

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35476

CRAIG A. GRIFFITH,
Acting State Tax Commissioner of
West Virginia,

Appellant,

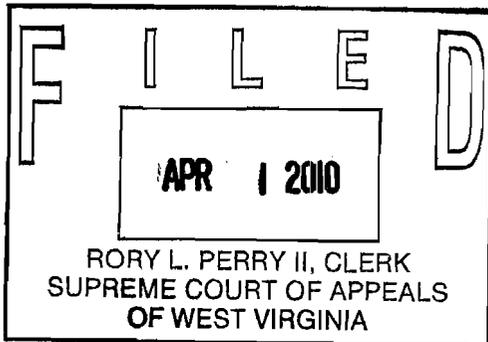
v.

HEARTWOOD FORESTLAND FUND
LIMITED PARTNERSHIP; HEARTWOOD
FORESTLAND FUND II LIMITED
PARTNERSHIP; HEARTWOOD
FORESTLAND FUND III LIMITED
PARTNERSHIP; and HEARTWOOD
FORESTLAND FUND IV LIMITED
PARTNERSHIP,

Appellees.

WEST VIRGINIA STATE TAX COMMISSIONER'S BRIEF

PETITION FOR APPEAL



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I.

INTRODUCTION

The Heartwood Forestland Fund Partnerships own thousands of acres of property in West Virginia valued at \$144,341,003.00 which they use to grow and manage standing timber. They were issued an assessment for unpaid business franchise taxes. The Heartwoods disclaimed liability for the taxes asserting that growing and managing standing timber was agriculture—which is not a taxable business under the business franchise tax. The circuit court agreed with the Office of Tax Appeals that growing and managing standing timber is agriculture. Because the Office of Tax Appeals and the circuit court were in error, this Court should reverse and direct the reinstatement the assessments.

II.

FACTS

Each Heartwood is a foreign limited partnership qualified to do business in West Virginia that has acquired thousands of acres of commercial woodlands for investment, to provide current income from the management and operations of the woods, and to realize capital appreciation. Res. at 270. The primary product of the acquisitions and management is standing saw timber. *Id.* The Division of Forestry has certified the property as “managed timberland” thus receiving special managed timberland valuation for real property taxes. *Id.* at 271.² Forestland management plans are designed on a tract to tract basis to provide a competitive investment return while maintaining the tract and ensuring that after the management period the forest condition will equal or exceed pre-acquisition condition. *Id.* at 270. The Heartwoods have considerable authority over the trees to be cut by considering size, defects, and a mix of hard and soft mast-producing stems. *Id.* at 271.

The Heartwoods earn income by selling standing timber according to its management plan. *Id.* None of the Heartwoods cut the timber or engage others to cut the timber on the Heartwoods behalfs. *Id.* at 272. Instead, each conveys the right to cut standing timber to unrelated third persons, such as independent loggers and sawmill owners, for money. *Id.* Independent loggers buy the standing timber from each Heartwood, cut the timber on their own account, and sell the logs to wood processors. *Id.* Also, some wood processors buy the standing timber from each of the Heartwoods and either cut the timber themselves or engage loggers to harvest the timber and haul the logs to mills. *Id.* at 273. The

¹“Managed timberland” means “surface real property, except farm woodlots, of not less than ten contiguous acres which is devoted primarily to forest use and which, in consideration of their size, has sufficient numbers of commercially valuable species of trees to constitute at least forty percent normal stocking of forest trees which are well distributed over the growing site, and that is managed pursuant to a plan[.]” W. Va. Code § 11-1C-2(b).

²E.g, W. Va. Code § 11-1C-5(2)(B); § 11-1C-7(a); W. Va. C.S.R. § 110-1H-1 to -14 & Appxs. 1 to 6.

Heartwoods pick the types of standing timber to sell and location of timber to be sold. *Id.* at 271. To comply with “Best Management Practices,” under West Virginia Code § 11-1C-10(d)(1), each Heartwood must approve any logger, must approve the location of any roads or improvements the logger may construct, and the manner and method of construction. *Id.* at 273. A written contract conveys timber cutting rights with each Heartwood having a retained economic interest in the timber until cut, per 26 U.S.C. (I.R.C.) § 631(b).³ *Id.* at 272. The Heartwoods are not subject to the State severance tax; the purchasers of the standing timber pay those taxes. *Id.* at 271.

In short, the Heartwoods’ business in West Virginia consists of managing and sustaining timber on timberland they own, and selling the standing timber. *Id.* at 69-99.

