No. 18-

IN THE

Supreme Court of the United States

ASHLAND SPECIALTY CO. INC.,

Petitioner,

v.

DALE W. STEAGER, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

MARK ALLEN LOYD, JR.
Counsel of Record
BRENT R. BAUGHMAN
BAILEY ROESE
BINGHAM GREENEBAUM DOLL LLP
101 South Fifth Street, Suite 3500
Louisville, KY 40202-3197
(502) 587-3552
mloyd@bgdlegal.com

Counsel for Petitioner

286548

QUESTIONS PRESENTED

A State punished a small business's inadvertent civil noncompliance by *automatically* applying a civil monetary penalty at the maximum percentage rate – 500% – without exercising discretion or considering any mitigating circumstances. Was the penalty grossly disproportionate to the offense and unconstitutional under the Eighth Amendment's Excessive Fines Clause and *United States v. Bajakajian*? In light of the myriad criteria currently employed by state and federal courts to evaluate gross disproportionality, should the Court resolve the multiple splits and affirmatively adopt factors, like those in *Cooper Industries v. Leatherman*, to decide whether a civil monetary penalty is grossly disproportionate to the underlying offense?

PARTIES TO THE PROCEEDING

The parties are as stated in the caption: *Ashland Specialty Co. Inc. v. Dale W. Steager, State Tax Comm'r of West Virginia.*

Ashland Specialty Co. Inc. is a closely held corporation and no parent or publicly held company owns 10% or more of the corporation's stock.

The State Tax Commissioner of West Virginia was Craig Griffith when the case was before the West Virginia Office of Tax Appeals, and was Mark W. Matkovich when the case was before the Circuit Court of Kanawha County, West Virginia.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Codes, Statutes, and Rules

Other Authorities

INTRODUCTION

Let the punishment match the offense. Reflecting the venerable nature of Cicero's maxim, the Founders codified it into law through the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Over two decades ago, this Court articulated a standard for evaluating whether a fine was excessive, holding a punishment unconstitutional if it is "grossly disproportionate" to the underlying offense. *United States v. Bajakajian*, 524 U.S. 321 (1998).

The Court stopped there, declining to specify what factors should be considered in reviewing a penalty for gross disproportionality, or if those factors should be the same whether the punishment was a criminal monetary penalty, a civil monetary penalty, or an *in rem* forfeiture.

Since then, state and lower federal courts have developed myriad factors to evaluate a penalty's excessiveness under the gross disproportionality standard, considering all manner of circumstances in their review. Each court reads *Bajakjian* differently, distilling from its holding three, four, or even five factors for determining gross disproportionality. Some courts even hold that they have *no* power to review a legislatively-enacted penalty for excessiveness.

Meanwhile, faced with revenue shortages and budget cuts, states and localities are enacting – and enforcing – more civil (and criminal) monetary penalties than ever before. This explosion of state power calls for clarity regarding excessiveness and gross disproportionality, particularly when some courts have effectively abdicated their duty to review a legislatively-authorized penalty for excessiveness.

Here, the Supreme Court of Appeals of West Virginia's decision to uphold a 500% penalty against Ashland Specialty for *civil* noncompliance, despite the undisputed inadvertence of its offense and its self-reporting and self-correcting of the mistake, illustrates the undesirable consequences of applying different tests in every jurisdiction: gross unfairness and inequity. It also shows how applying factors purportedly directly derived from *Bajakajian*, an *in rem* forfeiture case, to a civil penalty like this involves twisting the law to fit the facts. This case is the right opportunity, at the right time, to look at Excessive Fines jurisprudence with fresh perspective.

Adopting criteria such as the three used in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 52 U.S. 424 (2001) to evaluate gross disproportionality of civil monetary penalties is necessary to resolve the multiple splits and to preserve Excessive Fines Clause protections. A unified framework will secure one of our most precious and bedrock freedoms: freedom from a punishment that does not match the offense.

OPINIONS BELOW

The May 1, 2018 Opinion of the Supreme Court of Appeals of West Virginia is reported at 818 S.E.2d 827. *See* Appendix A. The April 11, 2017 Final Order of the Circuit Court of Kanawha County is not published but is reprinted in Appendix B. The August 18, 2014 Final Decision of the West Virginia Office of Tax Appeals is not published but is reprinted in Appendix C. The Order Denying Petition for Rehearing dated October 9, 2018 is reprinted in Appendix D.

JURISDICTION

The opinion of the Supreme Court of Appeals of West Virginia was rendered on May 1, 2018. The court denied Ashland Specialty Co., Inc.'s timely motion for reconsideration on October 9, 2018. On December 19, 2018, this Court granted an extension of time to file the Petition until February 6, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, U.S. Const. amend. VIII, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

The facts are undisputed. At issue is a civil monetary penalty which West Virginia assessed against Ashland Specialty, a small, regional wholesale distributor of convenience store items, including

tobacco products. Ashland Specialty is licensed in several states, including West Virginia. Three years after Ashland Specialty inadvertently sold cigarettes that were temporarily removed from West Virginia's Directory of Cigarette Brands Approved for Stamping and Sale ("the List"), the West Virginia Tax Commissioner imposed a penalty at 500% of the retail value of the cigarettes, the top percentage rate. App. 3a.

A. West Virginia, and Over 40 Other States, Impose This Civil Monetary Penalty as Part of Each State's Master Settlement Agreement Statutory Scheme.

Over 40 states impose compliance and monetary obligations and penalties virtually identical to those of West Virginia, all arising from those states' settlement of litigation with the tobacco industry.

In 1998, West Virginia and 45 other states, as well as the District of Columbia, Puerto Rico, and four U.S. territories, reached an agreement with certain U.S. cigarette manufacturers (the Participating Manufacturers or "PMs") concerning cigarette advertising, marketing, and promotion. App. 4a.[1] Referred to as the Master Settlement Agreement ("MSA"), it requires PMs to pay the settling states billions of dollars each year and to significantly restrict their marketing efforts. App. 4a. Settling states, including West Virginia, enacted the MSA's

[1] *See also* Master Settlement Agreement, November 23, 1998, *available at* https://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf.

suggested Model Statute to enforce its provisions. App. 4a.

Non-Participating Manufacturers ("NPMs") are those that did not enter into the MSA. They are thus not required to pay the annual sums to the settling states nor are they obligated to restrict their cigarette marketing. To offset the competitive advantage this gave NPMs over PMs, West Virginia and other settling states enacted legislation to prevent NPMs from frustrating the MSA's purpose; West Virginia's 1999 legislation required NPMs to deposit a sum into escrow for cigarettes they sell into the state. App. 4a.

In 2003, West Virginia enacted complementary legislation to strengthen its ability to enforce the escrow provisions against the NPMs, including by: (1) requiring the West Virginia Tax Commissioner ("Tax Commissioner") to maintain an online directory of the name and brands of all cigarette manufacturers authorized to sell their product in the state, the West Virginia Directory of Cigarette Brands Approved for Stamping and Sale ("the List"); and (2) only permitting cigarettes on the List to be sold in the state. App. 5a; *see also* W. Va. Code § 16-9D-3(c). The statute states that the Tax Commissioner "may" penalize a person who sells cigarettes into West Virginia not found on the List by, among other things, imposing a civil penalty "in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars…." W. Va.

Code § 16-9D-8(a).[2] Accordingly, the Tax Commissioner must exercise discretion in deciding whether and how to penalize a taxpayer, as evidenced by the Legislature's use of the word "may." App. 13a. The MSA requires the Tax Commissioner to diligently enforce the statutes implementing the MSA, including those involving the List and the NPM escrow deposits, or face losing a portion of the annual payment from PMs. App. 36a-37a.

Ashland Specialty is neither a PM nor an NPM. Instead, as a wholesaler, it sells both PM and NPM brand cigarettes and reports its sales to West Virginia and other states. App. 72a.

B. A Series of Events Results in Ashland Specialty's Inadvertent Sale of De-Listed Cigarettes.

It is against this complex regulatory backdrop that this case arises. For nearly 30 years, Ashland Specialty, based in Ashland, Kentucky, has sold cigarettes and other convenience store items to customers in Kentucky, Ohio, West Virginia, and other states. App. 6a. Ashland Specialty is a small business with a few dozen employees, generating an annual income of between $200,000 and $300,000. Hr'g Tr. 23:3-4; 41:22-42:22. As a small business in a

[2] In addition to the penalty that may be assessed between 0% and 500% of the retail value of the cigarettes (or $5,000, whichever is greater), the Tax Commissioner may also revoke or suspend a distributor's business registration certificate. As the Tax Commissioner admitted, however, he never considers those penalties. App. 76a-77a.

regional market, Ashland Specialty strives to comply with the laws of each state in which it does business. One such compliance obligation is to monitor the List and the approved cigarette brands for sale, not just in West Virginia, but in every state where Ashland Specialty operates.

Though Ashland Specialty sells millions of cigarettes each year without incident, a series of events resulted in Ashland Specialty inadvertently selling a relatively small number of de-Listed cigarettes in West Virginia in mid-2009.[3]

During this time period, the Tax Commissioner communicated List updates via e-mail; tobacco distributors could provide an e-mail address and

---

[3] Prior to 2009, Ashland Specialty developed its system for managing List compliance. As it worked to eliminate opportunities for human error, Ashland Specialty inadvertently committed two minor violations during 2001 to 2003 and again from 2005 to 2008 – both due to inventory keying errors – selling 56 cartons and 62 cartons that were not on the List in those respective time frames. App. 6a. Ashland Specialty took steps to ensure the keying errors would not occur again and paid a civil penalty assessed by the Tax Commissioner pursuant to W. Va. Code § 16-9D-8(a). App. 6a. Of the possible penalties available under that statute, the Tax Commissioner ***automatically*** applied the percentage penalty on the retail value of the cigarettes, ***and*** assessed it at the maximum 500% rate. App. 42a. Thus, despite the minor nature of the violations, Ashland paid penalties of $3,808 and $5,127, amounting to 500% of the retail value of the cartons sold. App. 42a. Ashland Specialty eliminated the cause of the keying errors and has not sold de-Listed cigarettes as a result of a keying error since then. Hr'g Tr. 27:20-28:18

receive notification of periodic changes to the approved brands. Hr'g Tr. 39:1-4. Ashland Specialty's system for List compliance involved adding its operations manager to the Tax Commissioner's listserv and having that employee monitor the List to remove from circulation cigarette brands that had been, for whatever reason, de-Listed. Hr'g Tr. 28:7-9. The system worked, with the manager promptly removing a cigarette brand from Ashland Specialty's shelves when he received an e-mail update from the Tax Commissioner.

In late 2008, however, Ashland Specialty experienced several "management/staffing issues." *Id*. at 73a. The long-time manager tasked with overseeing the List and ensuring Ashland Specialty's compliance was fired for theft, leaving the company in a lurch. Hr'g Tr. 24:16-25:19. Ashland Specialty hired a new employee to replace the manager but, almost immediately thereafter, he resigned unexpectedly due to family issues. Hr'g Tr. 25:10-15. In the tumult resulting from the firing, hiring, and quick, unexpected resignation, Ashland Specialty inadvertently failed to add its new compliance employee to the Commissioner's e-mail notification listserv for List brand additions and removals. Hr'g Tr. 27:6-28:18; 40:15-21

With no in-house employee receiving e-mails from the Tax Commissioner, Ashland Specialty was unaware that, as of May 2009, GP and GP Galaxy Pro cigarettes had been taken off the List in West Virginia, though they remained an authorized brand in other states. As a result, in June through August 2009, Ashland Specialty inadvertently continued to

sell GP and GP Galaxy Pro cigarettes into West Virginia. App. 3a.

Ashland Specialty reported these sales to the Tax Commissioner, evincing the completely unintentional and non-willful nature of its mistake. Hr'g Tr. 26:14-16. Despite receiving reports that de-Listed cigarettes were being sold into the state, the Tax Commissioner never contacted Ashland Specialty to inquire about, question, or demand it cease such activity. Hr'g Tr. 26:17-27:5. Instead, by mid-September 2009, Ashland Specialty discovered this error on its own, immediately ceased sales of GP/Galaxy Pro in West Virginia, and took steps to prevent future off-List sales. Hr'g Tr. 27:6-19; 27:20-28:18 By January 2010, West Virginia had placed GP and GP Galaxy Pro cigarettes back on the List.[4]

C. Ignoring the Events that Resulted in the Sales, the Tax Commissioner Punished Ashland Specialty with an *Automatic* 500% Penalty.

Though Ashland Specialty timely reported all of the involved sales, the Tax Commissioner never attempted to halt the off-List sales into West Virginia by alerting Ashland Specialty of its mistake. Instead, it was not until August 2012 that the Tax Commissioner audited Ashland Specialty and chose

---

[4] *See* West Virginia Director of Cigarette Brands Approved for Stamping and Sale in West Virginia, Non-participating Manufacturer Directory, available at https://tax.wv.gov/Business/ExciseTax/TobaccoTax/Directory/Pages/TobaccoDirectory.aspx.

to heavily penalize it at that time for the inadvertent sales that had occurred years prior. App. 73a.

Despite the non-willful nature of the infractions, Ashland Specialty's discovery and self-correction of the issue, and its ownership of it by reporting all the sales to the Tax Commissioner, the Tax Commissioner ***automatically*** assessed Ashland the maximum[5] 500% penalty of the cigarettes' retail value in the amount of $159,396, ignoring all mitigating factors. App. 76a-77a.

The amount of the penalty was staggering, more so for a small, local business like Ashland Specialty. The $159,396 is between approximately 53% and 80% of Ashland Specialty's annual $200,000-$300,000 income. The penalty is even more extreme when compared to the circumstances surrounding the involved sales. For Ashland Specialty's sale of de-Listed cigarettes between June and September 2009, the Tax Commissioner assessed a civil monetary penalty that is:

- ***64 times the profit*** Ashland Specialty made on the sales at issue[6]

---

[5] "Maximum" here refers to the 0-500% penalty only, not the other penalties that may have been available to the Tax Commissioner under W. Va. Code § 16-9D-8(a). The Tax Commissioner admittedly did not consider such penalties, and never does. App. 76a-77a.

[6] Ashland Specialty made a profit of just $2,491 on the sale of the de-Listed cigarettes. Hr'g Tr. 8:7-8.

- ***35 times*** the manufacturer's escrow deposit on the involved cigarettes[7]

- ***5 times*** the equivalent of an in rem seizure of the involved property

Beyond the sheer mathematics of the civil penalty, additionally frustrating was the Tax Commissioner's representative's admission at the hearing below that the *same penalty is always assessed regardless of circumstances.* Testifying that he has "no leeway" when it comes to whether to assess a particular penalty available under W. Va. Code § 16-9D-(8), he admitted, "***Our audit program is locked in at 500 percent***."[8] App. 77a. In other words, the Tax

---

[7] One reason the Tax Commissioner is required to "diligently enforce" the MSA is to protect the escrow payments tobacco manufacturers make to each state; one reason a brand may be removed from the List is for noncompliance with the escrow deposit. Per W. Va. Code § 16-9B-3(b)(1)(E), the manufacturer's escrow deposit is $0.0188482 per cigarette. Here, there was no evidence that this amount was not paid, *i.e.*, there was no evidence in the record of any harm done as a result of Ashland Specialty's sales of de-Listed cigarettes. Indeed, the involved brand was put back on the List in January 2010. So, the penalty is particularly extreme even in the face of *hypothetical* harm, *e.g.*, missed financial obligations to the State.

[8] The concurring Justices of the Supreme Court of Appeals of West Virginia took umbrage with this behavior as well. In his concurrence, which Justice Davis joined, Justice Ketchum wrote, "When a bureaucrat's reason for doing something is 'because we've always done it that way,' then discretion has gone by the wayside. If the Tax Commissioner's reason for never imposing anything less than a 500% penalty is 'because we've always done it that way,' then the same reasoning prohibits the imposition of anything greater than 500% as well. Even though West Virginia

Commissioner ***always automatically*** applies the 500% penalty and does not consider any of the other available penalties, regardless of circumstance, severity of the infraction, or – as here – any mitigating factors. App. 77a.

So, per the Tax Commissioner's admission, the same penalty would apply whether the cigarettes were sold to West Virginia customers by a criminal who smuggled contraband cigarettes into the State or by Ashland Specialty, which inadvertently sold them, reported the sales to the Tax Commissioner, and corrected its own mistake.

D. The West Virginia Office of Tax Appeals Slightly Reduces the Penalty Without Reference to the Excessive Fines Clause, But the Kanawha Circuit Court Reinstates It.

Ashland Specialty timely appealed the assessment to the West Virginia Office of Tax Appeals ("OTA"), arguing that the Tax Commissioner had acted arbitrarily by failing to exercise discretion, and unconstitutionally in violation of the Excessive Fines Clauses of the United States and West Virginia Constitutions. App. 72a. The OTA issued its Final

---

Code § 16-9D-8(a) authorizes a penalty of $5,000 per violation, the Tax Commissioner theoretically could not impose that penalty because it's never been done that way before, and consequently, because such a high penalty might appear random, capricious, and vindictive." App. 28a. In the concurring Justices' view, the 500% penalty may as well have been the only one available, given the Tax Commissioner's utter failure to exercise discretion.

Decision on August 18, 2014, finding that the Tax Commissioner abused his discretion by automatically assessing the penalty at the maximum 500% rate. App. 76a. The OTA modified the penalty from $159,398 to $119,548.50 (a 375% penalty), but it did not reach Ashland Specialty's constitutional claims. App. 82a-83a.

The parties cross-appealed to separate circuit courts, Ashland Specialty in its home circuit court of Cabell County and the Tax Commissioner to the capital's circuit court, Kanawha County. Ashland Specialty's appeal was *sua sponte* transferred to Kanawha County where the cases were consolidated and briefed. App. 8a. The Kanawha Circuit Court issued an Order on April 11, 2017 overturning the OTA's decision and reinstating the 500% penalty. App. 64a. The Court also held that the penalty did not violate the Excessive Fines Clauses of the United States and West Virginia Constitutions. App. 54a.

E. The Supreme Court of Appeals of West Virginia Holds the Penalty is Not Grossly Disproportionate to the Offense Under the Eighth Amendment, Applying *Dean v. State*, a West Virginia Case Construing *Bajakajian*.

