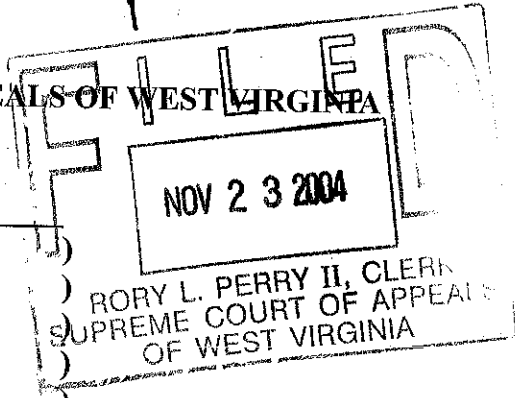


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



SOLUTION ONE MORTGAGE, LLC

Appellant,

vs.

REBECCA CRAIG, AS STATE
TAX COMMISSIONER OF WEST VIRGINIA

Appellee

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BRIEF OF THE APPELLANT

BRIEF OF THE APPELLANT SOLUTION ONE MORTGAGE, LLC

Appellant
SOLUTION ONE MORTGAGE, LLC
By Counsel

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**APPELLANT SOLUTION ONE MORTGAGE, LLC
BRIEF OF THE APPELLANT**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**APPELLANT SOLUTION ONE MORTGAGE, LLC
BRIEF OF THE APPELLANT**

**Kind of Proceeding and
Nature of the Rulings in the Circuit Court**

Comes now your Appellant, Solution One Mortgage, LLC , Petitioner below, and respectfully appeals from the final order of the Circuit of Kanawha County, West Virginia, entered March 3, 2004, and represents and states as follows:

1. Appellant is Solution One Mortgage, LLC , (herein "Solution One"), the Petitioner below in that certain administrative appeal in the Circuit Court of Kanawha County, West Virginia, styled *Solution One Mortgage, LLC, Petitioner vs. Rebecca Craig, As State Tax Commissioner of West Virginia, Appellee*, Civil Action Number 03-AA-67, (herein sometimes "the appeal").
2. Appellee is Rebecca Craig, As State Tax Commissioner of West Virginia.
3. The Appeal below was an appeal by Petitioner Solution One Mortgage, LLC from a final decision of the West Virginia Office of Tax Appeals, dated September 25, 2003, which decision affirmed certain West Virginia Consumer Sales and Service Tax assessments against Solution One Mortgage, LLC.
4. On March 3, 2004, the Circuit Court of Kanawha County, West Virginia, Judge Charles E. King, Jr, presiding, entered its "Final Order", dismissing the appeal from the administrative decision of the State Tax Commissioner, on the procedural ground that no bond was filed by Appellant/Petitioner Below.
5. Solution One Mortgage, LLC now appeals to this Honorable Court on the grounds that the Circuit Court of Kanawha County erred in dismissing the appeal on procedural grounds and in not deciding the appeal on the merits, all as a matter of law.

Statement of the Facts

1. Appellant Solution One Mortgage, LLC is a West Virginia Limited Liability Company, with its office in Kanawha County, West Virginia.
2. Appellee, Rebecca Craig, As Tax Commissioner of West Virginia, is an agency of the State of West Virginia.
3. The Circuit Court of Kanawha County, West Virginia, had jurisdiction over the petition for appeal below pursuant to the provisions of West Virginia Code § 11-10A-1 et seq, as an appeal by a party adversely affected by a final decision in an administrative appeal from a tax assessment under West Virginia, for which Appellant is entitled to judicial review thereof.
4. Appellant is aggrieved by the Final Order, entered March 3, 2004, of the Circuit Court of Kanawha County, West Virginia, Judge Charles E. King., Jr, presiding, which dismissed the Appellant's appeal from the final decision of the West Virginia Office of Tax Appeals, dated September 25, 2003, on the procedural ground that no bond was filed by the Appellant; a copy of which Final Decision is found in the Record.
5. After administrative hearing, the West Virginia Office of Tax Appeals, issued its Final Decision in the above matter, dated September 25, 2003, in which two decisions were made adverse to the Appellant: first, the administrative decision held that Appellant, Petitioner below, was not exempt from the West Virginia Consumer Sales and Service Tax under the professional exemption to that tax; and second, affirmed an assessment of Consumer Sales and Service Tax against petitioner for the tax periods May 21, 1998 through September 3, 2002, for tax of \$118,005.00 and interest of \$30,764.08, updated through September 30, 2002, totaling \$148,769.00.

6. Subsequently, the **State Tax Commissioner withdrew the assessment of tax, penalty and interest, by Administrative Decision dated October 3, 2003**, a copy of which is attached. See Exhibit A.

7. However, Appellant, Solution One Mortgage, LLC, was still aggrieved by the Final Decision, even though the assessment of tax liability had been withdrawn, because of the adverse decision on the question of law, that is, whether the Petitioner Below was entitled to exemption from the West Virginia Consumer Sales and Service tax under the professional services exemption.

