

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

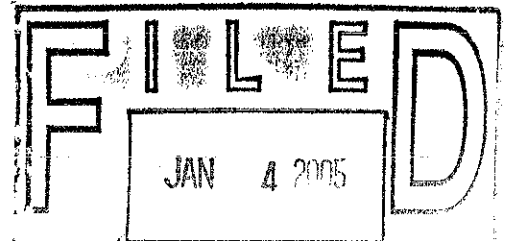
SOLUTION ONE MORTGAGE, LLC

Appellant,

vs.

REBECCA CRAIG, AS STATE  
TAX COMMISSIONER OF WEST VIRGINIA

Appellee



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

REPLY BRIEF OF  
THE APPELLANT

REPLY BRIEF OF THE APPELLANT SOLUTION ONE MORTGAGE, LLC

Appellant  
SOLUTION ONE MORTGAGE, LLC  
By Counsel

C. Page Hamrick III  
State Bar #1566  
Counsel for Appellant

1550 Kanawha Boulevard East  
Post Office Box 2521  
Charleston, West Virginia 25329-2521  
304-345-8283; FAX 304-342-5925

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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

Comes now your Appellant, Solution One Mortgage, LLC, Petitioner below, and respectfully replies to the Reply [sic] Brief of the Appellee, Rebecca Craig, as State Tax Commissioner of West Virginia, as follows:

**Discussion**

After administrative hearing, the West Virginia Office of Tax Appeals, issued its Final Decision in this specific matter, dated September 25, 2003, affirming an assessment of Consumer Sales and Service Tax against petitioner.

Subsequently, the State Tax Commissioner withdrew the assessment of tax, penalty and interest, by its ADMINISTRATIVE DECISION, dated October 3, 2003, a copy of which is attached to the Petition for Appeal and hereto again hereto as Exhibit 1. That document is on the letter head of the **"STATE OF WEST VIRGINIA Department of Tax and Revenue State Tax Department, addressed to Martin E. Rhodes Solution One Mortgage, LLC"**, and referenced **"RE: Administrative Decision/FEIN 55-075-9165/Docket No. 03-104U"**. In this second Administrative Decision, which applied not only to Petitioner Solution One Mortgage, LLC, but to ALL other similarly situated mortgage brokers in the whole State of West Virginia by the attachment, the Tax Commissioner reconsidered its earlier decision to subject all mortgage brokers to the West Virginia Consumer Sales and Service Tax from January 1, 2003, and stated that if the mortgage brokers would "collect and report and remit sales tax on mortgage brokering services on a "going forward basis" beginning July 1, 2003," the Tax Commissioner would not subject the mortgage brokers to the sales tax on prior sales. Note that the Appellee's Reply Brief inexplicably states that the clearly

labeled Administrative Decision, and clearly labeled by the State Tax Commissioner herself, is somehow not an Administrative Decision (see page 2 of Appellee's Brief). If it acts like a duck, quacks like a duck, and has DUCK written clearly on it, it must be a duck!

Since the assessment which had been issued against Petitioner was for periods prior to July 1, 2003, upon receipt of the Tax Commissioner's withdrawal of all those tax assessments, there were no further assessments against Solution One Mortgage, LLC, to appeal. However, Petitioner was still aggrieved by that part of the Administrative Decision issued September 25, 2003, which denied to Petitioner (and to all other similarly situated mortgage brokers) the professional services exemption from the West Virginia Consumer Sales and Service Tax altogether. That decision is adverse to the Petitioner and Petitioner appealed that legal issue and that issue alone.

Tax Commissioner has not issued a new assessment against Petitioner, nor has Tax Commissioner cross-appealed the Administrative Decision withdrawing the tax assessments against Petitioner and all other similarly situated mortgage broker taxpayers. It cannot, since the time for it to appeal its own Administrative Decision has long since passed. What the Tax Commissioner seems to be doing is say that it can ignore its own Administrative Decision. That is something it cannot do.

Tax Commissioner cannot undo what it has done by its own non-appealed Administrative Order. It is too late for Tax Commissioner to file an appeal. Therefore, the Tax Commissioner is simply wrong in trying to resurrect its withdrawn assessment.

Taxpayer very specifically appealed to the Circuit Court of Kanawha County only that specific part of the September 25, 2003, 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. When the Circuit Court of Kanawha County dismissed the appeal because no bond had been filed, it was simply in error. There

was no requirement of a bond because there was no assessment in existence at that time against this taxpayer. The Circuit Court of Kanawha County should have considered the appeal on the merits on the question before it. As the Circuit Court erred in its dismissal, this Court should simply reverse and remand this case to the Circuit Court to consider the question involved, whether the professional services exemption applies to this (and like situated) taxpayer(s).

