

M. Caryl

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

APOLLO CIVIC THEATRE, INC.

Petitioner,

v.

Civil Action No. 06-C-528
Judge Silver

HELTON, VIRGIL T., as Acting
STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

BERKELEY COUNTY
CIRCUIT CLERK
2007 AUG - 8 PM 3: 05
VIRGINIA SINE CLERK

**FINAL ORDER DENYING PETITION FOR APPEAL
AND AFFIRMING FINAL DECISION OF THE OFFICE OF TAX APPEALS**

This matter comes on for the Court's consideration this 7th day of August, 2007, upon the the Petition for Appeal of Administrative Decision filed July 26, 2006¹; upon the Answer of the Tax Commissioner filed September 5, 2006; upon Petitioner's Memorandum of Law in Support of Petition for Appeal of Administrative Decision and proposed Judgment Order filed May 8, 2007; upon Respondent Tax Commissioner's Brief in Opposition to Petitioner's Petition for Appeal and Proposed Findings of Fact and Conclusions of Law filed June 11, 2007; upon Petitioner's Reply Brief in Support of Petition for Appeal of Administrative Decision filed June 28, 2007; and upon the argument of the parties at the July 9, 2007 hearing.

BERKELEY COUNTY
CIRCUIT CLERK
2007 DEC - 9 PM 3: 38
VIRGINIA SINE CLERK

The Court has carefully considered Petitioner's Petition for Appeal, Respondent's Answer, Petitioner's Memorandum of Law in Support of Petition for Appeal, Respondent Tax Commissioner's Brief in Opposition to Petitioner's Petition for Appeal and Proposed Findings of

¹This case was transferred to this Court from Division I of the Berkeley County Circuit Court on January 19, 2007 as part of the reorganization of the 23rd Judicial Circuit's caseload in light of the appointment of a fifth circuit court judge to the 23rd Judicial Circuit.

Fact and Conclusions of Law, Petitioner's Reply Brief in Support of Petition for Appeal, the argument of the parties, the entire record of this case, and pertinent legal authority. As a result of these deliberations, the Court concludes that Petitioner's appeal must be denied.

Standard of Review

The statute providing for this appeal states that the circuit court "shall hear the appeal as provided in [W.Va. Code § 29A-5-4, a/k/a The State Administrative Procedures Act or SAPA]."

(See West Virginia Code Section 11-10A-19(f)). The State Administrative Procedures Act

(SAPA) provides, in pertinent part, 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. (West Virginia Code Section 29A-5-4.)

Further, when reviewing an agency decision under SAPA, courts are to grant deference.

Syl. Pt. 2, *Stewart v. West Va. Bd. of Examiners for Registered Professional Nurses*, 475 S.E.2d 478 (W.Va. 1996) (Citing Syl. Pt. 3, *Frymier-Halloran v. Paige*, 458 S.E.2d 780 (W.Va. 1995).

I. Interpretation of the Terms "Health and Fitness"

Petitioner's first ground for appeal asserts that the portion of the Office of Tax Appeals (OTA) Decision sustaining the sales tax assessment is clearly erroneous and based upon an

incorrect legal standard, is clearly wrong in view of the reliable, probative, conclusive and stipulated evidence in the whole record, and is arbitrary, capricious, and constitutes an abuse of discretion inasmuch as it relies upon the Respondent's interpretive regulation that purports to modify the plain and unambiguous language of the governing statute by asserting that its terms "health and fitness" refer only to "physical health and fitness."

In support of this assertion, Petitioner points the Court to West Virginia Code Section 11-15-11(b)(1) which provides:

(b) The exemption set forth in this section applies only to those corporations or organizations meeting the following criteria:

(1) The corporation or organization is organized and operated primarily for charitable or general welfare of youth, families and the aged, *improving health and fitness* and providing recreational opportunities to the public; [Emphasis added.]

