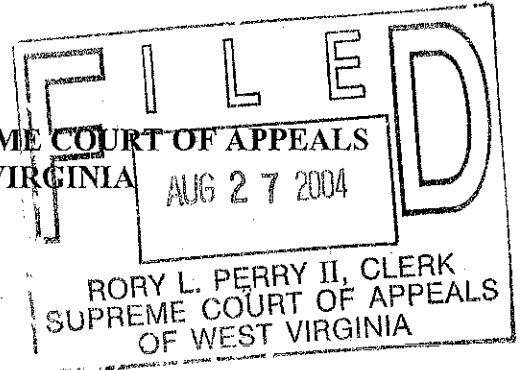


NO. 31735

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA



**MT. STATE BIT SERVICE, INC.,**

**Appellant / Petitioner below,**

**v.**

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

**Appellee / Respondent below.**

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**REPLY BRIEF OF APPELLANT MT. STATE BIT SERVICE, INC.**

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**GIANOLA, BARNUM & WIGAL, L.C.**

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August 26, 2004

**MT. STATE BIT SERVICE, INC.,  
a West Virginia Corporation;**

**Petitioner/Appellant,**

v.

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

**Respondent/Appellee,**

**MT. STATE BIT SERVICE, INC.'S REPLY BRIEF**

The Petitioner, Mt. State Bit Service, Inc., now files its Reply Brief to the State of West Virginia Department of Tax and Revenue's Appellee Reply Brief.

**I. WEST VIRGINIA CODE § 11-15-2(t) DOES NOT REQUIRE PRODUCERS OF NATURAL RESOURCES TO BE ENGAGED IN ALL ACTS AND PROCESSES SET FORTH IN THE STATUTE TO QUALIFY AS A NATURAL RESOURCE PRODUCER**

In its brief, the Appellee argues that West Virginia Code § 11-15-2(t) [1991] requires that a person or an entity must perform all of the acts and processes set forth in the statute in order to be engaged in the production of natural resources. West Virginia Code § 11-15-2(t) provides that:

**“Production of natural resources” means 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.**

(emphasis added.) The Appellee's argument that a person or entity must perform all of these acts or processes is erroneous because the legislature intended for West Virginia Code § 11-15-2(t) to be broadly construed as evidenced by the phrase “and any reclamation, waste disposal or environmental activities associated therewith,” which refers to all of the acts and processes,

whether individually or collectively, listed in the statute. Furthermore, West Virginia Code § 11-15-2(t) refers to “the act or process of . . .,” as opposed to “the act[s] or process[es] of . . .,” exploring, developing, severing, extracting, reducing to possession and loading for shipment for sale. Therefore, the language employed by the legislature is demonstrative of its intent for any individual or entity who is the “owner of the natural resources, or another”, and who is engaged in at least one of the acts or processes set forth in West Virginia Code § 11-15-2(t) to be considered a natural resource producer.

To further support the legislative intent that West Virginia Code § 11-15-2(t) be broadly construed, this Court has recognized that the word “and” is often misused and, as a result, it may be changed to “or” if necessary to effectuate legislative intent. In Carper v. Kanawha Banking & Trust Co., 157 W.Va. 477, 517, 207 S.E.2d 897, 921 (1974), this Court observed that:

The popular use of ‘or’ and ‘and’ is so loose, and so frequently inaccurate, that it has infected statutory enactments. For this reason, their strict meaning is more readily departed from than that of other words. In this respect it is clear that the courts have power to change and will change ‘and’ to ‘or’ and vice versa, whenever such conversion is required by the context, or is necessary to harmonize the provisions of a statute and give effect to all of its provisions, or to save it from unconstitutionality, or, in general, to effectuate the obvious intention of the legislature.

Accordingly, the word “and” as contained in West Virginia Code § 11-15-2(t) should be replaced by the word “or” to effectuate the legislative intent that the statute be broadly construed so as to include an entity or individual engaged in one of the activities set forth in the statute as a natural resource producer.

If this Court adopts the argument of the Appellee that a person or an entity must perform all of the acts and processes set forth in West Virginia Code § 11-15-2(t) to be considered a natural resource producer, then a major portion of the contract miners and loggers who are

clearly engaged in the production of natural resources would not be considered a producer of natural resources under the statute. For example, a contract mining company which is clearly engaged in the production of natural resources enters into a contract with the owner of the natural resources (in this example, coal) to provide the severance and extraction of the coal. The owner is also acting as his own marketing agent for the natural resources and, in this instance, the person responsible for the severance tax. The contract miner who does not load the coal for shipment but only performs the actual mining (severing and extracting) would not be a natural resource producer under Appellee's interpretation of West Virginia Code § 11-15-2(t).

