

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 081802 34710

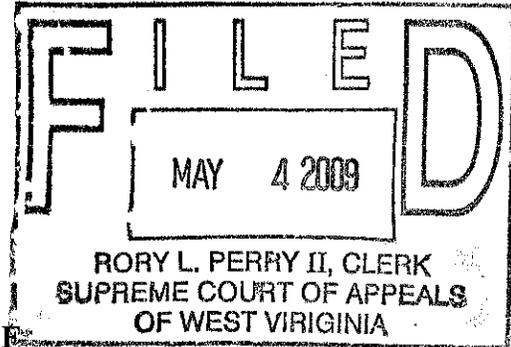
CHARLESTON AREA MEDICAL CENTER,

Appellant/Petitioner below,

v.

STATE TAX DEPARTMENT OF WEST VIRGINIA,

Appellee/Respondent below.



RESPONDENT'S BRIEF

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I. INTRODUCTION

This case involves various health care provider taxes. The circuit court affirmed the decision of the Office of Hearing Appeals which upheld an assessment by the Tax Department against Charleston Area Medical Center. Because there was no error below, this Court should affirm.

II. FACTS

From January 1, 1996 through June 30, 1997, CAMC maintained an optional self-insurance program for its employees and retirees. 12/2/99 Tr. at 15, 20-21, 27. Employees who participated in the program had their contributions withheld from their paychecks and deposited in a trust fund established to pay health care claims. *Id.* at 16. Retirees were also permitted to pay into the trust. *Id.* at 27. The premiums paid into the trust paid for employee health care, less any deductibles or co-payments. *Id.* at 22-24. CAMC pays for the healthcare its employees receive both at its facility, as well as healthcare received at other facilities. *Id.* at 23. When the employees receive healthcare from other health care providers, the applicable healthcare provider tax is paid to the State. *Id.* at 25.¹

When an employee or retiree covered by CAMC's self-insurance program receives medical services from CAMC, CAMC's billing system records the charges associated with the activity as if the person receiving the services was not covered by the self-insurance program. *Id.* at 16-17. As testified to by Charles Gregory Gibbs, a CPA and one of CAMC's witnesses at the OHA hearing, "[w]hen an employee goes in they [sic-CAMC] record revenue, and they [sic-CAMC] also record

¹ Q. And with respect to those providers, if they were in West Virginia and subject to the provider tax, would provider tax have been paid on that amount, ultimately paid to those providers?

A. Payments, cash payments were made to those providers. So I'm assuming that they would have included those payments in their gross receipts.

12/2/99 Tr. at 25-26.

the receivable.” *Id.* at 50. As Mr. Gibbs also explained, “[t]he accounting entry that is in question results from an adjustment of revenues that are recorded as a receivable that are never collected.” *Id.* at 48. It is this adjustment that is at issue in this case.

III. STANDARD OF REVIEW

“The same standard set out in the State Administrative Procedures Act, W. Va. Code, 29A-1-1, *et seq.*, is the standard of review applicable to review of the Tax Commissioner's decisions under W. Va. Code, 11-10-10(e) (1986).” Syl. Pt. 3, in part, *Frymier-Halloran v. Paige*, 193 W. Va. 687, 688, 458 S.E.2d 780, 781 (1995). Under the APA, “an agency action may be set aside if it is ‘[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record; . . . or [a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.’” *Id.* at 695, 458 S.E.2d at 788 (quoting W. Va. Code, 29A-5-4(g)(5) and -4(g)(6) (1964)). Clear error and abuse of discretion review are “highly deferential modes of review [.]” *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 106, 459 S.E.2d 374, 383 (1995). “The ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are [also] deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). The Court reviews questions of statutory interpretation *de novo*. See *Mildred L. M. v. John O.F.*, 192 W. Va. 345, 350, 452 S.E.2d 436, 441 (1994); *Frymier-Halloran v. Paige*, 193 W. Va. 687, 693, 458 S.E.2d 780, 786 (1995).

IV. ARGUMENT

There are two issues here. First, did the Tax Department improperly impose a tax on CAMC, and, secondly, does the fifteen months it took OHA to render a ruling automatically entitle CAMC

to prevail? Because the answer to both these questions is “no,” the circuit court should be affirmed.