Petitioner argues that the terms "health and fitness" as used in this statute are clear and unambiguous, and, therefore, must be applied in the ordinary sense of their meaning and not left open to interpretation. Petitioner claims that Respondent's reliance on the interpretive rule under Title 110, West Virginia Code of State Regulations (CSR), Series 15(D)4, Section 3.7, providing that "'health and fitness' means physical health and fitness of individuals but does not include mental health and fitness or spiritual health and fitness," is misplaced. Petitioner asserts that the governing statute, West Virginia Code Section 11-15-11, contains no such limitations and that Respondent's interpretive regulation is an attempt to modify and interpret the statute to make it unduly restrictive contrary to the West Virginia Supreme Court holding in *CNG Transmission v. Craig*, 564 S.E.2d 167 (W.Va. 2002):

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 and clear unambiguous force and effect that the language commands in the statute. (See Syl. Pt. 4, *Id.*)

Finally, Petitioner states that the definition of "health" as set forth by the World Health Organization includes physical and mental well being, as well as social and cultural soundness and vitality. Petitioner argues that the clear and unambiguous language of West Virginia Code Section 11-15-11 regarding "health and fitness," having not been limited by the legislature, encompasses a broad spectrum of health as recognized by the World Health Organization.

Respondent counters that the terms "health and fitness" are not clear and unambiguous as asserted by Petitioner, and, therefore, the promulgation of the interpretive rule under Title 110, West Virginia Code of State Regulations (WV-CSR), Series 15(D)4, Section 3.7, providing the definition for the terms "health and fitness" under the governing statute, is appropriate. In support of this, Respondent argues that if the terms on their face are clear and unambiguous, then Petitioner should not have had to resort to looking at the definition provided by an international agency such as the World Health Organization for a definition of "health." In further decrying Petitioner's position on this issue, Respondent points out that while the Petitioner relies on the World Health Organization's definition of the term "health," Petitioner does not address the meaning of the term "fitness" where the governing statute at issue employs the phrase "health and fitness."

Finally, Respondent points the Court to the West Virginia Supreme Court discussion in *Appalachian Power Co. v. State Tax Department*, 466 S.E.2d 424 (W.Va. 1995) that interpretive rules do not create rights, but merely clarify an existing statute. On this point, Respondent

asserts that once it is established that the phrase “health and fitness” is not clear and unambiguous, the Petitioner can point to no authority for Petitioner’s proposition that the Administrative Law Judge (ALJ) was clearly wrong or arbitrary and capricious in his reliance on the interpretive rule for guidance.

The Court finds merit in Respondent’s position. To begin, the Court looks to Syllabus Point 7 of *Lincoln County Board of Education v. Adkins*, 424 S.E.2d 775 (W.Va. 1992) wherein the West Virginia Supreme Court of Appeals held: “Interpretations of statutes by bodies charged with their administration are to be given great weight unless clearly erroneous.” West Virginia State Tax Department interpretive rule WV-CSR 110-15D-1, provides:

1.1 Scope – This interpretive rule explains and clarifies the exemption from consumers sales tax provided in W. Va. Code § 11-15-11, as added by Com. Sub. for Senate Bill No. 348 (1992), exempting sales of taxable services by certain community-based service organizations such as YMCAs and YWCAs.

As previously noted, *supra*, WV-CSR 110-15(D)3, Section 3.7, provides that “‘health and fitness’ means physical health and fitness of individuals but does not include mental health and fitness or spiritual health and fitness.”

The Court agrees with Respondent that the phrase “health and fitness” as employed in West Virginia Code Section 11-15-11 is ambiguous, because, just as Petitioner argues, there are different types of health and fitness: physical health and fitness and mental or spiritual health and fitness. The legislature did not choose to define or otherwise explain what it meant by employing the phrase “health and fitness.” This indicates to the Court that the legislature, by not setting forth within the statute its own explanation of the meaning of the phrase “health and fitness,” intended to delegate the interpretation of that phrase to the West Virginia State Department of

Tax. On this point, the Court finds support in the West Virginia Supreme Court of Appeal's findings as set forth in *Appalachian Power Co. v. State Tax Department of West Virginia*, 466 S.E. 2d 424 (W.Va. 1995):

We believe that if the Legislature explicitly leaves a gap in legislation, then an agency has authority to fill the gap and the agency is entitled to deference on the question. Thus, the agency's interpretation will stand unless it is "arbitrary, capricious, or manifestly contrary to the statute. . . . We find the contested words "kilowatt hours of net generation available for sale" are ambiguous. The failure of the Legislature to define these words or to enumerate any factors that the Tax Commissioner must consider in deciding such circumstances or characteristics evidences an intent to delegate that determination to the Tax Commissioner. Because this ambiguity cannot be resolved either by pre enactment legislative history or by a review of the overarching design of the original statute, the statute is subject to reasonable construction by the administrative agency charged with the duty to carry out these statutory objectives – the defendants (the Tax Department and the Tax Commissioner).