8. Appellant petitioned for appeal from the Circuit Court of Kanawha County, West Virginia, **only** on the issue of the professional services exemption, and **the Tax Commissioner did not cross-appeal** from its Administrative Decision dated October 3, 2003, withdrawing the tax assessment against Appellant, for periods prior to July 1, 2003. Therefore, **that Administrative Decision became final, without appeal.**

9. There was no pending tax assessment for consideration by the Circuit Court of Kanawha County and the appeal was solely on the determination that the Petitioner Below was not entitled to the professional services exemption from the Sales Tax, a determination not involving a present tax assessment, but only potential tax liability based on future service activities.

Assignments of Error

Appellant assigns the following error in this Petition for Appeal:

The Circuit Court erred as a matter of law in dismissing the Appellant's appeal from a final decision of the Office of Tax Appeals for failure to file an appeal bond, as there was no pending tax assessment requiring an appeal bond.

Points and Authorities

THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DISMISSING THE PETITIONER'S APPEAL FROM A FINAL DECISION OF THE OFFICE OF TAX APPEALS FOR FAILURE TO FILE AN APPEAL BOND, AS THERE WAS NO PENDING TAX ASSESSMENT REQUIRING AN APPEAL BOND.

Case Authority

Bradley v. Williams, 195 W.Va. 180 465 S.E.2d 180 (1995) 8

Chesapeake & Potomac Co. v. State Tax Dep't, 161 W.Va. 77, 239 S.E.2d 918 (1977) 6

Frantz v. Palmer, STC'r, 564 S.E.2d 398 (W.Va. 2001)(J. Albright) 7

Statutory Authority

W.Va. Code § 11-10A-19(e) 5

W.Va. Code § 11-15-8 8

W.Va. Code § 31-20-10 6

Standard of Review

Final orders of the circuit court and final orders of the Office of Tax Appeals are **reviewed de novo as to the conclusions of law and application of law to the facts.** *Martin v. Randolph County Bd. of Ed.*, 195 W.Va. 297, 465 S.E.2d 399 (1995). **Legal decisions are reviewed de novo.** *Lambert v. Gartin, Cabell County Sheriff*, S.E.2d , (W.Va. 2002).

Discussion of Law

THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DISMISSING THE PETITIONER'S APPEAL FROM A FINAL DECISION OF THE OFFICE OF TAX APPEALS FOR FAILURE TO FILE AN APPEAL BOND, AS THERE WAS NO PENDING TAX ASSESSMENT REQUIRING AN APPEAL BOND.

W.Va. Code § 11-10A-19(e), provides in pertinent part as follows:

“... **if the appeal is of an assessment**, except a jeopardy assessment for which security in the amount thereof was previously filed with the tax commissioner, then within ninety days after the petition is filed, or sooner if ordered by the circuit court, the petitioner shall file with the clerk of the circuit court a cash bond or a corporate surety bond approved by the clerk.

The applicable code provision clearly and distinctly requires a bond **ONLY** when the appeal is from a tax assessment. In the present case there was **NO** pending tax assessment since after the West Virginia Office of Tax Appeals entered its Final Decision, the State Tax Commissioner withdrew **ALL** pending assessments as to all similarly situated mortgage brokers, and for Appellant Solution One Mortgage, LLC. Solution One filed its appeal from the administrative Final Decision **ONLY** on the issue of its claimed professional services exemption from the Consumer Sales and Service tax. There was no pending tax assessment at the time Appellant filed its appeal to the circuit court below.

The Tax Commissioner's Administrative Decision still stands. The Tax Commissioner never withdrew the determination that mortgage brokers, such as Appellant, were not subject to the Consumer Sales and Service Tax for their service activities before July 1, 2003.

Note that the West Virginia Legislature reenacted West Virginia Code § 31-20-10, effective June 8, 2004, adding subsection (b), providing that

“Brokerage fees, additional charges and finance charges imposed by licensed mortgage brokers, lenders and loan originators are exempt from the tax imposed by article fifteen, chapter eleven of this code beginning on the first day of January, 2004.”

The Tax Commissioner did not file a cross-appeal from the Administrative Decision attempting to reinstate the Final Decision's tax assessment. Therefore, the Administrative Decision's withdrawal of the tax assessments became final.

Inasmuch as there was no “appeal.. of an assessment”, there was no requirement of a bond. There being no bond required, the circuit court should have proceeded to consider the Petitioner Below's appeal on its merits, rather than dismiss the appeal on a procedural ground, which did not exist. This is similar to the situation of a taxpayer appealing a denial of a refund claim; since there is no pending assessment, there is no requirement of bond. Inexplicably, the Circuit Court simply erred and must be reversed.