A. The Tax Department properly imposed the taxes on CAMC.

1. CAMC treated the charges for services as receivable.

The West Virginia Health Care Provider Tax Act of 1993 imposes taxes on a number of health care provider services.² These taxes “are generated for the distinct purpose of generating federal matching funds to draw down Medicaid funds.” *Helton v. Rem Community Options, Inc.*, 218 W. Va. 165, 172, 624 S.E.2d 512, 519 (2005) (footnote omitted). These provisions impose privilege taxes that share a common core, that is, the amount of tax is a percentage of the provider’s gross receipts. Gross receipts are universally defined in the statutory sections at issue here to “mean[] the amount received or receivable, whether in cash or in kind, from patients” An unambiguous statute “is not subject to interpretation[,]” *Fenton Art Glass Co. v. West Virginia Office of Ins. Comm’r*, 222 W. Va. 420, 664 S.E.2d 761, 770 (2008) (per curiam), so that “[w]here the language of a statutory provision is plain, its terms should be applied as written and not construed[,]” *DeVane v. Kennedy*, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999), regardless of a court’s belief in the wisdom of the enactment. *See, e.g., Hartley Hill Hunt Club v. County Comm’n*, 220 W. Va. 382, 387, 647 S.E.2d 818, 823 (2007); *State ex rel. Orlofske v. City of Wheeling*, 212 W. Va. 538, 546, 575 S.E.2d 148, 156 (2002); *State v. Richards*, 206 W. Va. 573, 577, 526 S.E.2d 539, 543 (1999). Thus, a privilege tax applies to the following: (1) amounts received or receivable whether (2) in cash or in kind—both criteria being met here.

The circuit court found that “[c]harges for the services received by participants in the

² Those at issue here are codified at West Virginia Code §§ 11-27-4; 11-27-7; 11-27-9; 11-27-6; and 11-27-19.

self-insurance program are recorded by CAMC as accounts receivable[,]” and that “[a]fter the charges are recorded as an account receivable, CAMC then makes an adjusting entry to remove the receivable from its books.” Final Order at p. 3. CAMC contends that these findings of fact must be set aside because the OHA decision did not find that accounting entries are accounts receivable. Appellant’s Br. at 3. This is incorrect.

The OHA decision never affirmatively found that accounting statements either are or are not accounts receivable. A reviewing tribunal is not precluded from making additional findings that are not in conflict with findings the hearing examiner has made. *Fairmont Spec. Serv. v. West Virginia Human Rights Comm’n*, 206 W. Va. 86, 90, 522 S.E.2d 180, 184 (1999). The circuit court cannot contradict a factual finding of a lower tribunal if the lower tribunal never made such a finding. And because an appellate court “reviews judgments, not statements in opinions[,]” *Black v. Cutter Lab.*, 351 U.S. 292, 297 (1956), an appellate court may affirm a decision on any basis apparent from the record. *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982); *Strawser v. Atkins*, 290 F.3d 720, 728 n.4 (4th Cir. 2002). Thus, the circuit court was free to look beyond the OHA findings of fact to reach its decision—and its findings of fact are supported by substantial evidence.

“‘Substantial evidence’ is such relevant evidence, on the whole record, as a reasonable mind might accept as adequate to support a finding; it must be enough to justify a refusal to direct a verdict, if the factual matter were tried to a jury.” *West Virginia Institute of Tech. v. West Virginia Human Rights Comm’n*, 181 W. Va. 525, 532-33, 383 S.E.2d 490, 497-98 (1989). Evidence provided by a party’s own witness may establish substantial evidence. *Public Service Co. of New Mexico v. F.E.R.C.*, 832 F.2d 1201, 1209 (10th Cir. 1987); *Northwestern Bell Telephone Co. v. Hagen*, 234 N.W.2d 841, 848 n.3 (N.D. 1975).

CAMC's own witness testified that "[w]hen an employee goes in they [sic-CAMC] record revenue, and they [sic-CAMC] also record the *receivable*[,]” and “[t]he accounting entry that is in question results from an adjustment of revenues that are recorded as a *receivable* that are never collected.” Tr. at 50, 48 (emphasis added). The following exchange also substantiates the circuit court's findings:

EXAMINER KALWAR: And what the Taxpayer in this case is saying is that the *amounts shown as receivable* were actually not collected, and they're not part of the gross income of CAMC.

THE [WITNESS]: That's correct.

Tr. at 54 (emphasis added). The circuit court's finding is supported by substantial evidence.

CAMC's argument is predicated on the argument that it did not treat its accounting entries as receivables. The circuit court's findings that it did are amply supported by the record and CAMC's argument, “without its predicate it collapses like a house of cards.” *In re Doe*, 860 F.2d 40, 47 (2nd Cir. 1988). Thus, the circuit court should be affirmed.