In the case at bar, the West Virginia State Tax Department has promulgated an interpretive rule designed to define the terms "health and fitness" as they are used in West Virginia Code Section 11-15-11, a statute which the State Tax Department is charged with administering. The State Tax Department's interpretation defines the terms "health and fitness" to mean physical health and fitness and not mental or spiritual health and fitness. Further, the Tax Department's interpretation relates to the specific kind of health and fitness contemplated under the statute in the absence of legislative direction, and that interpretation does not contradict the statute. Moreover, the Court is aware and emphasizes that, as interpretive rules, the State Tax Department's rules under WV-CSR 110-15D-1, et seq., are not binding upon a reviewing court but serve only as a source of guidance. (See *Appalachian Power Co, supra*, quoting *Skidmore v. Swift Co.*, 323 U.S. 134 (1944)). However, the Court is equally aware that "[t]he rulings,

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In support of this assertion, Petitioner points the Court to West Virginia Code Section 11-15-11(b)(1) which provides:

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Petitioner argues that the terms "health and fitness" as used in this statute are clear and unambiguous, and, therefore, must be applied in the ordinary sense of their meaning and not left open to interpretation. Petitioner claims that Respondent's reliance on the interpretive rule under Title 110, West Virginia Code of State Regulations (CSR), Series 15(D)4, Section 3.7, providing that "'health and fitness' means physical health and fitness of individuals but does not include mental health and fitness or spiritual health and fitness," is misplaced. Petitioner asserts that the governing statute, West Virginia Code Section 11-15-11, contains no such limitations and that Respondent's interpretive regulation is an attempt to modify and interpret the statute to make it unduly restrictive contrary to the West Virginia Supreme Court holding in *CNG Transmission v. Craig*, 564 S.E.2d 167 (W.Va. 2002):

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Respondent counters that the terms "health and fitness" are not clear and unambiguous as asserted by Petitioner, and, therefore, the promulgation of the interpretive rule under Title 110, West Virginia Code of State Regulations (WV-CSR), Series 15(D)4, Section 3.7, providing the definition for the terms "health and fitness" under the governing statute, is appropriate. In support of this, Respondent argues that if the terms on their face are clear and unambiguous, then Petitioner should not have had to resort to looking at the definition provided by an international agency such as the World Health Organization for a definition of "health." In further decrying Petitioner's position on this issue, Respondent points out that while the Petitioner relies on the World Health Organization's definition of the term "health," Petitioner does not address the meaning of the term "fitness" where the governing statute at issue employs the phrase "health and fitness."

Finally, Respondent points the Court to the West Virginia Supreme Court discussion in *Appalachian Power Co. v. State Tax Department*, 466 S.E.2d 424 (W.Va. 1995) that interpretive rules do not create rights, but merely clarify an existing statute. On this point, Respondent

asserts that once it is established that the phrase "health and fitness" is not clear and unambiguous, the Petitioner can point to no authority for Petitioner's proposition that the Administrative Law Judge (ALJ) was clearly wrong or arbitrary and capricious in his reliance on the interpretive rule for guidance.

The Court finds merit in Respondent's position. To begin, the Court looks to Syllabus Point 7 of *Lincoln County Board of Education v. Adkins*, 424 S.E.2d 775 (W.Va. 1992) wherein the West Virginia Supreme Court of Appeals held: "Interpretations of statutes by bodies charged with their administration are to be given great weight unless clearly erroneous." West Virginia State Tax Department interpretive rule WV-CSR 110-15D-1, provides:

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As previously noted, *supra*, WV-CSR 110-15(D)3, Section 3.7, provides that "health and fitness' means physical health and fitness of individuals but does not include mental health and fitness or spiritual health and fitness."

