

---

NO. 032340

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

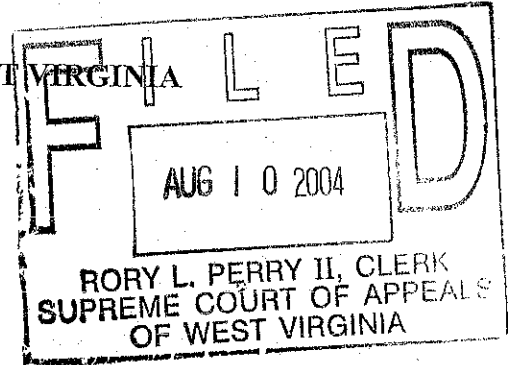
MT. STATE BIT SERVICE, INC.,  
a West Virginia corporation,

Petitioner,

v.

STATE OF WEST VIRGINIA,  
DEPARTMENT OF TAX AND REVENUE,

Respondents.



**STATE OF WEST VIRGINIA DEPARTMENT OF  
TAX AND REVENUE'S APPELLEE REPLY BRIEF**

STATE OF WEST VIRGINIA  
DEPARTMENT OF TAX AND REVENUE

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

A. M. "FENWAY" POLLACK, State Bar ID 7773  
ASSISTANT ATTORNEY GENERAL  
Office of the Attorney General  
Building 1, Room W-435  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305  
(304) 558-2522

---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 03-2340

MT. STATE BIT SERVICE, INC.,  
a West Virginia corporation,

Petitioner,

v.

STATE OF WEST VIRGINIA,  
DEPARTMENT OF TAX AND REVENUE,

Respondents.

**STATE OF WEST VIRGINIA DEPARTMENT OF  
TAX AND REVENUE'S APPELLEE REPLY BRIEF**

COMES NOW the West Virginia Department of Tax and Revenue ("Department"), by Counsel, A. M. "Fenway" Pollack, Assistant Attorney General, and pursuant to Rule 10(c) of the West Virginia Rules of Appellate Procedure presents it's Brief in response to the Appellant's Brief. The Appellee previously filed a response to the Appellant's petition and will not reiterate those arguments here, but would request that the arguments contained therein be incorporated by reference herein.

**ASSIGNMENTS OF ERROR IN APPELLANT'S BRIEF**

On page eight (8) of it's brief the Appellant argues that "it is clear that the West Virginia Department of Tax and Revenue State Tax Division intended for blasting activities to be exempt from use tax." It goes on to argue that some of the exemptions contained in the Code of State Rules Series 15 Section 123.4 regarding equipment for safety, drainage, pollution control etc., renders the Appellant's non exemption "nonsensical." Also on page eight (8), the Appellant suggests that when

the Legislature created the exemptions at issue here, it intended for those exemptions to apply to taxpayers such as the Appellant.

On page nine (9) of its brief the Appellant cites cases from other jurisdictions, but admits that the rulings contained therein are based upon statutory tax schemes different from West Virginia's.

At the Circuit Court level the Appellant submitted a twenty-seven (27) page reply brief. While many of the arguments contained therein were duplicative of its petition to the Circuit Court, it is anticipated that some of those arguments will be repeated here, and as such they will be addressed.

On pages five (5) to fifteen (15) of its reply brief below the Appellant applies various circuitous arguments that all attempt to lead to the same conclusion; namely that the Legislature intended for the use tax exemption to apply to anyone who provides **any** contract services in the production of natural resources. On pages fifteen (15) to twenty-two (22) of that brief the Appellant argues what is ostensibly its second argument, however in the second sentence of its argument it states "[t]he 'production of natural resources' requires the 'owner of natural resources or another' to be engaged in **one** of the enumerated production activities or post-production clean up services." (Emphasis added) As will be discussed in greater detail below that is the fatal (and constant) flaw in the Appellant's argument, to wit; that West Virginia Code Section 11-15-2(t) (1991) can be interpreted as allowing anyone who performs **any** of the functions of natural resource production to label themselves a "producer" of natural resources.