2. Services include payment in kind which include employee services.

This Court has long held that every single word in a statute must be given meaning and no word in a statute should be rendered nugatory. “It is a well-known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning[,]” *State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979), so that “terms of the same statute are not to be construed so as to be redundant.” *Banker v. Banker*, 196 W. Va. 535, 544, 474 S.E.2d 465, 474 (1996). Thus, payments in kind must be something other than cash. “It is significant that the statute uses the words . . . in the disjunctive and manifestly attaches a different meaning to each word. Obviously they are not synonyms.” *Smith v. Godby*, 154

W. Va. 190, 199, 174 S.E.2d 165, 171 (1970). Indeed, as this court has said, “[t]he phrase ‘in kind’ means ‘[i]n goods or services rather than money.’” *Arneault v. Arneault*, 219 W. Va. 628, 638 n.110, 639 S.E.2d 720, 730 n.10 (2006) (*Black’s Law Dictionary* 802 (8th ed.2004)). Here, CAMC’s argument is flawed because it disregards statutory language.

CAMC focuses on “cash.” Tr. at 47 (emphasis added) (“[The] [b]asic theory for not including these self insurance charges in revenue is that first, they never result in an inflow of *cash* . . .”). See also Tr. at 18(emphasis added) (“Q [by Mr. Lorensen]. With respect to this accounting entry, does CAMC receive *cash* or assets reducible to *cash* from any third-party?”). The statute, though, is not limited to cash, money, or currency—it encompasses “services” since “in kind” means “services rather than money.” And this situation prevails here.

“[T]here . . . is no free lunch--not even in health care.” Uwe E. Reinhardt, *The Predictable Managed Care Kvetch on the Rocky Road From Adolescence to Adulthood*, 24 J. Health Pol. Pol’y & L. 897, 901 (1999). Indeed, “[v]ery few employers provide health insurance out of altruistic motives.” Julie Roin, *The Consequences of Undoing the Federal Income Tax*, 70 U. Chi. L. Rev. 319, 323 (2003). Economic reality and common sense dictate that the medical services that CAMC renders to its employees are not “free”—CAMC must find a way to pay for these services. And most companies do so by passing the cost on to their employees.

“[I]t is undoubtedly true that employer contributions to health insurance are simply another form of compensation, a substitute for wages” William H. Pitsenberger, *The Pool of Bethesda Equity, Political Problems and Reinsurance Solutions in Mandated Individual Health Insurance*, 11 Quinipiac Health L.J. 145, 162 (2008). Employers provide health care “because it makes economic sense: They can (and do) recoup the cost of such programs from their employees in the

form of lower cash wages. Employees implicitly accept lower wages in return for health insurance coverage.” Roin, *The Consequences of Undoing the Federal Income Tax*, 70 U. Chi. L. Rev. at 324. See also Julie Roin, *United They Stand, Divided They Fall: Public Choice Theory and the Tax Code*, 74 Cornell L. Rev. 62, 89 (1988); *Crull v. GEM Ins. Co.*, 58 F.3d 1386, 1390 (9th Cir. 1995). Furthermore, CAMC has derived gross receipts in the form of an in kind receipt by having to pay less compensation to its employees.³ Thus, the circuit court should be affirmed.

B. CAMC’s reliance on West Virginia Code § 11-27-3 is waived or is inapposite.

The Health Care Provider Tax of 1993 imposes taxes upon “the privilege of engaging or continuing within this state in the business of providing [enumerated medical care].” CAMC asserts that its Self-Insurance Program should not be taxed because it was not in the business of providing medical care to its employees. CAMC did not make this argument to the OHA or the circuit court and it is, therefore, waived. See, e.g., *State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 203 W. Va. 690, 699, 510 S.E.2d 764, 773 (1998) (“Typically, we have steadfastly held to the rule that we will not address a nonjurisdictional issue that has not been determined by the lower court.”). Alternatively, CAMC’s reading of the Act violates established interpretive norms.

The Health Care Provider Tax Act of 1993 defines business as “all health care activities engaged in, or caused to be engaged in, with the object of gain or economic benefit, direct or indirect, and whether engaged in for profit, or not for profit, or by a governmental entity[,]” but then continues that it “does not include services rendered by an employee within the scope of his or her contract of employment.” W. Va. Code § 11-27-3(b)(1). The Act, though, continues that

³ The fact that not all of CAMC’s employees chose to participate in the self insurance plan in no way detracts from the fact that availability of health insurance is a benefit to an employee and its availability helps an employer maintain its workforce and its competitive position in the marketplace.