The Court agrees with Respondent that the phrase "health and fitness" as employed in West Virginia Code Section 11-15-11 is ambiguous, because, just as Petitioner argues, there are different types of health and fitness: physical health and fitness and mental or spiritual health and fitness. The legislature did not choose to define or otherwise explain what it meant by employing the phrase "health and fitness." This indicates to the Court that the legislature, by not setting forth within the statute its own explanation of the meaning of the phrase "health and fitness," intended to delegate the interpretation of that phrase to the West Virginia State Department of

Tax. On this point, the Court finds support in the West Virginia Supreme Court of Appeal's findings as set forth in *Appalachian Power Co. v. State Tax Department of West Virginia*, 466 S.E. 2d 424 (W.Va. 1995):

We believe that if the Legislature explicitly leaves a gap in legislation, then an agency has authority to fill the gap and the agency is entitled to deference on the question. Thus, the agency's interpretation will stand unless it is "arbitrary, capricious, or manifestly contrary to the statute. . . . We find the contested words "kilowatt hours of net generation available for sale" are ambiguous. The failure of the Legislature to define these words or to enumerate any factors that the Tax Commissioner must consider in deciding such circumstances or characteristics evidences an intent to delegate that determination to the Tax Commissioner. Because this ambiguity cannot be resolved either by pre enactment legislative history or by a review of the overarching design of the original statute, the statute is subject to reasonable construction by the administrative agency charged with the duty to carry out these statutory objectives – the defendants (the Tax Department and the Tax Commissioner).

In the case at bar, the West Virginia State Tax Department has promulgated an interpretive rule designed to define the terms "health and fitness" as they are used in West Virginia Code Section 11-15-11, a statute which the State Tax Department is charged with administering. The State Tax Department's interpretation defines the terms "health and fitness" to mean physical health and fitness and not mental or spiritual health and fitness. Further, the Tax Department's interpretation relates to the specific kind of health and fitness contemplated under the statute in the absence of legislative direction, and that interpretation does not contradict the statute. Moreover, the Court is aware and emphasizes that, as interpretive rules, the State Tax Department's rules under WV-CSR 110-15D-1, et seq., are not binding upon a reviewing court but serve only as a source of guidance. (See *Appalachian Power Co, supra*, quoting *Skidmore v. Swift Co.*, 323 U.S. 134 (1944)). However, the Court is equally aware that "[t]he rulings,

interpretations and opinions of the Administrator . . . do constitute a body of *experience* and *informed judgment* to which courts and litigants may *properly* resort for guidance.” [Emphasis added.] (*Id.*, quoting *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)). Based on these standards, the Court is not convinced, and, therefore, concludes that the OTA Decision in this case was neither clearly wrong, arbitrary, capricious, nor manifestly contrary to the governing statute, and that Petitioner’s appeal on this ground must be denied.

II. Interpretation of the Term “Recreational”

Petitioner’s second ground for appeal asserts that the portion of the OTA Decision sustaining the sales tax assessment is clearly erroneous and based upon an incorrect legal standard, is clearly wrong in view of the reliable, probative, conclusive and stipulated evidence in the whole record, and is arbitrary, capricious, and constitutes an abuse of discretion by employing an interpretation of that same Respondent’s interpretive regulation that would reject and nullify the Respondent’s express stipulation to the contrary and would conclude that the term “recreational”² in West Virginia Code Section 11-15-11(b)(1) refers only to “physical activity.”

In support of this assertion, Petitioner states that the OTA Decision reasoned that, since the Respondent’s interpretive rule limited “health and fitness” to “physical” health and fitness, the following and related concept in the language of the first criteria, “recreational,” had to also

²The relevant language of West Virginia Code Section 11-15-11(b)(1) provides:

(b) The exemption set forth in this section applies only to those corporations or organizations meeting the following criteria:

(1) The corporation or organization is organized and operated primarily for charitable or general welfare of youth, families and the aged, improving health and fitness and providing recreational opportunities to the public;

be limited to recreation that "necessarily involves some physical activity (albeit with some accompanying mental stimulation)." (See OTA Decision, p. 12.) Thus, argues Petitioner, to avoid the opposite conclusion contained in the Respondent's stipulation that the Petitioner's operations did, in fact, provide recreational opportunities to the public, the OTA Decision arbitrarily rejected that stipulation. Further, Petitioner asserts that inasmuch as the OTA Decision's treatment of the term "recreational" necessarily involved physical recreation, the OTA Decision completely failed to take into account the physical recreation experienced by the various performers and volunteers who participate in theatrical and other types of performances offered by Petitioner.

Petitioner also asserts that the OTA committed clear error by rejecting Joint Stipulation Number 8 of the parties below, which agreed stipulation stated: "Except for its operation of a concession stand at events, the Petitioner's revenue-producing activities are educational, charitable, or provide recreational opportunities to the public." In support of this assertion, Petitioner points the Court to *Norfolk National Bank of Commerce and Trust v. Comm'r*, 66 F.2d 48 (4th Cir. 1933) where the Court in that case made the following observation: "But the [United States] Board [of Tax Appeals] on its part is bound to accept as true the facts stipulated by the parties, and if it fails to do so, and makes a finding contrary to the evidence or the necessary inferences therefrom, it commits an error of law which the court has power to correct."

