

REDACTED DECISION – DK#’S 24-1092

**BY: CRYSTAL S. FLANIGAN, DEPUTY ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON FEBRUARY 14, 2025
ISSUED ON AUGUST 11, 2025**

FINAL DECISION

AAA (hereinafter “Petitioner”) in this matter owns residential property in BBB County, West Virginia that was reclassified from Class II to Class III. On February 7, 2023, the Petitioner learned of the reclassification by the BBB County Assessor (hereinafter “Assessor” or “Respondent”) and requested a property tax ruling.¹ Thereafter, the Assessor sought a property tax ruling from the Tax Commissioner. On February 27, 2024, the Tax Commissioner issued Property Tax Ruling 24-29 finding that the subject property was not Class II property and reclassified it as Class III property for the 2024 tax year.

Upon receipt of the Tax Commissioner’s decision, the Petitioner timely filed her Petition for a Property Tax Appeal with this Tribunal on April 3, 2024. An evidentiary hearing was held *de novo* on September 26, 2024. The evidence closed on February 14, 2025, and the matter became ripe for decision at that time.²

FINDINGS OF FACT

1. The Petitioner lives part-time in BBB County, West Virginia and owns the subject property with the address of CCC in BBB County, West Virginia (hereinafter “subject property”).

Tr. 39, Pet’r’s Ex. 3 & 4.

2. The parcel number for CCC is XX. Pet’r’s Ex. 3.

¹ On September 8, 2021, a letter from the BBB County Assessor’s Office was mailed to the Petitioner at the subject property reclassifying the subject property for the 2022 tax year.

² The West Virginia Tax Commissioner and the BBB County Assessor filed a Joint Response Brief, and it will be referred to as the Respondents’ brief or Respondents’ arguments in this decision.

3. The Petitioner is the sole owner of the subject property. Pet'r's Ex. 2.
4. The subject property was reclassified from Class II to Class III property for 2022 due to being non-owner occupied. Resp't's Ex. 3.
5. The Petitioner lives at the subject property approximately 25 weeks a year. Tr. 41:4.
6. The Petitioner utilizes the subject property as a second home. Tr. 36:19.
7. The Petitioner maintains a residence in Texas. Tr. 41:9-15.
8. The Petitioner has a Texas driver's license. Tr. 41:16-20.
9. DDD lives at the subject property as his primary residence and as a caretaker of the property. Tr. 4:22-5:16.
10. DDD is not related to the Petitioner through blood or marriage. Tr. 40:16-22.
11. DDD stays at the property 50-60 percent of the time. Tr. 26:19-21.
12. DDD has a daughter; EEE who lives at FFF which is located directly to the left of the subject property. Tr. 5:1-2.
13. DDD also spends the remaining time that he is not at the subject property at his daughter's house where he also keeps some personal effects. Tr. 24:17-23, 25:1-7.
14. DDD manages the Petitioner's mail, handles small repairs, cleans, provides lawncare, and other certain maintenance concerns for the subject property. Tr. 5:11-12; 7:5; 9:8-9; 28:11-23, 29:1-15.
15. DDD does not pay rent, nor does he have a lease. Tr. 13:16-17, 35:7-10.
16. DDD testified at the evidentiary hearing that he does caretaking duties in lieu of paying rent to the Petitioner. Tr. 35:1-10.

17. DDD does not have a land contract, life estate, or any equitable or ownership interest in subject property. Tr. 27:18-23; 28:1-4; 40:4-15; Pet'r's Ex. 2.

18. DDD receives the majority of his mail at the subject property. Tr. 30:4-6.

19. DDD keeps clothing at the subject property. Tr. 10:16-17, 22:6-8.

20. DDD takes most of his showers at the subject property. Tr. 14:4-7, 26:4-5.

21. The subject property's address appears on DDD's driver's license. Tr. 35:13-18.

22. DDD has a bedroom and full access to the subject property. Tr. 42:11-20.

23. DDD pays certain utility bills but has no specific arrangement with the Petitioner. Tr. 33:4-11.

24. In 2021, DDD listed CCC as his address for filing his personal property taxes on vehicles owned by him. On the personal property tax return, Mr. DDD identified the Petitioner as his landlord and a notation on the form stated "rental since Jan. 2020." Resp't's Ex. 1.

