

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33889

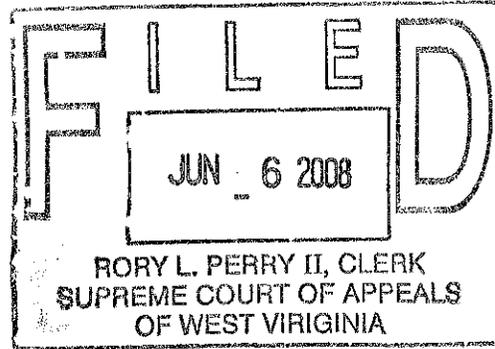
APOLLO CIVIC THEATER, INC.,

Appellant,

v.

**STATE TAX COMMISSIONER OF
WEST VIRGINIA,**

Appellee.



Respondent .

BRIEF OF THE APPELLEE STATE TAX COMMISSIONER

Respectfully submitted,

**WEST VIRGINIA STATE
TAX COMMISSIONER,
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I. INTRODUCTION

The Taxpayer-Appellant, Apollo Civic Theater, seeks appellate review of adverse decisions rendered against it by both the Office of Tax Appeals and the Circuit Court of Berkeley County finding that Apollo was not entitled to an exemption from paying consumer sales and use taxes.

II. STATUTORY BACKGROUND

Pursuant to West Virginia Code § 11-15-3(a), "For the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article, the vendor shall collect from the purchaser the tax as provided under this article and article fifteen-b of this chapter, and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article or article fifteen-b of this chapter."

There are a number of exemptions from the consumer sales and service tax, two of which are pertinent here.

First, West Virginia Code § 11-15-9(a)(6)(c) provides that

The following sales of tangible personal property and services are exempt as provided in this subsection:

...

Sales of tangible personal property or services to a corporation or organization which has a current registration certificate issued under article twelve of this chapter, which is exempt from federal income taxes under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended, and which is:

...

A corporation or organization which annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions or membership fees

Subsection (F) further explains that

(I) The term "support" includes, but is not limited to:

.....

(VI) The value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge. This term does not include any gain from the sale or other disposition of property which would be considered as gain from the sale or exchange of a capital asset or the value of an exemption from any federal, state or local tax or any similar benefit

Second, West Virginia Code § 11-15-11 provides that

(a) Sales of taxable services by a corporation or organization that are exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, and that meet the requirements set forth in subsection (b) of this section, are exempt from the tax imposed by this article, except that this exemption shall not apply to sales of taxable services to the extent that income received from the sales of such services is taxable under Section 511 of the Internal Revenue Code.

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

(1) The corporation or organization is organized and operated primarily for charitable or educational purposes and its activities and programs contribute importantly to promoting the general welfare of youth, families and the aged, improving health and fitness and providing recreational opportunities to the public;

(2) The corporation or organization offers membership or participation in its programs and activities to the general public and charges fees or dues which make its programs and activities accessible by a reasonable cross-section of the community; and

(3) The corporation or organization offers financial assistance on a regular and ongoing basis to individuals unable to afford the organization's membership dues or fees.

The State Tax Commissioner has promulgated an interpretive rule regarding Code

§ 11-15-11. See W. Va. C.S.R. § 110-15D-1 to - 4 (1992). In relevant part to this case, this rule defines "health and fitness" as found in Code § 11-15-11(b)(1) as meaning "physical health and

fitness of individuals but does not include mental health and fitness or spiritual health or fitness.”

W. Va. C.S.R. § 110-15D-3.7.

III. STATEMENT OF FACTS

The facts are established by stipulation of the parties. Rec. at 73, Ex. 16. Apollo is a community theater group that, according to its Constitutions and By-Laws, is meant to foster, promote, increase and develop amateur dramatics for the enjoyment and education of the general public. *Id.* ¶ 7. It is comprised of dues paying members with an interest in amateur dramatics, *id.* ¶ 11(a), but does not bar admission to membership if an otherwise qualified individual lacks the ability to pay dues. *Id.* ¶ 11(f).

When Apollo stages plays, members of the general public may attend by paying an admission fee, which ranges from five to twelve dollars. *Id.* ¶ 11(b). Apollo also offers special fee arrangements such as charging only three dollars for daytime performances for school students, *id.* ¶ 11(c), and offers complimentary tickets to certain individuals such as patients at the local Veterans Administration hospital. *Id.* ¶ 11(h). Apollo is exempt from federal income taxation under section 501(c) of the Internal Revenue Code. *Id.* ¶ 5.

From 1999 to 2003, Apollo did not charge, collect, or remit consumers sales and service tax on the sale of tickets for admission to the shows it staged nor did it remit to the vendor use taxes on certain goods, services, and equipment it had purchased. Rec. at 73, Exs. 9, 10. Additionally, although Apollo does not include non-cash contributions in its Internal Revenue Service Form 990, Rec. at 73 ¶ 25,¹ it yearly receives tangible donations that for the period 1999 to 2003 totaled not

¹An IRS Form 990 is a “Return of Organization Exempt from Income Tax” required by 26 U.S.C. § 6033. “While exempt organizations generally do not pay income tax, they nevertheless are required to file an annual return—Form 990, Return of Organization Exempt from Income (continued...)”

less than \$45,000.00. *Id.* ¶ 26. Further, although Apollo does not include donations of time on its IRS Form 990, *id.* ¶ 27, such donations for the years 1999 through 2003 would amount to no less than \$414,963.00 for those who directly assist in putting on show, *id.* ¶ 29, \$24,535.00 for non-professional administrative assistance, *id.* ¶ 31, and \$63,750.00 for time donated by Apollo's Certified Public accountant. *Id.* ¶ 32.