Ashland Specialty timely appealed to the Supreme Court of Appeals of West Virginia (hereinafter, "West Virginia court"), which, after April 11, 2018 oral argument, issued its opinion on May 1, 2018 affirming the Kanawha Circuit Court. App. 3a.

In addition to holding that the Tax Commissioner did not abuse his discretion in automatically applying the maximum 500% penalty, the West Virginia court purported to evaluate the penalty for excessiveness under the Eighth Amendment. App. 20a. In determining that the penalty was, in its view, not grossly disproportionate to the offense, the West Virginia court cited a West Virginia case, *Dean v. State*, 736 S.E.2d 40 (2012), which had created factors for deciding *Bajakajian*'s "grossly disproportionate" test, though the West Virginia court acknowledged both cases addressed a civil forfeiture in a criminal context, not a civil penalty. App. 20a.

As explained by the West Virginia court, *Dean* identified four factors to evaluate whether a penalty was excessive under the Eighth Amendment:

> Factors to be considered in assessing whether the amount of the forfeiture is grossly disproportionate to the gravity of an offense, include: (1) the amount of the forfeiture and its relationship to the authorized penalty; (2) the nature and extent of the ***criminal*** activity; (3) the relationship between the ***crime*** charged and other crimes; and (4) the harm caused by the charged ***crime***.

App. 21a. (emphasis added).

The West Virginia court went on to weigh each factor, which were designed in the context of an *in rem* civil forfeiture for ***criminal*** activity, not a civil monetary penalty imposed for a civil violation. App. 22a.

Accordingly, the court conducted no meaningful or relevant analysis concerning the constitutionality of this civil penalty particularly, as opposed to a forfeiture. In so doing, the West Virginia court ignored the deeply material differences between applying the "grossly disproportionate" standard set out in *Bajakajian* for a civil forfeiture in a criminal context, as *Dean* did, and a civil monetary penalty, such as in *Cooper Industries*.

Applying *Dean's* "grossly disproportionate" factors instead of those appropriate to analysis of a civil penalty, the court ultimately held that a 500% $159,398 penalty was not grossly disproportionate to the offense of selling de-Listed cigarettes at a profit of less than $2,500. App. 24a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS EXISTING CONFLICTS AND CONFUSION AMONG THE STATES AND FEDERAL CIRCUITS ABOUT WHAT FACTORS SHOULD BE USED TO EVALUATE *BAJAKAJIAN*'S "GROSS DISPROPORTIONALITY" STANDARD.

In *United States v. Bajakajian*, this Court was faced with whether a 100% forfeiture of currency was excessive under the Eighth Amendment. The defendant in that case pled guilty to failure to report currency he was taking out of the country, and was required to turn over all of it to the government. The question was novel; as the Court noted, before *Bajakajian*, it "had little occasion to interpret, and

ha[d] never actually applied, the Excessive Fines Clause." 524 U.S. at 327.

A. *Bajakajian* Develops the "Grossly Disproportionate" Standard But Stops Short of Delineating Factors for Evaluating Excessiveness.

After holding the forfeiture at issue was a "fine" that would come under the purview of the Excessive Fines Clause, the Court created the "grossly disproportionate" standard for determining whether a civil forfeiture is unconstitutionally excessive: "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." 524 U.S. at 334. In other words, more severe infractions should be punished more heavily than minor infractions.

First noting that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature,"[9] the Court also cautioned, "any judicial determination regarding the gravity of a particular…offense will be inherently imprecise." *Id*. at 336. The Court thus concluded, "[b]oth of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense, and

[9] Of course, legislative action is subject to judicial review, as is executive action that results from an empowering statute. *See Solem v. Helm*, 463 U.S. 277, 290 (1983) ("[N]o penalty is *per se* constitutional.")

we therefore adopt the **standard of gross disproportionality** articulated in our Cruel and Unusual Punishments Clause precedents." *Id.* (emphasis added).

The Court then engaged in a largely case-specific inquiry to hold that the 100% forfeiture of currency at issue (far less onerous than the 500% penalty at issue here) was grossly disproportionate to the respondent's offense. The Court focused on a number of facts: the nature of the crime was "solely a reporting offense"; the "violation was unrelated to any other illegal activities"; "respondent [did] not fit into the class of persons for whom the statute was principally designed" and was "not a money launderer, a drug trafficker, or a tax evader"; and, under the Sentencing guidelines, respondent would have received at most six months in prison. *Id*. at 337-38.

The Court also concluded that "[t]he harm respondent caused was also minimal" and affected only the government, so it was "impossible to conclude…that the harm respondent caused is anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking $12,000 out of the country in order to purchase drugs." These facts led the Court to hold the 100% forfeiture grossly disproportionate to the offense, and thus unconstitutional.

But the Court stopped short of identifying specific factors lower courts should consider in evaluating gross proportionality. *See United States v. Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003) ("*Bajakajian* does not mandate the consideration of any rigid set of

factors in deciding whether a punitive fine is "grossly disproportional to the gravity of a defendant's offense."). Instead, in the two decades since the Court decided *Bajakajian*, lower courts have derived myriad factors to determine whether civil penalties, *in rem* forfeitures, and civil fines are grossly disproportionate to the underlying offense. As a result, there is no national uniform standard to conduct these inquiries.

In evaluating the civil monetary penalty at issue here, the West Virginia court applied *Dean,* which purported to apply factors distilled from *Bajakajian*, but cited no fewer than ten federal cases articulating different standards ostensibly derived from *Bajakajian*. Ashland Specialty's case thus illustrates the need for Supreme Court intervention to articulate consistent and workable standards.

B. Lower Courts Apply *Bajakajian* in Penalty, Forfeiture, and Sentencing Cases – But None Apply It in the Same Way.

The current Excessive Fines landscape is rife with confusion, misapplication, and cross-pollination from case law on varying types of penalties and criminal sentencing, and this case is no exception to the rule. *Bajakajian's* "grossly disproportionate test" is applied in all manner of ways, imbued with each court's view of the factors for determining gross disproportion. Courts may develop those standards in an *in rem* forfeiture case resulting from a criminal trial, and later apply them in a civil monetary penalty case, without giving thought to whether the same factors should apply (or apply in the same way) in such

disparate contexts (as the West Virginia court did here). Some courts believe the entire matter is best left to the legislature and dispense with the question altogether. *See Newell Recycling Co. v. U.S. E.P.A.*, 23 F.3d 204, 210 (5th Cir. 2000) ("[N]o matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment."). This approach effectively leaves citizens without any recourse under the Eighth Amendment, as it moots any as-applied challenge.

This Court should articulate what factors must be considered in weighing gross disproportionality in a civil monetary penalty case to clear up the confusion below. The Court need only look at the prevailing views in each State and Federal Circuit to note the stark differences that have emerged in the 20 years since *Bajakajian* was decided.

1. The States Are Split in Their Application of *Bajakajian*'s "Grossly Disproportionate" Standard.

The states vary widely in their reading of *Bajakajian* and the factors used to evaluate excessiveness, as the following holdings reflect:

West Virginia (Fourth Circuit):[10]

> Factors to be considered in assessing whether the amount of the forfeiture is grossly disproportionate to the gravity of an offense, include: (1) the amount of the forfeiture and its relationship to the authorized penalty; (2) the nature and extent of the criminal activity; (3) the relationship between the crime charged and other crimes; and (4) the harm caused by the charged crime."

Dean, 736 S.E.2d at 50. *Dean* was applied in this case by the West Virginia court.

Massachusetts (First Circuit):

> To gauge the degree of Maher's culpability, we look to, among other things, the nature and circumstances of his offenses, *e.g.*, whether there was a relationship between the crimes that triggered the forfeiture and any other illegal activities, as well as to the maximum penalties authorized by the Legislature as punishment for his offenses.

---

[10] As states often look to their federal circuit in developing the criteria for a "grossly disproportionate" penalty, a state from each circuit is included as an example of the disparate holdings. However, states within the same circuit often also vary their criteria as well. *See, e.g.*, *Vanderbilt Mortg. & Fin. v. Cole*, 740 S.E.2d 562 (W. Va. 2013) *contra Dean*, 736 S.E.2d at 50.

Maher v. Ret. Bd. of Quincy, 895 N.E.2d 1284, 1291(Mass. 2008).

New York (Second Circuit):

> In determining gross disproportionality, we consider such factors as the seriousness of the offense, the severity of the harm caused and of the potential harm had the defendant not been caught, the relative value of the forfeited property and the maximum punishment to which defendant could have been subject for the crimes charged, and the economic circumstances of the defendant.

County of Nassau v. Canavan, 802 N.E.2d 616, 622 (N.Y. 2003).

Pennsylvania (Third Circuit): Reviews three factors, "which [are] limited to the conduct of the defendant: the penalty imposed as compared to the maximum penalty available; whether the violation was isolated or part of a pattern of misbehavior; and, the harm resulting from the crime charged." *Commonwealth v. 5444 Spruce Street,* 832 A.2d 396, 402 (Pa. 2003).

Texas (Fifth Circuit):

> In determining whether the forfeiture of the entire sum was 'excessive' or 'grossly disproportional,' the Court examined the nature of the offense (essentially, a reporting violation), the relationship of

> the offense to other illegal activities (none), the class of offenders addressed by the forfeiture (Respondents did not fit the class), and the harm caused (little or none).

One Car, 1996 Dodge X-Cab Truck White in Color 5YC-T17 v. State, 122 S.W.3d 422, 425 (Tex. Ct. App. 2003).

Kentucky (Sixth Circuit): Evaluates "the gravity of the offense, the potential penalties, the actual sentence, sentences imposed for similar crimes in this and other jurisdictions, and the effect of the forfeiture on innocent third parties." *Hinkle v. Commonwealth*, 104 S.W.3d 778, 782 (Ky. Ct. App. 2002), *discretionary review denied*, Jun. 4, 2003.

Illinois (Seventh Circuit):

> We also adopted a three-part test from the federal courts. That test required courts to weigh (1) the gravity of the offense against the harshness of the penalty, (2) how integral the property was in the commission of the offense, and (3) whether the criminal conduct 'involving the defendant property was extensive in terms of time and/or spatial use.'

People ex rel. Hatrich v. 2010 Harley-Davidson, 104 N.E.3d 1179, 1184 (Ill. 2018) (citations omitted).

Minnesota (Eighth Circuit): Holding that the inquiry did not end with *Bajakajian*, the court

adopted the three-part test from *Solem,* 463 U.S. at 290:

> (1) comparison of the gravity of the offense with the harshness of the penalty; (2) comparison of the contested fine with fines imposed for the commission of other offenses in the same jurisdiction; and (3) comparison of the contested fine with fines imposed for commission of the same offense in other jurisdictions.

Wilson v. Comm'r of Revenue, 656 N.W.2d 547, 555 (Minn. 2003).

California (Ninth Circuit): Looks to "four considerations: (1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." *Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 421 (Cal. 2005) (citation omitted).

Utah (Tenth Circuit): Takes a deep dive into each *Bajakajian* factor:

> "In short, a court must look at four main factors: (1) the gravity of the particular offense; (2) the harshness of the forfeiture; (3) the sentences imposed on other criminals in the same jurisdiction; and (4) the sentences imposed for commission of the same crime in other jurisdictions. In gauging the gravity of the offense (factor (1) above), a court

> should take into consideration: (a) the harm caused by the illegal activity, including (i) (in the drug trafficking context) the amount of drugs and their value, (ii) the duration of the illegal activity, and (iii) the effect on the community; and (b) the actual sentence the defendant received as a result of the offense compared to the maximum punishments authorized. In judging the harshness of the forfeiture (factor (2) above), a court should look at: (a) the fair market value of the property; (b) the intangible, subjective value of the property, e.g., whether it is the family home; and (c) the hardship to the defendant, including the effect of the forfeiture on defendant's family or financial condition.

State v. 633 East 640 North, 994 P.2d 1254, 1259-1260 (Utah 2000).

Georgia (Eleventh Circuit): Separates the test of gross disproportionality from two other standards: the relationship between the property and the crime, and the culpability of the defendant:

> We…frame our excessiveness inquiry in terms of the following considerations: (1) the harshness, or gross disproportionality, of the forfeiture in comparison to the gravity of the offense, giving due regard to (a) the offense committed and its relation to other

> criminal activity, (b) whether the claimant falls within the class of persons for whom the statute was designed, (c) the punishments available, and (d) the harm caused by the claimant's conduct; (2) the nexus between the property and the criminal offenses, including the deliberate nature of the use and the temporal and spatial extent of the use; and (3) the culpability of each claimant.

Howell v. State, 656 S.E. 2d 511, 512 (Ga. 2008).

2. The Federal Circuits Are Likewise Split in Their Application of *Bajakajian*'s "Grossly Disproportionate" Standard.

The Federal Circuit courts are similarly fractured:

First Circuit:

> "The case law invites us to consider as pertinent factors (1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant."

United States v. Heldeman, 402 F.3d 220, 223 (1st Cir. 2005).

Second Circuit: Defines the "*Bajakajian* factors" as:

> (1) the essence of the crime of the defendant and its relation to other criminal activity, (2) whether the defendant fits into the class of persons for whom the statute was principally designed, (3) the maximum sentence and fine that could have been imposed, and (4) the nature of the harm caused by the defendant's conduct.

United States v. Viloski, 814 F.3d 104, 110 (2d Cir. 2016) (internal quotation and citation omitted). In that case, the court added yet another factor: whether the penalty would deprive the defendant of his or her livelihood.

Third Circuit: *United States v. Young*, 618 Fed. Appx. 96, 97 (3d Cir. 2015) ("In assessing the proportionality of a fine, we consider (1) the nature of the offense or offenses; (2) whether the defendant falls into the class of persons for whom the statute was designed—*e.g.*, money launderers, drug dealers, or tax evaders; (3) the maximum fine authorized by statute and the sentencing guidelines which are associated with the offense or offenses; and (4) the harm caused by the defendant's conduct.")

Fourth Circuit: *United States v. Jalaram, Inc.*, 599 F.3d 347, 355-56 (4th Cir. 2010) distilled the *Bajakajian* factors as:

> (1) the amount of the forfeiture and its relationship to the authorized penalty (a $357,144 forfeiture for a crime subject to

> a $5000 maximum fine); (2) the nature and extent of the criminal activity (a single reporting offense); (3) the relationship between the crime charged and other crimes (none); and (4) the harm caused by the charged crime (again none).

Fifth Circuit: Imposing perhaps the most stringent of standards, holding, "No matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment." *Newell Recycling* 231 F.3d at 210. Under this holding, so long as the legislature passed a statute authorizing a civil penalty, administrative agency action evades Eighth Amendment review by the judiciary.

Sixth Circuit:

> Relevant factors to consider include the nature of the offense and its relation to other criminal activity, the potential fine under the advisory Guidelines range, the maximum sentence and fine that could have been imposed, and the harm caused by the defendant's conduct.

United States v. Zakharia, 418 Fed. Appx. 414, 422 (6th Cir. 2011) (citations omitted).

Seventh Circuit:

> The Supreme Court considered four factors when determining whether the

> forfeiture was excessive: (1) the essence of the crime and its relation to other criminal activity; (2) whether the defendant fit into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the defendant's conduct.").

United States. v. Malewicka, 664 F.3d 1099, 1104 (7th Cir. 2011). However, like the Fifth Circuit, the Seventh Circuit frequently defers to the legislature. *See, e.g.*, *Kelly v. United States E.P.A.*, 203 F.3d 519 (7th Cir. 2000) ("But we can't say the fine is grossly disproportionate to the gravity of the offense when Congress has made a judgment about the appropriate punishment.").

Eighth Circuit:

> Proportionality is determined by a variety of factors, including the reprehensibility of the defendant's conduct; the relationship between the penalty and the harm to the victim; and the sanctions in other cases for comparable misconduct. Legislative intent is also relevant, as is the defendant's ability to pay.

United States v. Aleff, 772 F.3d 508, 512 (8th Cir. 2014) (internal citations omitted).

Ninth Circuit:

> (While we are not restricted to 'any rigid set of factors,' we have typically 'considered four factors in weighing the gravity of the defendant's offense: (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused.'

United States v. $132,245.00 in U.S. Currency, 764 F.3d 1055, 1058 (9th Cir. 2014) (internal citations omitted).

Tenth Circuit:

> "…proportionality should be assessed by considering the nature of the offense, the relationship of the offense to other illegal activity, whether the property constitutes proceeds of illegal activity, the harm caused by the illegal activity, the value and function of the defendant property, the culpability of the claimant, the benefit reaped by the claimant, and the maximum sanction authorized by Congress for the offense."

United States v. Lot Numbered One (1) of Lavaland Annex, 256 F.3d 949, 958 (10th Cir. 2001).

Eleventh Circuit: *United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009) (internal citations

omitted) ("…[W]e principally look at three factors: "(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant." We do not take into account the impact the fine would have on an individual defendant. In addition, "if the value of forfeited property is within the range of fines prescribed by Congress, a strong presumption arises that the forfeiture is constitutional.").

As these examples show, the law on how to determine "gross disproportionality" is far from settled. There is currently no uniform or coherent standard, with no indication why, for example, a defendant's financial circumstances are taken into account in one jurisdiction but not another. The result is confusion and inequity.

II. THIS COURT SHOULD SETTLE THE QUESTION OF WHAT FACTORS SHOULD BE CONSIDERED IN EVALUATING GROSS DISPROPORTIONALITY AND APPLY THEM TO WEST VIRGINIA'S PENALTY.

Given the disparate factors considered by each state and circuit, this Court should take the opportunity to affirmatively adopt factors for evaluating the constitutionality of civil monetary penalties under the gross proportionality test to provide clarity and conformity for future Eighth Amendment cases.

A. *Cooper Industries* Provides an Appropriate Test For State-Imposed Civil Monetary Penalties Consistent With *Bajakajian*.

