IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.	)	No. 35476

FILED
MAY 5 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

APPELLEES' BRIEF

Michael E. Caryl, Esq. (WV Bar No. 662)
Thomas E. Heywood, Esq. (WV Bar No. 1703)
Heather G. Harlan, Esq. (WV Bar No. 8986)
Bowles Rice McDavid Graff & Love LLP
600 Quarrier Street
Charleston, W. Va. 25301
(304) 347-1100

Daniel R. McKeithen, Esq. (Ga. Bar No. 494330)
W. Scott Wright, Esq. (Ga. Bar No. 778821)
Sutherland Asbill & Brennan LLP
999 Peachtree St., N.E.
Atlanta, GA 30309-3996
(404) 853-8000

TABLE OF CONTENTS

Page

I. Introduction 1

II. Statement of Facts 2

A. Underlying Facts 2

B. Procedural History 6

1. Tax Commissioner's Arguments at the Office of Tax Appeals 6

2. Ruling of the Office of Tax Appeals for the Partnerships 7

3. Ruling of the Circuit Court for the Partnerships 7

III. Standard of Review 8

A. On-the-Record Review 8

B. Rejection of Newly Raised Issues 9

IV. ARGUMENT AND CITATION OF AUTHORITY 9

A. The Business Franchise Tax Is Not Imposed on Partnerships Engaged in the Activity of Agriculture and Farming. 9

B. The Appellee Partnerships Engage in Agriculture and Farming. 10

1. The Partnerships Engage in Qualifying Activities 11

2. The Partnerships Do Not Engage in "Timbering Activity." 12

a. The Legislature defines "timbering" as severance of timber. 13

b. The dictionary defines "timbering" as "cutting of timber." 14

c. West Virginia courts understand "timbering" means actual logging. 15

d. Other state courts similarly recognize that timbering means the actual severance of timber 15

e. The Partnerships never cut or remove the timber. 16

f. The Partnerships' activities are not "directly related to" cutting or removing the timber. 17

3. The Partnerships' Agriculture and Farming Activities Are Sufficiently Extensive to Qualify for the Exclusion. 20

C. The Limited Cross-Reference to Property Tax Does Not Change the Business Franchise Tax Definition of Agriculture and Farming. 21

1. The Commissioner's Construction of the Cross-Reference Ignores the Plain Language of the Statute. 21

2. The Commissioner's Construction Stretches the Meaning of the Cross-Reference Beyond Recognition. 22

3. The Commissioner's Construction Disregards His Own Regulation's Interpretation of the Cross-Reference. 24

D. The Tax Statute Should Be Construed Strictly Against the State. 26

E. The Court Should Not Address the New Issues Raised by the Commissioner for the First Time on Appeal. 29

1. Standing Timber Is Both a Woodland Product and Fiber. 31

2. The Common Meanings of Agriculture and Farming Include the Partnerships' Activities. 34

F. The Treatment of the Partnerships Is the Same as any other Agricultural Producer. 39

V. CONCLUSION 40

TABLE OF AUTHORITIES

CASES Page

In re 1994 Assessments of Property of Righini, 197 W. Va. 166, 475 S.E.2d 166 (1996) 30

Aiken v. McMillan, 106 So. 150 (Ala. 1925) 16

Allen v. Vuley, 635 N.Y.S.2d 821 (N.Y. App. Div. 1996) 15

Amoco Pipeline Co. v. Minn. Valley Landscaping, Inc., 481 N.W.2d 557 (Minn. 1992) 35

Appalachian Power Co. v. State Tax Department, 195 W. Va. 573, 466 S.E.2d 424 (1995) 8

Ballard's Farm Sausage, Inc. v. Dailey, 162 W. Va. 10, 246 S.E.2d 265 (1978) 27, 29