On April 9, 2004, the Commissioner issued a consumers' sales and service tax assessment against Apollo. *Rec.* at 14. This assessment, for the period January 1, 2001 to December 31, 2003, was \$11,778.00 and with interest of \$1,511.00 through March 31, 2004, totaled § 413,289.00. *Id.* Also, on April 9, 2004, the commissioner issued a purchasers' use tax assessment for \$4,039.00 for the period January 1, 1999 through December 31, 2003 with an addition of interest though March 31, 2004 of \$5,042.00. *Id.* at 15 .

Apollo contested claiming that is was exempt from payment of the taxes under West Virginia Code § 11-15-11 and 11-15-9(a)(6)(F)(i)(VI). *Rec.* at 73, Ex. 1. The Office of Tax Appeals affirmed the assessments, this OTA decision subsequently being affirmed by the Circuit Court. *Rec.* at 228.

IV. STANDARD OF REVIEW

A circuit court's reviews a decision of the Office of Tax Appeals under the standard of

¹(...continued)

Tax—stating specifically the items of gross income, receipts, and disbursements, and such other information as the Service may prescribe.” 13 *Mertens Law of Federal Income Taxation* § 47:111 (2007). “An IRS Form 990 is the equivalent of a tax return filed by a nonprofit organization. It reflects the organization’s annual revenues and expenses.” *Dedication and Everlasting Love to Animals v. Humane Soc.*, 50 F.3d 710, 711-12 (9th Cir. 1995). They “are merely information returns in furtherance of a congressional program to secure information useful in a determination whether legislation should be enacted to subject to taxation certain tax-exempt corporations competing with taxable corporations.” *Automobile Club of Mich. v. C.I.R.*, 353 U.S. 180, 188 (1957).

review set forth in the West Virginia Administrative Procedures Act, W. Va. Code §29A-5-4. W. Va. Code § 11-10A-19(f). Consequently, “[o]n appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.’ Syl. Pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).” Syl. Pt. 1, *Kanawha Eagle Coal, LLC v. Tax Comm’r*, 216 W. Va. 616, 617, 609 S.E.2d 877, 878 (2004). West Virginia Code § 29A-5-4(g):

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of 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.

V. ARGUMENT

- A. The term “health and fitness” in West Virginia Code § 11-15-11 is not ambiguous and encompasses only physical health and fitness.**

Apollo seeks a tax exemption under West Virginia Code § 11-15-11. “To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established.”

W. Va. Code, § 11-15-6. A taxpayer seeking an exemption bears the burden of proof. “It is incumbent upon a person who claims his property is exempt from taxation to show that such property clearly falls within the terms of the exemption; and if any doubt arises as to the exemption, that doubt must be resolved against the one claiming it.” Syl. Pt. 2, in part, *In re Hillcrest Mem. Gardens, Inc.*, 146 W. Va. 337, 119 S.E.2d 753 (1961). Apollo cannot claim the exemption here because it cannot demonstrate that it falls clearly within the terms of West Virginia Code § 11-15-11.

The Circuit Court decided this case on the basis that the term “health and fitness” was ambiguous. Rec. at 232. “A statute is ambiguous when it is ‘susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.’” *Board of Trustees v. City of Fairmont*, 215 W. Va. 366, 370, 599 S.E.2d 789, 793 (2004) (quoting *Hereford v. Meek*, 132 W. Va. 373, 386, 52 S.E.2d 740, 747 (1949)). Before a statute may be found to be ambiguous, however, it must be subjected to the traditional canons of construction for “[r]ules of interpretation are resorted to for the purpose of resolving an ambiguity” *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 401, 582 S.E.2d 841, 848 (2003) (Davis, C.J., dissenting) (quoting *Habursky v. Roberts*, 180 W. Va. 128, 132, 375 S.E.2d 760, 764 (1988) (quoting *Crockett v. Andrews*, 153 W. Va. 714, 719, 172 S.E.2d 384, 387 (1970))). Applying the traditional rules of construction here discloses that the terms health and fitness are not ambiguous but imply only physical health and fitness, thus mandating that the lower court be affirmed, albeit on different grounds than that advanced by the Court—which is perfectly permissible since “[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason

or theory assigned by the lower court as the basis for its judgment.” Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965). Accord Syl. *Sherwood Land Co. v. Municipal Planning Comm’n*, 186 W. Va. 590, 413 S.E.2d 411 (1991) (per curiam).

“The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. Pt. 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975). The starting point to ascertain this intent is the language of the statute itself. “Statutory construction must begin with the language of the statute To do otherwise would assume that . . . [the legislature] does not express its intent in the words of statutes . . . an idea that hopefully all will find unpalatable.” *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 587 n.15, 466 S.E.2d 424, 438 n.15 (1995) (quoting *Kofa v. U.S. Immigration & Nat. Serv.*, 60 F.3d 1084, 1088 (4th Cir.1995) (citation omitted)).

“Words are not pebbles in alien juxtaposition; they have only a communal existence; and . . . the meaning of each interpenetrate the other[.]” *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 25 n.6 (1988) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)), or more succinctly (but less eloquently) “the meaning of statutory language, plain or not, depends on context.” *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991). “Statutory language must be read in context and a phrase ‘gathers meaning from the words around it.’” *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). See also *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (“Ambiguity is a creature not of definitional possibilities but of statutory context[.]”). Thus, statutory language cannot be read in isolation. *County Comm’n v. Hill*, 194 W. Va. 481, 488, 460 S.E.2d 727, 734 (1995). “It is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but

it must be drawn from the context in which it is used.” *West Virginia Health Care Cost Review Auth. v. Boone Mem’l Hosp.*, 196 W. Va. 326, 338, 472 S.E.2d 411, 423 (1996) (citations omitted)