Though the Court may certainly exercise its wisdom to do so, there is no need to create from whole cloth factors for evaluating a civil monetary penalty's excessiveness. In fact, this Court has previously articulated a workable standard for evaluating whether a penalty is grossly disproportionate to the gravity of the offense under the Excessive Fines clause, pulling from both *Bajakajian* and another case, *BMW of North American v. Gore*, 517 U.S. 559 (1995). In *Cooper Industries*, this Court addressed factors to be considered when evaluating whether a punitive damage award is unconstitutional, explaining:

> The relevant constitutional line is inherently imprecise…but, in deciding whether that line has been crossed, this Court has focused on the same three criteria: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct.

532 U.S. at 425 (internal citations omitted). The Court also noted that "in each case the Court has engaged in an independent examination of the

relevant criteria" – that is, it would conduct a *de novo* review. *Id.*

Unlike *Bajakajian*, both *BMW* and *Cooper Industries* involved punitive damage awards, much more analogous to civil fines than the ***criminal*** *in rem* forfeiture at issue in *Bajakajian*. In contrast to the West Virginia court's application of *Bajakajian* and *Dean*, the factors specifically address civil punishments in addition to criminal ones; the *Bajakajian* factors articulated by *Dean* involved evaluating "the nature and extent of the criminal activity" as well as "the relationship between the crime charged and other crimes," both of which assume criminal conduct, unlike the wholly civil matter here. Logically, the factors should not be the same.

Behavior punishable by a fine exists on a spectrum ranging from inadvertent civil noncompliance (like this case) to criminal behavior punishable by a life sentence or the death penalty. In the middle, ranging from least to most severe, are, among other things, civil negligence, civil fraud, criminal negligence or fraud, and criminally violent behavior punishable by sentences less than death or a lifetime in prison. In the case below, the Tax Commissioner admitted that the same penalty would have been assessed whether the taxpayer inadvertently failed to comply with the law or whether the taxpayer committed a severe criminal act. If the gross disproportionality factors applied to both lead to the same result, their effectiveness must be called into question.

This Court should clearly delineate the test for whether a civil monetary penalty is grossly disproportionate to the gravity of the offense. The tests laid out in *Cooper Industries* are clear and workable, and have been applied in countless cases. *See, e.g., State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 99 F.3d 224 (3d Cir. 2005); *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002). It would be wholly appropriate to adopt them for civil monetary penalties.

B. Under the *Cooper Industries* Test, the 500% Penalty Imposed on Ashland Specialty is Grossly Disproportionate to Its Inadvertent Offense.

When viewed in light of the standards this Court has applied in evaluating other civil monetary fines, as opposed to *in rem* forfeitures for criminal activity, the patently excessive civil penalty imposed on Ashland Specialty cannot pass constitutional muster.

The first of the *Cooper Industries* factors is "the degree of the defendant's reprehensibility or culpability," 532 U.S. at 435, which is evaluated under a variety of criteria, including:

> whether…the…conduct evinced an indifference to or a reckless disregard of the health or safety of others…the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or mere accident.

State Farm, 58 U.S. at 419. This suggests a continuum of behavior against which a person's actions must be evaluated. Inadvertent civil noncompliance should be punished less severely than intentionally fraudulent acts, which in turn are less severe than violent crimes.

Ashland Specialty's conduct here is on the low end of *Cooper Industries'* reprehensibility spectrum. Ashland Specialty's actions were by all accounts a mistake and were even self-reported to the Tax Commissioner. There is no evidence in the record of any harm to the "health and safety" of others. Nor was Ashland Specialty acting with an intent to defraud or deceive – again, all sales of the involved cigarette sales were self-reported. Though there were prior incidents, those were extremely minor and caused by completely different circumstances, and Ashland Specialty fixed the issue so that the same error would not occur again. And, though multiple sales were involved here, the instant violation was essentially one unitary violation during a discrete and relatively short period of time. The sales were unintentionally made and contemporaneously reported. Ashland Specialty's behavior was far from reprehensible, particularly considering that this statute (and the Tax Commissioner) punish criminals exactly the same way.

The second *Cooper Industries* factor is the "relationship between the penalty and the harm caused by the defendant's actions." *Cooper Indus.,* 532 U.S. at 435. This has been described as a ratio between the penalty and the actual harm suffered by the victim. *See BMW*, 517 U.S. at 581. There is zero

evidence in the record of any harm caused by Ashland Specialty's actions. Any "threatened public harm" resulting from Ashland Specialty's actions is *purely hypothetical*. But even in the face of the hypothetical harm, which in this case would be the manufacturer's escrow payment of $4,610.27, the ratio of penalty to harm is ***35 to 1***. The penalty, therefore, far exceeds a rational relationship between any harm that could have resulted in this case.

The third *Cooper Industries* factor requires an evaluation of "sanctions imposed in other cases for comparable misconduct." *Cooper Indus.,* 532 U.S. at 435. Courts evaluating this factor compare the penalty assessed with those imposed for similar misconduct. For example, in *BMW*, this Court compared a $2 million sanction for the defendant's failure to advise customers of minor pre-delivery repairs to new automobiles with the maximum available penalty of $2,000 for a violation of Alabama's Deceptive Trade Practices Act, as well as penalties ranging from $5,000 to $10,000 for similar conduct in other states. 517 U.S. at 582-84.

Here, several states have chosen not to wield this statute in the draconian fashion that West Virginia has. In *State ex. rel. Wasden v. Native Wholesale Supply Co.*, 312 P.3d 1257 (Idaho 2013), the Idaho Supreme Court upheld a civil penalty of $214,200 for a cigarette wholesaler's *willful* importation and sale of *100 million cigarettes* that did not comply with the MSA. In *State ex. rel. Pruitt v. Native Wholesale Supply Co.*, 338 P.3d 613 (Okla. 2014), the Oklahoma Supreme Court upheld an order compelling a tobacco

wholesaler to disgorge only the gross receipts from willfully selling MSA non-compliant cigarettes.

West Virginia has instead elected to automatically impose a penalty that is ***64 times*** the profit, ***35 times*** the manufacturer's escrow payment, and the equivalent of a civil forfeiture ***five times*** over. This is yet another indication that the penalty here is excessive and disproportionate to the offense. *See Solem*, 463 U.S. at 291 ("If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive.").

All three *Cooper Industries* factors strongly indicate that the civil penalty imposed here is unconstitutionally excessive. Although under *Bajakajian*, 524 U.S. at 336, "judgments about the appropriate punishment for an offense belong in the first instance to the legislature," that cannot end the analysis, as "no penalty is *per se* constitutional" under the Excessive Fines Clause. *Solem*, 436 U.S. at 290. And that holds even truer here, where the legislative range of civil penalties was utterly ignored, in lieu of the automatic imposition – without the exercise of any administrative discretion – of the maximum possible percentage penalty.

Just as this Court held in *Bajakajian* that a penalty constituting a *100%* forfeiture violates the Excessive Fines Clause, so here West Virginia's discretion-less imposition of the maximum possible percentage penalty at *500%* violates the Constitution. The penalty upheld here is far more severe than that in *Bajakajian* and is unconstitutional. The *Cooper*

Industries factors further serve to amplify that conclusion.

III. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE THAT MERITS REVIEW BY THIS COURT.

In many ways, the Eighth Amendment has never been more important. As the above cases illustrate, it is currently applied in a wide variety of ways, with some courts granting complete deference to legislatures, abdicating any Eight Amendment review. This frustrates the right to judicial review of a legislative enactment as applied and effectively deprives citizens of their Eighth Amendment rights altogether. This case illustrates the result of such confusion, and the circumstances cry out for confirmation from this Court of the Excessive Fines Clause's strength, with a clear delineation of what factors apply to evaluate a civil penalty for gross disproportionality.

A. The Excessive Fines Clause is a Critical Limitation on the State's Power to Punish, and Clear Guidance From This Court is Required to Enforce Its Boundaries and Protect the Citizenry.

The Eighth Amendment's clear purpose is "limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267 (1989). "[T]he Eighth Amendment places limits on the steps a government may take against an individual,

whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments." *Id*. at 275. A key purpose of the Eighth Amendment was to prohibit the State from "extract[ing] large payments or forfeitures for the purpose of raising revenue or disabling some individual." *Id*.

And yet, in the decades since *Bajakajian* was decided (and in the centuries since the Star Chamber abuses prompted the Founding Fathers to enshrine protections against excessive punishment in the Bill of Rights), the State's power to punish has grown exponentially. Small towns to the nation's largest cities rely on fines from parking tickets to raise revenue.[11]

Executive branch agencies have more power than ever to exact financially crippling civil fines. In 2017, the Internal Revenue Service ("IRS") assessed $26.5 billion in civil penalties.[12] Penalties are becoming increasingly severe. For example, if a person fails to report the mere existence of a foreign bank account to

---

[11] *See* Sewell Chan, *Parking Tickets a Growing Source of City Revenue*, N.Y. TIMES, Nov. 28, 2008, https://cityroom.blogs.nytimes.com/2008/11/28/parking-tickets-a-growing-source-of-city-revenue/; Jeff Mays, *New York City Collects Record $1.9 Billion in Fines and Fees*, DNAINFO, Mar. 24, 2016 https://www.dnainfo.com/new-york/20160324/civic-center/new-york-city-collects-record-19-billion-fines-fees/.

[12] *See* Internal Revenue Service, Enforcement: *Collections, Penalties & Criminal Investigation*, https://www.irs.gov/statistics/enforcement-collections-penalties-criminal-investigation (last visited Feb. 6.

the IRS, he or she could be required to forfeit over 50% of the balance of the account. 31 U.S.C. § 5321.

Despite this expansion of power, many courts have seen fit to leave decision-making wholly up to the legislature. *See Newell Recycling*, 23 F.3d at 210. This deprives those subject to such fines of any judicial review, a remedy necessary to effectuate the balance of power the Founders intended.

Given how far the pendulum has swung in favor of state power, this Court should decide whether leaving these questions solely in the hands of the legislature is appropriate. Reviewing penalties like these is the only way to protect citizens from government overreach and to give meaningful effect to their Eighth Amendment rights.

B. This Case Provides an Excellent Opportunity to Address the Question Presented.

This particular case provides a ready vehicle for this Court to address the question presented, given that the facts are not in dispute, and the pertinent holding below was based on the Excessive Fines Clause and *Bajakajian* as analyzed by the West Virginia court in a prior case.

In its application of *Bajakajian* through *Dean*, the case is a perfect example of how *Bajakajian* has morphed into disparate distillations of the factors a court ought to consider in evaluating whether a particular penalty is excessive. In developing its version of the *Bajakajian* factors, *Dean* cobbled its factors together from no less than ten other courts'

interpretations of Bajakajian. This Court should take this opportunity to once and for all provide workable, cogent standards, to protect citizens' Eighth Amendment rights.

The case also presents a factual scenario that involves both mitigating and aggravating factors which could affect whether the penalty is excessive. The Court should not wait to find a wholly blameless appellant because by its very nature, an Eighth Amendment case must involve some level of wrongdoing. The question is what level of wrongdoing can justify a heavy penalty.

Everyone makes mistakes and should be punished accordingly; people receive parking tickets, speeding tickets, and other relatively small fines every day. Taxpayers make errors on their tax returns and are penalized. These fines often increase with the severity of the infraction. The faster a driver was going over the speed limit, the higher the fine. While a first time infraction for failure to file a tax return may be waived by the IRS, the next infraction will result in a penalty applied at a percentage of the unpaid tax, ranging from 5 percent to 25 percent, depending on how long it takes the taxpayer to file. Criminals, on the other hand, may face forfeiting the entirety of the proceeds from their criminal enterprise. How, then, should courts decide which of the myriad fines and penalties assessed every day are grossly disproportionate to the underlying infraction?

This case enables the Court to develop clear tests in the context in which Eighth Amendment questions arise – with facts supporting each side's view of

constitutionality. This case provides a backdrop against which the Court can develop factors which lower courts apply broadly and evenhandedly.

Finally, there is no reason for delay in addressing this issue. *Bajakajian* was decided over 20 years ago, and since that time, the powers of the state to punish have exploded. States and the Federal Circuits have had ample time in which to consider and develop factors that could appropriately evaluate penalties under the Eighth Amendment. The Court can now review these tests and crystalize the factors that should apply nationwide. *Cooper Industries* provides an excellent framework.

CONCLUSION

Dissenting in *Bajakajian*, Justice Kennedy wrote that the decision "foreshadow[ed]" "broader upheaval." 524 U.S. at 344. He went on to state, "The Court's holding may in the long run undermine the purpose of the Excessive Fines Clause." *Id*. at 354. In many ways, Justice Kennedy's words were prophetic. Each State and Federal Circuit has its own unique approach to evaluating excessive fines, standards pieced together from civil monetary penalty cases, sentencing cases, and *in rem* forfeiture cases. It is time for this Court to raze this Tower of Babel.

Several justices acknowledged as much during the recent oral argument in *Timbs v. Indiana*, which addressed whether the Eighth Amendment is incorporated against the States. If this Court decides that the right is incorporated, "there are always going to be questions about the scope of the right" that

applies, as Justice Kagan aptly noted. Justice Kagan went on, "And, so far, we have not addressed those questions when we've decided whether to flip the switch of incorporation or not. We've understood those questions to be distinct…and to be questions for another day." Transcript of Oral Argument at 56, *Timbs v. Indiana*, No. 17-1091 (Nov. 28, 2018).

That day has come.

Respectfully submitted,

Mark Allen Loyd, Jr.*
Brent R. Baughman
Bailey Roese
BINGHAM GREENEBAUM DOLL LLP
101 South Fifth Street, Suite 3500
Louisville, KY 40202-3197
(502) 587-3552
mloyd@bgdlegal.com

Attorneys for Petitioner
**Counsel of Record*

February 6, 2019

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, FILED MAY 1, 2018

IN THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA

January 2018 Term

No. 17-0437

ASHLAND SPECIALTY CO. INC.,

Petitioner Below, Petitioner

v.

DALE W. STEAGER, STATE TAX
COMMISSIONER OF WEST VIRGINIA,

Respondent Below, Respondent.

Appeal from the Circuit Court of Kanawha County
The Honorable Carrie L. Webster
Civil Action No. 14-AA-102

AFFIRMED

Submitted: April 11, 2018
Filed: May 1, 2018

JUSTICE WALKER delivered the Opinion of the Court.

JUSTICE DAVIS and JUSTICE KETCHUM dissent in part and concur in part and reserve the right to file separate opinions dissenting in part and concurring in part.

SYLLABUS BY THE COURT

1. "In an administrative appeal from the decision of the West Virginia Office of Tax Appeals, this Court will review the final order of the circuit court pursuant to the standards of review in the State Administrative Procedures Act set forth in *W. Va. Code*, 29A-5-4(g) [1988]. Findings of fact of the administrative law judge will not be set aside or vacated unless clearly wrong, and, although administrative interpretation of State tax provisions will be afforded sound consideration, this Court will review questions of law *de novo*." Syllabus Point 1, *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190, 728 S.E.2d 74 (2012).

2. "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are 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." Syllabus Point 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

3. "A review of a proportionality determination made pursuant to the Excessive Fines Clause of the West Virginia Constitution is de novo." Syllabus Point 8, *Dean v. State*, 230 W. Va. 40, 736 S.E.2d 40 (2012).

Appendix A

WALKER, Justice:

Ashland Specialty Company, Inc. (Ashland) unlawfully sold 12,230 packs of cigarettes in West Virginia in 2009 that were not approved for sale by the Tax Commissioner of the State of West Virginia (Commissioner).[1] Acting pursuant to West Virginia Code § 16-9D-8(a) (2016), the Commissioner penalized Ashland $159,398 for selling those cigarettes unlawfully, a penalty equal to 500% of the cigarettes' retail value. The Office of Tax Appeals (OTA) then ordered that penalty reduced by twenty-five percent. On review, the Circuit Court of Kanawha County reversed the OTA and reimposed the Commissioner's original $159,398 penalty.

Contrary to Ashland's arguments on appeal, we find that the Commissioner's original penalty (1) is not an abuse of the discretion afforded the Commissioner under West Virginia Code § 16-9D-8(a); (2) should not be cancelled or reduced due to circumstances that Ashland argues mitigate their unlawful cigarette sales; and (3) does not violate the Excessive Fines Clause of the West Virginia Constitution or the Eighth Amendment to the United States Constitution. For those reasons, and as discussed more fully below, we affirm the April 11, 2017 order of the Circuit Court of Kanawha County reversing the OTA and reinstating the Tax Commissioner's original $159,398 penalty.

---

1. Mark W. Matkovich was the Tax Commissioner at the commencement of this matter. He was later replaced by Dale W. Steager.

Appendix A

I. FACTUAL AND PROCEDURAL BACKGROUND

Before addressing the facts specific to Ashland's appeal, we first briefly review the statutes implicated by their arguments. These include West Virginia Code §§ 16-9B-1 through 4 (2016) ("Implementing Tobacco Master Settlement Agreement") and §§ 16-9D-1 through 10 (2016) ("Enforcement of Statute Implementing Tobacco Master Settlement Agreement"), related to the Tobacco Master Settlement Agreement (MSA) and subsequent efforts by the Legislature to ensure the MSA and its related requirements are enforced.

A. The MSA.

In 1998, leading tobacco product manufacturers entered into the MSA with the State of West Virginia.[2] In pertinent part, "[t]he master settlement agreement obligates these manufacturers, in return for a release of past, present and certain future claims against them . . . to pay substantial sums to the State (tied in part to their volume of sales) . . . ."[3] The following year, the Legislature enacted Article 9B of Chapter 16. In part, Article 9B requires cigarette manufacturers who are not part of the MSA, but whose cigarettes are sold in West Virginia, to make annual deposits into escrow accounts intended to pay a judgment or settlement resulting from a claim brought against the manufacturer by the State or a West Virginia resident.[4]

---

2. W. Va. Code § 16-9B-1(e) (2016).

3. *Id.*

4. W. Va. Code §§ 16-9B-1(f) and 3(b)(2)(A) (2016).

Appendix A

In 2003, the West Virginia Legislature enacted model legislation to prevent violations and aid enforcement of the obligations imposed by Article 9B of Chapter 16 of the West Virginia Code.[5] This legislation, codified at Article 9D of Chapter 16 of the West Virginia Code, directs the Commissioner to create and maintain a directory of cigarette brands approved for sale in West Virginia.[6] Chapter 16, Article 9D also charges the Commissioner with adding or removing manufacturers from the list as appropriate,[7] but not without first notifying the manufacturer and distributors of the manufacturer's affected brand or brands.[8] However, a manufacturer or distributor's failure to receive notice from the Commissioner of changes to the directory, or even the Commissioner's failure to provide such notice, does not excuse a party from their obligations under Article 9D of Chapter 16 of the West Virginia Code.[9]

---

5. W. Va. Code §§ 16-9D-1 through 10 (2016).

6. W. Va. Code § 16-9D-3(b), which states in full:

> The commissioner shall develop and publish on the Tax Division's website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection (a) of this section and all brand families that are listed in the certifications, except as provided in subdivisions (1) and (2) of this subsection.