A similar procedural question was found in *Chesapeake & Potomac Co. v. State Tax Dep't*, 161 W.Va. 77, 239 S.E.2d 918 (1977), decided under former WVC § 11-12A-13 prior to its repeal and the enactment of the present article. There this Court held that notwithstanding that an appeal from a delinquency tax assessment has been filed in circuit court, a taxpayer may institute original declaratory judgement proceedings to obtain a declaration of the tax assessment's invalidity

whenever the issues presented for judicial determination are limited to the construction or validity of the statute or statutes under which the challenged assessment was made, or other questions of an exclusively judicial nature. This is precisely what Appellant did below. It sought a legal determination of its entitlement to the professional services exemption to the consumer sales and service tax. Since, the denial of that exemption was made in an administrative decision, Appellant was entitled to appeal that decision. No bond is required since there is no pending tax assessment.

This Court has reviewed at least one other circuit court decision denying a petition for failure to file an appeal bond and equitably permitted the appeal to continue. For example, see *Frantz v. Palmer, STC'r*, 564 S.E.2d 398 (W.Va. 2001)(J. Albright). There the taxpayer appealed Tax Commissioner's administrative decision affirming assessment of business and occupation, severance, and franchise taxes. The Administrative Decision was issued more than seven years after the administrative hearing. Taxpayer appealed to the circuit court, but was unable to obtain an appeal bond from an insurance company. Circuit court dismissed the appeal for failure to provide the appeal bond. This Court held:

Syl.Pt.4: "The statutory language of West Virginia Code 11-10-10(d) (1986) (Repl.Vol.1999), which permits an administrative body to have ultimate discretionary authority on the critical issue of a bond or a substitute therefore, required to perfect an appeal of that administrative body's decision to a circuit court, violates the open courts provision set forth in Article III, Section 17 of the West Virginia Constitution."

As to the State Tax Commissioner's failure to appeal its own administrative decision, which withdrew all pending assessments of consumer sales and service tax against licensed mortgage brokers, what's "good for the goose is good for the gander". A taxpayer's failure to abide by the **express procedures** established for challenging a decision of the West Virginia State Tax

Commissioner, enunciated in the West Virginia Code, precludes the taxpayer's claim for refund or credit. See *Bradley v. Williams*, 195 W.Va. 180 465 S.E.2d 180 (1995). The same *should* apply to the Tax Commissioner. Since the Tax Commissioner issued the administrative decision which exempted mortgage brokers such as Appellant, it was up to the Tax Commissioner to either abide by its own decision or appeal it, if it did not like it. It was not up to the Appellant to appeal that decision. And, the Appellant did not. Taxpayer very specifically appealed only the part of the administrative decision which was adverse at that time: whether it was exempt from the consumer sales and service tax in the *future*, under the professional services exemption from that tax. See West Virginia Code § 11-15-8.

For these reasons, the Final Order of the Circuit Court below is in error and must be reversed.

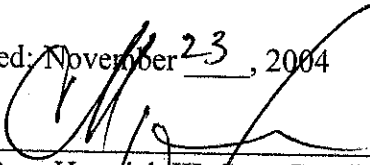
Summary

The circuit court erred in dismissing the Appellant's petition for appeal from the administrative Final Decision of the West Virginia Office of Tax Appeals, in that there was no pending tax assessment requiring the coverage of an appeal bond. The only remaining issue for decision was an appeal from an adverse determination that the Appellant was not exempt from the West Virginia Consumer Sales and Service Tax as a professional service. Consideration of that issue by the circuit court involved only the application of potential **future taxes** against Appellant, did not involve a present tax assessment against the Appellant, and required no appeal bond. Therefore, the circuit court erred in dismissing the appeal on procedural grounds. The circuit court should have proceeded to consider the appeal from the administrative decision on its merits.

Relief Prayed For

WHEREFORE, Appellant requests that the Supreme Court of Appeals reverse the error of the Circuit Court, and remand the case to the Circuit Court for a determination on the merits of the Appellant's appeal from the Final Decision of the West Virginia Office of Tax Appeals.

Dated: November 23, 2004


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Respectfully submitted,
Appellant Solution One Mortgage, LLC
By Counsel

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SOLUTION ONE MORTGAGE, LLC

Appellant,

vs.

REBECCA CRAIG, AS STATE
TAX COMMISSIONER OF WEST VIRGINIA

Appellees

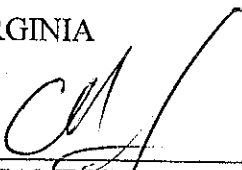
CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, C. Page Hamrick III, counsel for Appellant Solution One Mortgage, LLC, do hereby certify that I have served the required number of copies of the foregoing BRIEF OF THE APPELLANT SOLUTION ONE MORTGAGE, LLC on all parties concerned by mailing a true copy by First Class Mail, postage prepaid, to counsel of record at the following address this 23 day of November, 2004:

A.M. FENWAY POLLACK, ESQ.
ASSISTANT ATTORNEY GENERAL
STATE CAPITOL COMPLEX
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COUNSEL FOR APPELLEE

and that the original thereof was filed with:
CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA
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