Lastly, the Appellant argues that it is a contract miner and as such is entitled to the direct use exemption. The Appellant relies on sections 8a.4.1 and 123.4.3.5 of Title 110, Series 15 of the Code

of State Rules for the definition of a contract miner. And once again, these definitions rely on the overall statutory definition of a producer of natural resources as their foundation.

**AUTHORITIES RELIED ON**

**CASES**

Page No.

<i>Boley v. Miller</i> , 187 W. Va. 242, 418 S.E.2d 352 (1992) .....	6
<i>Carper v. Kanawha Banking &amp; Trust Co.</i> , 157 W. Va. 477, 207 S.E.2d 897 (1974) .....	6
<i>Connecticut Nat'l Bank v. Germain</i> , 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 LED.2d 391, 397 (1992) .....	4
<i>Expedited Transport Systems, Inc. v. Vieweg</i> , 529 S.E.2d 110, 207 W. Va. 90 (W.Va 2000) .....	5
<i>Lincoln County Board of Education v. Adkins</i> , 188 W. Va. 430, 424 S.E.2d 775 (1992) .....	6
<i>Martin v. Randolph County Board of Education</i> , 465 S.E.2d 399, 195 W. Va. 297 (W.Va.1995) .....	4

**STATUTES**

W. Va. Code § 11-15-2(t) (1987, 1991) .....	passim
---	--------

**OTHER**

110 C.S.R. 15, § 8a.4.1 .....	2
110 C.S.R. 15, §123.4 .....	1
110 C.S.R. 15, §123.4.3 .....	5
110 C.S.R. 15, §123.4.3.4 .....	5
110 C.S.R. 15, §123.4.3.5 .....	2
Blacks Law Dictionary 79 (5th Ed. 1979) .....	5

## ARGUMENT

Despite the Appellant's numerous and varied attempts to paint itself as a producer of natural resources, the statute in question is neither vague nor ambiguous and clearly expresses the intention of the legislature regarding which taxpayers should receive the benefit of the producer's exemption. West Virginia Code Section 11-15-2t (1987 and 1991 volumes) defines the production of natural resources as "the performance, by either the owner of the natural resources or another, of the act or process of exploring, developing, severing, extracting, reducing to possession AND loading for shipment for sale, profit or commercial use of any natural resource products and any reclamation, waste disposal or environmental activities associated therewith." W. Va. Code § 11-15-2(t) (1987 and 1991 volumes) and W. Va. Code § 11-15-2(o) (1995 volume). (Emphasis added.)

The Appellant's invocation of Legislative intent does not assist it in this argument. The statute at issue is neither vague nor ambiguous. "[C]ourts 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 Bd. of Educ., 465 S.E.2d 399, 195 W.Va. 297 (W.Va. 1995) (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 LED.2d 391, 397 (1992)).

Additional weight is lent to this argument by the Legislature's use of the conjunctive "and" along with a review of all the words that are co-joined by the word "and" "[a]nd' is a conjunction connecting words or phrases, expressing the idea that the latter is to be **added to or taken along** with the first; in its conjunctive sense the word 'and' is used to co-join words, clauses or sentences, expressing the relation of addition or connection, and signifying that something is to follow in addition to that which proceeds, and its use implies that the connected elements must be grammatically coordinate, as where the elements preceding and succeeding the word 'and' refer to

the same subject matter." Expedited Transp. Systems, Inc. v. Vieweg, 529 S.E.2d 110, 207 W.Va. 90, (W.Va. 2000) (citing Black's Law Dictionary 79 (5th Ed.1979))(emphasis added). It is no coincidence that in drafting West Virginia Code Section 11-15-2(t) the Legislature included every step in the production of natural resources, from exploring to shipment. Clearly, the Legislature meant that the exemption is reserved for those entities that do **all** of the activities associated with producing natural resources, not some of them. The regulations promulgated by the Department of Tax and Revenue also lend strength to this argument. Section 123.4.3, subsections 4 and 5 of Title 110, Series 15 of the Code of State Rules discuss those entities that are exempt for the direct use tax, including contract miners. Subsection 4 begins by stating "persons **subject to the severance tax** are exempt on all purchases made by them for use in severance activities." 110 C.S.R. 15, § 123.4.3.4. Subsection 5 discusses when contract miners are to be considered engaged in the production of natural resources, stating "contract miners or cutters are considered to be engaged in the production of natural resources and their purchases are subject to the direct use concept when engaged in the activities outlined in Section 123.4.3 of these regulations." Id. at subsection 5. Section 123.4.3 contains the same definition of a producer of natural resources as is contained in Code Section 11-15-2(t)*supra*. Clearly, the regulations associated with the production of natural resources and those entities who would benefit from tax exemptions as a result of that status mirror the same legislative intent as the statutory enactments. The whole point of the legislative and regulatory scheme is to give the tax benefits to those entities who pay severance tax, i.e., the owners or other parties who actually produce natural resources, **including** taking possession of the resource and selling it or using it. It is precisely to prevent the arguments being raised by the Appellant that the Legislature and the Department of Tax and Revenue drafted the laws in question with the inclusion of the much debated