Becker v. Donalson, 75 S.E. 1122 (Ga. 1912) 16

Bracamontes v. Weyerhaeuser Co., 840 F.2d 271 (5th Cir. 1988) 36

Bullman v. D&R Lumber Co., 195 W. Va. 129, 464 S.E.2d 771 (1995) 15

Cheek v. Wainwright, 269 S.E.2d 443 (Ga. 1980) 35

Chesser v. Hathaway, 190 W. Va. 594, 439 S.E.2d 459 (1993) 15

Commonwealth. v. Ricker, 30 Pa. D. & C. 3d 665 (Pa. Com. Pl. 1982) 35

Comptroller v. Maryland Specialty Wire, Inc., 378 A.2d 183 (Md. Ct. App. 1977) 28

Conservation Com'n of Town of Fairfield v. DiMaria, 989 A.2d 131 (Conn. App. Ct. 2010) 37

Coordinating Council for Independent Living, Inc. v. Palmer, 209 W. Va. 274, 546 S.E.2d 454 (2001) 26

Duquesne Light Co. v. State Tax Department, 174 W. Va. 506, 327 S.E.2d 683 (1984) 30

Fidler v. Zoning Board of Adjustment of Upper Macungie Township, 182 A.2d 692 (Pa. 1962) 36

Frymier-Halloran v. Paige, 193 W. Va. 687, 458 S.E.2d 780 (1995) 8

In re Glenn, 181 B.R. 105 (Bankr. E.D. Okla. 1995) 37

Estate of Glessner v. Carman, 146 W. Va. 282, 118 S.E.2d 873 (1961) 10

Green Pond Corp. v. Township of Rockaway, 2 N.J. Tax 273 (N.J. Tax Ct. 1981) 15-16

Henry v. Board of Appeals of Dunstable, 641 N.E.2d 1334 (Mass. 1994) 35

Huber v. Serpico, 176 A.2d 805 (N.J. Super. Ct. App. Div. 1962) 16

IP Timberlands Operating Co., Ltd. v. Denmiss Corp., 657 So. 2d 282 (La. Ct. App. 1995) 35

International Paper, Inc. v. Bridges, 972 So. 2d 1121 33

Longview Fibre Co. v. Commissioner, 71 T.C. 357 (1978) 33

McGonigle v. Lower Heidelberg Township Zoning Hearing Board, 858 A.2d 663 (Pa. Commw. Ct. 2004) 38

McMillan v. Gurdon Lumber Co., 75 S.W.2d 229 (Ark. 1934) 33

Morante-Navarro v. T&Y Pine Straw, Inc., 350 F.3d 1163, 1172 (11th Cir. 2003) 36

In re Morgan Hotel Corp., 151 W. Va. 357, 151 S.E.2d 676 (1966) 30

Mowery v. Hitt, 155 W. Va. 103, 181 S.E.2d 334 (1971) 9, 30

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (U.S. 1995) 19

Noss Co. v. U.S., 588 F. Supp. 1408 (Ct. Int'l Trade 1994) 33

Ohio Cellular RSA Ltd. Partnership v. Board Public Works, 198 W. Va. 416, 481 S.E.2d 722 (1996) 26

Olshan v. Tenet Health System City Avenue, LLC, 849 A.2d 1214 (Pa. Super. Ct. 2004) 18

People ex rel. Pletcher v. City of Joliet, 152 N.E. 159 (Ill. 1926) 36

Potter v. Houston, 847 N.E.2d 241 (Ind. Ct. App. 2006) 35

Sancho v. Bowie, 93 F.2d 323 (1st Cir. 1937) 36

Sapp v. Conrad, 240 So. 2d 884 (Fla. Dist. Ct. App. 1970) 36

Sierra Club v. U.S. Forest Serv., 46 F.3d 835 (8th Cir. 1995) 33

Singleton v. McLeod, 8 S.E.2d 908 (S.C. 1940) 16

Solis v. Conley's Nursery and Landscaping, Inc., 641 F. Supp. 2d 1200 (D.N.M. 2009) 36

South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, fn 2 (1984) 33

Sudler Lakewood Land, LLC v. Lakewood Township, 18 N.J. Tax 451 (N.J. Tax Ct. 1999) 38

