and amendments as set forth herein.
> Therefore, in order to encourage the use of alternatively-fueled motor vehicles and possibly reduce unnecessary pollution of our environment and reduce our dependence on foreign sources of energy, there is hereby created an alternative-fuel motor vehicles tax credit and an alternative-fuel infrastructure tax credit.

Martin Distrib. Co., Inc. v. Matkovich, 238 W. Va. 300, 794 S.E.2d 21, 25–26 (2016) (quoting W. Va. Code § 11-6D-1 (2011)).

The first two cases on appeal in *Martin* involved whether two appellants were eligible for the "qualified alternative fuel vehicle refueling infrastructure" tax credit for the installation of solar panels on their businesses. *See Martin Distrib.* 238 W. Va. 300, 794 S.E.2d 21, 26. The appellants in the first two *Martin* Court cases argued that the only evidence of record established that the infrastructures that they installed on their businesses are capable of dispensing alternative fuel into alternative fuel motor vehicles. *See id.* at 27. Rejecting this argument, the *Martin* Court ruled that:

> We disagree. While the tax credit for owning a qualified alternative fuel vehicle refueling infrastructure is found in W. Va. Code § 11-6D-4(c), in order to determine what constitutes a "qualified alternative fuel vehicle refueling infrastructure" for the purpose of the tax credit, one must consult W. Va. Code § 11-6D-2(e). This statutory provision defines "qualified alternative fuel vehicle refueling infrastructure," in pertinent part, as property "used for storing alternative fuels *and* for dispensing such alternative fuels into fuel tanks of motor vehicles." [Emphasis added.] This statutory definition plainly requires that a qualifying alternative fuel vehicle refueling infrastructure not only be capable of dispensing alternative fuels, but also that such a system also be capable of "storing alternative fuels." Therefore, the circuit court did not err in determining that the petitioners' infrastructures do not meet the definition of "qualified alternative-fuel vehicle refueling infrastructure" because the infrastructures do not store alternative fuels.

> Although we agree, based upon the Legislative findings and purpose set forth in W. Va. Code § 11-6D-1 (2011), that the Legislature views the development and use of alternative fuel vehicles to be in the public interest, we must nevertheless give effect to the statute as enacted by the Legislature. Under our law, "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. pt. 5, *State v. Gen. Daniel Morgan Post 548*, 144 W.Va. 137, 107 S.E.2d 353 (1959). The applicable code section, W. Va. Code § 11-6D-2(e), is plain and this Court will apply it as written. Based on the plain language of the code section, this Court now holds that in order to be eligible to claim a tax credit under the 2011 version of W. Va. Code § 11-6D-4(c) for constructing or purchasing and installing a qualified alternative fuel vehicle refueling infrastructure, the infrastructure must be owned by the applicant for the tax credit, located in this State, not located in or on a private residence or private home, and used for storing alternative fuels and for dispensing such alternative fuels into fuel tanks of motor vehicles pursuant to W. Va. Code § 11-6D-2(e) (2011).
>
> *Martin Distrib. Co., Inc. v. Matkovich*, 238 W. Va. 300, 794 S.E.2d 21, 27 (2016).

The Petitioners in the second two *Martin* cases claimed the "qualified alternative fuel vehicle home refueling infrastructure" tax credit for the installation of solar panel systems on their residences. *Id.* at 28. Upholding the circuit court's conclusion that only a portion of the infrastructures purchased and installed by these petitioners constitute qualified alternative fuel vehicle home refueling infrastructures for the purpose of receiving tax credit pursuant to W. Va. Code § 11-6D-4(c), the *Martin* Court held:

> With respect to the petitioners' argument that granting them the alternative fuel motor vehicle tax credit for their entire infrastructures is consistent with the Legislature's purpose for creating the tax credit., we observe that the Legislature clearly stated its purpose in W. Va. Code § 11-6D-1 as follows: "[I]n order to encourage the use of alternatively-fueled motor vehicles and possibly reduce unnecessary pollution of our environment and reduce our dependence on foreign sources of energy, there is hereby created an alternative-fuel motor vehicles tax credit and an alternative-fuel infrastructure tax credit." This Court fails to see how installing a solar panel system, the primary purpose of which is to provide power to a residence, promotes the use of alternatively-fueled motor vehicles. Finally, we find it significant that a residential solar energy tax credit was available to taxpayers who install a solar energy system to power their residences at the time the petitioners applied for the alternative fuel infrastructure tax credit.

> According to W. Va. Code § 11-13Z-1 (2009):
> Any taxpayer who installs or causes to be installed a solar energy system on property located in this state and owned by the taxpayer and used as a residence after July 1, 2009, shall be allowed a credit against the taxes imposed in article twenty-one [§§ 11-21-1 et seq.] of this chapter in an amount equal to thirty percent of the cost to purchase and install the system up to a maximum amount of $2,000.
>
> In order to receive this tax credit, the solar energy must be used to generate electricity, heat or cool a structure, provide hot water in the structure, or to provide solar process heat. *See* W. Va. Code § 11-13Z-2 (2009). This Court has held that "[t]he Legislature, when it enacts legislation, is presumed to know of its prior enactments." Syl. pt. 12, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953). When the Legislature amended Article 6D, Chapter 11 of the Code in 2011 to make tax credits available for qualified alternative fuel vehicle home refueling infrastructures, we presume that the Legislature knew of its prior enactment of Article 13Z of Chapter 11 of the Code providing the residential solar energy tax credit. Further, "[i]t is always presumed that the legislature will not enact a meaningless or useless statute." Syl. pt. 4, *State ex rel. Tax Comm'r v. Veterans of Foreign Wars*, 147 W.Va. 645, 129 S.E.2d 921 (1963). Having provided a tax credit for solar energy systems that provide power to residences in W. Va. Code § 11-13Z-1 in 2009, we presume that the Legislature would not have provided the same tax credit in W. Va. Code § 11-6D-4(c) in 2011.