The West Virginia Tax Department assessed the Heartwoods a grand total of almost \$3,000,000.00.

| | |
|--------------------------------|----------------|
| Heartwood Forestland, | \$ 963,771.00 |
| Heartwood Forestland Fund II, | \$ 784,831.00 |
| Heartwood Forestland Fund III, | \$ 132,504.00 |
| Heartwood Forestland Fund IV, | \$1,102,678.00 |
| Total. | \$2,983,784.00 |

III.

STANDARD OF REVIEW

“Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.” Syl. Pt. 1, *Appalachian Power Co. v State Tax Dep’t*, 466 S.E.2d 424 (W. Va. 1995).

³A retained economic interest “is possessed in every case in which the taxpayer has acquired by investment any interest in . . . standing timber and secures, by any form of legal relationship, income derived from . . . severance of the timber, to which he must look for a return of his capital.” Treas. Reg. § 1.611-1(b)(1).

IV.

ARGUMENT

A. The agricultural and farming exemption does not extend to forestry or growing timber.

In addressing a statutory question, “[w]e look first to the statute’s language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.” *Appalachian Power Co. v State Tax Dep’t*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). Thus, “[w]here, as here, the statute’s language is plain, “the sole function of the court is to enforce it according to its terms.”” *West Virginia Univ Hosps. v Casey*, 499 U.S. 83, 99 (1991) (citations omitted).

The Business Franchise Tax Act imposes a tax, *inter alia*, for the privilege of doing business in West Virginia, W. Va. Code § 11-23-6, and defines doing business as

any activity of a . . . partnership which enjoys the benefits and protection of the government and laws of this state, except the activity of agriculture and farming, which shall mean the production of food, fiber and woodland products (but not timbering activity) by means of cultivation, tillage of the soil and by the conduct of animal, livestock, dairy, apiary, equine or poultry husbandry, horticulture, or any other plant or animal production and all farm practices related, usual or incidental thereto, including the storage, packing, shipping and marketing, but not including any manufacturing, milling or processing of such products by persons other than the producer thereof.

Id. § 11-23-3(b)(8). The Heartwoods assert that they engage in agriculture and farming and, thus, do not do business under the Act. However, the second sentence of West Virginia Code § 11-23-3(b)(8) provides,

The activity of agriculture and farming shall mean such activity, as above defined, occurring on not less than five acres of land and the improvements thereon, used in the production of the aforementioned activities, *and shall mean the production of at least one thousand dollars of products per annum through the conduct of such principal business activities as set forth in section ten, article one-a, chapter eleven of this code.*

Id. § 11-23-3(b)(8) (emphasis added). In turn, West Virginia Code § 11-1A-10(b) (emphasis added) provides, a “person is *not* engaged in farming if he is primarily engaged in forestry or growing timber.”

The Heartwoods are not engaged primarily in agriculture since they are primarily engaged in forestry and growing timber. Rec. at 273.⁴ Under the plain language of the Business Franchise Tax Act and West Virginia Code § 11-1A-10(b), the Heartwoods are liable for business franchise taxes.

The Heartwoods claims are belied by a reading of West Virginia Code § 11-3-23(b)(8) and § 11-1A-10(b). However, if it is necessary to branch out beyond this argument, the Heartwoods are still left out on a limb.

B. Timbering activity encompasses the growing, managing, and furnishing of timber.

1. The common meaning of the terms farming and agriculture do not include forestry.

“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 General 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). In Common usage, growing timber trees is not farming.

“In common usage, do we not ordinarily regard farming and farm products as matters pertaining to the soil and to fields, and not to forests or timbered lands? Inquire of any farmer as to the quantity of land that he is cultivating or ‘farming,’ and he will probably answer solely in terms of ‘cleared land.’” *Collins v Mills*, 30 S.E.2d 866, 870 (Ga. 1944). *See also Just-A-Mere Farm v Peet*, 430 P.2d 987, 989 (Or. 1967) (“we do not think that in common parlance the growing of trees for the purpose of producing lumber is regarded as an agricultural operation.”); Robert Brothers, *Respectful Forestry*, 8 In Context 46, 46 (1985) (“Forestry is not Farming”); Food and Agricultural Organization of the United Nations,

⁴ In its Petition for Appeal, the undersigned counsel erred in stating the circuit court did not find that Heartwood satisfied both criteria. “Certainly we understand that in writing appellate briefs, as in any human endeavor, errors and mistakes are only to be expected.” *State v Watkins*, 214 W. Va. 477, 480 n.4, 590 S.E.2d 670, 673 n.4 (2003) (per curiam). The undersigned counsel apologizes to all concerned for the error.