Taylor v. Canyon County Board of Com'rs, 210 P.3d 532 (Idaho 2009) 37

Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 459 S.E.2d 374 (1995) 39

Town of Enfield v. Enfield Shade Tobacco, LLC, 828 A.2d 596 (Conn. 2003) 37-38

United States v. Norman G. Jensen, Inc., 550 F.2d 662 (C.C.P.A. 1977) 35, 37

United States v. Olympic Radio & Television, Inc., 349 U.S. 232 (1955) 31

United States v. Turner Turpentine Co., 111 F.2d 400 (5th Cir. 1940) 37

West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital, 196 W. Va. 326, 472 S.E.2d 411 (1996) 12

Walter Butler Building Co. v. Soto, 142 W. Va. 616, 97 S.E.2d 275 (1957) 8

Wang-Yu Lin v. Shin Yi Lin, 224 W. Va. 620, 687 S.E.2d 403 (2009) 9, 30

Whitlow v. Board of Education of Kanawha County, 190 W. Va. 223, 438 S.E.2d 15 (1993) 9, 30

Willamette Egg Farms, Inc. v. Department of Revenue, 14 P.3d 609 (Or. 2000) 18

Wooddell v. Dailey, 160 W. Va. 65, 230 S.E.2d 466 (1976) 26

FEDERAL STATUTES

Fair Labor Standards Act, 29 U.S.C. § 203(f) (2010)) 36

IRC § 512(b)(5) 2, 20

IRC § 631(b) 2, 3, 5, 19, 20

STATE STATUTES

Conn. Gen. Stat. §1-1(q) 37

Timberlands Productivity Act, Cal. Gov't Code § 51104(f) (2010) 33

W. Va. Code § 11-13A-2(c)(11), (8) 14

W. Va. Code § 11-13A-3b 14

W. Va. Code § 11-1A-10 ..... 21-25, 32

W. Va. Code § 11-1A-11 32

W. Va. Code § 11-1C-10 23

W. Va. Code § 11-23-1 23

W. Va. Code § 11-23-3(b)(8) 6, 9-11, 20-25, 27, 32, 39

W. Va. Code § 11-23-6 ..... 9, 26

W. Va. Code § 11-23-6(a) 6

W. Va. Code § 11-23-7(h) 9

W. Va. Code § 11-3-1 39

W. Va. Code § 19-1B-3(e) 13, 17

W. Va. Code § 19-1B-4 13

WASH. ADMIN. CODE § 222-16-010 (2010) 34

RULES AND REGULATIONS

W. Va. Code St. R. § 22-2-2.21 14

W. Va. Code St. R. § 110-23-3.10.2 ..... 20, 25

MISCELLANEOUS

Administrative Notice, West Virginia State Tax Department, January 19, 1990, CCH 200-387 22

BOUVIER'S LAW DICTIONARY 36

H. James, RODERICK HUDSON, xli (New York ed., World's Classics 1980) 19

WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1961) 36

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2394 (1986) 12, 15

WEBSTER'S THIRD NEW INT'L DICTIONARY, 641 & 1916 (unabridged ed. 1993) 18

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.	))))))))))))))))))	No. 35476

APPELLEES' BRIEF

I. INTRODUCTION

The issue in this case is whether the activities of growing and managing standing timber constitute "agriculture and farming" under the business franchise tax statute. In detailed and well-reasoned opinions, both Chief Judge Reed of the Office of Tax Appeals and Judge Zakaib of the Circuit Court of Kanawha County determined that they are. Both lower courts held that the Appellee Partnerships' activities of growing and managing standing timber were agriculture and farming under the business franchise tax statute's definition because they involved the production of fiber and woodland products by means of cultivation or other plant production. The Partnerships respectfully request that this Court affirm.

II. STATEMENT OF FACTS

A. UNDERLYING FACTS

All of the facts of this case were stipulated and are part of the record. Certified Record filed with Supreme Court of Appeals on December 7, 2009 (hereinafter "R.") 268-74. The key facts are summarized below.