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

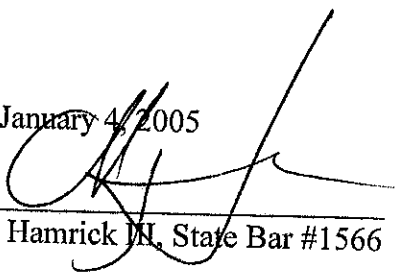
### Summary

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: January 4, 2005



C. Page Hamrick III, State Bar #1566

Respectfully submitted,  
Appellant Solution One Mortgage, LLC  
By Counsel

Counsel for Appellant  
1550 Kanawha Boulevard, East  
PO Box 2521  
Charleston, West Virginia 25329-2521  
304-345-8283; Fax 304-342-5925



STATE OF WEST VIRGINIA  
Department of Tax and Revenue  
State Tax Department



Bob Wise  
Governor

Rebecca Melton Craig  
State Tax Commissioner

October 3, 2003

Martin E. Rhodes  
Solution One Mortgage, LLC  
901 Quarrier St.  
STE 318A  
Charleston, WV 25301

Re: Administrative Decision / FEIN 55-075-9165-001 / Docket No. 03-104 U

Dear Mr. Rhodes:

This is in response to our phone conversation of October 3, 2003 regarding the above-mentioned administrative decision received by Solution One Mortgage, LLC for West Virginia Sales and Service and Use Tax. The tax periods covered in the assessment were May 1998 through September 2002.

Mortgage brokering services conducted in West Virginia are subject to consumer sales tax. An administrative law judge affirmed our estimated assessment against Solution One Mortgage, LLC on September 25, 2003. However, subsequent to the hearing, the West Virginia State Tax Commissioner allowed that mortgage brokers who begin collecting, reporting, and remitting sales taxes on a "going forward basis" beginning July 1, 2003 would not be assessed for any period prior to July 1, 2003.

It is the intention of the West Virginia State Tax Department to allow Solution One Mortgage, LLC to collect, report and remit sales tax on mortgage brokering services on a "going forward basis" beginning July 1, 2003. In exchange for continued compliance with our notice, the Department will not pursue sales tax on mortgage brokering services for any tax period prior to July 1, 2003. Consequently, no further action is required from Solution Mortgage, LLC with regard to the above-mentioned administrative decision.

Should you require further information or assistance in this or any other matter, please contact me at (304) 558-8771.

Sincerely,

Jeff Oakes, Tax Unit Supervisor  
Special Projects Unit  
Compliance Division  
West Virginia State Tax Department





STATE OF WEST VIRGINIA  
 Department of Tax and Revenue  
 State Tax Department

Bob Wise  
 Governor

Rebecca Melton Craig  
 State Tax Commissioner

«License»  
 «Address1»  
 «Address2»  
 «City», «State» «Zip\_Code»

License #: «License\_Number»  
 FEIN: «FEIN»  
 Location: «Location\_1»  
 «Location\_2»

**AMENDED NOTICE**  
**IMMEDIATE ACTION IS REQUIRED**

Attention Mortgage Broker:

The Tax Department has received information from the Division of Banking that indicates you are licensed as a mortgage broker with the State of West Virginia. Mortgage brokering is a service subject to the 6 % West Virginia Consumer Sales and Service Tax. Publication (TSD-408) contains important information regarding your sales tax responsibilities.

You recently received a Tax Department notice about West Virginia sales tax compliance for mortgage brokers. That initial notice required mortgage brokers to report and remit the tax for periods beginning on and after January 1, 2003.

The requirement has been amended to change the commencement date from January 1, 2003 to July 1, 2003. Consumer sales and service tax collection, reporting and remittance will be required for the tax period beginning July 1, 2003 on the service of mortgage brokering. The first return and remittance will be due for the month of July 1, 2003 through July 31, 2003. Reports and remittances will be due for each succeeding month on the statutory due dates.

Mortgage brokers who comply with the requirements of this notice and who also fulfill their sales tax collection and remittance responsibilities on a going-forward basis, will not be assessed for any periods prior to July 1, 2003 for sales tax collection on the activity of mortgage brokering. This policy will not extend to tax collected but not remitted, taxable activity other than mortgage brokering or other taxable sales.

If you have not collected and remitted the West Virginia sales tax on your mortgage brokering services, you are requested to:

- 1) Complete the attached form and report the amount of sales tax that should have been collected for the period beginning July 1, 2003 through July 31, 2003.
- 2) Send your return and pay any amount due by August 15, 2003.
- 3) Stay current with all future sales tax filings and payments.

Please send your completed return and remittance to:

Compliance Division  
 Special Projects Unit  
 P. O. Box 229  
 Charleston, WV 25321

Failure to fulfill these three requirements for sales tax compliance will result in the implementation of Tax Department compliance measures. Should you have questions or require assistance, please contact Jeff Oakes at (304) 558-8771. Sherry Bess at (304) 558-8768. or Katie Hoyer at (304) 558-8767.

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

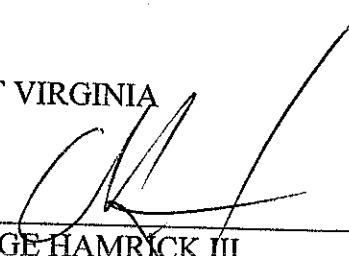
CERTIFICATE OF SERVICE

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 REPLY 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 4th day of January, 2005:

A.M. FENWAY POLLACK, ESQ.  
ASSISTANT ATTORNEY GENERAL  
STATE CAPITOL COMPLEX  
BLDG 1, RM W-435  
CHARLESTON WV 25305  
COUNSEL FOR APPELLEE

and that the original thereof was filed with:  
CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA  
STATE CAPITOL  
CHARLESTON WV 25305

  
C. PAGE HAMRICK III  
Counsel for Appellant

State Bar #1566  
PO Box 2521  
Charleston, West Virginia 25329-2521  
304-345-8283; Fax 304-342-5925