25. In 2022, DDD signed and submitted a personal property tax form that listed CCC as his address. This form listed "AAA" in response to the inquiry "if you do not own a home and you rent, who is your landlord." Pet'r's Ex. 1.

26. On September 8, 2021, the Assessor issued a letter by first class U.S. mail to the Petitioner at the CCC informing her that the subject would be reclassified for the upcoming 2022 tax year as Class III/IV. Resp't's Ex. 3. Tr. 79:1-22.

27. The Assessor testified that the letter was sent to the Petitioner at her last known address of CCC. Tr. 79:1-22.

28. The Petitioner asserts that she did not receive the September 8, 2021, letter. Tr. 46:18-20.

29. The September 8, 2021, letter was not returned to the Assessor as being non-deliverable. Tr. 79:1-22.

30. The Assessor never received a challenge to the 2022 reclassification for the 2022 tax year until February 7, 2023. Tr. 80:14-21.

31. On February 7, 2023, the Petitioner emailed the Assessor that she was “writing to appeal the 2022 change of classification to tax class 3.” Resp’t’s Ex. 2 at 5, Pet’r’s Ex. 6D.

32. On February 28, 2023, the Assessor updated the Petitioner regarding a taxpayer who filed their personal property assessment on their vehicle at CCC, and that the Petitioner had not filed any personal property assessment. Resp’t’s Ex.5 at 4, Pet’r’s Ex. 6B at 4-5.

33. On March 1, 2, and 3, 2023, the Petitioner and the Assessor exchanged a series of emails regarding the subject property. Resp’t’s Ex.5, Pet’r’s Ex. 6B.

34. On March 2, 2023, the Petitioner requested that the Assessor seek a ruling on the matter from the West Virginia State Tax Commissioner for 2023 tax year. Resp’t’s Ex.5, Pet’r’s Ex. 6B at 2-3.

35. No property tax ruling from the Tax Commissioner for the 2023 tax year was issued due to the Petitioner’s request being past the statutory deadline of February 28th of that tax year. Tr. 83:10-12, 101:12-15, 110:8-23.

36. On January 11, 2024, the Petitioner timely requested a taxability ruling from the Tax Commissioner for the 2024 tax year. Resp’t’s Ex. 4.

37. The Tax Commissioner issued ruling 24-29 on February 28, 2024, which determined that the Petitioner’s property should be classified as Class III. Joint Ex. 1.

38. For tax year 2024, the Petitioner’s property was classified as Class III, and she was issued a tax ticket for a total of \$XX. Pet’r’s Ex. 4.

39. The Petitioner requests a ruling from the Office of Tax Appeals for tax years 2022, 2023, and 2024 for the classification of the subject property. The issue is the same for each of the three tax years³

DISCUSSION

The two primary issues before this Tribunal are whether the subject property was properly reclassified as Class III property from Class II property and if the Petitioner timely requested a classification ruling from the Tax Commissioner for the 2023 tax year.⁴ In this matter, both parties agree regarding the controlling law, and neither party argues that any of the statutory provisions are ambiguous.

The controlling law in this matter is West Virginia Code § 11-8-5 which states that property shall be classified as follows:

Class I. All tangible personal property employed exclusively in agriculture, including horticulture and grazing;

All products of agriculture (including livestock) while owned by the producer;

All notes, bonds, bills and accounts receivable, stocks and any other intangible personal property;

Class II. All property owned, used and occupied by the owner exclusively for residential purposes;

All farms, including land used for horticulture and grazing, occupied and cultivated by herowners or bona fide tenants;

Class III. All real and personal property situated outside of municipalities, exclusive of Classes I and II;

Class IV. All real and personal property situated inside of municipalities, exclusive of Classes I and II.

W. Va. Code Ann. § 11-8-5 (West 1961). (Emphasis added).

³ This Tribunal dismissed the 2022 tax year in the Petitioner's appeal because it did not have jurisdiction to hear any property tax appeals until HB 2581 which was promulgated by the West Virginia Legislature for tax year 2023 and tax years going forward. This Tribunal did not dismiss the 2023 tax year as it found that there was a factual question as to when the Petitioner requested a taxability ruling and allowed that tax year to proceed to hearing.

⁴ The timeliness of the Petitioner's request for a classification ruling for the 2024 tax year is not at issue in this matter.