“In the interpretation of statutes, words and phrases therein are often limited in meaning and effect, by necessary implications arising from other words or clauses thereof.” Syl. pt. 5, *Ex parte Watson*, 82 W. Va. 201, 95 S.E. 648 (1918). A kindred “traditional rule of statutory construction [is] that ‘the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning[.]’” *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 495, 490 S.E.2d 306, 314 (1997) (quoting *State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979)). See also Syl. Pt. 9, in part, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953) (“It is a cardinal rule of statutory construction that a statute should be construed as a whole, so as to give effect, if possible, to every word . . . thereof[.]”); Syl. Pt. 2, in part, *Argand Refining Co. v. Quinn*, 39 W. Va. 535, 20 S.E. 576 (1894) (“In interpreting a statute, it should be so construed that, if it can be prevented, no . . . word shall be superfluous or insignificant . . .”). See generally *AD Global Fund, LLC ex rel. North Hills Holding, Inc. v. United States*, 67 Fed. Cl. 657, 672 n.19 (2005). And, finally, another “rule of construction which is helpful in ascertaining the legislature’s intent is that ‘[g]enerally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.’” *Dieter Engineering Serv., Inc. v. Parkland Develop., Inc.*, 199 W. Va. 48, 483 S.E.2d 48 (1996). “In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Syl. pt. 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477

(1982). See also *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)) (“We ‘begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”). Apollo violates all these rules of interpretation.

Apollo chooses to disregard the term fitness—arguing that “fitness” is synonymous with “health.” Appellant’s Br. at 20. See also Rec. at 231 (circuit court order noting that Apollo made no argument below concerning fitness as opposed to health). If the term “health” alone were at issue—as Apollo strives to make it, Appellant’s Br. at 20, Apollo might have point. See *Venable v. Gulf Taxi Line*, 105 W. Va. 156, 161, 141 S.E. 622, 624 (1928). But, the word “health alone” is not the issue—the words health and *fitness* are the issue, and Apollo may not disregard fitness being that “[i]t is presumed the legislature had a purpose in the use of every word . . . found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word . . . no function to perform, or makes it, in effect, a mere repetition of another word . . . if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective.” Syl. pt. 7, *Ex parte Watson*, 82 W. Va. 201, 95 S.E. 648 (1918). “Health” cannot be divorced from its compatriot term “fitness[,]” because a “key element of health, in turn, is physical fitness.” Doug Sedwick, *Fatness v. Fitness*, 68 Or. St. Bar Bull. 70, 70 (2008).

In response, Apollo cites to a *medical* dictionary of fitness. Appellant’s Br. at 21. But Apollo’s reliance is misplaced. The average, ordinary person would not tend to rely on a technical dictionary. “Because statutes . . . are construed according to their plain meaning, not their professional or technical meaning, such evidence is inapposite.” See *Ward v. Allstate Ins. Co.*, 45 F.3d 353, 356 (10th Cir. 1994) (use of medical dictionary to define “rehabilitative” and “medical”

condemned). *See also Inverness Medical Switzerland GmbH v. Princeton Biomeditech Corp* 309 F.3d 1365, 1369 (Fed. Cir. 2002) (differentiating between dictionaries of the English language and technical authorities that should be resorted to for the definition of terms of art in particular fields); *Hayes v. American Standard Ins. Co.*, 847 S.W.2d 150, 153 (Mo. Ct. App. 1993) (“For a layperson’s understanding of a term, it is appropriate for us to consult a general dictionary of the English language.”). *See also* Ellen P. April, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Ariz. St. L. J. 275, 311 (1998) (“To the extent a law dictionary is used for common words, however, it tends to undermine the textualists’ claim that they seek to find the meaning of ordinary language for the ordinary speaker.”). At best, the average, ordinary person would rely on a dictionary of general distribution—and such a common, ordinary dictionary definition of fitness is “[t]he state or condition of being *physically* fit, esp[ecially] as the result of exercise and proper nutrition.” *The American Heritage College Dictionary* 515 (3d ed. 2000) (emphasis added). *See also* V *Oxford English Dictionary* 976 (2d ed. 1991) (emphasis added) (defining fitness as “The quality or state of being fit or suitable; the quality of being fitted, qualified, or competent. *spec.* the quality or state of being *physically* fit.”); 1 *Funk and Wagnalls Standard Dictionary* 484 (Int. ed. 1961) (emphasis added) (defining “fit” as “In good *physical* condition and training: originally a sporting use.”). This common usage of fitness as physical is evident as, for example, when one speaks of a health or fitness club, because the implication is that the club is for obtaining *physical* health and fitness. *Lund v. Bally’s Aerobic Plus, Inc.*, 93 Cal. Rptr.2d 169, 170 (Cal. Ct. App. 2000) (a “health or fitness club is a place where a person can attain physical health and fitness.”). *See also Metrowest YMCA, Inc. v. Town of Hopkinton*, 2006 WL 1881885, 7 (Mass. Land Ct.) (witness described health and fitness-related program in terms of physical health and fitness, including

classes in dance, movement, yoga, nutrition, exercise, swimming, and martial arts); *Northland Racquetball, Inc. v. Bemidji State Univ.*, 1995 WL 81413, 3 (Minn. Ct. App.) (“Bemidji State benefitted the public by making a fitness and recreational center available at a modest charge because it provided recreation and promoted the physical health and fitness of community members.”). *See also Activities to Promote Personal Fitness*, Exec. Ord. No. 13266, 67 Fed. Reg. 42467 (June 20, 2002) (describing how personal fitness can lead to a physically healthier life).