Forestry Projects of the United Nations Development Program, 88 *Unasylva* (1968) (“Forestry is not farming”); Charles H. Flory, *Organization of National Forest Force* 12 (Mar. 12, 1910) (“Forestry is not agriculture”), www.fs.fed.us/r6/uma/publications/history/Flory1.pdf (visited Feb. 22, 2010); Treas. Reg. § 31.3121(g)-1(a) (“The term ‘agricultural labor’ as defined in section 3121(g) [i]n general . . . does not include services performed in connection with forestry, lumbering, or landscaping.”). *Cf.* W. Va. Code § 46-9-102(34) (“‘Farm products’ means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation[.]”). Growing standing timber is not agriculture or farming and this Court should reverse the circuit court so as to ensure the plain language of the statute is enforced.

2. *Pertinent law provides that forestry is not farming*

West Virginia Code § 11-23-3a(a) provides that “[a]ny term used in [the Business Franchise Tax] shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required by the context or by definition of this article.” The Internal Revenue Service Regulations state that “[a] taxpayer engaged in forestry or the growing of timber is not thereby engaged in the business of farming.” Treas. Reg. § 1.175-3; Treas. Reg. § 1.182-2 (same).

3. *Timbering is not limited to severing*

Timbering is not limited to severing. While the circuit court observed a number of opinions that equate timbering with severing, Rec. at 578, these cases did not, and were not asked to, examine if severing were synonymous to timbering. “The mere fact that the Supreme Court has made an *assumption* in an earlier case does not necessarily mean that it will subsequently render a *holding* in conformity with that assumption when the relevant issue is squarely presented for resolution.” *Tristani v. Richman*, 609 F. Supp.2d 423, 467 (W.D. Pa. 2009).

West Virginia Code § 11-23-3(b)(8) does not define timbering activity. However,

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Syl. Pt. 5, *State v Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908). Thus, this Court recognized in *Glen Falls Insurance Co. v Smith*, 217 W. Va. 213, 224 n.15, 617 S.E.2d 760, 771 n.15 (2005), “that where the Legislature consistently defines a term in a certain manner throughout the West Virginia Code, the term should receive a consistent interpretation where it has not otherwise been defined.”

West Virginia Code § 19-1B-3(e) defines “timbering operations.” Because West Virginia Code § 19-1B-3(e) defines timbering operations, it deals with the same subject matter as does West Virginia Code § 11-23-3(b)(8), and the two statutes should be read in *pari materia*. “Statutes relating to the same subject matter, whether enacted at the same time or at different times, and regardless of whether the later statute refers to the former statute, are to be read and applied together as a single statute the parts of which had been enacted at the same time.” Syl. Pt. 1, *Owens-Illinois Glass Co. v Battle*, 151 W. Va. 655, 154 S.E.2d 854 (1967). As this Court has said, “[a]lthough a particular body of legislation may not define a particular term contained therein, statutes relating to the same subject matter must be construed *in pari materia*, and not inconsistently with one another.” *Bowers v Wurzburg*, 205 W. Va. 450, 463, 519 S.E.2d 148, 161 (1999).⁵

West Virginia Code § 19-1B-3(e) provides that timbering operations means “activities directly related to the severing or removal of standing trees from the forest as a raw material for commercial

⁵To be in *pari materia*, the statutes do not have to even be in the same chapter or title. *United States v Phommachanh*, 91 F.3d 1383, 1386 (10th Cir.1996); *State v Kraus*, 530 S.W.2d 684, 687 (Mo. 1975); *Phoenix Ins. Co. v City of Omaha*, 36 N.W. 522, 526 (Neb. 1888); *Bradley v Board of County Comm’rs*, 890 P.2d 1228, 1231 (Kan. Ct. App. 1995); *State v Loftis*, 600 N.E.2d 744, 746 (Ohio Ct. App. 1991).

processes or purposes.” Thus, timbering operations are not limited only to severing, they include antecedent “activities directly related to the severing or removal of standing trees from the forest[.]”