“[e]mployee services . . . are the business of the employer . . . and reportable as such for purposes of the taxes imposed by this article.” *Id.*

Tax statutes that relieve a party from paying a tax are to be strictly construed against the taxpayer. *E.g.*, Syl. Pt. 5, *CB&T Operations Co., Inc. v. Tax Comm’r*, 211 W. Va. 198, 564 S.E.2d 408 (2002). The use of the term “does not include” in the Act creates a tax exemption and, as such, must be strictly construed against CAMC. *See In re Estate of Rosenberg*, No. L-01-1016, 2001 WL 1155804, at * 3 (Ohio App. 6 Dist. Sept. 28, 2001); *see also City of Detroit v. General Foods Corp.*, 197 N.W.2d 315, 322 (Mich. App. 1972) (statute reading “‘Doing business’ means the conduct of any activity with the object of gain or benefit, except that it does not include: . . . ‘(c) The mere storage of personal property in the city in a warehouse neither owned nor leased by the taxpayer’” creates an exemption “to be strictly construed . . .”). CAMC “claims that [it] is exempt from the payment of the tax in question. Therefore, the burden rests upon [it] to clearly show that [it] is exempt and if [it] fails to do so, the application of the tax is justified.” *State ex rel. Lambert v. Carman*, 145 W. Va. 635, 638-39, 116 S.E.2d 265, 267 (1960).⁴ Further, “[a] cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.” Syllabus point 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999).

⁴ CAMC states that it does not include the Self Insurance Program (SIP) payments in its IRS Form 990 (Form 990 is a Return of an Organization Exempt from Federal Income Tax, a sort of tax return for non-profits, *Dedication and Everlasting Love to Animals v. Humane Soc.*, 50 F.3d 710, 712 (9th Cir. 1995)). Whether CAMC includes its SIP on its Form 990 is not relevant because this case presents a matter of how to calculate a state, not federal, tax. *Cf. Holt v. New Mexico Dep’t of Tax. & Rev.*, 59 P.3d 491, 499 (N.M. 2002) (state court could judge validity of state income tax based on federal income tax returns even if that meant finding federal returns erroneous). *Accord Williams v. State Tax Assessor*, 812 A.2d 245, 248-49 (Me. 2002); *Maxitrol Co. v. Department of the Treasury*, 551 N.W.2d 471, 474 (Mich. App. 1996); *Stella A Schaevitz Trust v. Director*, 15 N.J. Tax 296, 311-12 (N.J. Tax 1995).

West Virginia Code § 11-27-3(b)(1) provides that business “does not include services rendered by an employee within the scope of his or her contract of employment[,]” but does include “[e]mployee services[.]” Thus, the statute draws a distinction between services rendered by a contractual employee and an at-will employee. If the services are rendered by a contract employee, then the health care provider is not within the business, but if provided by an at will employee, it is. Here, the record is devoid of the status of the persons rendering care taxed under the Health Care Provider Tax. As such, CAMC has failed to carry its burden to be relieved of its burden of taxation.

Finally, CAMC parades the horrors about how far the legislature will go in imposing taxes on fringe benefits. However, CAMC ignores that this case deals with Health Care Provider Taxes that are meant to draw down federal matching funds. Unfortunately, the federal government has hampered states by limiting the flexibility they have to raise their share of the Medicaid pot. *See* W. Va. Code § 11-27-1(f) (“Enactment by the United States Congress in 1991 of Public Law 102-234, amending Section 1903 of the Social Security Act, places limitations and restrictions on the flexibility states have to raise state share for its medical assistance program.”); Thomas C. Fox, *et al.*, Health Care Financial Transaction Manual § 18.22 (footnote omitted) (“The ability of a state to seek [federal financial participation] for revenues raised by voluntary contributions of providers and provider-specific taxes has been limited by federal legislation. Known as the Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991, this federal law restricts the use of provider-financed programs established in many states. The failure of a state's provider donation and/or tax programs to meet the federal requirements can result in a shortfall of federal Medicaid monies for the state and subsequently for health care providers.”); Edward Allen Miller, *et al.*, *the Devil's in the Details: Trading Policy Goals for Complexity in Medicaid Nursing Home*