Indeed, this is further strengthened by “the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning.” *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). *See also Powerex Corp. v. Reliant Energy Serv., Inc.*, 127 S. Ct. 2411, 2417 (2007) (“A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.”). Therefore, “[t]he connotation of a term in one portion of an Act may often be clarified by reference to its use in others.” *United States v. Cooper Corp.*, 312 U.S. 600, 606-607 (1941), *superseded by statute on other grounds as stated in United States Postal Service v. Flamingo Indust., Inc.*, 540 U.S. 736 (2004). Code § 11-15-9(a)(34) exempts “[c]harges for memberships or services provided by health or fitness organizations related to personalized fitness programs[.]” Health and fitness as used in Code § 11-15-9(a)(34) refers to physical fitness—and since identical terms in a statute must be read identically—Code § 11-15-11’s reference to health and fitness must be read to mean physical health and fitness. Hence, while health might encompass mental and spiritual health, fitness is limited to physical fitness.¹ Thus, the Circuit Court should be affirmed.

B. Alternatively, “health and fitness” is ambiguous.

Alternatively, the terms health and fitness may be construed as being ambiguous. Here, the

ALJ and the Circuit Court both concluded that West Virginia Code § 11-15-11 is ambiguous because the Legislature left undefined “health and fitness” and there may be several different kinds of health (e.g., physical, mental, or spiritual). An undefined term may render a statute ambiguous. *See Tony P. Sellitti Const. Co. v. Caryl*, 185 W. Va. 584, 591-92, 408 S.E.2d 336, 342-43 (1991) (“The consumers sales and service tax and use tax exemption statutes in question were ambiguous because the sales and use tax legislation at the time in controversy did not define ‘contracting.’”).

Further, while Apollo cites *Webster’s Medical Desk Dictionary* and the World Health organization for definitions, Appellant’s Br. at 21, a more common dictionary does not follow these authorities. *Compare, e.g., The American Heritage College Dictionary* 515 (3d ed. 2000). That dictionaries vary on the definition of a term is evidence of ambiguity. *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 573 (Wis. 1990). At the very least, that health and fitness may be read to be either physical or something more is indicative of the ambiguous nature of the term, since a term that can be read to include numerous subsets, without defining if the term is inclusive or exclusive of any given subset, is ambiguous. *See, e.g., Hawkins v. United States*, 469 F.3d 993, 1002 (Fed. Cir. 2006) (noting that the term “enforcement of the laws” could be viewed as ambiguous as to the type of “laws” Congress intended to encompass in the statute); *Great Eastern Cas. Co. v. Blackwelder* 94 S.E. 843 (Ga. Ct. App. 1918) (“building” in its legal sense, is ambiguous, as it includes many different kinds of structures and edifices erected by man); *Holiday Acres Property Owners Ass’n, Inc. v. Wise*, 998 P.2d 1106, 1108 (Colo. Ct. App. 2000) (similar-many different types of mobile homes).

It is beyond cavil that the party seeking a tax exemption bears the burden of demonstrating entitlement thereto[.]” *LZM, Inc. v. Virginia Dep’t of Taxation*, 606 S.E.2d 797, 799 (Va. 2005)

(“The taxpayer has the burden of establishing that it comes within the terms of an exemption.”), and that any doubt about the exemption must be construed against the taxpayer. “Taxation is the rule and exemption therefrom the exception; and the claimant of such an exemption must show his right thereto by evidence which leaves the question free from doubt. The claimant for an exemption must show that his demand is within the letter as well as the spirit of the law.” 3A *Sutherland on Statutory Construction* § 66:9 at 82 (Rev. ed. 2003) (citation omitted)).

“This Court has consistently followed the concept of strict construction of tax exemptions.” *In re Maier*, 173 W. Va. 641, 650, 319 S.E.2d 410, 419 (1984). “Constitutional and statutory provisions exempting property from taxation are strictly construed. It is incumbent upon a person who claims his property is exempt from taxation to show that such property clearly falls within the terms of the exemption; and if any doubt arises as to the exemption, that doubt must be resolved against the one claiming it.” Syl. Pt. 2, *In re Hillcrest Mem. Gardens, Inc.*, 146 W. Va. 337, 119 S.E.2d 753 (1961). *Accord State ex rel. Cook v. Rose*, 171 W. Va. 392, 394, 299 S.E.2d 3, 5 (1982) (“All tax exemptions are strictly construed against people claiming them.”), *overruled on other grounds by City of Morgantown v. West Virginia Univ. Med. Corp.*, 193 W. Va. 614, 457 S.E.2d 637 (1995). If the term(s) “health and fitness” are ambiguous, the rule of strict construction requires the Circuit Court to be affirmed.

C. The Commissioner’s Rule is entitled to considerable deference.

An interpretive rule is one “that clarifies a statute’s ambiguous use of a term, or explains how a provision operates[,]” *Mining Energy, Inc. v. Director*, 391 F.3d 571, 575 n.3 (4th Cir. 2004), that is, interpretive rules “clarify an existing statute or regulation.” *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (1995). Where a statutory term is ambiguous, an

interpretive rule is warranted. *See Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 354-55 (1935); *Water Quality Ass'n Employees' Benefit Corp. v. United States*, 795 F.2d 1303, 1309 (1986). *See also Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 114, 59 S.Ct. 423, 425 (U.S. 1939) (“We agree that Section 22(a) is so general in its terms as to render an interpretative regulation appropriate.”). The term health and fitness warrants an interpretive rule here.