“[T]he plain meaning of the words ‘directly related to’ connotes an uninterrupted, close relationship or link between the things being considered.” *City of Amarillo v Fernwick*, 19 S.W.3d 499, 501 (Tex. App. 2000). An indispensable act, indeed, an act necessary or required before the severing of the trees is “directly related” to timbering. See *GTE Serv. Corp. v F.C.C.* 205 F.3d 416, 424 (D.C. Cir. 2000) (defining, albeit in a non-timbering case, “directly related” as “necessary, required, or indispensable”); *Jampol v State*, 178 P.3d 396, 403 (Wyo. 2008) (“related directly” means indispensable); *North Texas Operating Engineers Health Ben. Fund v Dixie Masonry*, 544 F. Supp. 516, 520 (N.D. Tex. 1982) (“‘directly related’ if the job could not have been obtained or completed without them.”). Thus, if the Heartwoods must engage in antecedent actions without which the severing would not occur, those antecedent actions are “directly related to” the severing and are timbering activity. See *State v Crable*, No. 04-BE-17, 2004 WL 2913280, at *6 (Ohio Ct App. Dec. 8, 2004) (“In addition, the aggravated trespassing conviction was directly related to the victim’s home, since trespassing cannot occur without entering the premises of another.”).

The Heartwoods engage in actions and conduct that are directly related to severing. Each Heartwood must approve any logger and the location of any roads or improvements the logger may construct and the manner and method of construction. Rec. at 271. Without such approval no roads can be built, and hence, no trees severed. Indeed, such “[r]oads are *directly related* to the acquisition and disposal of the timber.” *Casey v United States*, 459 F.2d 495, 496 (Ct. Cl. 1972) (quoting *United States v Regan*, 410 F.2d 744, 746 (9th Cir. 1969)) (emphasis added). “Logging roads are an integral part of logging activities.” *Lyle Wood Prod. v Dep’t of Reu*, 588 P.2d 215, 215 (Wash. 1978). Approving and building “are inextricably intertwined when, in the context of a road to facilitate logging, “timber sales

cannot proceed without the road, and the road would not be built but for the contemplated timber sales.” *Crutchfield v United States Army Corps of Engineers*, 154 F. Supp.2d 878, 902-03 (E.D. Va. 2001) (citations omitted). *See also State v Watters*, 156 P.3d 145, 147 (Or. Ct. App. 2007) (“The Smith Mountain section . . . has several different uses . . . Its primary purpose is timber resource management, so there is a logging road system in the area to provide access to the timber resources.”).

Without granting permission to cut the trees, without selecting the trees to be cut, without selling the trees, without allowing for the building of logging roads to access the timber, none of the Heartwoods’ trees would ever be severed. Thus, the Heartwoods’ permission, selection, and selling, is directly related to severing since such permission, selection, and selling is necessary, required, or indispensable to the severing. The circuit court erred should be reversed.

4. *Timbering should be defined in the context of the purpose and results of the Heartwoods’ activities, that is the severing standing timber and of supporting the timber industry.*

“In tax matters, it is the substance, not the form of a transaction that determines tax liability.” *Huntington Pub. Co v Caryl*, 180 W. Va. 486, 491, 377 S.E.2d 479, 483 (1988). “This basic concept of Tax Law is particularly pertinent to cases involving a series of transactions designed and executed as parts of a unitary plan to achieve an intended result.” *Kanawha Gas & Utilities Co v C.I.R.*, 214 F.2D 685, 691 (5th CIR. 1954). “[L]inking together all interdependent steps with legal or business significance, rather than taking them in isolation, . . . Tax liability may be based on a realistic view of the entire transaction.” *C.I.R. v Clark*, 489 U.S. 726, 738 (1989). Thus, it is “well established . . . the tax consequences of an interrelated series of transactions are not to be determined by viewing each of them in isolation but by considering them together as component parts of an overall plan.” *Crenshaw v United States*, 450 F.2d 472, 475 (5th Cir. 1971). “[T]he individual tax significance of each step is irrelevant when, considered as a whole, they all amount to no more than a single transaction which in purpose and effect

is subject to the give tax consequence.” *Id.* at 476.

The Heartwoods sell their trees to obtain special tax benefits under I.R.C. § 631(b).⁶ However, “[i]t is essential that the consideration for the transaction [under I.R.C. § 631(b)], . . . be contingent upon the severance of the timber[.]” *Dyalwood*, 342 F.2d at 252. “Where payments owing under timber contracts are payable in any event, regardless of the fact of severance there is no retained economic interest.” *Huxford v United States*, 299 F. Supp. 218, 221 (N.D. Fla. 1969).⁷ Thus, to obtain § 631(b) treatment, the trees the Heartwoods sell have to be cut down. *See* Treas. Reg. § 1.631-2(d)(2) (“if the right to cut timber under the contract expires, terminates, or is abandoned before the timber which has been paid for is cut, the taxpayer shall treat payments attributable to the uncut timber as ordinary income and not as received from the sale of timber under section 631(b).”).