7. W. Va. Code § 16-9D-3(b)(3).

8. *Id*. § 16-9D-3(b)(3)(A) and (B).

9. W. Va. Code § 16-9D-3(b)(3)(C).

It is unlawful to sell, offer, or possess for sale in West Virginia a brand of cigarettes that is not included in the Commissioner's list.[10] Pursuant to West Virginia Code § 16-9D-8(a), the Commissioner may impose a wide range of penalties upon a party that sells a brand of cigarettes in West Virginia when that brand does not appear on the Commissioner's list—that is, when the brand is "delisted."

B. Ashland's Violations of § 16-9D-3(c).

Ashland is a Kentucky corporation that distributes cigarettes to convenience stores in West Virginia and other states. It is undisputed that between June and September 2009, Ashland sold 12,210 packs of delisted GP and GP Galaxy Pro brand cigarettes and 20 packs of delisted Berley brand cigarettes in violation of West Virginia Code § 16-9D-3(c). The Commissioner identified these illegal sales during a 2012 audit. In August 2012, pursuant to his authority under § 16-9D-8(a), the Commissioner assessed a $159,398 penalty upon Ashland, a penalty equal to 500% of the retail value of the 12,230 packs of delisted cigarettes.

The Commissioner previously assessed a $3,808 penalty upon Ashland for selling 56 cartons of delisted cigarettes from 2001 to 2003. Ashland had also paid a $5,127 penalty for selling 62 cartons of delisted cigarettes from 2005 to 2008. Like the penalty imposed by the Commissioner in 2012, these penalties equated to 500%

10. *Id.* § 16-9D-3(c)(2). The statute contains two exceptions that do not apply here.

of the retail value of the delisted cigarettes. Ashland did not contest these smaller penalties.

C. Review before the OTA.

Ashland timely petitioned the OTA to review the Commissioner's August 2012 penalty assessment. The administrative law judge (ALJ) conducted an evidentiary hearing in August 2013. Testimony offered at the hearing by a representative of the West Virginia State Tax Department indicated that the Commissioner consistently imposes a 500%-of-retail-value penalty for violations of West Virginia Code § 16-9D-3(c). Specifically, the Commissioner's representative testified:

> Yes. My auditors have no discretion. I mean they have the ability to come to me. I have the ability to go to my director and get anything—to request something less. It's never happened. I mean we—in my recollection, they've all been 500 percent that we've done. And these are rare. There's not many of them. . . .
>
> I've never gone up the food chain for any—. I've never heard a good explanation to go up the food chain. Our audit program is locked in at 500 percent. I mean I don't—. Like I said, these were rare. I don't recall any reason to ask for a reduced rate.

When asked to justify the 500%-of-retail-value penalty imposed by the Commissioner in this case, the

representative explained that Ashland had "two previous audits, that they've been forewarned, and—they're still continuing to do so, I don't really see any need to reduce it. I mean, they've had plenty of warning and they keep making the same error."

In August 2014, the ALJ issued a written order finding the Commissioner's $159,398 penalty to be "erroneous, unlawful, void, or otherwise invalid[.]" The ALJ reasoned that "the Tax Commissioner exercised no discretion at all in issuing the penalty" to Ashland because the evidence demonstrated that the Commissioner invariably assessed the 500%-of-retail-value penalty for the sale of delisted cigarettes. Additionally, the ALJ concluded that the $159,398 penalty was too harsh because "[c]ommon sense tells us that the maximum penalty should be reserved for the worst offenders, for example, a seller who deliberately sells delisted brands or who engages in some criminal activity in connection with cigarette sales." Consequently, the ALJ reduced the penalty by 25% to $119,548.50.

D. Review before the Circuit Court of Kanawha County.

Both the Commissioner and Ashland appealed the OTA's reduction of the Commissioner's original penalty, and briefing on the matter proceeded before the Circuit Court of Kanawha County.[11] On April 11, 2017, the circuit

11. Ashland appealed to the Circuit Court of Cabell County, and the Commissioner appealed to the Circuit Court of Kanawha County. The Circuit Court of Cabell County transferred Ashland's appeal to the Circuit Court of Kanawha County.

court entered an order reversing the order of the OTA and reinstating the Commissioner's original penalty. The circuit court found, among other things, that: (1) the OTA erred in concluding that the Commissioner exercised no judgment, when the $159,398 penalty imposed was not the maximum permitted by West Virginia Code § 16-9D-8(a); (2) the OTA erred in concluding that the Commissioner abused his discretion by imposing the same, proportional penalty on all violators of § 16-9D-3(c); and (3) the $159,398 penalty did not violate the Excessive Fines Clause of the West Virginia Constitution or the Eighth Amendment to the United States Constitution. Ashland now appeals from that order.

II. STANDARD OF REVIEW

Ashland's arguments implicate several standards of review. We set out each below within the analysis of the corresponding assignment of error.

III. ANALYSIS

Ashland attacks the circuit court's order on several fronts. First, it argues that the circuit court erred by reinstating the Commissioner's original $159,398 penalty. Ashland contends that the OTA correctly concluded that the Commissioner's consistent application of a 500%-of-retail-value penalty is, itself, an abuse of discretion, and that by reinstating the Commissioner's original judgment, the circuit court substituted its judgment for that of the OTA. Ashland also argues that the circuit court should have further reduced, or completely forgiven, the reduced

penalty ordered by the OTA due to circumstances that Ashland contends mitigate its violation of West Virginia Code § 16-9D-3(c). Ashland next argues that the Commissioner's original penalty violates the Excessive Fines Clause of the West Virginia Constitution and the Eighth Amendment to the United States Constitution. It also challenges the Circuit Court of Kanawha County as the appropriate venue for the proceedings below. We address each of Ashland's arguments in turn.

A. Reinstatement of the Commissioner's original penalty.

Ashland first argues that the circuit court abused its discretion by reversing the decision of the OTA and reinstating the Commissioner's original $159,398 penalty. In Syllabus Point 1 of *Griffith v. ConAgra Brands, Inc.*,[12] this Court confirmed the standard of review applicable to appeals such as Ashland's:

> In an administrative appeal from the decision of the West Virginia Office of Tax Appeals, this Court will review the final order of the circuit court pursuant to the standards of review in the State Administrative Procedures Act set forth in *W. Va. Code*, 29A-5-4(g) [1988]. Findings of fact of the administrative law judge will not be set aside or vacated unless clearly wrong, and, although administrative interpretation of State tax provisions will be afforded sound

12. 229 W. Va. 190, 728 S.E.2d 74 (2012).

> consideration, this Court will review questions of law *de novo*.[13]

West Virginia Code § 29A-5-4(g) (2015) provides:

> 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 . . .
>
> (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.

"The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational

13. *Id.*

basis."[14] With this standard in mind, we analyze Ashland's argument that the circuit court erroneously reinstated the Commissioner's original $159,398 penalty.

The Tax Commissioner penalized Ashland's sale of delisted cigarettes under West Virginia Code § 16-9D-8(a). That subsection states:

> (a) Revocation of business registration certificate and civil money penalty. — In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a distributor, stamping agent or any other person has violated subsection (c), section three [§16-9D-3] of this article, or any rule adopted pursuant thereto, the commissioner *may* revoke or suspend the business registration certificate of the distributor, stamping agent or other person in the manner provided by article twelve [§§ 11-12-1 et seq.], chapter eleven of this code. Each stamp affixed and each sale or offer to sell cigarettes in violation of [§ 16-9D-3(c)] constitutes a separate violation. The commissioner *may* also impose a civil penalty in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars upon a determination of violation of [§ 16-9D-3(c)] or any rules adopted pursuant thereto. The

14. Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

> penalty shall be imposed and collected in the manner that tax is assessed and collected under article ten [§§ 11-10-1 et seq.], chapter eleven of this code. The amount of penalty collected shall be deposited in the tobacco control special fund created in section nine [§ 16-9D9] of this article.[15]

The parties agree that this subsection provides the Commissioner with broad discretion[16] to select a penalty for Ashland's unlawful sale of 12,230 packs of delisted cigarettes in 2009. For example, the Commissioner could have revoked or suspended Ashland's West Virginia business registration. And, he could have imposed a civil penalty on Ashland of up to $61,150,000, that is, $5,000 per violation, assuming that Ashland sold each delisted pack of cigarettes individually.[17] And, of course, the Commissioner could have imposed the exact penalty that he actually did in this case: a civil penalty equivalent to 500% of the delisted cigarettes' retail value.

---

15. W. Va. Code § 16-9D-8(a) (emphasis added).

16. *See State v. Hedrick*, 204 W. Va. 547, 552, 514 S.E.2d 397, 402 (1999) ("The word 'may' generally signifies permission and connotes discretion.").

17. In its briefing, Ashland asserted that the Commissioner's original $159,398 penalty was the maximum civil penalty that could be imposed under West Virginia Code § 16-9D-8(a). However, in response to the Court's inquiry during oral argument, Ashland's counsel conceded that the maximum penalty permitted by § 16-9D-8(a) was, in fact, over $61 million, as the Commissioner argued. In this sense, the OTA's finding that the Commissioner imposed the maximum penalty on Ashland is clearly wrong.

Based on the plain language of West Virginia Code § 16-9D-8(a), we conclude that the circuit court did not err by reinstating the Commissioner's original $159,398 penalty. First, and most importantly, the Commissioner imposed a penalty that is expressly provided for in § 16-9D-8(a). Thus, the Commissioner did not violate that subsection; he strictly complied with it.[18] Nor was the Commissioner's original $159,398 penalty arbitrary or capricious.[19] There is no dispute that Ashland sold 12,230 packs of delisted cigarettes in 2009. Ashland, therefore, violated § 16-9D-3(c) and was subject to any of the penalties set forth in § 16-9D-8(a). The Commissioner imposed a penalty that directly correlated to the retail value of the cigarettes that Ashland sold unlawfully. Consequently, the Commissioner's original $159,398 penalty was both supported by substantial evidence and based on reason and, therefore, was neither arbitrary nor capricious.[20] For those same reasons, we reject Ashland's assertion that the circuit court simply substituted its own judgment for that of the OTA when it reinstated the Commissioner's original penalty.

Ashland's primary argument in opposition—that the Commissioner's consistent application of a 500%-of-retail-value penalty is, itself, an abuse of the discretion

---

18. *See* W. Va. Code § 29A-5-4(g)(1) (court shall reverse, vacate or modify the decision of the agency because the administrative decision violates statutory provisions).

19. *Id.* § 29A-5-4(g)(6).

20. *See* Syl. Pt. 3, *In re Queen*, 196 W. Va. at 442, 473 S.E.2d at 483.

afforded him by West Virginia Code § 16-9D-8(a)—is a red herring, albeit an intriguing one. Unfortunately, we find the authority relied upon by the OTA to justify adoption of Ashland's argument, *Brunson v. Pierce County*,[21] unpersuasive.

In *Brunson*, a Washington county imposed one-year suspensions on the licenses of three women who violated various county ordinances governing erotic dancing.[22] In setting the one-year suspensions, the responsible county official considered the seriousness of the offense, but not the dancers' personal situations or criminal histories.[23] The official testified that she could not think of a situation where a penalty less than a one-year suspension—the maximum penalty permitted—would be appropriate.[24] A Washington intermediate appellate court reversed the one-year suspensions because the county official did not consider the dancers' individual circumstances and so failed to exercise the discretion granted to her by the applicable county ordinance.[25]

We are not inclined to follow *Brunson* for several reasons. First, it is not binding on this Court, and the case has not been cited outside of Washington. Second, it

21. 205 P.3d 963 (Wash. App. Div. 2 2009).

22. *Id*. at 965.

23. *Id*.

24. *Id*. at 965, 967.

25. *Id*. at 967.

arises from a factual scenario drastically different than that presented here. The three dancers penalized by the county official in *Brunson* (who testified regarding the specific hardships the suspensions would create for their families[26]) are not comparable to a multi-state distributor of convenience store items, such as Ashland. Moreover, the penalty at issue in *Brunson* was not calibrated to the severity of the dancers' offenses. In this case, the penalty imposed by the Commissioner each time Ashland violated West Virginia Code § 16-9D-3(c) reflected the retail value of the cigarettes sold illegally. So, when Ashland sold 560 packs of delisted cigarettes between January 2001 and November 2003, it paid a $3,808 penalty. And, six years later, when Ashland sold many more packs of delisted cigarettes (12,230), the Commissioner imposed a much larger penalty upon it ($159,398). Thus, unlike in *Brunson*, the rubric applied by the Commissioner in this case reflects a factual circumstance explicitly recognized in § 16-9D-3(c): the retail value of the cigarettes unlawfully sold by Ashland.

Finally, the county official in *Brunson* applied the maximum penalty permitted by the relevant county ordinance. That is not the case, here. As Ashland admitted during oral argument, West Virginia Code § 16-9D-8(a) enables the Commissioner to impose a civil penalty up to $61,150,000 in this case and to suspend Ashland's business registration. The Commissioner exercised neither option. In light of those distinctions, the circuit court did not err by finding that the OTA's reliance on *Brunson* was misplaced and declining to apply the reasoning of that case in this instance.

---

26. *Id.* at 965.

The West Virginia authority relied upon by Ashland, footnote 6 of our decision in *Gentry v. Magnum*,[27] is also distinguishable. In *Gentry*, we stated: "In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them."[28] We offered the commentary in that footnote in the course of reviewing a circuit court's decision as to the admissibility of certain testimony under the West Virginia Rules of Evidence.[29] While this Court has cited that dicta from *Gentry* on several occasions, we have not cited it in the context of a review of an administrative decision.[30] And this makes

---

27. *Gentry v. Mangum*, 195 W. Va. 512, 520 n.6, 466 S.E.2d 171, 179 n.6 (1995).

28. *Id.*

29. *Id.* at 520, 466 S.E.2d at 179.

30. *State v. Greeson*, App. No. 16-0497, 2017 WL 2210145, at *3 (W. Va. May 19, 2017) (reviewing circuit court's exclusion of certain evidence at trial for abuse of discretion); *Rife v. Shields*, App. No. 15-0975, 2016 WL 6819045, at *3 (W. Va. Nov. 18, 2016) (reviewing judgment entered pursuant to West Virginia Rule of Civil Procedure 60(b) for abuse of discretion); *Melody A. v. Todd A.*, App. No. 14-1112, 2016 WL 3410340, at *3 (W. Va. June 14, 2016) (reviewing circuit court's custody decision for abuse of discretion); *Prima Mktg., LLC v. Hensley*, App. No. 14-0275, 2015 WL 869265, at *2 (W. Va. Feb. 27, 2015) (reviewing denial of motion to set aside entry of default judgment for abuse of discretion); *State v. Bowling*, 232 W. Va. 529, 550, 753 S.E.2d 27, 48 (2013) (reviewing circuit court's admission of certain testimony for abuse of discretion); *State ex rel. Thrasher Eng'g, Inc. v. Fox*, 218 W. Va. 134, 139 n.2, 624 S.E.2d 481, 486 n.2 (2005) (reviewing

sense. Ashland's appeal is subject to review under West Virginia Code § 29A-5-4(g) and its interpretive case law, such as *In re Queen*. Those authorities sufficiently guide this Court's review without resort to the *Gentry* dicta cited by Ashland. We decline Ashland's entreaty to rely on footnote 6 of *Gentry*, now, to reject the circuit court's reinstatement of the Commissioner's original $159,398 penalty, in light of our conclusion that that penalty was supported by substantial evidence and based on reason.

We likewise find unpersuasive Ashland's argument that the circuit court should have further reduced the discounted penalty ordered by the OTA, or forgiven it altogether. As explained above, in West Virginia Code § 16-9D-8(a), the Legislature granted discretion to the Commissioner to impose a range of penalties for the sale of delisted cigarettes. The Legislature did not dictate to the Commissioner what factors it should or should not

---

circuit court's determination of whether to permit the filing of a third-party complaint for abuse of discretion); *Shafer v. Kings Tire Serv., Inc.*, 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004) (reviewing circuit court's decision to award attorneys' fees for abuse of discretion); *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 575, 584 S.E.2d 203, 209 (2003) (reviewing for abuse of discretion circuit court's determination of whether to permit the filing of a third-party complaint); *State v. Calloway*, 207 W. Va. 43, 47, 528 S.E.2d 490, 494 (1999) (reviewing circuit court's evidentiary rulings for abuse of discretion); *State ex rel. Kahle v. Risovich*, 205 W. Va. 317, 322–23, 518 S.E.2d 74, 79– 80 (1999) (reviewing circuit court's grant of new trial for abuse of discretion); and *State v. Hedrick*, 204 W. Va. 547, 552–53, 514 S.E.2d 397, 402–03 (1999) (reviewing for abuse of discretion circuit court's decision on whether to remit a previously forfeited bail bond).

consider in selecting a penalty under § 16-9D-8(a). Nor did the Legislature instruct the Commissioner to reduce or abate a penalty if the offending party demonstrated "reasonable cause," as it has done in other statutes cited by Ashland.[31] There is no equivalent "reasonable cause" exception in §§ 16-9D-3(c) or 16-9D-8(a), and we will not read one into those statutes.[32] Even if we could read such an exception into those statutes, it would not make sense to do so. The Legislature has already stated that the Commissioner's failure to provide notice to distributors of the delisting of a brand of cigarettes does not excuse a violation of § 16-9D-3(c).[33] This legislative statement cuts strongly against a gloss on either §§ 16-9D-3(c) or 16-9D-8(a) that includes the "reasonable cause" exception advocated by Ashland.