The Appellees (the "Partnerships") are North Carolina limited partnerships that have invested in woodlands in West Virginia and manage the woodlands for the production of standing timber. The Forestland Group LLC ("TFG"), a North Carolina limited liability company, manages the Partnerships. TFG filed income and franchise tax returns in West Virginia, and its tax liability is not at issue in this case. (R. 269.) No single person or entity owns, directly or indirectly, a controlling interest in the Partnerships. (R. 270.)

The limited partners of the Partnerships are all passive investors. Most of the partners are not-for-profit organizations exempt from federal and West Virginia income tax, such as charitable foundations, college endowments, pension and profit sharing plans, and other not-for-profit entities. (R. 269.) The remaining limited partners of the Partnerships consist of institutional and individual investors. (R. 269.)

Tax-exempt organizations, such as the investors in the Partnerships here, are generally exempt from federal income tax on their income other than unrelated business taxable income ("UBTI"). *See § 511, Internal Revenue Code of 1986, as amended* ("IRC"). The income these organizations receive from timberlands is excluded from UBTI when they limit their activities to the growing of and caring for the trees and selling the standing timber pursuant to contracts that qualify under IRC § 631(b). IRC § 512(b)(5). To qualify under IRC § 631(b), these organizations (and the partnerships in which they invest) must sell the standing timber by

granting rights to harvest the trees to third parties rather than harvesting the trees themselves and selling the cut logs.

Given these federal income tax restrictions on their not-for-profit partners, the Partnerships limit their operations in West Virginia, as in other states, to the growing of trees on timberland they own for the production of standing timber. (R. 273.) The Partnerships derive income by selling the harvest rights to the standing timber to third parties pursuant to contracts that satisfy the limitations of IRC § 631(b). (R. 271, 272.) The Partnerships never cut the standing timber themselves; nor do they engage others to cut timber on their behalf. (R. 272.)

The Partnerships limit their activities to cultivating the woodlands to produce viable and sustainable stands of timber. They design forestland management plans on a tract-by-tract basis, paying careful attention to each property's unique attributes, including timber quality, biological habitat, and species diversity. (R. 270.) Each management plan has two objectives: (a) to provide a competitive return to investors while being consistent with the maintenance and enhancement of the biological productivity of the tract, and (b) to ensure that at the end of the management period the overall condition of the forestland will be equal or superior to the condition at the time of acquisition. (R. 270.) The management of the forestlands owned by the Partnerships involves multiple activities required to produce and sustain standing timber and commercially viable forestland, including but not limited to replanting or naturally regenerating trees in areas that have been harvested, herbaceous weed control, woody vegetation control, fire control, and the selection of individual trees for sale and removal and the identification and maintenance of seed trees for future naturally regenerated growth potential. (R. 270.)

The forest management practices the Partnerships utilize are focused on the management of the space between trees to assure optimal sunlight, moisture and soil conditions for quality

plant production and growth. (R. 270.) These production practices are designed to encourage the natural regeneration of the forest and must account for such variables as soil quality, light conditions, residual stand composition and spacing, climate and existing timber volume. (R. 271.) These practices allow for the production of a sustainable yield of standing timber, while maintaining habitat for wildlife, promoting biological diversity, stabilizing watersheds and protecting soil fertility. (R. 271.)

As mentioned, each Partnership derives income for its investors by periodically selling standing timber in accordance with its management plan. (R. 271.) Each Partnership chooses the types and locations of standing timber to sell in order to establish a desirable species mix, maintain the ecological health of the remaining forest, and maximize long-term investment returns. (R. 271.)

The Partnerships use the following tree selection guidelines to improve the residual stand of timber that is left after harvest.

a. Trees of the size that will increase over the management period from pulpwood to small sawtimber or from small sawtimber to large sawtimber are not sold.

b. Higher value species are left as crop trees in the residual stand. Regardless of value, three to four hard and soft mast producing stems are left on each acre as wildlife trees.

c. Trees that have visible quality defects, such as cat faces, frost cracks, lightning strikes, damaged tops, and visible rot are marked for removal; whereas high-quality stems, those that have no visible quality defects and which have good prospective growth potential, are left in the residual stand.

d. Crop trees that are left in the residual stand are those that have a high live crown ratio to respond well to release from surrounding competition.

e. Each crop tree left in the residual stand must be well spaced from surrounding competition but not left open enough to be subject to epicormic branching, wind throw, ice damage or lightning strike. (R. 271-72.)