In reply, the Respondent asserts that since the OTA Decision approved the Tax Commissioner's interpretive rule defining the terms "health and fitness" to mean only "physical" health and fitness, and that by this definition sitting and watching a performance offered by Petitioner does not promote the physical health and fitness of the community, then it becomes

unnecessary to reach Petitioner's argument regarding the Administrative Law Judge's (ALJ) treatment of the term "recreational."

The Court agrees with Respondent on this issue. Whether or not the ALJ committed reversible error in rejecting Joint Stipulation No. 8 of the parties in the proceeding below is moot at this point, because Petitioner did not prevail on the issue of the State Tax Department's interpretation of "health and fitness." Thus, the Court concludes that if there were any error in the ALJ's Decision regarding the rejection of Joint Stipulation No. 8 of the parties, it was harmless error.³

III. Petitioner's Percentage of Support Received From Gifts, Grants, Direct or Indirect Charitable Contributions and/or Membership Fees.

Petitioner's third ground for appeal asserts that the portion of the OTA Decision sustaining the use tax assessment is clearly erroneous and based upon an incorrect legal standard, is clearly wrong in view of the reliable, probative and conclusive, stipulated evidence in the whole record, and is arbitrary, capricious, and constitutes an abuse of discretion in concluding that the stipulated value of donated services and in-kind property donations could not be counted to determine that the Petitioner received more than one half of its support from gifts, grants, direct or indirect charitable contributions and/or membership fees.

In support of this assertion, Petitioner claims that upon applying the language of West

³For the record, the Court notes that in rejecting Joint Stipulation No. 8 of the parties, the ALJ addressed that rejection with the following language: "It is well settled law that a tribunal is not bound by a stipulation of "fact" which is contrary to the law on point. This tribunal rejects that portion of joint stipulation No. 8 stating that Petitioner's revenue-producing activities provide "recreational" opportunities to the public . . ."

Virginia Code Section 11-15-9(a)(6)(F)(i)(I) to the evidence in the record of this matter, it becomes clear that more than fifty percent of the Petitioner's annual support, during the years in question, represents subsidies, grants, gifts and/or direct or indirect charitable contributions given in order to enable Petitioner to accomplish its charitable purpose.

Petitioner claims that during the period in question, Petitioner received support consisting of services donated by individuals helping to present performances, and/or provide non-professional administrative services and professional administrative services in the amount of \$503,248.00. Petitioner claims that these types of services qualify as support under West Virginia Code Section 11-15-9(a)(6)(F)(i)(I). In comparing the donated services figure of \$503,248.00 to a total income of \$1,296,240.00 during the relevant years (which includes other gift, grant, and membership income in the amount of \$281,376.00), Petitioner claims to have received more than sixty percent of its support during each year of the relevant time period from qualifying sources.

Also, in asserting that the donated non-professional and professional services qualify as support under West Virginia Code Section 11-15-9(a)(6)(F)(i)(VI), Petitioner points out that the language of the statute provides:

(i) The term 'support' includes, but is not limited to:

(VI) The value of services or facilities (exclusive of services or generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge . . .

Petitioner claims even though the legislature failed to specifically provide for donated time

and/or services in the statute, that the phrase "includes, but is not limited to," and the reference to the value of services or facilities furnished by a governmental unit under IRS Code Section 170(c)(1), indicates that the legislature intended the sources listed to be representative of the kinds of support that qualify under the statutory scheme, but did not intend for same to be a comprehensive list of sources of support.