Thus, viewed holistically, the cutting of the trees is a necessary component of the end result the Heartwoods seek. The Heartwoods should not be allowed to artificially truncate the full reach and end of their conduct to avoid the tax consequences which their conduct—as a whole—generates.

Moreover, the special tax benefits the Heartwoods obtain under I.R.C. §§ 631(b) are not to inure to the benefit of the taxpayer *for the taxpayer*, but to the benefit of the *timber industry*. “Congress bestowed this [§ 631(b)] benefit upon timber owners in order to promote the timber industry.” *Weyerhaeuser Co v United States*, 32 Fed. Cl. 80, 140 n.96 (1994), *rev'd on other grounds*, 92 F.2d 1148 (Fed. Cir. 1996). *Accord Dyalwood, Inc v United States*, 588 F.2d 467, 469 (5th Cir. 1979) (“Section 631 is substantially the same as 117(k) of the Internal Revenue Act of 1939, added to that Act in 1944. Revenue Act of 1943, s 127, 58 Stat. 21, 46-47. . . . Section 117(k) was intended to promote the timber

⁶*See generally* IRS Pvt. Ltr. Rul. 200151046 (Dec. 21, 2001).

⁷*See generally* Francine J. Lipman, *No More Parking Lots: How the Tax Code Keeps Trees Out of a Tree Museum and Paradise Unpaired*, 27 Harv. Envtl. L. Rev. 471, 485 (2003); Mark A. Williams and Kent N. Schneider, *Timber Disposition: A Primer on Obtaining Favorable Tax Treatment*, 57 J. Mo. B. 24, 28 (2001).

industry . . .”); *United States v Brown Wood Preserving Co.*, 275 F.2d 525, 528 (6th Cir. 1960) (“Section 117(k) . . . was intended to promote a continuing timber industry . . .”); *Ouderkerk v C.I.R.*, TC-Memo 1977-120 (Apr. 27, 1977) (same). Similarly, by invoking managed timberland valuation, the Heartwoods place themselves within the ambit of the purpose of managed timberland valuation, which “has been determined by the Legislature to conform to the reality of placing a value on natural resources that is compatible with both an equitable and long-term economic development of the forestry industry.” *In re Righini*, 197 W. Va. 166, 168, 475 S.E.2d 166, 168 (1996). By engaging in activities within the ambit of § 631(b) and managed timberland valuation under West Virginia Code § 11-1G-5(a)(2)(B), that is, by engaging in activities to promote the timber and forestry industry, the Heartwoods are engaging in timbering activities.

C. The Heartwoods do not produce woodland products.

West Virginia Code § 11-23-3(b)(8) does not define “woodland products.”⁸ However, other West Virginia law within the Tax Code and legislative rules relating to taxation does. This Court may employ these definitions here, as the definition of a term in one statute may be employed in interpreting the identical word in another statute that does not define the word, *Glen Falls Ins.*, 217 W. Va. at 224 n.15, 617 S.E.2d at 771 n.15, *In re Cesar L.*, 221 W. Va. 249, 256, 654 S.E.2d 373, 380 (2007) (looking to definition of parent in West Virginia Code § 61-8D-1(7) to supply definition of parent in West Virginia Code § 49-6-6 which did not define the parent), and this is especially appropriate here since, in more than any other area of the law, the Tax Code which should be viewed “as a coherent whole[.]”

⁸Also within the ambit of West Virginia Code § 11-23-3(b)(8) are food and fiber. The Heartwoods stipulated that they produce standing timber, not that they produce food or fiber. Timber is not used for producing fiber since timber refers only to the production of wood, see, e.g., *Boen Hardwood Flooring, Inc v United States*, 254 F. Supp.2d 1349, 1356 (C.I.T. 2003), *rev'd on other grounds*, 357 F.3d 1262 (Fed. Cir. 2004); *Greenhalge v Town of Dunbarton*, 453 A.2d 1295, 1297 (N.H. 1982), *Craddock Mfg. Co. v Faison*, 123 S.E. 535, 536 (Va. 1924), and, of course, “wood is not a food for humans or other animals” Bernice G. Segal, *Chemistry: Experiment and Theory* 904 (1989).