The Partnerships never cut the standing timber themselves; nor do the Partnerships engage others, in an agency capacity or any other capacity, to cut timber on the Partnership's behalf. (R. 272.) Rather, the Partnerships convey the right and obligation to cut standing timber to unrelated third parties, such as independent loggers, sawmill owners, or other wood processors in exchange for the payment of money. (R. 272.) This is done through timber cutting agreements by virtue of which the Partnership retains an economic interest in the timber until it is cut (within the meaning of IRC § 631(b)). (R. 272.)

Independent loggers purchase the standing timber from the Partnerships, cut the timber for their own account, and then sell the logs to wood processors. (R. 272.) Wood processors may also purchase the standing timber directly from the Partnerships, and either cut the timber themselves or engage loggers as their agents to harvest the timber and haul the cut logs to the mills. (R. 273.) Loggers, whether independent or engaged by the wood processors, must build logging roads or other improvements from time to time to access and harvest the timber. The loggers must seek the approval of the Partnerships as landowner before the loggers construct the roads or other improvements the loggers have determined they need to perform the loggers' operations. (R. 273.)

B. PROCEDURAL HISTORY

In 2000, the Commissioner notified the Partnerships that they should be filing West Virginia Business Franchise Tax returns. The Partnerships contested this notification and the Commissioner ultimately concluded that the Partnerships would not be required to file returns or pay tax for years prior to 2003. At the Commissioner's insistence, however, the Partnerships filed West Virginia Business Franchise Tax returns for the years at issue in the present case, 2003 and 2004, claiming that they were not subject to tax because they were engaged in agriculture and farming within the meaning of the business franchise tax statute. (R. 208.) The Commissioner then issued the Partnerships Notices of Assessment for 2003 and 2004. The Notices did not explain the reason for the assessment other than to state that the Partnerships had erroneously under reported their taxable capital on their business franchise tax returns. (R. 276.)

The Partnerships then petitioned the Office of Tax Appeals for a reassessment arguing that its activities were not subject to the business franchise tax pursuant to W. Va. Code § 11-23-6(a), which imposes the tax on partnerships "doing business" in West Virginia, and W. Va. Code § 11-23-3(b)(8), which defines "doing business" in relevant part as any activity "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 . . . or any other plant or animal production."

1. Tax Commissioner's Arguments at the Office of Tax Appeals

The Commissioner's only arguments before the Office of Tax Appeals were (i) that the property tax definition of "farming" expressly excludes forestry and the growing of timber and that this should be incorporated into the franchise tax definition of "agriculture and farming" because the second paragraph of section 11-23-3(b)(8) makes a cross reference to the property tax, Reply Brief in Support of State's Position, R. 310-15, and (ii) even though the Partnerships

were not engaged in timbering, they made money by selling standing timber to other unrelated parties who were engaged in timbering. (Transcript of Oral Argument, R. 60-61.) The Commissioner did not contest the Partnerships' position that they produced fiber and woodland products by means of cultivation and other plant production and were not engaged in timbering activities themselves because they never harvested the standing timber or engaged anyone to harvest the timber on their behalf. (R. 312 (Commissioner stating in his brief that, "Fortunately, there is no need to decide this case based on what does or does not constitute 'timbering.'"))

2. Ruling of the Office of Tax Appeals for the Partnerships

The Office of Tax Appeals ruled in favor of the Partnerships and vacated the assessments. (*See* Final Decision, R. 331-45.) Chief Judge Reed held that the business franchise tax definition of agriculture and farming "applies clearly to the activities of growing and managing standing timber, without any timbering (severing) activity." (R. 342.) As revealed by the words of the franchise tax statute and the Commissioner's own regulations, the purpose of the cross reference to the property tax statutes was only for "incorporating the requirement of 'principal activity' into the meaning of the 'business of farming' for business franchise tax purposes (as well as for property tax purposes)." (R. 341-42.)