Martin Distrib. Co., Inc. v. Matkovich, 238 W. Va. 300, 794 S.E.2d 21, 29–30 (2016).

Upon detailed review of the Court's decision in *Martin* and the pertinent legislative history, this Tribunal hereby finds that the Interpretation, as expressed in the 2012 Schedule, fails to comport with the plain language of the Subject Statute, the purpose of which is to promote the use of alternatively-fueled motor vehicles. To the contrary, the Interpretation impermissibly limits the plain language of the Subject Statute and is contrary to its intent specifically proscribed by the Legislature in W. Va. Code §11-6D-1, in violation of *Syncor International Corporation v. Palmer*, III, 208 W. Va. 658, 542 S.E.2d 479. Indeed, it is well settled that "[a] statute or administrative rule, may not, under the guise of "interpretation," be modified, revised, amended or rewritten. *Id. at* Syl. Pt. 3 (quoting Syl. Pt. 1, *Consumer Advocate Div'n v. Public Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989)).

VI. DISPOSITION

WHEREFORE, after considering the Parties' arguments,[27] the entire record in this matter, and the applicable law, it is the final decision of the West Virginia Office of Tax Appeals that the Petitioners' petition for refund is **GRANTED** and the Assessments are hereby **VACATED.**

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____

Heather G. Harlan
Chief Administrative Law Judge

[27] The Respondent, without citing to any statutory or regulatory authority, states that the "trade-in of another vehicle cannot factor into the purchase price for purpose of calculating the AFTC" and "[i]n the case of a trade-in payoff being deducted, it would be absurd to argue that a financial institution's payoff of the taxpayer's car loan was actually part of the purchase price paid by the taxpayer." Furthermore, as stated by the Respondent, "[t]he Petitioners' debt on their trade-in vehicle is separate and apart from the new car and such debt should not be considered part of the purchase price of an AFTC vehicle. To the contrary, as Petitioners explained in their Initial Brief, two separate and distinct transactions were reflected in in the purchase agreement: 1) The value of the Traded Vehicle was ($29,276.88) was applied to the balance owed on such vehicle ($30,139.33) and 2) Petitioners paid for, and financed $33,947.45 for the alternative fuel vehicle. Ironically, this position is consistent with Respondent's position that the "debt on their trade-in is separate and apart from the new car."

Respondents argue that Petitioners not only received a trade-in value for their vehicle, but they also received a trade-in payoff, which they allege occurs when a debt owed on the current vehicle is paid off by the dealership or a financial institution and then, essentially, that amount is added back to the value of the new vehicle to be financed. Respondent provides yet another example to argue that in the case of a trade-in payoff being deducted, it would be absurd to argue that a financial institution's payoff of the taxpayer's car loan was essentially part of the purchase price paid by the taxpayer. Respondent apparently utilizes this example to prove its assertion that "In essence, Petitioners are asking the West Virginia General Revenue Fund to subsidize another vehicle. The amount of Petitioner's trade-in payoff is an already existing debt. The Petitioners owed that amount on their 2010 Cadillac SRX long before they purchased the new 2012 flex fuel 2012 Jeep Cherokee. This debt is separate and apart from the new car and such debt should not be considered part of the purchase price of an AFTC vehicle. Petitioners are attempting to turn their debt on the trade-in vehicle into debt eligible for an AFTC credit."

To refute the persuasive authority Petitioners cited that is contained in the Consumer Sales and Service Tax, Respondent states that it is important to note that in the context of motor vehicles sales, the West Virginia Consumer Sales and Service Tax deducts the value of trade-in vehicles from the sales price paid on motor vehicles. This is to prevent vehicles from being taxed twice. However, the same argument applies in this matter. In fact, Respondent is essentially using the same taxable base to determine the credit as the Division of Motor Vehicles is to determine the sales tax. Therefore, Respondent's argument in this regard is without merit.

Respondent goes on to (1) point out the Petitioners have conceded that the rebate should be subtracted from the purchase price when calculating the AFTC credit (2) comments that when a rebate is given, it obviously offsets the amount of out-of-pocket outlay by the taxpayer and (3) concludes, by way of a hypothetical, that a rebate makes the purchase price lower than if there had been no rebate. Respondent then reasons that by the same token, the trade-in of another vehicle cannot factor into the purchase price for the purposes of calculating the AFTC because a trade-in represents an already expended outlay of cash, and would allow a taxpayer to essentially concert their current vehicle into a tax credit, regardless of whether that vehicle was an alternative fuel motor vehicle eligible for the credit. Inasmuch as this Tribunal is called on to answer only actual controversies, this illustration is likewise without merit.