Baumer v United States, 580 F.2d 863, 875 (5th Cir. 1978), and “give[en] . . . as great an internal symmetry and consistency as its words permit.” *United States v Olympic Radio and Television*, 349 U.S. 232, 236 (1955). Thus, because the Tax Code should not be seen as a conglomeration of disjointed statutes, but as a rational and cohesive whole,⁹ a court may look to the definition of a term in one section of the tax code to define that same or similar term a term in another portion of the code that does not define it. See *UMWA 1992 Ben. Plan v Leckie Smokeless Coal Co.*, 201 B.R. 163, 171 (S.D. W. Va.) (“the Coal Act is part of the Internal Revenue Code and the term ‘successor in interest’ is used elsewhere in the Internal Revenue Code. The Court will give the term meaning consistent with the rest of the body of law in which it is found.”), *aff’d*, 99 F.3d 573 (4th Cir. 1996).

West Virginia Code § 11-1C-2(f) defines woodland products as things “such as nuts or fruits harvested for human consumption[.]” Accord W. Va. C.S.R. § 110-1H-3.6. The Legislature placed this definition of woodland products in the same chapter, article, and section as its definition of timberland and managed timberland. W. Va. Code § 11-1C-2(a) & (b). Therefore, it was well aware of defining woodland products as producing edibles in the context of timber production.

Further, West Virginia Code of State Rules § 110-1A-2.5.26.2 and 3 reads as follows:
2.5.26.2 Wood Lot. - The term “wood lot” shall mean that portion of a farm in timber but shall not include land used primary for the growing of timber for commercial purposes except that Christmas trees, or nursery stock and woodland products, such as nuts or fruits harvested for human consumption, shall be considered farm products and not timber products.

2.5.26.3 Woodland Products. - The term “woodland product” shall mean cut trees, firewood, posts, rails, splints, logs, limbs and similar wood products and hickory nuts, walnuts, bechnuts, butternuts, and similar edible nuts or fruits of woody plants and maple sap used in making syrup and maple sugar.

⁹*Lisner v McCaless*, 356 F. Supp. 398, 401-02 (D. Ariz. 1973) (“It is axiomatic that a true code-which Congress intended here to create-is primarily different from statutes in that a comprehensive, cross-related scheme of laws is presented. No one section can be interpreted without reference to its place in the scheme of things.”); *Southern Nat. Gas Co. v United States*, 412 F.2d 1222, 1266 (Ct. Cl. 1969) (“All the sections of the Code must be read together to avoid conflict and achieve a harmonious, rational result.”); *Hawkins v United States*, 544 F. Supp. 39, 42 (S.D. Ohio 1982) (“the tax code must be read together as a whole”).

Even under the most liberal reading of the Code and State Legislative Rules (that is, excluding from woodland products the sole requirement that the product be edible by homo sapiens as required by West Virginia Code § 11-1C-2(f)), woodland products extend only to “cut” trees. The Heartwoods claim they do not produce *cut* trees; but, instead, they claim they only produce *live standing* trees. Rec. at 270. Hence, under the Heartwoods’ own arguments, they do not fall within the agricultural and farming exception to “doing business” in the business franchise tax. The circuit court should be reversed.

D. Even if the Heartwoods do not engage in timbering activity, they still are not exempt from the business franchise tax.

Assuming for the sake of argument that the Heartwoods are correct and (1) that they do not engage in timbering activity; and, (2) that they produce woodland products, they are still not out of the woods. They must still produce these woodland products through “cultivation, tillage of the soil and by the conduct of animal, livestock, dairy, apiary, equine or poultry husbandry, horticulture, or any other plant or animal production and all farm practices related, usual or incidental thereto cultivation and tillage of the soil.” W. Va. Code § 11-23-3(b)(8).

The plain meaning of cultivation and tillage refers to traditional farming by the raising of crops by plowing and sowing. *Nationwide Agribusiness Ins. Co. v Byler*, Nos. 06-1604, 06-5421, 2009 WL 890114, at * 9 (E.D. Pa. Mar. 31, 2009) (citation omitted) (““Cultivate” is defined as to ‘prepare or prepare and use for raising or [sic] crops.’”); *Township of Piscataway v Spectra Energy*, Civil Action No. 01-4828 (FSH), 2008 WL 4534187, at * 5 (D.N.J. Oct. 7, 2008) (citation omitted) (“‘Cultivating’ generally means traditional farming. The word dictionary defines ‘cultivate’ to mean ‘to prepare or prepare and use for the raising of crops.’”); *Cascadia Wildlands Project v Goodman*, 393 F. Supp.2d 1041, 1048 n.4 (D. Or. 2004) (“Merriam Webster’s defines ‘tillage’ as the operation of tilling land. ‘Till’ is defined in part

as “to work by plowing, sowing, and raising crops.”).

