

NO. 041286

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SOLUTION ONE MORTGAGE, LLC,

Plaintiff

v.

UPON APPEAL FROM THE CIRCUIT
COURT OF KANAWHA COUNTY
CIVIL ACTION NO. 03-AA-167

REBECCA CRAIG, AS STATE
TAX COMMISSIONER OF WEST
VIRGINIA,

Defendant.

APPELLEE'S REPLY BRIEF

DALE W. STEAGER
ACTING STATE TAX COMMISSIONER
OF WEST VIRGINIA

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RESPONSE TO APPELLANT'S STATEMENT OF THE CASE AND ARGUMENT
REGARDING SAME

**I. THE TAX COMMISSIONER ISSUED NO ADMINISTRATIVE
DECISION REGARDING THE ASSESSMENT AGAINST
THE APPELLANT.**

The appellant's entire argument is predicated on the assertion that no appeal bond was necessary because of a purported "administrative decision," which according to the appellant, extinguished a valid assessment. The appellant indicates that this decision was issued on October 3, 2003. However, a review of the file in this matter shows that no such decision was issued on that date. The file does contain an October 3, 2003, letter from the Compliance Division of the Tax Department to the appellant. Even a perfunctory review of this letter shows that the appellant's reliance on it is misplaced.

Not only does the letter in question fail to withdraw the assessment as suggested by the appellant, but in its second paragraph it specifically refers to a favorable decision from the Office of Tax Appeals (hereinafter "OTA") **upholding** the previously issued assessment against the appellant. The letter goes on to state that in exchange for the appellant paying its proper share of sales taxes, beginning July 1, 2003 the Tax Department would not "pursue sales tax on mortgage brokering services for any tax period prior to July 1, 2003." It is hard to fathom how the appellant can construe a letter that basically says "look we won, but we won't hound you for the back taxes owed, **as long as you start paying them on July 1**" as saying that the assessment was no longer valid.

A careful review of the rest of the language in the letter also shows that it was not an "administrative decision" forgiving an assessment. Ironically, the regarding line at the beginning of the letter and the first paragraph both refer to **the actual** Administrative Decisions, issued in December of 2002. Those decisions assessed the appellant One Hundred and Forty-Five Thousand, Three Hundred and Eighty-Nine dollars (\$145,389.00) for uncollected sales and use tax for the period May 1998 to September 2002.¹ The October 3, 2003, letter explains that it is in response to an earlier phone call between the appellant and the appellee and is obviously memorializing a previously reached agreement.

Finally, if the point of this October 3, 2003, letter was to inform the appellant that it was not responsible for collecting and paying sales and use tax, why did the letter clearly state that such taxes must be remitted beginning July 1, 2003?

¹ Those December 2002 Administrative Decisions were the appellee's exhibits one and two before the Office of Tax Appeals.

II. ASSUMING ARGUENDO THAT THE OCTOBER 3, 2003, LETTER DID WITHDRAW AN ASSESSMENT, THE AGREEMENT WAS BREACHED BY THE APPELLANT'S FAILURE TO ABIDE BY ITS TERMS.

The appellant fails to discuss how its appeal to the Circuit Court could be characterized as continued compliance with the Tax Department's assessment; yet that is the understanding the letter memorializes. As quoted above, the letter formalizes an agreement with a quid pro quo, namely that the appellant start paying the taxes that an Administrative Law Judge determined were valid and the appellee would refrain from collecting the back taxes owed. When the appellant appealed to the Circuit Court, it signaled its intention to **not** comply with the ALJ's determination. The appellant may well argue that it began paying the taxes at issue beginning on July 1, 2003 and the appellee does not dispute that. However, that fact alone cannot be characterized as continued compliance with the determination that the taxes are owed. Obviously the appellant did not appeal the ALJ's decision as part of some intellectual debate; **it's about money**. If the appellant had prevailed at the Circuit Court level, it would have asked for a refund of the taxes paid. As a result, the appellant cannot in good faith state that it abided by the terms of the October 3, 2003, agreement. The appellant's appeal to the Circuit Court should deny it the benefit contained in the agreement, the Tax Department's willingness to forebear from collecting the back taxes. Even if the letter could be characterized as withdrawing the assessment (which the Tax Commissioner strenuously denies it does), the appellant, by its breach, cannot get the benefit of the bargain. The Tax Department has been denied the benefit of the bargain, as evidenced by the existence of this brief. The Tax Department has had to expend time and money to defend this matter before this Honorable Court. Clearly, the whole point of the letter was to avoid further litigation of the matter.

III. THE APPELLANT'S APPEAL WAS NOT A DECLARATORY JUDGEMENT ACTION AND WAS AN APPEAL OF A QUASI-JUDICIALLY DETERMINED ASSESSMENT.

Again, despite the appellant's attempts to characterize its Circuit Court appeal as something special, it was no different than any of the other appeals filed in 2003 regarding OTA decisions. The language in the appellant's petition to the Circuit Court even mirrors the statutory language of Section Ten of Article Ten, Chapter Eleven, requesting that the Circuit Court "determine anew" all questions submitted to it by the appellant.² Additionally, the appellant's appeal was filed on October 3, 2003, **before** it received the letter from the Tax Department memorializing the aforementioned agreement regarding the assessment. Counsel for the appellant could not have drafted what it now seeks to characterize as a declaratory judgement action **before** the appellant even knew that the Tax Department was going to forebear from collecting the back taxes due. What the appellant filed in the Circuit Court on October 3, 2003 clearly was not a declaratory judgement action, it was an appeal of an assessment that had been upheld by the OTA; that is why it was styled "Petition for Appeal."