“and.” The point is to prevent a business similarly situated as the Appellant from **occasionally** (as the record below clearly shows) assisting an entity that does pay severance tax, turning around and receiving the same tax benefits without paying the severance tax.

Assuming arguendo that there was some ambiguity in the West Virginia Code Section 11-15-2(t), nonetheless, this Honorable Court has stated on numerous occasions that deference must be shown to administrative bodies charged with the implementation of the statute in question. *See Lincoln County Board of Education v. Adkins*, 188 W.Va. 430, 424 S.E.2d 775 (1992). When faced with a problem of statutory construction, the circuit court and this Court should give some deference to the interpretation of the officer who is charged with statutory implementation. *See Boley v. Miller*, 187 W.Va. 242, 418 S.E.2d 352 (1992). (Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.)

This Honorable Court has in the past indicated that because of frequent inaccurate and interchangeable statutory use of the words “and” and “or,” courts should be free to change the usage, **but only when necessary to harmonize the provisions of a statute, to save it from unconstitutionality, or to effectuate the obvious intention of the legislature.** *See Carper v. Kanawha Banking & Trust Co.*, 157 W.Va. 477, 207 S.E.2d 897 (1974)(emphasis added). In this case the obvious intention of the Legislature, as discussed above, would be turned on its head by the insertion of the word “or” into West Virginia Code Section 11-15-2(t).

In summation, the Appellants entire argument can be boiled down to its assertion that the Legislature intended for it to call itself for tax purposes, a “producer of natural resources.” The Appellant wants to achieve this designation despite the fact that the statute in question is clear and unambiguous and despite the fact that 90% of its business is sales of equipment. It is only

occasionally that the Appellant even assists the actual producers of natural resources. Of course, the Appellant does not pay the severance tax. The Appellant and entities similarly situated are precisely why the Legislature drafted the law as written; they don't produce natural resources, they occasionally assist those who do, and they are not subject to the severance tax.

### CONCLUSION

For the reasons stated above and in its previously filed Response to Petition, the Department of Tax and Revenue requests that this Honorable Court affirm the decision of the Circuit Court of Monongalia County. The Appellee requests such other general relief as this Honorable Court deems just and proper.

Respectfully submitted,

**STATE OF WEST VIRGINIA,  
DEPARTMENT OF TAX AND REVENUE,**

By Counsel,

**DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL**

  
A. M. "FENWAY" POLLACK (WVSB# 7773)

ASSISTANT ATTORNEY GENERAL

Building 1, Room W-435

1900 Kanawha Boulevard, East

Charleston, West Virginia 25305

(304) 558-2522

NO. 032340

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MT. STATE BIT SERVICE, INC.,  
a West Virginia corporation,

Petitioner,

v.


STATE OF WEST VIRGINIA,  
DEPARTMENT OF TAX AND REVENUE,

Respondents.

CERTIFICATE OF SERVICE

I, A. M. "Fenway" Pollack, Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing "*State of West Virginia Department of Tax and Revenue's Appellee Reply Brief*" was served by depositing the same, postage prepaid, via United States Mail, this 10th day of August, 2004 to the following:

James A. Gianola, Esquire  
Michelle L. Bechtel, Esquire  
1714 Mileground  
Morgantown, WV 26505  
(304) 291-6300

  
A. M. "Fenway" Pollack