In sum, we conclude that the circuit court did not err in reversing the order of the OTA and reinstating the Commissioner's original $159,398 penalty against Ashland for the sale of 12,230 packs of delisted cigarettes, in violation of West Virginia Code § 16-9D-3(c).

---

31. *See, e.g.*, W. Va. Code § 11-10-18(a)(1) (2013) (imposing penalty where party fails to file tax return, unless "it is shown that such failure is due to reasonable cause and not due to willful neglect").

32. *See W. Va. Consol. Pub. Ret. Bd. v. Wood*, 233 W. Va. 222, 230, 757 S.E.2d 752, 760 (2014) ("Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (internal quotation and alteration omitted).

33. *See* W. Va. Code § 16-9D-3(b)(3)(C).

B. The Excessive Fines Clause of the West Virginia Constitution and the Eighth Amendment to the United States Constitution.

As it did before the circuit court, Ashland argues that the Commissioner's $159,398 penalty violates both the Excessive Fines Clause of the West Virginia Constitution and the Eighth Amendment to the United States Constitution. The circuit court held that the penalty was not excessive under either the state or federal constitutions. "A review of a proportionality determination made pursuant to the Excessive Fines Clause of the West Virginia Constitution is de novo."[34] Following a de novo review, we find that the penalty imposed by the Commissioner was not grossly disproportionate to the gravity of Ashland's offense, and so affirm the circuit court.

This Court recently analyzed a civil forfeiture under the Excessive Fines Clause of the West Virginia Constitution and the Eighth Amendment to the United States Constitution. Civil forfeiture is a slightly different context than the civil penalty at issue in this case, but our analysis and decision in *Dean v. State* is instructive, nevertheless.[35]

---

34. Syl. Pt. 8, *Dean v. State*, 230 W. Va. 40, 736 S.E.2d 40 (2012).

35. Neither party disputes that the $159,398 penalty implicates the Eighth Amendment. Nevertheless, we do observe that, "[c]ivil fines serving remedial purposes do not fall within the reach of the Eighth Amendment. However, if a civil sanction

Appendix A

Following the United States Supreme Court's decision in *United States v. Bajakajian*,[36] this Court identified in *Dean* several factors to determine whether the amount of a forfeiture of real property pursuant to West Virginia Code § 60A-7-703(a)(8) (2014) was grossly disproportionate to the gravity of the defendant's offenses, and therefore excessive. As we explained in *Dean*:

> Factors to be considered in assessing whether the amount of the forfeiture is grossly disproportionate to the gravity of an offense, include: (1) the amount of the forfeiture and its relationship to the authorized penalty; (2) the nature and extent of the criminal activity; (3) the relationship between the crime charged and other crimes; and (4) the harm caused by the charged crime.[37]

The factors set forth by this Court in *Dean* presuppose that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature."[38]

---

can only be explained as serving in part to punish, then the fine is subject to the Eighth Amendment." *Korangy v. U.S. F.D.A.*, 498 F.3d 272, 277 (4th Cir. 2007) (internal quotation omitted). Assuming that the $159,398 penalty is at least partially punitive and thus subject to the Eighth Amendment, we would still affirm the circuit court's order because we find that the penalty is not grossly disproportionate to the gravity of Ashland's offense.

36. 524 U.S. 321 (1998).

37. Syl. Pt. 7, in part, *Dean*, 230 W. Va. at 40, 736 S.E.2d at 40.

38. *Bajakajian*, 524 U.S. at 336.

We enunciated the *Dean* factors in the context of a civil forfeiture, rather than a civil penalty. However, the *Dean* factors, which themselves are derived from the United States Supreme Court's decision in *Bajakajian*, closely follow factors considered by federal courts since *Bajakajian* to determine whether a punitive, civil penalty is grossly disproportionate to the gravity of a party's violation.[39] Therefore, we apply the *Dean* factors, here, to determine whether the civil penalty imposed on Ashland is grossly disproportionate to the gravity of its violation of West Virginia Code § 16-9D-3(c), and, therefore, whether the civil penalty violates article III, section 5 of the West Virginia Constitution and the Eighth Amendment to the United States Constitution.

The first factor, the amount of the penalty and its relationship to the authorized penalty, cuts in the Commissioner's favor. As both parties acknowledge, the maximum penalty authorized by the Legislature for Ashland's violation of West Virginia Code § 16-9D-3(c) is $61,150,000—a penalty roughly 383 times larger than the

39. *See U.S. Sec. & Exch. Comm'n v. Brookstreet Sec. Corp.*, 664 F. App'x 654, 656 (9th Cir. 2016) ("This court generally considers four factors when weighing the gravity of a violation: (1) the nature and extent of the violation, (2) whether the violation was related to other illegal activities, (3) the penalties that may be imposed for the violation, and (4) the extent of the harm caused."); *United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014) (assessing proportionality of a civil penalty under "variety of factors, including the reprehensibility of the defendant's conduct; the relationship between the penalty and the harm to the victim; and the sanctions in other cases for comparable misconduct").

one actually imposed by the Commissioner.[40] Additionally, the Commissioner could have also suspended or revoked Ashland's business registration, an option that the Commissioner did not exercise.

The second factor, the nature and extent of the criminal activity, also weighs in the Commissioner's favor. Prior to 2012, the Commissioner had fined Ashland twice for selling delisted cigarettes in violation of West Virginia Code § 16-9D-3(c). Obviously, Ashland was aware of its obligation not to sell delisted cigarettes and its obligation to remain apprised of changes to the Commissioner's directory of approved brands.[41] Moreover, it was aware of the potential civil penalties it could face for future violations. Federal courts have also affirmed administrative penalties similar in size to the $159,398 penalty imposed by the Commissioner, in this case.[42]

The third and fourth factors also mitigate in favor of the conclusion that the penalty imposed by the Commissioner is not grossly disproportionate to Ashland's violation.

---

40. The Fifth Circuit Court of Appeals has gone so far as to hold that "[n]o matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment." *Newell Recycling Co., Inc. v. U.S. E.P.A.*, 231 F.3d 204, 210 (5th Cir. 2000).

41. *See* W. Va. Code § 16-9D-3(b)(3)(C).

42. *See Salisbury v. United States*, 368 Fed. App'x 310 (2010) ($152,500 civil penalty imposed on lobster fisherman for violation of the Magnuson-Stevens Act was not excessive).

With regard to the third factor—the relationship between Ashland's violation of West Virginia Code § 16-9D-3(c) and other violations—the West Virginia Legislature has authorized similar, civil penalties in the context of the retail sale of alcohol.[43] As to the fourth factor, that is, the harm caused by Ashland's violation of § 16-9D-3(c), we do not agree with Ashland that the sole victim of its sale of delisted cigarettes is the State. The Legislature enacted §§ 16-9D-1 through 10 to prevent violations and aid enforcement of the laws implementing the MSA and so to "safeguard the Master Settlement Agreement, the fiscal soundness of the state, and the public health."[44] Thus, contrary to Ashland's arguments, we find credible the Commissioner's position that Ashland's violation of § 16-9D-3(c) threatens public harm.

In sum, our analysis of the *Dean* factors demonstrates that the $159,398 penalty imposed is not grossly disproportionate to the severity of Ashland's unlawful activity, that is, the sale of 12,230 packs of delisted cigarettes in violation of West Virginia Code § 16-9D-3(c). Accordingly, the circuit court did not err in holding that the Commissioner's original $159,398 penalty does not violate the Excessive Fines Clause of the West Virginia Constitution or the Eighth Amendment to the United States Constitution.

---

43. *See* W. Va. Code § 60-3A-26 (2014) (authorizing West Virginia Alcohol Beverage Control Commissioner to impose a civil penalty of up to $1,000 per violation of statutes or rules controlling the sale of alcohol by retail liquor licensees).

44. W. Va. Code § 16-9D-1.

C. Venue.

Finally, Ashland argues that under West Virginia Code § 11-10A-19(c)(3) (2013), the appropriate venue for its administrative appeal was the Circuit Court of Cabell County and not the Circuit Court of Kanawha County. We readily dispose of this argument on the grounds of waiver.

"[T]the inadequacy of appellate relief in matters involving 'a substantial legal issue regarding venue' may require the resolution of such issues through the exercise of original jurisdiction."[45] In this case, Ashland did not pursue a writ of prohibition challenging the Circuit Court of Kanawha County as the venue for its appeal of the OTA's decision. Rather, it fully briefed the matter before the Circuit Court of Kanawha County without objecting to venue[46] and only raises the issue now, before this Court. On these facts, we find that Ashland has waived its objection to venue in the Circuit Court of Kanawha County[47] and that

45. *State ex rel. Air-Squid Ventures, Inc. v. Hummel*, 236 W. Va. 142, 145, 778 S.E.2d 591, 594 (2015) (quoting *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995)).

46. In footnote 1 of "Ashland Specialty's Brief in Reply to State Tax Commissioner's Response to Ashland Specialty's Merit Brief," Ashland acknowledged that it had filed its appeal to the OTA's decision with the Circuit Court of Cabell County, and that its appeal was subsequently transferred to the Circuit Court of Kanawha County. Ashland did not, however, object or otherwise argue that the Circuit Court of Kanawha County was an improper venue for the matter.

47. *See Hansbarger v. Cook*, 177 W. Va. 152, 157, 351 S.E.2d 65, 70–71 (1986) (concluding that party waived venue defense where

any error with regard to venue that may have occurred in the proceedings, below, is harmless.

IV. CONCLUSION

For the foregoing reasons, the April 11, 2017 order of the Circuit Court of Kanawha County is affirmed.

Affirmed.

---

he did not argue venue in a motion to dismiss, or raise the issue in his answer or in any other responsive pleading).

Appendix A

Ketchum, Justice, concurring, in part, and dissenting, in part, with whom Justice Davis joins:

I agree with the result in this case. A tobacco company unlawfully selling cigarettes is, without question, deserving of a hefty monetary penalty.

My dissent concerns the appearance that the Tax Commissioner abdicated the exercise of discretion when calculating that monetary penalty. West Virginia Code § 16-9D-8(a) says (with emphasis added) that the Tax Commissioner "*may* also impose a civil penalty in an amount *not to exceed* the greater of five hundred percent of the retail value of the cigarettes[.]" The definition of the word "may" is pretty clear:

> As a general rule of statutory construction, the word "may" inherently connotes discretion and should be read as conferring both permission and power. The Legislature's use of the word "may" usually renders the referenced act discretionary, rather than mandatory, in nature.[1]

The Legislature's use of the word "may" tells us the Tax Commissioner is obligated to use his (or her) noggin and exercise some guided judgment. The law doesn't require a 500% penalty; instead, it confers the power to set a penalty up to but not exceeding 500%. But the Tax

1. Syllabus Point 1, *Pioneer Pipe, Inc. v. Swain*, 237 W.Va. 722, 791 S.E.2d 168 (2016).

Commissioner's representative testified that auditors working for the Commissioner "have no discretion" and always impose a penalty equal to 500% of the retail price of the cigarettes. That is unacceptable.

When a bureaucrat's reason for doing something is "because we've always done it that way," then discretion has gone by the wayside. If the Tax Commissioner's reason for never imposing anything less than a 500% penalty is "because we've always done it that way," then the same reasoning prohibits the imposition of anything greater than 500% as well. Even though West Virginia Code § 16-9D-8(a) authorizes a penalty of $5,000 per violation, the Tax Commissioner theoretically could not impose that penalty because it's never been done that way before and, consequently, because such a high penalty might appear random, capricious and vindictive.

In the future, the Tax Commissioner should plainly articulate why a specific civil penalty was chosen, and should do so according to some specific rules of thumb. Doing so not only avoids arbitrary and capricious results, but also negates the mere *appearance* that a result was randomly punitive.

I am authorized to state that Justice Davis joins in this separate opinion.

APPENDIX B — FINAL ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, DATED APRIL 11, 2017

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Civil Action No. 14-AA-102

ASHLAND SPECIALTY COMPANY, INC.,

Petitioner Below, Appellee,

v .

MARK W. MATKOVICH, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent Below, Appellant.

Judge Carrie L. Webster

FINAL ORDER REVERSING ADMINISTRATIVE DECISION OF THE OFFICE OF TAX APPEALS

This matter came before the Court upon simultaneous Petitions for Appeal filed by Mark W. Matkovich, in his capacity as the West Virginia State Tax Commissioner, and Ashland Specialty, Inc. The Tax Commissioner's Petition asks this Court to reverse an August 18, 2014 final order of the Office of Tax Appeals (hereinafter "OTA") that reduced a penalty assessment issued against

Ashland Specialty for distributing non-approved tobacco products in West Virginia. The Tax Commissioner further requests that this Court reinstate the original penalty assessment of $159,398.00. Meanwhile, Ashland Specialty requests that this Court further reduce or entirely abate the penalty imposed for its third admitted occurrence of distributing delisted cigarettes. The Court has studied the Petitions, reviewed all pertinent legal authorities, and, for the reasons explained below, has concluded that OTA's final order must be reversed and the original penalty assessment issued by the Tax Commissioner reinstated.

I. STANDARD OF REVIEW

West Virginia Code § 11-10A-19(f) provides that appeals from OTA shall be governed by the standards set forth in the Administrative Procedures Act. Specifically, West Virginia Code § 29A-5-4(g) provides that:

> (g) The court may affirm the order or decision of the agency or remand the ease for further proceedings. It shall reverse, vacate or modify the order or decision of the agehcy 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 the 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.

Questions of law are reviewed *de novo*. *Griffith v. ConAgra Brands, Inc.*, 229 W.Va. 190, 728 S.E.2d 74 (2012). "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume the 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). "When reviewing the administrative decision of the Tax Commissioner, the circuit couri is required to engage in a substantial inquiry, but it must not substitute its own judgment for that of the Tax Commissioner." *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995).

II. PROCEDURAL HISTORY

In an Audit Notice of Assessment issued on August 3, 2012, the West Virginia State Tax Department asserted that Ashland Specialty owed $159,398.00 in penalties due to its sale of cigarettes not listed in the directory of approved brands during the period from June 30, 2009 through May 31, 2012. R. Tab 15.

Appendix B

On October 3, 2012, Ashland Specialty filed a Petition for Reassessment with the Office of Tax Appeals. The Petition was assigned Docket No. 12-366 X-M by OTA. R. Tab 52. A hearing on the Petition was convened by OTA Chief Administrative Law Judge A.M. "Fenway" Pollack in Charleston, West Virginia on August 27, 2013. R. Tab 29.

By an administrative decision dated August 18, 2014, OTA modified the $159,398.00 penalty assessment to the amount of $119,548.50. R. Tab 4.

The Tax Commissioner filed the Petition for Appeal that is currently pending before this Court on October 17, 2014. Also on October 17, 2014, Ashland Specialty appealed the OTA decision to the Circuit Court of Cabell County where it was assigned to the Honorable Christopher D. Chiles. Following Ashland Specialty's Motion to Transfer and Consolidate, Judge Chiles entered a Transfer Order and *sua sponte* ordered that the Cabell County case be transferred to Kanawha County where it was subsequently assigned to Judge Tod Kaufman (Civil Action No. 15-AA-55).

On October 22, 2015, the parties in this matter filed a Joint Motion to transfer Civil Action No. 15-AA-55 pending before Judge Kaufman and consolidate it with the matter currently pending before this Court. The Motion to Consolidate remains pending before this Court. Meanwhile, on October 28, 2015, Judge Kaufman dismissed Civil Action 15-AA-55 on the basis that it was a duplicate filing.

Appendix B

On December 4, 2015, this Court entered an Amended Scheduling Order directing the Petitioner (Tax Commissioner) in 14-AA-102 to file its brief by January 25, 2016. While the Tax Commissioner filed its brief in accord with the Court's instruction, Ashland Specialty simultaneously filed its own brief in support of its Petition for Appeal that had not been consolidated into this action. Thereafter, the parties submitted simultaneously responses and replies.

Following the parties' submission of proposed findings of fact and conclusions of law on March 25, 2016, this matter became ripe for decision.

III. FINDINGS OF FACT

1. Ashland Specialty Company, Inc. is a Kentucky corporation that provides inventory including tobacco products to convenience stores in West Virginia. (R. Tab 78, pgs. 13 and 22)

2. Ashland Specialty has had a West Virginia license to stamp and sell cigarettes since 1989. (R. Tabs 21, 22, and23)

3. West Virginia statutory law requires the Tax Commissioner to maintain an online directory that contains the name and brand names of all cigarette manufacturers that are authorized to be sold in the State of West Virginia. *See* W.Va. Code § 16-9D-3(b).

4. Pursuant to West Virginia Code § 16-9D-3(c), it is unlawful to stamp or sell cigarettes not on the directory maintained by the Tax Commissioner. The Tax Commissioner is afforded broad discretion in determining the penalty for violations, which may include suspending the business registration certificate and/or imposing civil penalties.

5. Prior to the penalty assessment at issue in this appeal, the taxpayer has been twice penalized for selling non-approved cigarette brands.

6. In a previous audit for the period of January 1, 2001 through November 30, 2003, the Tax Department assessed Ashland Specialty a civil penalty for selling 56 cartons of cigarettes in violation of West Virginia Code § 16-9D-3. This penalty was assessed at 500 percent of the retail value of the cigarettes. (R. Tab 25)

7. In a second audit for the period of May 1, 2005 through February 29, 2008, the Tax Department assessed Ashland Specialty a civil money penalty for selling 62 cartons of non-approved cigarette brands in violation of West Virginia Code § 16-9D-3. The penalty assessed after this audit was also 500 percent of the retail value of the cigarettes. (R. Tab 26)

8. In 2012, an auditor with the West Virginia State Tax Department performed a third audit

of Ashland Specialty reviewing its books and records regarding cigarette sales and discovered that it had again sold cigarettes that were no longer listed in the directory of approved brands. Specifically, during the period of June to September of 2009, Ashland Specialty sold 12,210 packs of Galaxy/Galaxy Pro cigarettes and twenty packs of Berley cigarettes when those brands were not on the approved list. (R. Tabs 15, 16)

9. On August 3, 2012, an Audit Notice of Assessment in the amount of $159,398.00 was issued by the West Virginia State Tax Department against Ashland Specialty. This assessment was issued for the time period of June 30, 2009 through May 31, 2012. This assessment consisted entirely of a civil money penalty of $159,398.00. As in its past audits, the penalty imposed was 500 percent of the retail value of the cigarettes. (R. Tab 15)

10. Ashland Specialty's failure to have a system in place which prevented the sale of delisted cigarettes was not beyond its control.