While “interpretive rules do not have the force of law nor are they irrevocably binding on the agency or the court[,]” nonetheless, “they are entitled to some deference from the courts[.]” *Id.*, 466 S.E.2d at 434. Indeed, while this Court interprets a statute *de novo*, Syl. Pt. 1, *id.*, “[y]et even in this sphere we are not entirely free to substitute our own judgment for that of an administrative agency, as “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” *CB&T Operations Co., Inc. v. Tax Comm’r*, 211 W. Va. 198, 202, 564 S.E.2d 408, 412 (2002) (quoting Syl. pt. 4, *Security Nat’l Bank & Trust Co. v. First W. Va. Bancorp., Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981)). In other words, “[a]n inquiring court—even a court empowered to conduct *de novo* review—must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.” *Appalachian Power Co.*, 195 W. Va. at 582, 466 S.E.2d at 433. Thus, “[t]his court has held that a construction given a statute by the officers charged with the duty of executing it ought not to be discarded without cogent reason.” *State ex rel. Daily Gazette Co. v. County Court*, 137 W. Va. 127, 132, 70 S.E.2d 260, 262 (1952). In other words, “the courts (if [the legislature] has not spoken on the precise question at issue) are to accord [interpretive rules] ‘considerable weight’ and uphold them if they implement the congressional mandate in ‘a reasonable manner.’” *Mining Energy, Inc.*, 391 F.3d at 575 n.3. *See also Commissioner v. Estate of Hubert*, 520 U.S. 93, 127 (1997) (citations omitted)

(“when a provision of the Internal Revenue Code is ambiguous . . . this Court has consistently deferred to the Treasury Department's interpretive regulations so long as they “”implement the congressional mandate in some reasonable manner.””). *Accord Cottage Savings Assn. v. Commissioner*, 499 U.S. 554, 560-61 (1991). Here, a number of factors counsel in favor of this considerable deference.

First, West Virginia Code § 11-15-11 was passed in 1992. 1992 W. Va. Laws Ch. 207. The exemption became effective June 5, 1992. W. Va. C.S.R. § 110-15D-4.6. West Virginia Code of State Rules § 110-15D-1 was filed on September 1 of that year, *id.* § 110-15D-1.3, with an effective date of October 2, 1992. *Id.* § 110-15D-1.4. The promulgation of West Virginia Code § 110-15D-1 was contemporaneous with West Virginia Code § 11-15-11. *See, e.g., Small Business in Telecommunications v. F.C.C.*, 251 F.3d 1015, 1022 n.9 (D.C. Cir. 2001) (an “agency decision or practice interpreting an ambiguous statute may be considered a contemporaneous construction even though the interpreting act occurs months or even one year or more after the statute was enacted”); *Judisch v. United States*, 755 F.2d 823, 828 n.10 (11th Cir. 1985) (nine months). “Where a statute is of doubtful meaning, the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous.” Syl. Pt., 7, *Evans v. Hutchinson*, 158 W. Va. 359, 214 S.E.2d 453 (1975). *See also* Syl. Pt. 2, *State ex rel. Brandon v. Board of Control*, 84 W. Va. 417, 100 S.E. 215 (1919) (“Where a statute is of doubtful meaning, the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown, unless it is clear that such construction is erroneous.”).

Second, the Commissioner has never varied from West Virginia Code § 110-15D-1. *See Accounting Outsourcing, LLC v. Verizon Wireless Personal Communications, L.P.*, 329 F. Supp.2d 789, 808 (M.D. La. 2004) (ten years longstanding). This long standing interpretation is entitled to great weight in this Court's deliberations. *See, e.g., Tony P. Sellitti Constr. Co. v. Caryl*, 185 W. Va. 584, 591, 408 S.E.2d 336, 343 (1991); Syl. Pt. 3, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970); *State ex rel. Ballard v. Vest*, 136 W. Va. 80, 87, 65 S.E.2d 649, 653 (1951); Syl. Pt. 4, *State v. Davis*, 62 W. Va. 500, 60 S.E. 584 (1907).

Finally, the Legislature revisited the Consumer Sales and Service Tax in H.B. 3014, 2003 W. Va. Acts Ch. 146. H.B. 3014 made no changes to West Virginia Code § 11-15-11. "With the statute re-enacted . . . th[e Commissioner's] administrative construction may be said to have received [legislative approval]." *Don E. Williams Co. v. C. I. R.*, 429 U.S. 569, 576-77 (1977). *Accord Corn Products Refining Co. v. Commissioner of Internal Revenue*, 350 U.S. 46, 53 (1955). In sum, "regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received [legislative] approval and have the effect of law." *United States v. Cleveland Indians Baseball Co.* 532 U.S. 200, 219 (2001) (quoting *Cottage Savings Assn. v. Commissioner*, 499 U.S. 554, 561 (1991)). *Accord Petroleum Exploration v. Commissioner of Internal Revenue*, 193 F.2d 59, 64 (4th Cir. 1952). Consequently, West Virginia Code of State Rules § 110-15D-3.7 must be taken to have risen to the level of force of law. As such, the circuit court should be affirmed

D. Apollo has failed to demonstrate that its activities "contribute importantly" to promoting health and fitness.

Under West Virginia Code § 11-15-11(b)(1) an organization is only entitled to the exemption

if its activities and programs, *inter alia*, “contribute importantly to . . . improving health and fitness” “The burden is on the taxpayer to show that he or she clearly falls within the language of a statute granting an exemption.” 85 C.J.S. *Taxation* § 1875 at 862 (2001). *See also* 68 Am. Jur.2d *Sales and Use Taxes* § 113 at 86 (2000) (footnote omitted) (“The burden of proof is on the taxpayer to establish an exemption from a sales tax provision, and to show clearly that he or she comes within the claimed exemption.”), a rule in accord with West Virginia law. *Woodell v. Dailey*, 160 W. Va. 65, 66-67, 230 S.E.2d 466, 468 (1976).