Respondent counters that Petitioner offers no authority for Petitioner's assertions regarding this issue. Respondent contends that just because West Virginia Code Section 11-15-9(a)(6)(F)(i)(VI) allows qualifying support to include the value of services furnished by a governmental unit, there is no support for the proposition that the legislature meant to include the value of all services or facilities, no matter the source. Respondent also asserts that it is significant that Petitioner admits that it has not been the accounting policy of Petitioner to include on its IRS Form 990 such non cash contributions (time/services) donated by non professional and professional volunteers. (See Petitioner's Memorandum of Law in Support of Petition for Appeal of Administrative Decision, p. 5.) Further, Respondent points out that by Petitioner's own five year averages submitted as part of the record in this matter, Petitioner had total income during the relevant period of \$1,296,240.00, that fifty percent of this total amounts to \$648,120.00, and that Petitioner's total gifts, grants, charitable contributions, and membership fees (legitimate support) for the relevant period totaled just \$281,376.00, well short of the fifty percent requirement. By way of conclusion, Respondent reiterates that without the inclusion of the volunteers' time, for which inclusion Petitioner can set forth no legal authority, Petitioner does not meet the fifty percent support requirement as provided for under the applicable statute.

Once again, the Court concludes that the weight of authority rests with Respondent.

While the Court understands and appreciates Petitioner's argument that West Virginia Code Section 11-15-9(a)(6)(F)(i) provides that the term "support" includes, but is not limited to the items then listed, Petitioner has provided no authority of sufficient weight to convince the Court that the ALJ inappropriately affirmed the State Tax Commissioner's use tax assessment against Petitioner. To use Petitioner's own illustration, for example, Petitioner correctly states that West Virginia Code Section 11-15-9(a)(6)(F)(i)(VI) provides:

(i) The term 'support' includes, but is not limited to:

(VI) The value of services or facilities (exclusive of services or generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge . . .

Petitioner's interpretation of this provision is that the value of services or facilities furnished by a governmental unit referred to in IRS Code 170(c)(1) is just *one* example of what kind of entity may furnish services or facilities that qualify as support. However, it is equally, if not more so, arguable that under subsection (VI) only the value of services or facilities furnished by a governmental unit may be counted as support, and the governmental units referred to in IRS Code Section 170(c)(1) represent a non-exclusive list of the types of governmental units that qualify. The Court recognizes Respondent's support for the latter interpretation of the statute in question as well as the Court's duty to give deference to the interpretation of a statute to the body charged with administering that statute, unless the administering body is clearly wrong. In the absence of any stronger authority on behalf of the Petitioner, the Court cannot conclude that the

State Tax Department was clearly wrong on this issue. This being the case, the Court concludes that the OTA Decision was neither clearly wrong, arbitrary, capricious, nor manifestly contrary to the governing statute, and that Petitioner's appeal on this ground must be denied.

IV. Interest from the Burkhart Bequest.

Petitioner's fourth and final ground for appeal asserts that the portion of the OTA Decision sustaining the use tax assessment is based on an incorrect legal standard, because it would exclude, as eligible support, interest income the Petitioner received from the Burkhart Estate bequest, due to its unauthorized reliance on extraneous financial accounting rules having no force and effect in the context of consumers sales and service tax or use tax.

In support of this assertion, Petitioner claims that in reaching the conclusion below that Petitioner was not entitled to an exemption under West Virginia Code Section 11-15-9(a)(6)(C), the ALJ improperly relied upon the Statement of Financial Accountant Standard No. 116 (Accounting for Contributions Received and Contributions Made) which compelled the ALJ to conclude that since the Burkhart bequest was received prior to the years at issue in this matter, the interest income from the bequest that Petitioner received during the relevant period did not qualify as support in the form of a gift, grant or charitable contribution for purposes of the subject exemption. Also, Petitioner points out that the applicable code section neither references nor authorizes reliance upon such Statements of Financial Accounting Standards as promulgated by the Financial Accounting Standards Board (FASB), and that no such use may be implied. Further, Petitioner states that while the West Virginia Legislature expressly incorporated Generally Accepted Accounting Principles (GAAP) by reference into the business franchise tax

and corporation net income tax articles (West Virginia Code Sections 11-23-1, et seq. and 11-24-1, et seq.), the legislature omitted any reference to the GAAP or FASB rules in the consumers sales and service tax or use tax laws (West Virginia Code Sections 11-15-1, et seq., 11-15A-1, et seq., and 11-15B-1, et seq.).

Finally, Petitioner asserts that in construing West Virginia Code Section 11-15-9(a)(6)(C) in *Kings Daughters Housing, Inc. v. Paige*, 506 S.E.2d 329 (W.Va. 1998), the West Virginia Supreme Court of Appeals held that the term "grant" as used in that case simply meant giving something to accomplish a charitable purpose. Petitioner emphasizes that in *Kings Daughters*, the Supreme Court did not refer to, much less rely upon, standards issued by the FASB. Petitioner argues that since the holding of funds of the Burkhart Estate bequest in interest bearing accounts, pending their expenditure for charitable purposes, was the inherent fiduciary duty of the Petitioner, the obvious implication is that such interest was, along with the principal, something given "to accomplish a charitable purpose."