S. Compliance with the statute is the responsibility of the taxpayer. *See* W.Va. Code § 16-9D-3(b)(3).

IV. DISCUSSION

The Office of Tax Appeals erred when it modified downward the penalty assessment issued by the Tax

Department against Ashland Specialty. OTA's modification lacked a basis in law and usurped the statutory discretion granted to the Tax Commissioner. Furthermore, Ashland Specialty's request to further reduce or abate entirely the penalty for its third violation would only compound the errors committed by OTA when it substituted its judgment for that of the Tax Commissioner. For the reasons detailed below, this Court reverses the improper modification ordered by OTA and reinstates the original penalty assessment of $159,398.00.

The statutes at the core of this matter result from the Tobacco Master Settlement Agreement ("MSA"). In 1998, four of the largest tobacco product manufacturers and forty-six states entered into the MSA to settle litigation brought by the states to recoup health care expenses resulting from cigarette smoking. *See* W.Va. Code § 16-9B-1. In 1999, the West Virginia Legislature required tobacco product manufacturers who did not join the MSA and whose cigarettes are sold in West Virginia to make annual deposits into escrow accounts to cover health care expenses resulting from cigarette smoking. *Id*

In 2003, the legislature enacted "Complementary Legislation" to strengthen the Escrow Statute. The legislature found "that enacting procedural enhancements will help prevent violations and aid enforcement of article nine-b of this chapter and thereby safeguard the master settlement agreement [payment], the fiscal soundness of the state, and the public health." W.Va. Code § 16-9D-1. In order to protect its allocation of the annual MSA payment, the State of West Virginia must diligently enforce the

statutes implementing the Tobacco Master Settlement Agreement.

The Complementary Legislation statute ultimately enacted by West Virginia is molded after multi-state Model Legislation and is substantially similar to statutes enacted by the other states. *See* e.g. Idaho Code § 39-8406, La. Statutes Ann. 13:5076, N.M.S.A. § 6-4-22, N.C.G.S.A. § 66-293, 68 Okl. St. Ann. § 10-50-82, and Rev. Code of Wash. § 70.158.060.

One of the key components of the Complementary Legislation was the creation of a directory of approved brands and penalties for selling cigarettes not appearing in the directory. West Virginia Code § 16-9D-3(c) provides in part:

> c) Prohibition against stamping or sale of cigarettes not on the directory. — It is unlawful for any person:
>
> (1) To affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory, or
>
> (2) To sell, offer, or possess for sale in this state, cigarettes of tobacco product manufacturer or family brand not included in the directory.

When a violation of West Virginia Code § 16-9D-3(c)(3) occurs, the Tax Commissioner has multiple actions it may

undertake. Specifically, West Virginia Code § 16-9D-8(a) provides as follows:

> Revocation of business registration certificate and civil money penalty. — In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a distributor, stamping agent or any other person has violated subsection (c), section three of this article, or any rule adopted pursuant thereto, *the commissioner may revoke or suspend the business registration certificate* of the distributor, stamping agent or other person in the manner provided by article twelve, chapter eleven of this code. Each stamp affixed and each sale or offer to sell cigarettes in violation of subsection (c), section three of this article *constitutes a separate violation*. The commissioner *may also* impose a civil penalty *in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars upon a determination of violation of subsection (c)*, section three of this article or any rules adopted pursuant thereto. The penalty shall be imposed and collected in the manner that tax is assessed and collected under article ten, chapter eleven of this code. The amount of penalty collected shall be deposited in the tobacco control special fund created in section nine of this article. (Emphasis added.)

Appendix B

Each sale of a pack of cigarettes constitutes a separate violation. *See* W. Va. Code § 16-9D-8(a). Thus, the plain language, recited above, allows the Tax Commissioner to penalize businesses or persons who sell unauthorized cigarettes by: (1) assessing a monetary penalty of up to 500 percent of the retail price of the unauthorized cigarettes, or (2) assessing a penalty of $5,000 for each pack of unauthorized cigarettes that is sold, and/or (3) suspending or revoking the seller's business registration certificate, or (4) imposing a combination of the penalties authorized by statute.

A. OTA erred in concluding that the Tax Commissioner exercised no discretion when it is uncontroverted that the Tax Commissioner did not assess the maximum monetary penalty or suspend the taxpayer's business license as authorized by West Virginia Code § 16-9D-8(a).

The Office of Tax Appeals erred when it concluded that the Tax Commissioner exercised no discretion in issuing the $159,398.00 penalty against Ashland Specialty. Moreover, the OTA decision is erroneous in repeatedly concluding that the $159,398.00 assessment equated to the imposition of the maximum allowable penalty. A simple reading of the applicable statute reveals that the Tax Commissioner had numerous penalty options and the imposed penalty was exponentially less than the maximum monetary penalty allowed by law. Additionally, the loss of Ashland Specialty's ability to do business in this State could have caused it to suffer economic loss in excess of the penalty assessed. Therefore, the Tax Commissioner's

issuance of a less than maximum penalty is demonstrative of his exercised discretion.

There is no question in this case that Ashland Specialty sold unauthorized cigarettes in the State of West Virginia. The uncontroverted facts reflect that from January 1, 2001 through November 30, 2003, Ashland Specialty sold 56 cartons of cigarettes in violation of West Virginia Code § 16-9D-3. Thereafter, from May 1, 2005 through Febmary 29, 2008, Ashland Specialty sold 62 cartons of cigarettes which were unauthorized for sale in this State in violation of West Virginia Code § 16-9D-3. Furthermore, in the case *sub judice*, it is uncontested that for the time period of June to September of 2009, Ashland Specialty sold 1,223 cartons of nonapproved cigarettes. (R. at Tab 12, pg. 4.) Thus, there is no dispute that Ashland Specialty may be penalized within the statutory parameters of West Virginia Code § 16-9D-8.

Ashland's argument that the Tax Department failed to exercise discretion lacks merit on multiple accords. At the outset, the issued assessment of $159,398.00 does not represent the maximum penalty. The applicable statute clearly allows the Tax Commissioner to impose a penalty of $5,000 per violation with each pack of cigarettes constituting a separate violation, which would have resulted in a penalty in excess of $61 million dollars. *See* W.Va. Code § 16-9D-8(a). West Virginia Code § 16-9D-8(a) further provides for the revocation of the entity's business registration certificate. If Ashland Specialty's business registration certificate had been revoked, it would have been unable to do any business in the State.

Appendix B

Ashland's counter to the availability of more harsh penalties is that "the other penalties are obviously inapplicable" citing *per se* unconscionability and due process violations. Ashland Specialty"s Response Brief, pg. 4, FN 1. However, Ashland cites no law to support this blanket statement.

In support of its argument that the Tax Commissioner exercised no discretion, Ashland Specialty cites to footnoted language in *Gentry v. Magnum* which stated that "an abuse of discretion occurs when a material fact deserving significant weight is ignored, or when an improper factor is relied upon, or when all or no improper factors are assessed but a serious mistake [is made] in weighing them." *Gentry*, 195 W.Va. 512, 466, S.E.2d 171 (1995). The *Gentry* footnote relied upon by Ashland provides that an abuse of discretion occurs when *material* facts deserving significant weight are ignored. *Gentry* at 179. There are no such facts in this matter. Ashland's attempt to interject facts regarding its employee turnover and record keeping issues are irrelevant given the strict liability imposed upon entities that distribute nonapproved cigarette brands.

The matter at bar is a purely legal question. The Tax Commissioner's decision to assess a penalty falling within the parameters contemplated by statute must be construed as valid because the decision is supported by substantial evidence or by a rational basis. *See* Syllabus point 3, *In re: Queen*, 196 W.Va. 442, 473 S.E. 2d 483 (1996).

When considering the other statutorily available penalties, it is clear that the Tax Commissioner exercised

discretion when he imposed a penalty of $159,398.00, which is exponentially less than the maximum monetary penalty of $61 million and/or removal from the West Virginia marketplace.

B. OTA erred when it concluded that the Tax Commissioner abused his discretion in penalizing Ashland Specialty, as a three time violator of the requirement to sell only authorized cigarettes in the State, for an amount authorized by the Legislature in West Virginia Code § 16-9D-8(a).

When considering Ashland Specialty's history of selling non-approved brands, OTA erred when it found that the Tax Commissioner's imposition of a $159,398.00 penalty should be reduced to $119,548.50, which discounted the third and more sizable infraction when compared to the first two violations. In requesting that this Court usurp the discretion afforded to and exercised by the Tax Commissioner, Ashland argues that its previous offenses are of no import to this appeal. Given that Ashland is asking this Court to consider a multitude of extraneous factors in re-examining the Tax Commissioner's discretion, it is contradictory for Ashland to argue that the Court should disregard a history of previous violations.

It is undisputed that when violations were found in the prior audits of Ashland Specialty, the penalty assessed was 500 percent of the sales price of the cigarettes, which is the same formula that Ashland now challenges. Furthermore, the uncontroverted evidence establishes that following the two previous audits, Ashland Specialty did not correct its

behavior. It did not place adequate safeguards in place to conform to this State's laws for businesses or persons choosing to sell cigarettes here. For example, the seller must ensure that all cigarette packs are contained in the Tax Commissioner's directory. West Virginia Code § 16-9D-3(b)(3) states:

> (C) Failure of a manufacturer, distributor or other stamping agent to receive notice under paragraph (A) or (B), subdivision (3), subsection (b) of this section, or failure of the state to provide notice of any addition to or removal from the directory shall not relieve the distributor or other stamping agent of its obligations under this article.

If cigarettes are not on the directory, they cannot be lawfully sold in West Virginia. This is undisputedly what happened in this case. The seller is obligated to keep apprised of changes to the online directory of approved brands. Ashland asserts that a change in staffing should mitigate its penalty assessment. R. Tab. 12. West Virginia Code § 16-9D-3(b)(3) squarely invalidates this argument. A taxpayer's failure to comply cannot be mitigated and, therefore, the excuses offered by the taxpayer are of no avail.

Ashland's assertion that it is now in compliance with the law and should not be subjected to a penalty is not only irrelevant, but also unconvincing in light of its historical compliance. A Tax Department auditor testified below that directory violations are "rare," yet Ashland is an admitted three-time offender. Hr'g Tr. pg. 67 .

Appendix B

When reviewing the historical compliance of Ashland in regard to the directory of approved brands, it is evident that the Tax Commissioner did not abuse his discretion in issuing a penalty assessment consistent with previous penalty assessments. Imposing a reduced penalty for a third infraction that exceeded the illegal volume of the first two violations would be counterproductive to the intended purpose of the directory statute which is to "safeguard the master settlement agreement [payment], the fiscal soundness of the state, and the public health." W.Va. Code § 16-9D-1. The West Virginia Supreme Court of Appeals has held that "[s]tatutory damages serve the purpose of deterring the public harm associated with the activity proscribed, rather than seeking to compensate each private injury caused by a violation." *Vanderbilt Mortg, & Finance, Inc. v. Cole*, 230 W.Va. 505, 512 (2013). The original penalty assessment deters the public harm that could result from the influx of off-directory cigarettes into the West Virginia marketplace including a reduction in West Virginia's annual MSA payment. The assessed penalty also protects public health, which is threatened by cigarettes that have not been fully vetted. Cigarettes appearing on the directory must meet numerous certification requirements under the authority of West Virginia Code § 16-9D-4a relating to ownership, manufacturing location, federal permits, packaging, ingredient reporting, etc. The cigarettes placed into West Virginia commerce by Ashland Specialty bypassed a certification and review for these standards rendering the penalty imposed by the Tax Commissioner entirely proper.

The undercurrent of both the OTA decision and the arguments tendered by Ashland is the preemption of discretion statutorily granted to the Tax Commissioner to ensure compliance with laws that he is responsible for enforcing. *See Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W.Va. 573, 590, 466 S.E.2d 424, 441 (1995). *The Appalachian Power* Court held that "[g]iven the competing policy concerns behind the statute and the industries affected, the language of the statute suggests the Legislature intended the Tax Commissioner to strike the appropriate balance of the goals of the statute..." *Id.* at 591, 442. Likewise, the language of West Virginia Code § 16-9D-l, *et seq.* suggests that the legislature intended for the Tax Commissioner to balance the goals of the statute. However, the final decision of OTA usurped the Tax Commissioner's ability to deploy his expertise in MSA-related matters.

The West Virginia Supreme Court of Appeals has held that "it is this Courfs practice not to interfere with a sentence imposed within legislatively prescribed limits, so long as the trial judge did not consider any impermissible factors." Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). Therefore, just as the *Appalachian Power* Court found the contested statute to be within the Tax Departmenfs "area of expertise" and the *Goodnight* Court found the applicable sentence to be within legislatively proscribed bounds, this Court concludes that the assessment of penalties for selling unapproved brands rests solely at the discretion of the Tax Commissioner who was charged with the obligation to maintain the tobacco directory and who possesses expertise in the enforcement of MSA-related statutes.

C. OTA erred when it found the Tax Commissioner had abused his discretion when the evidence revealed that the same penalty is imposed on all businesses or persons who sell unauthorized cigarettes.

OTA erroneously concluded that the Tax Commissioner abused his discretion in imposing the same penalty upon all businesses who sell unauthorized cigarettes. Ashland sought to further compound this error by arguing that the Tax Commissioner's penalty does not treat similarly-situated taxpayers alike as required by the Equal Protection Clause of the State and Federal Constitution. *See* U.S. Const. Amend. XIV and W.Va. Const, art. 3, § 10. Ashland asserts that the circumstances of its third offense render it in a separate category from other statute violators. However, the plain language of West Virginia Code § 16-9D-3(b)(3) offers strict liability and the consideration of any extenuating circumstances is unnecessary.

Because West Virginia Code § 16-9D-3 implicates no suspect or quasi-suspect class and burdens no fundamental right, the "rational relationship" test is the appropriate standard by which constitutionality should be judged. *See Whitlow v. Bd of Educ. of Kanawha County*., 190 W.Va. 223, 438 S.E.2d 15 (1993), *O'Neil v. City of Parkersburg*, 160 W.Va. 694, 237 S.E.2d 504 (1977). Under this highly deferential standard, social or economic legislation must be affirmed "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Appalachian Power Co. v. State Tax Department*, 195 W.Va. 573, 466 S.E.2d 424

(1995). Protecting West Virginia's annual MSA payment, preventing adulterated cigarettes from being placed into the market, and ensuring that all cigarettes sold contain the proper warning rotations are just a few of the many legitimate state interests in preventing the sale of unapproved cigarette brands. *See* W.Va. Code 16-9D-3.

In order to reach its erroneous conclusion that "the Tax Commissioner exercised no discretion at all in issuing the penalty," OTA relied upon *Brunson v. Pierce Cnty.*, 205 P.3d 963 (Wash. App. 2009). Such reliance is misplaced because *Brunson* is not binding precedent in this State. Additionally, no other states appear to follow it. Furthermore, it is distinguishable because the erotic dancers in *Brunson* had their licenses to engage in their work suspended. This is in contrast to this case where the suspension or revocation of the taxpayer's business registration conspicuously omits the same language from other penalty provisions, it is clear that the legislature did not intend for there to be an examination of the taxpayer's intent.

It is a well settled maxim that the legislature will not enact a meaningless or useless statute. Syl. Pt. 4, State of West Virginia ex rel. *Hardesty v. Aracoma-Chief Logan No. 4523*, 147 W.Va. 645, 129 S.E.2d 921 (1963). The West Virginia Supreme Court of Appeals has additionally held that "'courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995), quoting *Connecticut Nat'l Bank v. Germain*,

503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391, 397 (1992), *see also Appalachian Power Co.* at 586, 437 (1995). The legislature's wisdom in crafting West Virginia Code § 16-9D-8(a) expresses their wish for the Tax Commissioner to impose penalties without regard for the taxpayer's intent and reflects its intent to impose penalties for violations of the statute.

Additional language in West Virginia's Complementary Legislature underscores that willful intent is not necessary. West Virginia Code § 16-9D-3(b)(3)(C) clearly places the taxpayer on notice that it is responsible for ensuring that the cigarettes it sells are authorized for sale. Stated another way, the seller is strictly liable for its sale of cigarettes that do not appear in the Tax Commissioner's directory.

Ashland Specialty's admitted negligence, which it attributes to staffing and management issues, does not provide a basis for a reduction of the penalty because intent or willfulness is not a prerequisite to arriving at the penalty. Rather, if a seller sells unauthorized cigarettes, the penalty may be imposed without examining the reasons for the unlawful sale. This is especially true in light of the taxpayer's status as a serial offender. OTA was erroneous in refusing to acknowledge that willful intent is not necessary and that any alleged mitigating circumstances are inconsequential.

E. OTA erred when it substituted its judgment for that of the Tax Commissioner when the totality of the evidence did not reflect an abuse of discretion.

OTA erred when it substituted its judgment for that of the Tax Commissioner when the totality of the evidence did not reflect an abuse of discretion. This error is rooted in OTA's misreading of West Virginia Code § 16-9D-8(a), which gives the Tax Commissioner the discretion to penalize sellers of unauthorized cigarettes in the State. The delegation of this power to the Tax Commissioner and not to OTA was done by the legislature and must be respected. Moreover, the Tax Commissioner's authority to impose a penalty or penalties provided in the, statute brought with it the responsibility to ensure compliance with the reporting and other responsibilities placed on cigarette manufacturers and those who sell or distribute cigarettes. *See* W.Va. Code § 16-9D-1 *et seq.*

As is clear from a review of the aforesaid statutes, the purpose of giving the Tax Commissioner enforcement powers was to do all that could be done within the State's power to ensure that there is no reduction in the annual payment the State received from the Tobacco Master Settlement. West Virginia Code § 16-9D-1 provides :

> The Legislature finds that violations of article nine-b of this chapter threaten the integrity of the tobacco master settlement agreement, the fiscal soundness of the state, and the public health. The Legislature finds that enacting procedural enhancements will help prevent

> violations and aid enforcement of article nine-b of this chapter and thereby safeguard the master settlement agreement, the fiscal soundness of the state, and the public health.