At no point in any of the stipulated facts is there any authority to support the proposition that either attending or participating in a play fosters any health or fitness, be it mental, spiritual or physical. No matter how many audience members there are, these audience members remain sedentary throughout a performance, hardly the kind of activity contributing to physical fitness. And, while Apollo seeks to argue that volunteer performers and stage hands may get some physical activity, Appellant’s Br. at 29, there is no *evidence* in the record that participating in a play is either aerobically or anaerobically challenging in such a way as to contribute to health and fitness.² And, indeed, there is no evidence in the record as to how many participants, either actors or stage crew, participate in plays. Arguments and opinions of counsel are not evidence. *See, e.g., West Virginia Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 112 n.5, 543 S.E.2d 664, 669 n.5 (2000) (quoting *Crum v. Ward*, 146 W.Va. 421, 457, 122 S.E.2d 18, 38 (1961) (Haymond, P.J., dissenting) (“Every trial judge knows, as every trial lawyer knows, and every appellate court judge should know, that

² Indeed, if mental health is a factor to be considered, it is apparent that such mental health must be read in the context of physical exercise, Dorothy L. Helling, *Physical Fitness as it Relates to Professionalism: Maintaining the Machine and Getting into the Locker Room*, 23 Vt. B. J. & L. Dig. 32, 32 (1997) (“Physical fitness through exercise promotes health and mental wellbeing.”), and not the sedentary activity—such as watching a play.

the statements of counsel in an argument are not evidence but are merely the expression of his individual views . . .”). Cf. *Boggs v. Settle*, 150 W. Va. 330, 338, 145 S.E.2d 446, 451 (1965) (unsworn oral statements of counsel are not evidence).

E. The term “recreational” is not relevant to this case.

Although the OTA based part of its decision on the term “recreational,” Rec. at 23-24, the Circuit Court correctly concluded that if Apollo could not satisfy the term health and fitness, the term recreational was moot. *Id.* at 236. A court need not address an issue if the decision is rendered on another ground. See, e.g., *State ex rel. Darling v. McGraw*, 220 W. Va. 322, 327 n.6, 647 S.E.2d 758, 763 n.6 (2007) (per curiam); *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 388 n.19, 624 S.E.2d 815, 825 n.16 (2005); *Sydenstricker v. Mohan*, 217 W. Va. 552, 558 n.11, 618 S.E.2d 561, 567 n.11 (2005); *O’Dell v. Miller*, 211 W. Va. 285, 287, 565 S.E.2d 407, 409 (2002).

F. The donation of services by private individuals cannot be counted as “support” under the Sales and Services Act.

West Virginia Code § 11-15-9(a)(6)(C) provides that

The following sales of tangible personal property and services are exempt as provided in this subsection:

...

Sales of tangible personal property or services to a corporation or organization which has a current registration certificate issued under article twelve of this chapter, which is exempt from federal income taxes under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended, and which is:

...

A corporation or organization which annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions or membership fees

Subsection (F) further explains that

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

.....

(VI) The value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge. This term does not include any gain from the sale or other disposition of property which would be considered as gain from the sale or exchange of a capital asset or the value of an exemption from any federal, state or local tax or any similar benefit

There is no dispute that if the donation of services is excluded from the support calculation, Apollo does not receive more than one half of its support from charitable contributions. Rec. at 238.

The OTA and the Circuit Court both read West Virginia Code 11-15-9(a)(6)(F)(i)(VI) as being exclusive—that is, the only services that count toward the support test are services provided by a governmental entity. Apollo, points to the term, “including, but not limited to,” contending that the services rendered can extend beyond simply those offered by a government. Appellant’s Br. at 38-39. Under the language of the Act and the rules of construction, the Commissioner has the better position.

First, a “ specific section of a statute controls over a general section of the statute.” Syl. Pt. 2, *State ex rel. Myers v. Wood*, 154 W. Va. 431, 175 S.E.2d 637 (1970). *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (“[I]t is a basic principle of statutory construction that a specific statute, here subsection (e), controls over a general provision such as subsection (c)(3), particularly when

the two are interrelated and closely positioned, both in fact being parts of § 501 relating to exemption of organizations from tax.”); *Cox v. U.S. Dep’t of Justice*, 576 F.2d 1302, 1306 (8th Cir. 1978) (similar). The Legislature was very specific in setting forth what types of services would be considered support.

Similarly, Apollo’s approach reads a part of the statute out of existence. “[C]ourts are not to eliminate through judicial interpretation words that were purposely included[.]” *Banker v. Banker*, 196 W. Va. 535, 547, 474 S.E.2d 465, 477 (1996). See also *Hawkins v. C.I.R.*, 86 F.3d 982, 992 (10th Cir. 1996) (noting the federal “Supreme Court’s frequent admonition that courts must not read language out of a statute.”). If the Legislature had desired to be broader in its approach to services it could very easily have eliminated the language “(exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended,” and to have the subsection read simply “[t]he value of services or facilities to an organization without charge”

Finally, Apollo’s reliance on *State Human Rights Commission v. Pauley*, 158 W. Va. 495, 212 S.E.2d 77 (1975), Appellant’s Br. at 36-37, is misplaced. *Pauley* dealt with the Human Rights Act. The Human Rights Act is a remedial statute. See, e.g., *Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 64, 479 S.E.2d 561, 574 (1996). “It is a general rule of law that statutes which are remedial in nature are entitled to a liberal construction.” 73 Am. Jur. 2d *Statutes* § 185 at 381 (2001) (footnote omitted). However, tax exemption statutes are not remedial. *Fleet Credit Corp. v. Frazier*, 726 A.2d 452, 455 (R.I. 1999).