By way of response, Respondent asserts that Petitioner has stated no legal authority for the proposition that subsequent interest income from a charitable contribution in one year can be considered as charitable support in future years. Respondent states that the ALJ was correct in adopting the reasoning of Respondent in the proceeding below that such subsequent interest payments are not part of the original contribution based upon West Virginia Code Section 11-10A-10(c) which provides:

The office of tax appeals is not bound by the rules of evidence as applied in civil cases in the circuit courts of this state. The office of tax appeals may admit and give probative effect to evidence of a type

commonly relied upon by a reasonably prudent person in the conduct of his or her affairs.

Respondent claims that on this issue, in the absence of direction from the West Virginia Legislature, the ALJ gave probative effect and value to normal financial accounting standards in order to decide an issue before him. Finally, Respondent asserts that Petitioner's reliance on the holding in *Kings Daughters, supra*, is misplaced, because the Court in that case was defining the term "grants," as the term is used in West Virginia Code Section 11-15-9, and not defining the term "charitable contributions."

The Court finds Respondent's argument most convincing, because the Petitioner has pointed to no authority mandating what accounting procedure or other method that the State Tax Department or the OTA must use in classifying the interest income earned in later years from the corpus of a charitable bequest held in trust, other than to point out that the West Virginia Legislature expressly incorporated the GAAP by reference into the business franchise tax and corporation net income tax articles, but did not do so regarding the tax articles at issue in the case at bar. On the other hand, Respondent has pointed to solid authority in support of the OTA's Decision. West Virginia Code Section 11-10A-10(c) provides that: "The office of tax appeals may admit and give probative effect to evidence of a type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs." Based upon the lack of legislative direction, and any authority of Petitioner to the contrary, this Court finds that the OTA properly relied upon a recognized and generally accepted accounting principle regarding the interest generated by the Burkhart bequest.

Lastly, the Court finds no merit in Petitioner's reliance upon the *Kings Daughters* case,

supra. This Court acknowledges that by way of *dictum* the West Virginia Supreme Court noted that the West Virginia Legislature intended the term "grant" in West Virginia Code Section 11-15-9 also to mean the giving of something to accomplish a charitable purpose. However, the issue presented in *Kings Daughters* was whether or not a government "subsidy" from the United States Department of Housing and Urban Development paid to a charitable organization, in that case a senior citizen housing complex, qualified as a "grant" for the purposes of West Virginia Code Section 11-15-9. The Supreme Court concluded that the government subsidies were grants. This Court does not draw from the Supreme Court's conclusion in *Kings Daughters* that interest income generated in later years from a charitable bequest qualifies as a "grant" for the purposes of West Virginia Code Section 11-15-9. Therefore the Court concludes that the OTA Decision on this issue was neither clearly wrong, arbitrary, capricious, nor manifestly contrary to the governing statute, and that Petitioner's appeal on this ground must be denied.

WHEREFORE, in consideration of all the foregoing, the Court does hereby **ADJUDGE** and **ORDER** that Petitioner's Petition for Appeal of Administrative Decision is **DENIED**, and that the Final Decision of the West Virginia Office of Tax Appeals is **AFFIRMED**.⁴

The objection and exception of the parties to any adverse findings or rulings of the Court are noted.

⁴The Court would be remiss if it did not note the wonderful civic opportunities which the Apollo Civic Theatre provides to the members of the local community, including many children, our community's most important resource. The Court would further note the laudatory longstanding dedication and tremendous amount of work performed by so many volunteers, many of whom were in the courtroom for oral argument. These volunteers are our community's true heroes. Nevertheless, the Court is mandated to hear and decide such an appeal under the strict standard of review in applying the facts to the related law.

The Clerk shall retire this matter from the active docket and place it among causes ended.

The Clerk shall forward attested copies of this Order to the following counsel of record:

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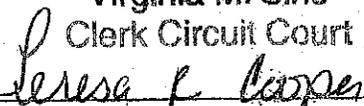
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Gray Silver, III, Judge
Berkeley County Circuit Court

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Clerk Circuit Court

By: 

Deputy Clerk