Given his statutory duties under West Virginia Code § 16-9B-1 *et seq.* and West Virginia Code § 16-9D-1 *et seq.*, the Tax Commissioner and not OTA had a complete picture of the actions taken against all non-compliant sellers of cigarettes in the State in addition to the general landscape of tobacco enforcement issues.

In discussing the applicable standard of reviewing a State Tax Department decision, the West Virginia Supreme Court of Appeals has held than an inquiring court "must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." *Appalachian Power Co.* at 582. The West Virginia Supreme Court of Appeals has additionally held that a reviewing body is required "to engage in a substantial inquiry, but it must not substitute its own judgment for that of the Tax Commissioner." *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d780 (1995).

In support of its argument that the Tax Commissioner's decisions regarding penalties can be usurped, Ashland relies upon a West Virginia Supreme Court of Appeals decision that is easily distinguishable. *See United Fuel Gas Co. v. Battle*, 167 S.E.2d 890 (W.Va. 1969). In *United Fuel*, there was uncertainty regarding the taxability of certain transactions which is not present in this matter.

West Virginia Code § 16-9D-1 *et seq.* very clearly provides penalties for the sale of non-approved cigarettes brands and places the burden upon the wholesaler to stay apprised of directory listings. Therefore, it is inconsequential if Ashland's internal operations created confusion because it was strictly liable for the cigarettes brands it placed into the market.

Following its admission that the Tax Commissioner has discretion regarding the amount of a penalty assessment, Ashland argues that "when interpreting a statute, courts may look to 'the language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships." *Citing to* Norman J. Singer & J.D. Sharnbie Singer, *Sutherland Statutory Construction*, 7th ed. 2012, § 53:3. The West Virginia Supreme Court of Appeals has repeatedly held that where a statute is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation. Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968), *see also* Syl. Pt. 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970) ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.") The statute at issue very plainly provides the Tax Commissioner with discretion to impose a penalty he deems appropriate and very clearly excludes the need to examine mitigating circumstances.

Assuming *arguendo* that the Court would need to examine other similar statutes, the more appropriate examination would involve the equivalent penalty statute

in nearly every other sister state that joined the Tobacco Master Settlement Agreement[1] As noted above, the directory statute enacted by West Virginia is molded after multi-state Model Legislation and is substantially similar to statutes enacted by the other states. Furthermore, the statutory framework in no other state provides that mitigating factors and/or willful neglect are to be considered when assessing directory violation penalties.

In sum, Tax Department expertise in this matter lends first-hand knowledge of Ashland Specialty's previous penalties for selling non-approved brands. Prior to the penalty assessment at issue in this appeal, the taxpayer has been twice penalized for selling non-approved cigarette brands. Both of the previous penalties were assessed at 500 percent of the retail value of the cigarettes. R. Tabs 24 and 25. Therefore, it was well within the Tax Commissioner's discretion to determine that the imposition of a less than 500 percent penalty for a third infraction would be nonsensical and serve

1. *See e.g.* Ala. Code §§ 6-12A-1-7, Ariz. Rev Stat. Ann. § 44-7111, Ark. Code. Ann. §§ 26-57-1301-1308, Cal. Rev. & Tax Code § 30165.1, Conn. Gen. Stat. Ann. §§ 4-28k-r, D.C. Code Ann. §§ 7-1803.01-07, Ga. Code Ann. §§ 10-13A-1-9, Kan. Stat. Ann. §§ 50-6a04, 50-6a07-6a021, Ky. Rev. Stat. §§ 131.606-131.630, La. Rev. Stat. Ann. §§ 13:5071-5077, Mich. Comp. Laws §§ 205.426 c-d, 205.427, Neb. Rev. Stat. §§ 69-2704-2711, Neb. Rev. Stat. §§ 69-2704-2711, Nev. Rev. Stat. §§ 370.600-705, N.H. Rev. Stat. Ann. §§ 541-D:1-9, N.J. Stat. Ann. §§ 52:4D-4-12, N.C. Gen. Stat.§§ 66-292-294.1, Okla. Stat. tit. 68, §§ 360.1-9, S.C. Code Ann. §§ 11-48-10-110, Tenn. Code Ann. §§ 67-4-2601-2607, Va. Code Ann. §§ 3.2-4204-4219, Wyo. Stat. Ann. §§ 9-4-1205-1210, P.R. Laws Ann. tit. 24, §§ 15005-15010.

no future deterrent effect. Despite his disclaimer that he does not wish to micromanage the functions of the Tax Department, the OTA administrative law judge clearly substituted his own judgment for that of the Tax Commissioner which is contrary to binding court precedent. In substituting his judgment for that of the Tax Commissioner, the administrative law judge did not give any legal or factual support to explain the basis for the amount of his reduced assessment.

F. OTA erred when it found that the Taxpayer had met its burden of showing that the money penalty issued against it by the Tax Commissioner was erroneous, unlawful, void or otherwise invalid.

OTA erred when it found that Ashland Specialty had carried its burden of proof by showing the penalty originally imposed was erroneous, unlawful, void, or otherwise invalid. The original penalty is well within the parameters set by the Legislature and is supported by the substantial evidence in the record which included a history of previous and escalating infractions. Ashland argues that this Court should cancel entirely the penalty assessment for a third infraction, which was based upon its own internal control failures. Arguing that the applicable law requires a free pass for a third offense is contrary to the law. Because the penalty cornports with the applicable statutory authority, it is not unlawful, void or otherwise invalid. *See* W.Va. Code § 16-9D-8(a).

G. The penalty imposed by the Tax Commissioner is not in violation of the United States and West Virginia Constitutions.

The penalty assessed against Ashland for selling non-approved cigarette brands does not violate the Excessive Fines Clauses of either the United States or the West Virginia Constitutions. The Eighth Amendment of the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed..." U.S. Const. amend. VIII. Meanwhile, Article 3 of the West Virginia Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." W.Va. Const. Art. 3 § 5. As detailed below, the 500 percent penalty imposed upon Ashland Specialty for placing illegal cigarettes into the West Virginia marketplace was not excessive and the penalty was proper under the totality of the circumstances, which included a history of previous and escalating infractions.

This Court must exercise caution in declaring a penalty assessed within the parameters of West Virginia Code § 16-9D-8a to be unconstitutional. The West Virginia Supreme Court of Appeals has held that the presumption is always in favor of the constitutionality of a law enacted by the legislature and the courts must be slow and cautious to overthrow legislative action. *State v. Page*, 100 W.Va. 166, 130 S.E. 166 (W.Va. 1925). The West Virginia Supreme Court has further held that "courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and

executive branches." Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965). The Supreme Court elaborated that "[i]n considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt." Id. (*see also* Syl. pt. 1, *Lewis v. Canaan Valley Resorts, Inc*, 185 W.Va. 684, 408 S.E.2d 634 (1991) and Syl. Pt. 1, *State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 474 S.E.2d 906 (1996)) In this matter, the denial of the discretion afforded to the Tax Commissioner by the legislature is not required by the uncontroverted evidence or the plain language of the statute.

The West Virginia Constitution provides that "[p]enalties shall be proportional to the character and degree of the offense." W.Va. Const. Art. 3 § 5. In this matter, the imposition of a 500 percent penalty is proportional to the offense because Ashland Specialty is an admitted repeat offender. The matter at bar is the third time Ashland Specialty has sold non-approved brands and the offenses have escalated in terms of volume. Ashland was penalized with a 500 percent penalty for its first two infractions. Ashland's request for this Court to drastically rebate or entirely abate the penalty rate for a third and escalating offense lacks any sense of proportion.

In determining the reasonableness of the imposed penalty it is important to note that the Tax Commissioner did not assess the maximum penalty allowable by statute. Specifically, the Tax Commissioner did not impose the maximum monetary penalty of $61 million and did not revoke Ashland's business registration certificate

rendering it unable to transact business in this State. The $159,398.00 assessment is exponentially less than the maximum allowable penalty or the monetary ramifications of having its business registration certification revoked.

The nature of the offense is also instructive. The United States Supreme Court has held that fines "must bear a proportionate relationship to the gravity of the offense it is designed to punish." *US v. Bajakajian*, 524 U.S. 321, 327 (1998). The purpose of enforcing a directory of approved brands was to do all that could be done within the State's power to ensure that there is no reduction in the annual payment the State received from the MSA. West Virginia Code § 16-9D-1 specifically provides:

> The Legislature finds that violations of article nine-b of this chapter threaten the integrity of the tobacco master settlement agreement, the fiscal soundness of the state, and the public health. The Legislature finds that enacting procedural enhancements will help prevent violations and aid enforcement of article nine-b of this chapter and thereby safeguard the master settlement agreement, the fiscal soundness of the state, and the public health.

Ashland Specialty's act of placing non-approved cigarettes into the West Virginia market for a third time threatened the integrity of the MSA and West Virginia's annual tobacco payment. Therefore, reducing or abating the penalty deemed appropriate by the Tax Commissioner would be counterintuitive to the intended purposed of the legislation.

Appendix B

The West Virginia Supreme of Appeals addressed the issue of excessive civil penalties and ultimately concluded that "[c]ivil penalties are rarely found to be excessive. This is because statutes awarding penalties dictate the minimum and maximum amounts that may be awarded." *Vanderbilt Mortgage and Finance, Inc. v. Cole*, 230 W.Va. 505, 740 S.E.2d 562 (2013). Just as the West Virginia Consumer Credit and Protection Act detailed potential penalties to mortgage lenders in *Vanderbilt*, the Complementary Legislation in the case at bar clearly delineated the potential penalties that could be imposed upon wholesalers that sell non-approved cigarettes brands. The Vanderbilt Court found that the statutory language provided creditors with reasonable warning that should they violate the provisions described in West Virginia Code § 46A-5-101(1), they may be subject to a civil penalty. That is precisely the situation before this Court. Given the assessment and payment of two previous 500 percent penalties, in addition to the clear and unambiguous language found in West Virginia Code § 16-9D-8(a), Ashland was provided with reasonable warning that it would face a sizeable penalty should it again sell non-approved cigarettes brands.

The United States Supreme Court has rejected a challenge to a statutory penalty alleged to be unconstitutional. *See St. Louis I.M. & S. Ry., Co. v. Williams*, 251 U.S. 63 (1919). The standard set forth in *Williams* provides that constitutional challenges to awards of statutory penalties must demonstrate that the, award is "so severe and oppressive as to be wholly disproportioned to the offense and obviously

unreasonable." *Id.* at 67. Ashland has not and cannot demonstrate that the Tax Commissioner's assessment of a 500 percent penalty, which falls within the parameters of allowable penalties, meets that high standard especially where the maximum allowable monetary penalty was not imposed and Ashland's ability to conduct business in West Virginia was not revoked.

V. CONCLUSIONS OF LAW

1. In 1998, the Tobacco Master Settlement Agreement was executed to settle litigation brought by the states against tobacco manufacturers to recoup health care expenses resulting fromcigarette smoking. *See* W.Va. Code §16-9B-1. As part of the settlement, the West Virginia Legislature enacted legislation that required tobacco product manufacturers who did not join the MSA and whose cigarettes are sold in West Virginia to make annual deposits into escrow accounts to cover health care expenses resulting from cigarette smoking. *Id.*

2. In 2003, the legislature enacted "Complementary Legislation" to strengthen the Escrow Statute. The legislature found "that enacting procedural enhancements will help prevent violations and aid enforcement of article nine-b of this chapter and thereby safeguard the master settlement agreement [payment], the fiscal soundness of the state, and the public health." W.Va. Code § 16-9D-1.

3. One of the key components of the Complementary Legislation was the creation of a directory of approved brands and penalties for selling cigarettes not appearing in the directory. W.Va. Code § 16-9D-3(c).

4. West Virginia Code § 16-9D-8(a) provides multiple penalties that may be imposed upon a distributor that sells non-approved brands. Specifically, West Virginia Code § 16-9D-8(a) provides as follows:

> Revocation of business registration certificate and civil money penalty. — In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a distributor, stamping agent or any other person has violated subsection (c), section three of this article, or any rule adopted Pursuant thereto, *the commissioner may revoke or suspend the business registration certificate* of the distributor, stamping agent or other person in the manner provided by article twelve, chapter eleven of this code. Each stamp affixed and each sale or offer to sell cigarettes in violation of subsection (c), section three of this article constitutes a separate violation. The commissioner *may also* impose a civil penalty *in an*

> *amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars upon a determination of violation of subsection (c)*, section three of this article or any rules adopted pursuant thereto. The penalty shall be imposed and collected in the manner that tax is assessed and collected under article ten, chapter eleven of this code. The amount of penalty collected shall be deposited in the tobacco control special fund created in section nine of this article. (Emphasis added.)

5. The distributor must ensure that all cigarette packs are contained in the Tax Commissioner's directory. West Virginia Code § 16-9D-3(b)(3) states:

> (C) Failure of a manufacturer, distributor or other stamping agent to receive notice under paragraph (A) or (B), subdivision (3), subsection (b) of this section, or failure of the state to provide notice of any addition to or removal from the directory shall not relieve the distributor or other stamping agent of its obligations under this article.

6. "[A]n abuse of discretion occurs when a material fact deserving significant weight is ignored, or when an improper factor is relied upon, or when all or no improper factors are assessed...but a serious mistake [is made] in weighing them." *Gentry*, 195 W.Va. 512, 466, S.E.2d 171 (1995). A reviewing body is not required to consider irrelevant facts. Ashland's attempt to interject facts regarding its employee turnover and record keeping issues are immaterial given the strict liability imposed upon entities that distribute nonapproved cigarette brands.

7. The West Virginia Supreme Court of Appeals has held that "[s]tatutory damages serve the purpose of deterring the public harm associated with the activity proscribed, rather than seeking to compensate each private injury caused by a violation." *Vanderbilt Mortg. & Finance, Inc. v. Cole*, 230 W.Va. 505, 512 (2013). The penalty assessed by the Tax Commissioner deters the public harm that could result from the influx of off-directory cigarettes into the West Virginia marketplace including a reduction in West Virginia's annual MSA payment and the availability of cigarettes that bypassed stringent certification requirements.

8. "[I]t is this Court's practice not to interfere with a sentence imposed within legislatively prescribed limits, so long as the trial judge did not consider any impermissible factors." Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

9. West Virginia Code § 16-9D-8(a) contains no willfulness requirement. In other tax penalty statutes, the legislature was explicit that penalties be assessed in cases only where a taxpayer's noncompliance was shown to be willful. *See* W.Va. Code § 11-10-19.

10. It is a well settled maxim that the legislature will not enact a meaningless or useless statute. Syl. Pt. 4, *State of West Virginia ex rel. Hardesty v. Aracoma-Chief Logan* No. 4523, 147 W.Va. 645, 129 S.E.2d 921 (1963). The West Virginia Supreme Court of Appeals has additionally held that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995), quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391, 397 (1992); *see also Appalachian Power Co.* at 586, 437 (1995).

11. An inquiring court "must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." *Appalachian Power Co.* at 582. Furthermore, a reviewing body is required "to engage in a substantial inquiry, but it must not substitute its own judgment for that of the Tax Commissioner." *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995).

12. The Eighth Amendment of the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed..." U.S. Const. Amend. VIII. Meanwhile, Article 3 of the West Virginia Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." W.Va. Const. Art. 3 § 5.

13. The presumption is always in favor of the constitutionality of a law enacted by the legislature and the courts must be slow and cautious to overthrow legislative action. *State v. Page*, 100 W.Va. 166, 130 S.E. 166 (W.Va. 1925). "[C]ourts must exercise due restraint, in recognition of the principle of the separation of powers in government among. the judicial, legislative and executive branches." Syl. Pt. l, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965). "In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt." *Id*. (*See also* Syl. pt. 1, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 408 S.E.2d 634 (1991) and Syl. Pt. 1, *State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 474 S.E.2d906 (1996)).

14. "Penalties shall be proportional to the character and degree of the offense." W.Va. Const. Art. 3 § 5. In this matter, the imposition of a 500 percent

penalty is proportional to the offense because Ashland Specialty is an admitted repeat offender.

15. "Civil penalties are rarely found to be excessive. This is because statutes awarding penalties dictate the minimum and maximum amounts that may be awarded." *Vanderbilt Mortgage and Finance, Inc. v. Cole*, 230 W.Va. 505, 740 S.E.2d 562 (2013).

XI. ORDERS

The Office of Tax Appeals erred when it substituted its judgment for that of the Tax Commissioner and reduced a penalty assessment against Ashland Specialty, a business entity that admittedly distributed non-approved tobacco products in West Virginia. The Tax Commissioner's request for reinstatement of the original penalty imposed is consistent with the substantial evidence in the record reflecting Ashland's repeated failures to ensure that only listed cigarettes are sold in the State of West Virginia. Meanwhile, Ashland Specialty's request to drastically reduce or entirely abate the assessed penalty for its third and escalated infraction would further compound OTA's error.

Accordingly, this Court **REVERSES** the OTA Decision set forth in *Ashland Specially Company, Inc. v. Mark W Matkovich*, as State Tax Commissioner, OTA Docket No. 12-366 X-M. It is further ordered that the original penalty assessment of $159,398.00 be **REINSTATED**.

Appendix B

The Clerk of the Circuit Court is directed to transmit a true copy of this Final Order to the counsel listed below and remove this case from the Court's docket.

Entered this Order the Seventh day of April, 2017.

/s/Judge Carrie L. Webster
Judge Carrie L. Webster

APPENDIX C —FINAL DECISION OF THE WEST VIRGINA OFFICE OF TAX APPEALS DATED AUGUST 18, 2014

WEST VIRGINIA OFFICE OF TAX APPEALS

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

DOCKET NO. 12-366 X-M

ASHLAND SPECIALTY COMPANY, INC.

Petitioner,

v.