A case more analogous to this case is *Phillips v. Larry’s Drive in Pharmacy, Inc.*, 220 W. Va. 484, 647 S.E.2d 920 (2007). At issue in *Phillips* was whether a pharmacy fell within the

definition of “health care provider” entitled to rely upon the protections of the 1986 Medical Professional Liability Act. *Id.* at 487, 647 S.E.2d at 923. The Act defined health care provider as, inter alia, “including, but not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or psychologist, or an officer, employee or agent thereof acting in the course and scope of such officer’s, employee’s or agent’s employment.” *Phillips*, 220 W. Va. at 487-88, 647 S.E.2d at 923-24. This Court found “[t]he parties [gave the MPLA] dueling, plausible interpretations: the plaintiffs argu[ing] that pharmacies [were] not covered by the MPLA because they were specifically not included in the statute, and the defendant respond[ing] that the language of the statute was broadly drawn and may therefore be construed to include coverage for pharmacies[.]” *id.* at 491, 647 S.E.2d at 927, a quintessential example of an ambiguous statute. *See, e.g., Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson* 545 U.S. 409, 419 n.2 (2005) (noting that the statute at issue was “ambiguous because its text, literally read, admits of two plausible interpretations.”); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 67 (2004) (Thomas, J., concurring) (“I agree with the Court that [the statute] is ambiguous . . . because on its face it is susceptible of several plausible interpretations.”); *Herman v. Local 305, Nat. Post Office Mail Handlers*, 214 F.3d 475, 479 (4th Cir. 2000) (“Because there are several plausible meanings for the term ‘final decision,’ we believe the term is ambiguous.”); *Charboneau v. Beverly Enterprises, Inc.*, 625 N.W.2d 75, 79 (Mich. Ct. App. 2000) (“in the present case the statute is ambiguous, as demonstrated by the plausible but differing interpretations given to it by the parties.”); *Norris v. Industrial Comm’n*, 730 N.E.2d 1184, 1186 (Ill. Ct. App. 2000) (“when parties present evenly plausible but divergent interpretations of the same statutory language, a court may find the statute

ambiguous.”).

This Court then proceeded to explain that the “well accepted canon” of *expressio unus est exclusio* (the inclusion of one thing is the exclusion of all others) applied—“[i]f the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation.” *Id.* at 492, 647 S.E.2d at 928 (quoting *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995). Here, the “Legislature explicitly limit[ed] application of [the] rule to one specific factual situation and omit[ed] to apply the doctrine to any other situation” and, consequently, this Court “should infer the Legislature intended the limited rule would not apply to any other situation [i.e., services provided by non-governmental actors].”

Finally, this Court follows “the universal rule is that a tax exemption provision is to be construed strictly against the person claiming the exemption[.]” *Mid-American Growers, Inc. v. Department of Revenue*, 493 N.E.2d 1097, 1099 (Ill. Ct. App. 1986). *See, e.g., RGIS Inventory Spec. v. Palmer*, 209 W. Va. 152, 154, 544 S.E.2d 79, 81 (2001) (citing Syl. Pt. 4 of *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 488 S.E.2d 20 (1997) (noting that this Court has repeatedly invoked the rule of strict construction of tax exemption statutes)); *In re Northview Serv’s, Inc.*, 183 W. Va. 683, 685, 398 S.E.2d 165, 167 (1990) (applying “the rule of strict construction of tax exemptions”); *In re Maier*, 173 W. Va. 641, 650, 319 S.E.2d 410, 419 (1984) (“This Court has consistently followed the concept of strict construction of tax exemptions.”). Apollo, though, argues that West Virginia Code § 11-15-11—a tax exemption statute—should be *liberally* interpreted since it is socio-economic legislation in favor of “typically cash strapped organizations.” Appellant’s Br. at 40. Apollo cites

in support of this radical proposition *Andy Brothers Tire Co. v. West Virginia State Tax Commissioner*, 160 W. Va. 144, 233 S.E.2d 134 (1977) and *Brockway Glass Co., Inc., v. Caryl*, 183 W. Va. 122, 394 S.E.2d 524 (1990). Appellant's Br. at 39-40. However, *Brockway* itself is fatal to Apollo's position drawing, as it did, a distinction between tax *credits* and tax *exemptions* and finding *Andy Brothers* applied only to tax credits. *Brockway*, 183 W. Va. at 125, 394 S.E.2d at 527 ("In the present case, however, a tax credit, not a tax exemption, statute is involved, and *Andy Bros. Tire* is authority for liberally construing tax credit legislation in favor of the taxpayer."). If Apollo is excused from paying its fair share of taxes, other taxpayers become the "unwitting (and perhaps unwilling) contributors to the [theater] by having to pay for the . . . services of government delivered to this [organization]." *Id.* Thus, while Apollo might be sympathetic, "this issue is one of wider import that must be decided not only upon these facts, where our sympathies might well lie with Appellant, but in a larger context[;]" *State v. Phillips*, 205 W. Va. 673, 684, 520 S.E.2d 670, 681 (1999), and "this Court remains constitutionally bound to follow the guiding precedents before us, to apply the law as it has been interpreted by our predecessors, and to reach the result prescribed thereby." *Hart v. National Collegiate Athletic Ass'n*, 209 W. Va. 543, 548, 550 S.E.2d 79, 84 (2001) (per curiam). The Circuit Court should be affirmed.

G. The OTA and Circuit Court properly applied well recognized accounting principles.

The late Ralph Burkhart left a bequest to Apollo when he passed way in 1999. Rec. at 73, Ex. 16, ¶ 18. Apollo wishes to count the interest generated from this bequest as support for the year in which the interest was earned, while the Commissioner asserts that only the bequest itself is countable. The OTA and the Circuit Court both relied on the Financial Accounting Standards Board's Statement of Financial Accounting No. 116, *Accounting for Contributions Received and*

Contributions Made (June 1993) in finding for the Commissioner. Rec. at 29 (OTA), 242 (Circuit Court).

Apollo asserts that reliance on Standard 116 is impermissible because while the business franchise tax, W. Va. Code § 11-23-3(b)(1)(A),(B) & (D), *id.* § 11-23-5(o); and the corporate net income tax, *id.* § 11-24-7(g), both cite to generally accepted accounting principles, the sales and service tax statute does not so that “such use cannot be implied.” Appellant’s Br. at 41. This argument is flawed on several levels.