AUTHORITIES RELIED ON

Cases

Chesapeake & Potomac Co. v. State Tax Department, 161 W. Va. 77, 239 S.E.2d 918 (1977)	5
<i>Frantz v. Palmer</i> , 211 W.Va. 188, 564 S.E.2d 398 (2001)	5

²It should be noted that despite this statutory language, in *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995) this Honorable Court held that appeals from administrative decisions are not *de novo* as to the facts.

AUTHORITIES RELIED ON

Cases (cont'd)

Frymier-Halloran v. Paige,
193 W. Va. 687, 458 S.E.2d 780 (1995) 4

State ex rel. Paige v. Canady,
189 W.Va. 650, 434 S.E.2d 10 (W.Va.1993) 7

Other

W.Va. Code Section 11-10-14(i) 7

W.Va. Code Section 11-10-19(e) 7

W.Va. Code Section 29A-5-4(f) 2002 6

ARGUMENT

I. THE CASES RELIED ON BY THE APPELLANT ARE NOT DETERMINATIVE.

The appellant relies on *Chesapeake & Potomac Co. v. State Tax Dept.*, 161 W.Va 77, 239 S.E.2d 918 (1977) as standing for the proposition that a taxpayer can appeal an administrative decision and contemporaneously file a declaratory judgement action regarding the same tax determination. The appellee does not dispute that the *Chesapeake* Court ruled as such. Nonetheless, because the appellant **did not** file a declaratory judgment action the *Chesapeake* decision is not illustrative of any issue before this Honorable Court.

The same can be said regarding the appellant's reliance on *Frantz v. Palmer*, 211 W.Va. 188, 564 S.E.2d 398 (2001). In *Frantz* this Honorable Court held that a taxpayer who chooses to proceed **under the statutory alternative** to an appeal bond (a request that the Tax Commissioner waive the

bond upon a showing of sufficient assets) can appeal to the Circuit Courts if there is an adverse decision by the Commissioner. In the case currently before the bar the appellant did not request to proceed under the bond alternative. As such, the holding in *Frantz* is not determinative of any issue before this Honorable Court.

In summation, the appellee never issued an administrative decision whereby the assessment against the appellant was withdrawn. Even if such a decision had been made, the appellant would have breached that agreement by its appeal to the Circuit Court. Finally, the appellant's appeal to the Circuit Court was just that, an appeal, filed before it received any agreement from the Tax Department; the point clearly stated therein, that the appellant should not be subject to the taxes at issue and that the ALJ was clearly wrong or arbitrary and capricious.

II. THE CIRCUIT COURT COULD NOT GRANT THE RELIEF THE APPELLANT PURPORTS TO WANT.

The appellant claims that it only wanted the Circuit Court to rule on the issue of the applicability of future taxes. The appellee is mindful that the only issue before this Honorable Court is the necessity of the appellant to have filed an appeal bond. However, to provide even more context for this Court, it is interesting to note that the Circuit Court could not have provided the relief that the appellant claims to have been seeking. The obvious reason for this conclusion is that in its appeal to the Circuit Court the appellant was asking the Court to rule on the correctness of the ALJ's opinion. However, the ALJ's decision was based upon the record before him. Correspondingly, the appeal to the Circuit Court was going to be on the record before OTA. See W.Va. Code Section 29A-5-4(f)(2002)(reviews of agency actions shall be upon the record made before the agency). As a result, the Circuit Court could not take the record built before OTA and use

it to determine the correctness of taxes that the appellant had not even paid yet. In actuality, even if the appellant had filed a declaratory judgment complaint in the Circuit Court, that too would have been improper. In *State ex rel. Paige v. Canady*, 189 W.Va. 650, 434 S.E.2d 10 (W.Va.1993) this Honorable Court held that because West Virginia Code Section 11-10-14(i) provides the exclusive remedy for obtaining a refund of any allegedly improper tax, and because that statutory remedy expressly disallows relief through a declaratory judgment action, circuit court action was unavailable prior to exhausting administrative remedies.

If the appellant truly wanted the Circuit Court to rule on the propriety of the taxes in the future, it needed to file for a refund and if the refund was denied, pursue its remedy in Circuit Court.

RELIEF PRAYED FOR

The appellee respectfully requests that his honorable court rule that the mandatory bond requirements of West Virginia Code Section 11-10A-19(e) were not fulfilled by the appellant and as such the Circuit Court was correct in dismissing the appellant's petition for appeal.

Respectfully submitted,

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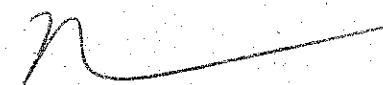
REBECCA CRAIG, AS STATE
TAX COMMISSIONER OF WEST
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Defendant.

CERTIFICATE OF SERVICE

I, A. M. "Fenway" Pollack, Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing "*Appellee's Reply Brief*" was served by depositing the same, postage prepaid, via United States Mail, this 20th day of December, 2004 to the following:

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