Reimbursement, 34 J. Health Pol. Pol’y & L. 93, 116 (2009) (“Over the last two decades, states have used a range of “creative financing” mechanisms to increase federal matching funds under Medicaid, especially during periods of fiscal stress. In 1991, Congress enacted legislation amending the federal Medicaid statute to establish specific rules for when states could levy provider taxes on the gross patient revenues of health care providers.”). Thus, the situation here deals with a complex system where states are, for all intents and purposes, beholden to the federal government which sets the criteria to obtain medicaid services. W. Va. Code § 11-27-1(d) & (e). Consequently, it is seriously doubtful if the kind of circumstances here will rise in some other area. Therefore, it is of importance here to remember that “adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency.” *State of New York v. United States*, 326 U.S. 572, 583 (1946). Therefore, the circuit court should be affirmed.

C. Fifteen Months between Submission and Decision is Either not unreasonable or is, at best, Harmless Error.

CAMC also asserts that it is entitled to an automatic reversal because it took the OHA 15 months to render its decision and that length of time was unreasonable under West Virginia Code § 11-10-9 that requires decisions to be rendered in a “reasonable time” after the hearing. CAMC is not entitled to this relief.

In Syllabus Point 2 of *Kanawha Valley Transportation Co. v. Public Service Commission*, 159 W. Va. 88, 219 S.E.2d 332 (1975), this Court held, “[t]he mere delay in the disposition or decision of a case does not vitiate the order or judgment. If a decision is unduly delayed, a proceeding in mandamus may be instituted to compel a decision but not how to decide.” *See also Special Care of New Jersey, Inc. v. Board of Review*, 742 A.2d 1023, 1026 (N.J. Super. A.D. 2000)

("the remedy Special Care seeks is not justified by the Board's delay, particularly where the record reveals no effort by Special Care to compel the Board to act."); *DeMilo and Co., Inc. v. Department of Transp.*, 658 A.2d 170, 175 (Conn. Super. 1993) ("The short answer to the plaintiff's argument is that § 4-180 provides its own remedy in the case of an administrative agency that fails to render a timely decision. That remedy is an application to this court for an order to compel the issuance of a decision. The plaintiff did not avail itself of that remedy in this case, and the court concludes that the remedy was waived."). *Accord* 2 Am. Jur.2d *Administrative Law* § 572 (footnote omitted) ("The preferred remedy for administrative delay is an order compelling agency action, not a reversal of the eventual agency decision."); 73A C.J.S. *Public Administrative Law and Procedure* § 456 (). *Cf. F.T.C. v. Anderson*, 631 F.2d 741, 750 (D.C. Cir. 1979) (under the federal Administrative Procedures Act, a "citizen may be entitled to a court ruling that an agency exercise its discretion even though the court cannot say which way the discretion is to be exercised.").⁵ Never having sought such relief, CAMC is barred from arguing that the decision was unreasonably delayed.

CAMC also cites two lower court decisions and implies that there is some weight to them because this Court refused the Petitions for Appeal in those cases. This argument is flawed because when this Court refuses a Petition for Appeal without reason such a refusal "is similar to the denial of certiorari by the U.S. Supreme Court in that the denial of appeal is not an adjudication on the merits and does not carry any implication of approval of the judgment sought to be reviewed."

⁵ In dicta this Court seems to have expressed some reticence with *Kanawha Valley. Frantz v. Palmer*, 211 W. Va. 188, 191, 564 S.E.2d 398, 401 (2001). But, dicta in a case cannot overrule an explicit holding in a previous case. *See, e.g., Waine v. Sacchet*, 356 F.3d 510, 517 (4th Cir. 2004) ("dicta does not and cannot overrule established Supreme Court precedent"); *Trope v. Katz*, 902 P.2d 259, 268 (Cal. 1995) ("A precedent cannot be overruled in dictum[.]"); *cf. West Virginia Dep't of Transp. v. Parkersburg Inn, Inc.*, 222 W. Va. 688, ___ n.6, 671 S.E.2d 693, 699 n.6 (2008) (per curiam), especially since any change in West Virginia law must be made through syllabus points. Syl. Pt. 2, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001). *See, e.g., Syl. Pt. 9, Smith v. Cross*, No. 34147 (W. Va. Mar. 31, 2009).

Triggs v. Berkeley County Bd. of Ed, 188 W. Va. 435, 441 n.9, 425 S.E.2d 111, 117 n.9 (1992).