The West Virginia Code defines several terms that apply to West Virginia Code Section 11-8-5 as set out below:

West Virginia Code § 11-4-3(a)(1) defines an “owner” as:

(1) “Owner” means the person, as defined in section ten, article two, chapter two of this code, who is possessed of the freehold, whether in fee or for life. A person seized or entitled in fee subject to a mortgage or deed of trust securing a debt or liability is considered the owner until the mortgagee or trustee takes possession, after which the mortgagee or trustee shall be considered the owner. A person who has an equitable estate of freehold, or is a purchaser of a freehold estate who is in possession before transfer of legal title is also considered the owner. Owner shall also include the corporation or other organization possessed of the freehold of a qualified continuing care retirement community.

W. Va. Code Ann. § 11-4-3(a)(1) (West 2007).

The parties agree that the Petitioner is the sole owner of the subject property. This dispute also involves the application of West Virginia Code 11-4-3(a)(2) which states:

(2) “Used and occupied by the owner thereof exclusively for residential purpose” means actual habitation by the owner or the owner's spouse, or a qualified resident of all or a portion of a parcel of real property as a place of abode to the exclusion of any commercial use: *Provided*, That if the parcel of real property was unoccupied at the time of assessment and either: (A) Was used and occupied by the owner thereof exclusively for residential purposes on the first day of July of the previous year assessment date; (B) was unimproved on the first day of July of the previous year but a building improvement for residential purposes was subsequently constructed thereon between that date and the time of assessment; or (C) is retained by the property owner for noncommercial purposes and was most recently used and occupied by the owner or the owner's spouse as a residence and the owner, as a result of illness, accident or infirmity, is residing with a family member or is a resident in a nursing home, personal care home, rehabilitation center or similar facility, then the property shall be considered “used and occupied by the owner thereof exclusively for residential purpose”: *Provided, however*, That nothing herein contained shall permit an unoccupied or unimproved property to be considered “used and occupied by the owner thereof exclusively for residential

purposes” for more than one year unless the owner, as a result of illness, accident or infirmity, is residing with a family member or is a resident of a nursing home, personal care home, rehabilitation center or similar facility. Except in the case of a qualified continuing care retirement community, if a license is required for an activity on the premises or if an activity is conducted thereon which involves the use of equipment of a character not commonly employed solely for domestic as distinguished from commercial purposes, the use may not be considered to be exclusively residential. In the case of a qualified continuing care retirement community, uses attendant to the functioning of the qualified continuing care retirement community, including, without limitation, cafeteria, laundry, personal and health care services, shall not be considered a commercial use even if such activity or equipment requires a separate license or payment.

W. Va. Code Ann. § 11-4-3(a)(2) (West 2007).

The Respondents argue that the property should remain Class III under the following rationale: 1) the Petitioner is not using and occupying the subject property exclusively for residential purposes; 2) the Petitioner is sole owner of the subject property; 3) Mr. DDD, who is not married to the Petitioner and has no ownership interest in the subject property is the primary resident; 4) the Petitioner’s use of the subject property is secondary and remote; and because of these arguments, the subject property does not qualify for Class II Classification.

The essential question is whether the Petitioner is exclusively using the property for residential purposes when Mr. DDD resides there as his primary residence? It is undisputed that Mr. DDD is a non-owner resident who is not related by blood or marriage to the Petitioner and lives on the property as his primary residence.

Mr. DDD testified that he lives at the subject property as his primary residence. He spends approximately 50–60% of his time at the property and the remainder at his daughter's home nearby. He does not move out of the subject property when he is at his daughter’s house. He always keeps most of his clothing and personal belongings at the subject property, has a bedroom there, showers

there, receives mail there (including government benefits), and the subject property is listed on his personal property appraisal form and his driver's license. He performs caretaking duties for the property, makes small repairs, cleans the house, maintains the lawn, and gathers the Petitioner's mail. He occasionally helps pay certain utilities for the subject property, but there is no set arrangement for splitting bills.⁵ These facts all indicate that Mr. DDD's primary residence is the subject property.