While the Heartwoods may replant individual trees, clear vegetation, space trees for sunlight and moisture, clear weeds, and put in fire breaks, Rec. at 270, they do not sow or till. See *id.* The Heartwoods engage in conservation—but conservation is not agriculture. “[T]imber is not converted into a farm product by nomenclature, so also is it not so transformed, in our opinion, by commendable methods of conservation, reforestation and increasing production.” *Kirby Lumber Corp. v Hardin Indep. Sch. Dist.*, 351 S.W.2d 310, 313 (Tex. Civ. App. 1961). See also 29 C.F.R. § 780.208 (“Operations in a forest tree nursery such as seeding new beds and growing and transplanting forest seedlings are not farming operations.”). See also *U.S. Steel Min. Co. v Helton*, 219 W. Va. 1, 7 n.10, 631 S.E.2d 559, 565 n.10 (2005) (quoting J. Hellerstein and W. Hellerstein, *State Taxation: Third Edition* ¶ 4.17(2)(d) (2004) (footnotes omitted)) (noting that the regrowing of trees is part of timbering—“even the timber industry (at least the large companies engaged in timbering) regrows the forests it cuts down.”).

Moreover, the Heartwoods do not raise crops; timber is not thought of as a crop. See *Kirby Lumber Corp. v Hardin Indep. Sch. Dist.*, 351 S.W.2d 310, 311-12 (Tex. Civ. App. 1961) (dicta) (“Appellant urges that ‘tree farming’ is a new concept, developed over recent years, and hence timber grown in its forests or ‘tree farms’ are technically ‘crops’. There is respectable authority from which it could be said that trees as grown on the land involved are not ‘crops’ under the statute.”). Indeed, the very etymology of agriculture, that is *ager* or *agri* meaning “field,” Benjamin L. D’ooge, *Elements of Latin* 1 (1921), substantiates that agriculture applies to a field not a forest. See *Boyd v Mitchell*, 268 S.E.2d 252, 254 (N.C. Ct. App. 1980) (noting “cases from other jurisdictions . . . that if timber is being removed to provide a field for farming, the work is agricultural.”).

Hence, agriculture, in its “common and appropriate sense . . . is used to signify that species of cultivation which is intended to raise grain and other field crops for man and beast.” *Great Western*

Mushroom Co. v Industrial Comm'n, 82 P.2d 751, 752 (Colo.1938).¹⁰ A field is “an open land area free of woods,” *Webster’s New Collegiate Dictionary* 427 (1973), the exact opposite of the kind of area that the Heartwoods utilize, and standing timber is not a crop as a standing timber tree cannot be harvested annually and still be afforded I.R.C. § 631(b) treatment. Thus, even if the Heartwoods do not timber, they do not farm or engage in agriculture either. *See also* Syl. Pt. 2, *Wilson v Riffle*, 87 W. Va. 160, 104 S.E. 285 (1920) (“A verbal, indefinite, and thoroughly informal contract by which an owner of forest land, in consideration of the clearing and fencing of a portion thereof by the other party to the contract, agrees to cultivate it, when cleared, for a certain number of years, and yield to such other one-half of the crops, creates a term of years in the party clearing and fencing the land, and obligates the owner thereof to cultivate it[.]” The Heartwoods cannot prevail and the circuit court should be reversed.

E. **The Heartwoods should not be allowed to characterize their business as forestry on the one hand for property tax purposes, versus agriculture on the other hand for business franchise tax purposes.**

The Division of Forestry grants the Heartwoods special timber management treatment which reduces their property taxes. The reduced property taxes on managed timberland axiomatically increases the return on timbering activities. *See* Janet E. Milne, *Timber Taxes: A Critique of the Northern Forest Lands Council’s Tax Recommendations*, 19 Vt. L. Rev. 423, 475 n.23 (1995). The Heartwoods, though, now want to claim that they are not engaged in *forestry*, but *agriculture*.