“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.” *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)). See also *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting the denial of certiorari) (“The one thing that can be said with certainty about the Court’s denial of Maryland’s petition in this case is that it does not remotely imply approval or disapproval of what was said by the Court of Appeals of Maryland.”). See also *Siekierda v. Commonwealth*, 860 A.2d 76, 84 n.10 (Pa. 2004) (“This Court’s denial of a request for discretionary review suggests no position on the merits and carries no precedential weight.”); *State v. Rucker*, 471 S.E.2d 145, 145 (S.C. 1996) (“The denial of a petition for a writ of certiorari to the Court of Appeals does not dismiss or decide the underlying appeal; it simply determines that, as a matter of discretion, this Court does not desire to review the decision of the Court of Appeals.”); *Shepherd v. Summit Mgt. Co.*, 794 So.2d 1110, 1115-16 (Ala. Civ. App. 2000) (“we note that the law is settled that the Alabama Supreme Court’s denial of a petition for a writ of certiorari is not legal precedent concerning any consideration of the merits of the underlying case.”); *Sheffield v. State*, 650 S.W.2d 813, 814 (Tex. Crim. App. 1983) (“The Bench and Bar of the State should not assume that the summary refusal of a petition for discretionary review lends any additional authority to the opinion of the Court of Appeals.”).

Finally, “[t]he doctrine of harmless error in [sic] firmly established as the law of this state by statute, court rule and court decisions[,]” *Lancaster v. Potomac Edison Co.*, 156 W. Va. 218, 232, 192 S.E.2d 234, 243 (1972) and is a “principle by which we should be guided in the exercise of the appellate jurisdiction of this Court.” *Whittaker v. Pauley*, 154 W. Va. 1, 6, 173 S.E.2d 76, 79

(1970). Thus, “the mere passage of time in rendering an administrative determination will not, standing alone, justify its annulment. Instead, a party must demonstrate actual and substantial prejudice as a result of the delay.” *Board of Ed. v. Donaldson*, 839 N.Y.S.2d 558, 561 (N.Y.A.D. 3 Dept. 2007) (citations omitted).

In this case, the delay between the hearing and rendering the decision was approximately fifteen months. Fifteen months is well within the time periods this Court has found do not facially give rise to prejudice and well short of time periods that give rise to a presumption of prejudice. Compare *Kanawha Valley Transp. Co.*, 159 W. Va. at 94-95, 219 S.E.2d at 338 (16 to 24 months not prejudicial), [*accord Britt v. Britt*, 606 S.E.2d 910, 913 (N.C. App. 2005) (16 months); *Hartman v. Hartman*, 624 N.Y.S.2d 470, 472 (N.Y.A.D. 3 Dept. 1995) (“There was a 19-month delay between the hearing and the order of custody which petitioner claims was prejudicial to his interests. Although we believe the delay was unduly long, such delay in and of itself is insufficient to require a new hearing.”)]; *City-Wide Asphalt Co., Inc. v. City of Independence*, 546 S.W.2d 493, 498-99 (Mo. App. 1976) (16 month between bench trial and order not prejudicial)] with Syl. Pt. 1, *State ex rel. Leonard v. Hey*, 269 S.E.2d 394, 394 (W. Va. 1980) (“A delay of eleven years between the commission of a crime and the arrest or indictment of a defendant, his location and identification having been known throughout the period, is presumptively prejudicial to the defendant and violates his right to due process of law, U.S. Const. Amend. XIV, and W. Va. Const. art. 3, § 10. The presumption is rebuttable by the government.”).⁶ Indeed, with the Tax Department’s abatement of the penalties, CAMC can demonstrate no prejudice. The circuit court should be affirmed.

⁶ The paucity of binding authority on this issue for the Appellant is demonstrated by the fact that this Court has decided cases in roughly the same period of time that the OHA took in this case. See *Community Antenna Serv., Inc. v. Public Serv. Comm’n*, 219 W. Va. 425, 633 S.E.2d 779 (2006) (submitted on January 18, 2005 and decided on June 30, 2006).

V. CONCLUSION

For all of the above reasons, this Court should refuse the petition for appeal.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 081802

CHARLESTON AREA MEDICAL CENTER,

Appellant/Petitioner below,

v.

STATE TAX DEPARTMENT OF WEST VIRGINIA,

Appellee/Respondent below.

CERTIFICATE OF SERVICE

I, Katherine A. Schultz, Senior Deputy Attorney General, do hereby certify that the foregoing "Respondent's Brief" was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 4th day of May 2009, addressed as follows:

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