Furthermore, Mr. DDD testified that his caretaking duties, such as maintaining the lawn, cleaning the house, and performing small repairs, serve as consideration for his living at the subject property. He stated that he performs these tasks "more or less" in lieu of paying rent. Although the Petitioner and Mr. DDD do not have a formal landlord-tenant arrangement, and he does not pay rent to the Petitioner, his care taking activities serve as consideration for him living there and put him in the position of a tenant.

The Petitioner avers that despite Mr. DDD living there as his primary residence, she meets the statutory definition of "used and occupied by the owner exclusively for residential purposes." W. Va. Code Ann. § 11-8-5. She does not charge Mr. DDD rent and they are both using the property exclusively for residential and not commercial purpose. Therefore, her position is that the property is not being used in a commercial manner.

The Petitioner argues that her use of the property meets the language of "**occupied by the owner exclusively for residential purposes**" under West Virginia Code 11-8-5 because she is using the property as a residence. (Emphasis added.) She further avers that this statute does not require that the property must be used exclusively by the owner without any other occupants.

⁵ During the evidentiary hearing, Mr. DDD thought that certain utilities may have been in his name. This Tribunal permitted the Petitioner to supplement the record with additional exhibits. On October 2, 2024, the Petitioner supplemented the record with two utility payments that were in her name only and were marked as Petitioner's Exhibit 7.

However, she does not cite any legal authority that supports her interpretation. Moreover, West Virginia Code Section 11-4-3(a)(2) states that “[U]sed and occupied by the owner thereof exclusively for residential purpose” ‘means actual habitation by the owner or the owner's spouse, or a qualified resident of all or a portion of a parcel of real property as a place of abode to the exclusion of any commercial use.’ This definition conflicts with the Petitioner’s interpretation. Therefore, we find this argument without merit.

Additionally, she argues that her use of the subject property is primary and immediate and not secondary and remote as discussed in *Central Realty, et al., v. Martin*, 126 W.Va. 915, 30 S.E.2d 720 (1944). In *Central Realty*, the West Virginia Supreme Court held that a “[r]eal estate owner by a fraternal association, for purely commercial enterprises is, not exempt from taxation under Article X, Section 1, Constitution, and Code 11-3-9, as amended by Chapter 40, Acts of Legislature, 1933. *Id.* at Syl. Pt. 1. The subject property in *Central Realty*, involves a hotel where the primary and immediate use was for a commercial purpose even though the income from a hotel is applied to and used for charity, a secondary use. However, the Court held that even though the income from the property was being applied for charitable purposes that did not exempt the property from property taxation. The Petitioner attempts to distinguish that *Central Realty* involved a property tax exemption, and her case does not. Therefore, *Central Realty* and the rationale of primary and immediate use and secondary and remote use should not apply to her. While it is true that the subject case does not involve a property tax exemption, it does involve the use of the property which was the primary issue in *Central Realty*.

The Petitioner’s residence is in Texas; she has a Texas driver’s license and stays at the subject property in West Virginia approximately 25 weeks a year. Owning a second home or vacation home would not typically negate a Class II classification for an out-of-state or part-time

property owner who uses the property for their own residential purposes.⁶ This scenario is different because Mr. DDD is a non-owner, non-family member who is using the property as his primary residence.

The Petitioner further argues that because she and Mr. DDD do not have a lease and she does not receive rent from him, it is not a commercial use of this property. Furthermore, the Petitioner relies on the language of “exclusively for residential purposes” under Section 11-4-3 of the West Virginia Code because Mr. DDD is using the subject property as a residence and not in a commercial manner. This argument fails on two grounds. First, Mr. DDD would have to be an owner of the subject property to meet the full requirements of the Section 11-4-3 of the West Virginia Code which states “[a]ll property owned, used and occupied by the owner thereof exclusively for residential purposes” to qualify for Class II. Second, Mr. DDD is essentially functioning as a tenant because he lives there as his primary residence, does not own the property, manages the Petitioner’s mail, handles small repairs, cleans, provides lawncare and other certain maintenance concerns for the subject property in lieu of rent. As he is functioning as a tenant, the property is not being used by the owner exclusively for residential purposes.

The Petitioner argues that a Bed and Breakfast in BBB County received more favorable tax treatment than she did. The Bed and Breakfast was classified as a Class II and Class IV or a split classification which West Virginia Code Sections 11-4-2(1) and 11-4-18 allows. The specific areas used for commercial purposes were classified as Class IV and the remaining areas were classified as Class II. In the instant case, both Mr. DDD and the Petitioner have full access to the entire property and not just specific areas.