**II. THE NATURAL RESOURCE PRODUCER EXEMPTION CLEARLY APPLIES TO NATURAL RESOURCE PRODUCERS WHO ARE NOT SUBJECT TO SEVERANCE TAX AND, THEREFORE, THESE PRODUCERS ARE INCLUDED AS THE INTENDED RECIPIENTS OF THE BENEFIT OF THE NATURAL RESOURCE EXEMPTION**

The Appellee argues that the legislative and regulatory tax scheme is designed to provide the natural resource producer exemption only to those entities that pay severance tax. 110 C.S.R. 15 § 123.4.3 provides, in part, that:

Persons engaged in the business of the production of natural resources are subject to the direct use concept, unless they fall within the special exemption for severance taxpayers outlined in Section 123.4.3.4 of these regulations. If the person engaged in the production of natural resources is not entitled to the exemption for severance taxpayers, they must pay tax on purchases of tangible personal property and services, which are indirectly used in the production of natural resources. Purchases of tangible personal property and services which are directly used in the business of the production of natural resources are exempt from sales and use tax when such property or services are purchased by a person engaged in the business of the production of natural resources.

110 C.S.R. 15 § 123.4.3 must be read in *pari materia* with 110 C.S.R. 15 § 123.4.3.4 to fully understand and comprehend the relationship between the severance tax, use tax, natural resource producer exemption and direct use concept. 110 C.S.R. 15 § 123.4.3.4 states, in part, that

“[p]ersons subject to the severance tax are exempt on all purchases made by them for use in severance activities. This exemption includes purchases used either directly or indirectly in the production of natural resources, but only in activities for which the gross receipts are subject to severance tax.” Therefore, if an entity is subject to severance tax, then any purchases used either directly or indirectly in the production of natural resources are exempt from use tax. More simply, the direct use concept does not apply to entities subject to the severance tax.

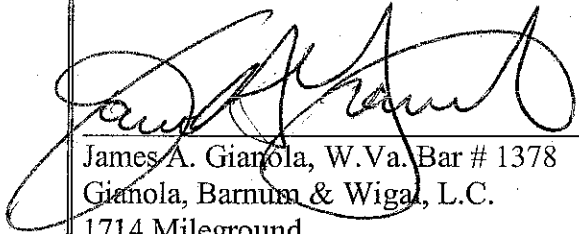
On the other hand, if a natural resource producer is not subject to severance tax, then only its purchases used directly in the production of natural resources are exempt from use tax. 110 C.S.R. 15 § 123.4.3. In other words, the direct use concept applies to natural resource producers who are not subject to severance tax. Therefore, the Appellee’s argument that the legislative and regulatory tax scheme is designed to provide the natural resource producer exemption only to those entities that pay severance tax is erroneous in that the regulations clearly distinguish the applicability of the use tax to natural resource producers who are subject to severance tax and those that are not.

### CONCLUSION

West Virginia Code § 11-15-2(t) [1991] does not require producers of natural resources to be engaged in all acts and processes set forth in the statute to qualify as a natural resource producer. Furthermore, the Appellee’s argument that the legislative and regulatory tax scheme is designed to provide the natural resource producer exemption only to those entities that pay severance tax must fail. The direct use concept applies only to those natural resource producers who are not subject to severance tax. Therefore, the legislature intended to allow those entities who are not subject to the severance tax to benefit from the natural resource producer exemption as long as the requirements of the direct use concept are satisfied.

MT. STATE BIT, INC.  
By Counsel.

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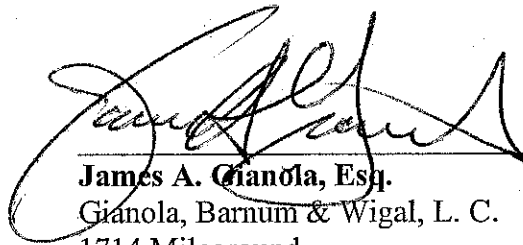


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**CERTIFICATE OF SERVICE**

I, James A. Gianola, certify that on August 26, 2004, I served A.M. "Fenway" Pollack, Esq., counsel for the Appellee, a copy of Mt. State Bit, Inc.'s Reply Brief by mailing the same via United States first class mail, postage prepaid, to the following:

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**POINTS AND AUTHORITIES**

West Virginia Code § 11-15-2(t) .....1, 2, 3, 4

Carper v. Kanawha Banking & Trust Co.,

157 W. Va. 477, 207 S.E. 2d 897 (1974) .....2

110 C.S.R. 15 § 123.4.3..... 3, 4

110 C.S.R. 15 § 123.4.3.4.....3