GRIFFITH, CRAIG A., as **STATE TAX COMMISSIONER of WEST VIRGINIA,**

Respondent

ADMINISTRATIVE LAW JUDGE:	A.M. "Fenway" Pollack Chief Administrative Law Judge
EVIDENTIARY HEARING HELD:	August 27, 2013 Charleston, WV
SUBMITTED FOR DECISION:	December 31,2013

Appendix C

SYNOPSIS

PUBLIC HEALTH
IMPLEMENTATION AND ENFORCEMENT OF TOBACCO MASTER SETTLEMENT AGREEMENT

The agreement between West Virginia and certain major tobacco companies is referred to as the "Tobacco Master Settlement Agreement" and implementation of this agreement is codified in West Virginia Code Section 16-9B-1 *et seq.* Enforcement of the agreement is codified in West Virginia Code Section 16-9D-1 *et seq.*

PUBLIC HEALTH
ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER SETTLEMENT AGREEMENT
DEFINITIONS

In Article 9D, the West Virginia Legislature has given the Tax Commissioner enforcement duties under the agreement. *See* W. Va. Code Ann. §16-9D-2(c) (West 2014) ("Commissioner" means the duly appointed head of the agency responsible for collection of the excise tax on cigarettes").

Appendix C

PUBLIC HEALTH
ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER SETTLEMENT AGREEMENT
CERTIFICATIONS; DIRECTORY; TAX STAMPS

"Directory of cigarettes approved for stamping and sale. - The commissioner shall develop and publish on the tax division's website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection (a) of this section and all brand families that are listed in the certifications, except as provided in subdivisions (1) and (2) of this subsection." W. Va. Code Ann. §16-9D-3(b) (West 2014).

PUBLIC HEALTH
ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER SETTLEMENT AGREEMENT
CERTIFICATIONS; DIRECTORY; TAX STAMPS

"The tax commissioner shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family." W. Va. Code Ann. §16-9D-3(B)(3) (West 2014).

Appendix C

PUBLIC HEALTH

ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER SETTLEMENT AGREEMENT

CERTIFICATIONS; DIRECTORY; TAX STAMPS

"Prohibition against stamping or sale of cigarettes not on the directory. -- It is unlawful for any person: (1) To affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory; or (2) To sell, offer, or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory .... "W. Va. Code Ann. §16-9D-3(c)(1)&(2) (West 2014).

PUBLIC HEALTH

ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER SETTLEMENT AGREEMENT

PENALTIES AND OTHER REMEDIES

"Revocation of business registration certificate and civil money penalty. -- In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a distributor, stamping agent or any other person has violated subsection (c), section three of this article, or any rule adopted pursuant thereto, the commissioner may revoke or suspend the business

registration certificate of the distributor, stamping agent or other person in the manner provided by article twelve, chapter eleven of this code. Each stamp affixed and each sale or offer to sell cigarettes in violation of subsection (c), section three of this article constitutes a separate violation. The commissioner may also impose a civil penalty in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars upon a determination of violation of subsection (c), section three of this article or any rules adopted pursuant thereto." W. Va. Code Ann. §16-9D-8(a) (West 2014).

WEST VIRGINIA OFFICE OF TAX APPEALS CONCLUSION OF LAW

West Virginia Code Section 16-9D-8(a) affords the Tax Commissioner discretion as to both, what action to take upon the sale of de-listed cigarettes and as to the amount of penalty upon such sales.

WEST VIRGINIA OFFICE OF TAX APPEALS CONCLUSION OF LAW

By failing to exercise discretion as to the amount of the money penalty in this matter, the Tax Commissioner abused his discretion.

Appendix C

WEST VIRGINIA OFFICE OF TAX APPEALS CONCLUSION OF LAW

In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. See W. Va. Code Ann. §11-10A- 10(e) (West 2010); W. Va. Code. R. §§121-1-63.1 and 69.2 (2003).

WEST VIRGINIA OFFICE OF TAX APPEALS CONCLUSION OF LAW

The Petitioner has met its burden of showing that the money penalty issued against it by the Tax Commissioner was erroneous, unlawful, void, or otherwise invalid.

FINAL DECISION

On August 3, 2012, the Auditing Division of the West Virginia State Tax Commissioner's Office (hereafter Tax Commissioner or Respondent) issued an audit notice of assessment against Ashland Specialty Company, Inc. (hereafter Petitioner). This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 16, Article 9D *et seq*, of the West Virginia Code. The assessment was for the sale of cigarettes not listed in the directory of approved brands or manufacturers during the period from June 30, 2009, through May 31, 2012. The assessment was for additions to tax (a money penalty) in the amount of $159,398.00. Written notice of this assessment was served on the Petitioner, as required by law.

Appendix C

On October 3, 2012, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§ 11-1 0A-8(1); 11-10A-9 (West 2010). An evidentiary hearing was held on August 27, 2013. Thereafter, the parties filed legal briefs. At the conclusion of the briefing schedule this matter became ripe for decision.

FINDINGS OF FACT

1. The Petitioner is a Kentucky corporation that provides inventory to convenience stores, including some in West Virginia. Included in the inventory it provides are tobacco products.

2. In 1998, the state of West Virginia was one of the states that entered into a settlement agreement with various tobacco manufacturers, as the result of previously filed national litigation. This agreement is commonly referred to as the "master settlement agreement."

3. In 2003, the West Virginia Legislature drafted Article 9D of Chapter 16 of the state code, which codified certain violations and penalties regarding the agreement. One of the provisions of Article 9D was a prohibition on selling cigarettes that were not listed in a directory of approved brands. Article 9D also created money penalties for selling unapproved brands.

4. Article 9D gave the Tax Commissioner enforcement duties.

5. In 2012, an auditor with the West Virginia State Tax Department reviewed the Petitioner's books and records regarding cigarette sales and discovered that it had sold cigarettes that were no longer listed in the directory of approved brands. Specifically, during the period of June to September of 2009 the Petitioner sold 12,210 packs of Galaxy/Galaxy Pro cigarettes and twenty packs of Berley cigarettes when those brands were not on the approved list.

6. During the period when the de-listed cigarettes were sold the Petitioner was undergoing management/ staffing issues. The Petitioner attributes the selling of the de-listed brands to these issues.

7. This is the third audit of this Petitioner that revealed the sale of de-listed cigarettes.

8. The money penalty amount that forms this assessment constitutes the number of packs sold that were not on the approved list, times the state minimum pricing, times seven percent, to obtain the retail price, times five hundred percent.

DISCUSSION

Despite the fact that this matter involves the tobacco master settlement agreement, the West Virginia Legislature has clearly given the Tax Commissioner enforcement authority and the Petitioner does not quibble about this point. *See* W. Va. Code Ann. §16-9D-1 *et seq* (West 2014). In fact, this matter hinges on

only one complaint by the Petitioner, namely, that the penalty/fine that was assessed is too high, and that the Tax Commissioner abused his discretion in levying such a penalty. The Tax Commissioner, for his part, argues that the Petitioner should have known better than to sell brands that were not on the list, because twice before it has been assessed a money penalty for selling non-approved brands. The Tax Commissioner also points out that he could have revoked the Petitioner's business registration certificate, but chose not to.

The Tax Commissioner's ability to assess a money penalty for the sale of de-listed brands is codified in West Virginia Code Section 16-90-8:

> *Revocation of business registration certificate and civil money penalty.* -- In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a distributor, stamping agent or any other person has violated subsection (c), section three of this article, or any rule adopted pursuant thereto, the commissioner may revoke or suspend the business registration certificate of the distributor, stamping agent or other person in the manner provided by article twelve, chapter eleven of this code. Each stamp affixed and each sale or offer to sell cigarettes in violation of subsection (c), section three of this article constitutes a separate violation. The commissioner may also impose a civil penalty in an amount not to exceed the greater

> of five hundred percent of the retail value of the cigarettes or five thousand dollars upon a determination of violation of subsection (c), section three of this article or any rules adopted pursuant thereto.

W. Va. Code Ann. §16-9D-8(a) (West 2014). In their post-hearing briefs the parties argue back and forth as to whether the Tax Commissioner abused his discretion under the facts of this case. As one would expect, the Petitioner argues that the Tax Commissioner failed to take into account any factors that would mitigate the issuance of a maximum penalty. The Tax Commissioner contrasts Section 8(a) with West Virginia Code Section 11-10-19[1]. Due to the fact that Section 11-10-19 only allows the Tax Commissioner to issue a penalty upon a finding of a willful failure to pay or evade a tax, while Section 8(a) contains no willfulness requirement for assessing a penalty for selling de-listed cigarettes, the Tax Commissioner argues that the penalty in this case was proper. We find this argument to be unpersuasive. The Tax Commissioner's suggestion that he has no choice but to assess a penalty upon the sale of a de-listed brand is belied by the Legislatures use of the word "may" in Section 8(a). *See Rosen v. Rosen*,

1. Any person required to collect, account for and pay over any tax administered under this article, who willfully fails truthfully to account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over. W. Va. Code Ann. §11-10-19 (West 2010).

222 W. Va. 402, 664 S.E.2d 743 (2008) (An elementary principle of statutory construction is that the word "may" is inherently permissive in nature and connotes discretion). West Virginia Code Section 16-9D-8(a) is clear and unambiguous, and by it's plain language the Tax Commissioner can do four things upon discovering the sale of de-listed cigarettes, he or she can 1) revoke the sellers business registration certificate, 2) assess them a money penalty, 3) revoke and assess a penalty, 4) or do nothing. Additionally, if the Tax Commissioner assesses a money penalty, he or she has discretion as to the amount of the penalty.

In this matter, we must rule for the Petitioner. The Tax Commissioner did abuse his discretion when he assessed the penalty in this matter, but not because, as the Petitioner argues, he ignored certain mitigating factors. The evidence in this matter shows that the Tax Commissioner exercised no discretion at all in issuing the penalty. In fact, the Tax Commissioner's only witness testified that there is **never** any discretion exercised when issuing penalties such as this.

> **JUDGE POLLACK:** ... Now, is it your understanding that you have no discretion, that you have to do 500 percent?
>
> **MR. JOHNSON:** Yes. My auditors have no discretion. I mean they have the ability to come to me. I have the ability to go to my director and get anything --- to request something less. It's never happened. I mean we --- in my

> recollection, they've all been 500 percent that we've done. And these are rare. There's not that many of them.

Transcript at p. 65. Mr. Johnson's testimony seems to suggest that while the Tax Commissioner routinely assesses the maximum penalty in cases such as this, there is the remote possibility that in certain circumstances, there is at least room for discussion about a lesser penalty. Unfortunately, later in his testimony, Mr. Johnson states something more troubling, namely, that the Tax Department computers have been programed to always assess the maximum penalty.

> **JUDGE POLLACK:** Okay. But when you say it's at 500 percent, is it your understanding that --- don't even bother going up the food chain because the answer is going to be no?
>
> **MR. JOHNSON:** I've never gone up the food chain for any ---. I've never heard a good explanation to go up the food chain. *Our audit program is locked in at 500 percent.* I mean I don't ---. Like I said, these were rare. I don't recall any reason to ask for a reduced rate.

Transcript at p. 67 (emphasis added). No matter what the situation, employees who think they have to assess the maximum penalty, or a computer program[2] that will

---

2. If the computers will in fact not allow a lesser penalty, the record does not show who, at the Tax Department, directed that

not allow a lesser penalty, the evidence in this matter clearly shows that the Tax Commissioner never exercises the discretion afforded him by the Legislature, when it drafted West Virginia Code Section 16-9D-8.[3] The end result is Section 8(a) having been, for all intents and purposes, rewritten by the Tax Commissioner to now read: "The commissioner may also impose a civil penalty in an amount ~~not to exceed~~ **equal** to the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars."

The Petitioner wants this Tribunal to rule that the Tax Commissioner abused his discretion by ignoring certain mitigating factors regarding the amount of the penalty in this matter. We cannot rule as such, because the Tax Commissioner never considered any factors regarding the amount of the penalty. However, this failure was, in and of itself, an abuse of discretion. *See e.g. Brunson v. Pierce Cnty.*, 149 Wash. App. 855, 205 P.3d 963 (2009) (Failure to exercise discretion is an abuse of discretion).

After this decision was completed we sent it to the parties with directions that they, in accordance with Section 73 of Title 121, Series 1 of the Code of State

---

they be programmed as such.

3. We recognize that the Legislature has given the Tax Commissioner discretion in two areas, what to do upon discovery of the sale of de-listed brands and how much of a penalty to assess. As a result, the Tax Commissioner's argument that he could have revoked the Petitioner's business registration certificate is not relevant to a discussion regarding the exercising of discretion as to the proper amount of penalty.

Rules, consult and attempt to arrive at a corrected penalty amount.[4] The parties were unable to agree on a revised penalty amount. The Petitioner argues for a penalty equating to the retail price of the delisted cigarettes sold, times 25%, which would reduce the Tax Commissioner's penalty by approximately $151,000.00. The Tax Commissioner argues that the penalty should remain at the maximum allowed under West Virginia Code Section 16-9D-8(a) *supra* which is the retail price times 500%. The Tax Commissioner makes this argument based upon the fact that this is the third time the Petitioner has sold cigarettes that were not on the approved list.[5]

We have no interest in micromanaging the functions of the Tax Department. However, in this matter the Petitioner argued that the Tax Commissioner had abused the discretion given to him in Section 8(a) and the evidence showed that to be true. We do agree with the

4. "Where the office of tax appeals has filed or stated its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the office of tax appeals detennination of the issues, showing the correct amount of the liability or overpayment to be entered as the decision." W. Va. CodeR. §121-1-73.1.1 (2003).

5. The Tax Commissioner also complains that this decision is inconsistent with a recently issued decision in which we upheld the maximum penalty for a first time violator. However, in that matter, the Petitioner, by counsel, argued that there should be no penalty whatsoever because the Tax Commissioner failed to properly notify it of the brand's removal from the approved list. Therefore, we did not have any evidence before us regarding the Tax Commissioner's exercise of discretion or lack thereof.

Tax Commissioner that a larger penalty is warranted in this matter, precisely because this is not the first time the Petitioner has been audited and been found to have sold delisted brands. We just disagree with the Tax Commissioner's contention that this Petitioner deserves the maximum penalty. Common sense tells us that the maximum penalty should be reserved for the worst offenders, for example, a seller who deliberately sells delisted brands or who engages in some criminal activity in connection with cigarette sales. We believe that a 25% reduction in the penalty in this matter is appropriate, or put another way, a fine representing the price of the nonapproved packs that were sold times 375%.

CONCLUSIONS OF LAW

1. The agreement between West Virginia and certain major tobacco companies is referred to as the "Tobacco Master Settlement Agreement" and implementation of this agreement is codified in West Virginia Code Section 16-9B-1 *et seq.* Enforcement of the agreement is codified in West Virginia Code Section 16-9D-1 *et seq.*

2. In Article 9D, the West Virginia Legislature has given the Tax Commissioner enforcement duties under the agreement. *See* W. Va. Code Ann. §16-9D-2(c) (West 2014) ("Commissioner" means the duly appointed head of the agency responsible for collection of the excise tax on cigarettes").

3. *"Directory of cigarettes approved for stamping and sale.* - The commissioner shall develop and publish

on the tax division's website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection (a) of this section and all brand families that are listed in the certifications, except as provided in subdivisions (1) and (2) of this subsection." W. Va. Code Ann. §16-9D-3(b) (West 2014).

4. "The tax commissioner shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family." W. Va. Code Ann. §16-9D-3(b)(3) (West 2014).

5. "*Prohibition against stamping or sale of cigarettes not on the directory.* -- It is unlawful for any person: (1) To affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory; or (2) To sell, offer, or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory .... " W. Va. Code Ann. §16-9D-3(c)(1)&(2) (West 2014).

6. "*Revocation of business registration certificate and civil money penalty.* -- In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a distributor, stamping agent or any other person has violated subsection (c), section three of this article, or any rule adopted pursuant thereto, the commissioner may revoke or suspend the business registration certificate of the distributor, stamping agent or other person in the manner provided by article

twelve, chapter eleven of this code. Each stamp affixed and each sale or offer to sell cigarettes in violation of subsection (c), section three of this article constitutes a separate violation. The commissioner may also impose a civil penalty in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars upon a determination of violation of subsection (c), section three of this article or any rules adopted pursuant thereto." W. Va. Code Ann. §16-9D-8(a) (West 2014).

7. West Virginia Code Section 16-9D-8(a) affords the Tax Commissioner discretion as to both, what action to take upon the sale of de-listed cigarettes and as to the amount of penalty upon such sales.

8. By failing to exercise discretion as to the amount of the money penalty in this matter, the Tax Commissioner abused his discretion.

9. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010); W. Va. Code. R. §§121-1-63.1 and 69.2 (2003).

10. The Petitioner has met its burden of showing that the money penalty issued against it by the Tax Commissioner was erroneous, unlawful, void, or otherwise invalid.

Appendix C

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the money penalty assessment issued against the Petitioner on August 3, 2012, for additions to tax in the amount of $159,398.00 is hereby **MODIFIED** to now be in the amount of $119,548.50.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: /s/ A.M. "Fenway" Pollack
A.M. "Fenway" Pollack
Chief Administrative Law Judge

August 18, 2014
Date Entered

APPENDIX D — ORDER DENYING PETITION FOR REHEARING OF THE STATE OF WEST VIRGINIA, DATED OCTOBER 9, 2018

STATE OF WEST VIRGINIA

No. 17-0437

ASHLAND SPECIALTY CO., INC.,

Petitioner Below, Petitioner,

vs

DALE W. STEAGER, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent Below, Respondent.

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 9th Day of October, 2018, the following order was made and entered:

ORDER

On October 4, 2018, The Court, having maturely considered the petition for rehearing filed by the petitioner, Ashland Specialty Co., Inc., by its attorneys, Floyd M. Sayre, III, and Mark A. Loyd, and the response filed thereto, by the respondent, Dale W. Steager, State Tax Commissioner of West Virginia, by his attorneys, Katherine A. Schultz and Cassandra L. Means, is of

opinion to and does hereby refuse said petition for rehearing.

Justice Loughry, Allen H., II suspended, therefore not participating and Justice Paul T. Farrell sitting by temporary assignment.

A True Copy

Attest: //s// Edythe Nash Gaiser
Clerk of Court