⁶ This Tribunal recently held in OTA decision, docket number 23-1491 that an out of state property owner who uses a property part-time for their own residential use is entitled to Class II property tax treatment. In that decision, the property owners used the property as a vacation home but had no one else was using the property as a primary residence.

Based upon all the above, this Tribunal finds that the Petitioner has failed to meet her burden of proof on the issue of classification.

The Petitioner's second issue alleges that the BBB County Assessor failed to properly consider her request for a ruling from the Tax Commissioner for Tax Year 2023. The Respondents argue that the Petitioner did not properly request a ruling from the Tax Commissioner prior to the February 28, 2023, deadline for the 2023 tax year. The Petitioner filed her appeal based on the 2022, 2023, and 2024 tax years which involve the same issue of classification of the subject property from Class II to Class III.

Each tax year is independent of prior tax years and independent of subsequent tax years. *See* Syl. Pt. 2, *Mountain America, LLC. v. Huffman*, 229 W.Va. 708, 735 S.E.2d 711 (2012) (“[T]he demand for the tax in the subsequent year being a different demand from that for the former”). However, the instant case involves the same issue of classification for the 2022, 2023, and 2024 tax years.⁷ As this Tribunal has ruled that the Petitioner has failed to meet her burden of proof on the issue of classification, the Petitioner's second issue regarding her request for a 2023 ruling from the Tax Commissioner is moot.

Upon consideration of the evidentiary transcript, the exhibits, the post hearing briefs, and the record in its entirety, this Tribunal finds that the Petitioner has failed to prove her case by a preponderance of the evidence and that the subject property should remain classified as Class III property.

CONCLUSIONS OF LAW

Based upon all the above, it **FINDS** and **CONCLUDES** that:

⁷ As previously discussed, this Tribunal does not have jurisdiction over property tax cases prior to tax year 2023. The 2023 and 2024 tax years involved the same issue of Mr. DDD's residency at the subject property and the change in classification.

1. Taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. W. Va. Const. art. X, § 1.

2. Class II property is defined as “[a]ll property owned, used and occupied by the owner exclusively for residential purposes.” W. Va. Code Ann. § 11-8-5 (West 1961).

3. “ ‘Owner’ means the person, as defined in section ten, article two, chapter two of this code, who is possessed of the freehold, whether in fee or for life.” W. Va. Code Ann. § 11-4-3(a)(1) (West 2007).

4. “ ‘Used and occupied by the owner thereof exclusively for residential purpose’ means actual habitation by the owner or the owner's spouse, or a qualified resident of all or a portion of a parcel of real property as a place of abode to the exclusion of any commercial use.” W. Va. Code Ann. § 11-4-3(a)(2) (West 2007).

5. Each tax year is independent of prior tax years and independent of subsequent tax years. Syl. Pt. 2, *Mountain America, LLC v. Huffman*, 229 W.Va. 708, 735 S.E.2d 711 (2012) (“[T]he demand for the tax in the subsequent year being a different demand from that for the former”).

6. All hearings before the Office of Tax Appeals are held *de novo*. W.Va. Code Ann. § 11-3-25b (West 2021).

7. For all appeals regarding property tax assessments, taxability, and classifications pursuant to § 11-3-1 *et seq.*, the standard of proof which a taxpayer must meet at all levels of review and appeal shall be a preponderance of the evidence standard. W.Va. Code Ann. § 11-10A-10(h) (West 2021), W.Va. Code Ann. § 11-3-24(k) (West 2021).

8. In a hearing before the Office of Tax Appeals on a Petition for Property Tax Appeal, the burden of proof is on the Petitioner to show the BBB County Assessor's actions are erroneous, unlawful, void or otherwise invalid. W.Va. Code Ann. § 11-10A-10(e) (West 2002), W.Va. Code R. § 121-1-63.1 (West 2003).

9. The Petitioner has not met her burden of proof under the preponderance of the evidence standard to show that the BBB County Assessor's actions were erroneous, unlawful, void or otherwise invalid.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the classification of the subject property designated as Class III for the 2023 and 2024 property tax years is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Crystal S. Flanigan
Deputy Chief Administrative Law Judge

Date Entered