The FASB “is the body which establishes the standard accounting practices in the United States which are known as GAAP[,]” *PECO Energy Co. v. Commonwealth*, 919 A.2d 188 n.4, 193 (Pa. 2007),³ or “generally accepted accounting practices.” *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 61 Cal. Rptr.3d 29, 41 n.11 (Ct. App. 2007) (“GAAP is the acronym for generally accepted accounting principles.”). In order for an accountant to be within the professional standard of care for that profession, the accountant must follow GAAP. *See generally* 2 Douglas Danner & Larry L. Varn, *Expert Witness Checklist*, § 7:1 (“An accountant follows outlined rules and standards, known as generally accepted accounting principles (GAAP) and generally accepted auditing standards (GAAS), to analyze and interpret the financial data and information involved in business operations and transactions.”). Indeed, West Virginia’s Board of Accountancy requires that its licensees or substantial equivalency practitioners performing tax services comply with the

³ *Accord IES Utilities Inc. v. Iowa Dep’t of Revenue and Finance*, 545 N.W.2d 536, 544 (Iowa 1996) (“GAAP rules are issued by the financial accounting standards board (FASB), a private, independent organization involved in the self-policing of accountants.”); *Butler v. Kent*, 655 N.E.2d 1120, 1124 (Ill. Ct. App. 1995) (“Perks testified that FASB is the rule-making body of the American Institute of Certified Public Accountants and its application is GAAP (Generally Accepted Accounting Principles.)”).

recognized professional standards applicable to the services. W. Va. C.S.R. § 1-1-20.2(b) (2004). See also *First Nat. Bank v. Crawford*, 182 W. Va. 107, 110, 386 S.E.2d 310, 313 (1989) (accountant preparing report held to a standard of care dependent on GAAP).

Further, it is a well established rule that a court will not interpret a statute to reach an absurd result. E.g., *Napier v. Board of Ed.*, 214 W. Va. 548, 553, 591 S.E.2d 106, 111 (2003) (per curiam) (“Neither will we construe a statute to achieve an absurd result.”); *Legg v. Johnson, Simmerman & Broughton, L.C.*, 213 W. Va. 53, 59, 576 S.E.2d 532, 538 (2002) (per curiam) (“the law itself indicates that statutes should not be construed to reach absurd results.”); *Richardson v. State Comp. Comm’r*, 137 W. Va. 819, 824, 74 S.E.2d 258, 261 (1953) (“It is to be supposed that the legislature did not intend an absurd or unreasonable result.”). Apollo does not posit what standard should be employed, if not the general standard applicable to entire accounting community (and, of course, Apollo had professional accounting assistance, Rec. at 73, Ex. 16, ¶ 32). Apollo surely cannot be contending that it should be allowed to follow generally *unaccepted* accounting principles in running the theater. It was well within reason to apply GAAP.

Further, Apollo points to *Kings Daughters Housing, Inc. v. Paige*, 203 W. Va. 74, 506 S.E.2d 329 (1998) (per curiam) to support its position. Apollo contends that since the principal of the Burkhart request was carried in interest bearing accounts, that the interest too must be considered a gift since it was given to accomplish a charitable end. It also argues that *Kings Daughters* did not reference GAAP in determining the meaning of gift. Appellant’s Br. at 41-42. These contentions are in error.

First, an opinion that does not resolve an issue squarely is not authority to say that the issue was decided. “[C]ases cannot be read as foreclosing an argument that they never dealt with.”

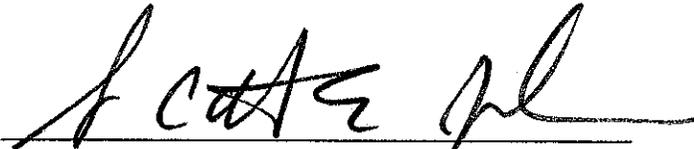
Waters v. Churchill, 511 U.S. 661, 678 (1994). The issue of GAAP was not addressed in *Kings Daughters* so the issue remains open. Second, Apollo cites no authority for its argument that how the fiduciary treats a bequest is evidence of how to account for a bequest in the tax arena. A failure to cite any legal authority compels the court to discount the argument. *See, e.g., State ex rel. Hatcher v. McBride*, ___ W. Va. ___, ___, 656 S.E.2d 789, 795 (2007) (per curiam); *State v. Arbaugh*, 215 W. Va. 132, 135 n.6, 595 S.E.2d 289, 292 n.6 (2004) (per curiam). Therefore, Apollo's argument must fail and the Circuit Court should be affirmed.

VI. CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Berkeley County should be affirmed.

Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33889

APOLLO CIVIC THEATER, INC.,

Appellant,

v.

STATE TAX COMMISSIONER OF
WEST VIRGINIA,

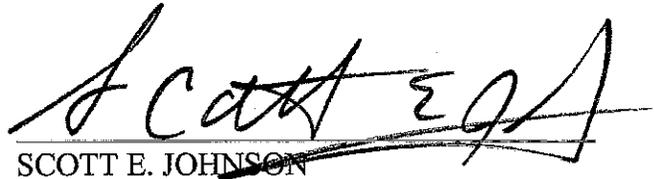
Appellee.

Respondent .

CERTIFICATE OF SERVICE

I, Scott E. Johnson, Assistant Attorney General for the State of West Virginia, do hereby certify that a true copy of the foregoing "*Brief of the Appellee State Tax Commissioner*" was served upon counsel for the Appellant by depositing said copy in the United States Mail, with first class postage prepaid, on this 6th day of June, 2008, addressed as follows:

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