If the Heartwoods are engaged in agriculture, they should seek farm use valuation—and not managed timberland valuation—and in that way attempt to avoid the business franchise tax. But that path would be fatal to the Heartwoods. Under the Code and the Code of Legislative Rules a farm

¹⁰*See also* *O’Neill Prod. Credit Ass’n v Schmoor*, 302 N.W.2d 376, 379 (Neb. 1981) (citation omitted) (defining crops as “[p]roducts of the soil, as are annually grown, raised, and harvested.”); *Iroquois Gas Transmission Sys. v Kopjarzski*, No. CV 91034975S, 1996 WL 745844, at * 5 (Conn. Super. Ct. Dec. 17, 1996) (same); *Collins v Mills*, 30 S.E.2d 866, 870 (Ga. 1944).

cannot consist of land “used primarily in commercial forestry or the growing of timber for commercial purposes[.]” W. Va. Code § 11-1A-3(f); nor is agriculture “commercial forestry or the growing of timber for commercial purposes” under the Code of State Rules. W. Va. C.S.R. § 110-1A-2.5.1.

“A party may not accept “the benefits of a transaction or statute and then subsequently tak[e] an inconsistent position to avoid the corresponding obligations or effects.” *In re Robb*, 23 F.3d 895, 898 (4th Cir. 1994). See also *Tednicon Med. Info. Sys. Corp. v Green Bay Packaging Inc.*, 687 F.2d 1032, 1034 (7th Cir. 1982). In other words, “[f]or tax purposes, the taxpayer cannot eat his cake and have it too[.]” *Solomon v C.I.R.*, 204 F.2d 562, 565 (4th Cir. 1953), “by designing transactions to take advantage of the tax and regulatory benefits of ownership without also having to bear the tax burdens associated with those benefits.” Jennifer A. Simmons, Comment, *The Missouri Use Tax: Matching the Burdens to the Benefits of Ownership* 70 Mo. L. Rev. 269, 288 (2005). This, though, is precisely what the Heartwoods are doing here.

When the Heartwoods’ conduct benefits them by granting them special tax benefits, such conduct, they agree, is managing timberland. But, when the Heartwoods’ conduct does not benefit them, that is, makes them liable for the business franchise tax, then they are engaged in agriculture—even though they cannot claim farm use valuation for their property. The Heartwoods have the benefit of special property tax valuation because they are foresters and are entitled to managed timberland valuation, and the Commissioner does not dispute the legitimacy of such valuation—but that is the extent to which the Heartwoods are entitled to special state tax treatment. The circuit court erred and this Court should reverse it.

F. The Heartwoods position results in an unfairness and absurdity contrary to legislative intent.

If this Court has to depart from the plain meaning of the statute, the path the circuit court charted does not lead it out of the woods. A court has “a duty to ‘avoid whenever possible [an

application] of a statute which leads to absurd, inconsistent, unjust or unreasonable results.” *Peters v Rivers Edge Min*, ___ W. Va. ___, ___, 680 S.E.2d 791, 807 (2009) (quoting *State v Kerns*, 183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990)) or a result “that is demonstrably at odds with clearly expressed [legislative] intent to the contrary.” *United States v Crabtree*, 565 F.3d 887, 889 (4th Cir. 2009).

Under the circuit court’s reasoning, if a partnership or corporation owns more than five acres of land or sells more than \$1,000.00 of timber per annum it is exempt from tax. Under this logic, a partnership that owned only four acres of land and sold \$999.99 of timber would be liable for franchise tax, while the Heartwoods, because of their massive holdings and income would be exempt. But, the business franchise tax is imposed on the privilege doing business in West Virginia and in respect of the benefits and protection conferred. W. Va. Code § 11-23-6. Therefore, under the Heartwoods theory, the partnership or corporation that owns more property, that makes more money, and enjoys the benefits and protections of the State, will not pay a Franchise Tax that a partnership or corporation that owns less property, makes less money, and benefits less from the privilege of doing business and using the services of the State will have to pay. The OTA and circuit court rulings are demonstrably at odds with the intent of the business franchise tax and should be reversed.

V.

CONCLUSION

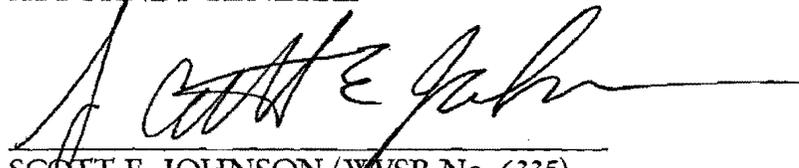
This Court should reverse the circuit court.

Respectfully submitted,

WEST VIRGINIA STATE
TAX DEPARTMENT,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Scott E. Johnson", written over a horizontal line.

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