3. Ruling of the Circuit Court for the Partnerships

The Commissioner then appealed to the Circuit Court of Kanawha County for on-the-record review of the Office of Tax Appeals' decision. In that appeal, the Commissioner re-asserted its positions but also raised the new issue not addressed by the parties below (because not raised by the Commissioner as a reason for the assessments) of whether timber is a "woodland product." Judge Zakaib issued a 23-page opinion rejecting the Commissioner's old and new arguments and affirming the Office of Tax Appeals. (Final Order, R. 566-88.)

III. STANDARD OF REVIEW

A. ON-THE-RECORD REVIEW

In appeals from decisions of the Office of Tax Appeals, the Court conducts its review upon the record of the proceedings before the Office of Tax Appeals, reviewing conclusions of law de novo and conclusions of fact under a clearly erroneous standard. *Frymier-Halloran v. Paige,* 193 W. Va. 687, 458 S.E.2d 780 (1995). "Interpreting a statute or a regulation presents a purely legal question subject to *de novo* review." *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 581-582, 466 S.E.2d 424 (1995). However, "once the legislature creates an administrative agency and assigns adjudicatory decision making to that agency, then courts must defer to its decisions and cannot review factual determinations de novo." *Frymier-Halloran*, 458 S.E.2d at 787 (citing *Walter Butler Bldg. Co. v. Soto,* 142 W.Va. 616, 97 S.E.2d 275 (1957)). Accordingly, to the extent that the Tax Commissioner now argues on appeal that the Partnerships engage in timbering activity, the contrary finding of the lower courts could be reversed only if they were clearly erroneous. Furthermore, to the extent that the Tax Commissioner now argues on appeal to this Court that the Partnerships do not farm or cultivate the woodlands or produce a woodland product, the contrary finding of the lower courts that "the Partnerships cultivate and manage the woodlands in order to produce a sustainable yield of standing timber, a woodland product," R. 574, could be reversed only if it were clearly erroneous.

B. REJECTION OF NEWLY RAISED ISSUES

"In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which have not been decided by the court from which the case has been appealed." *Mowery v. Hitt,* 155 W.Va. 103, 181 S.E.2d 334, 338 (1971) (citations omitted); *Wang-Yu Lin v. Shin Yi Lin*, 224 W.Va. 620, 687 S.E.2d 403, 407-408 (2009) ("because this issue was not raised and decided below, we decline to address it for the first time on appeal"). The only exception to this rule is where the issue is constitutional in nature, which is not the case here. *Whitlow v. Bd. of Educ. of Kanawha County*, 190 W.Va. 223, 438 S.E.2d 15, 18 (1993). There are three justifications for the rule foreclosing a party from raising a new issue on appeal:

> . . . when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. **When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal.** Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

Id. (emphasis added).

IV. ARGUMENT AND CITATION OF AUTHORITY

A. THE BUSINESS FRANCHISE TAX IS NOT IMPOSED ON PARTNERSHIPS ENGAGED IN THE ACTIVITY OF AGRICULTURE AND FARMING.

West Virginia Code § 11-23-6 imposes the business franchise tax "on the privilege of doing business in the state." West Virginia Code § 11-23-3(b)(8) then defines the term "doing business" as "any activity of a corporation or partnership which enjoys the benefits and protection of the government and laws of this state, except the activity of agriculture and farming" and goes on to define specifically what is meant by "agriculture and farming." The legislature also provided an exemption from the franchise tax for agriculture and farming. West Virginia Code § 11-23-7(h) exempts "[a]ny corporation or partnership engaged in the activity of

agriculture and farming, as defined in [section 11-23-3(b)(8)]." Thus, the business franchise tax is not imposed on the activity of agriculture and farming.

The activity of agriculture and farming is not merely expressly exempted from the tax to which it would otherwise be subject; the tax does not even apply to the activity in the first place. The Circuit Court and the Office of Tax Appeals properly determined that the Partnerships' activities were limited to agriculture and farming as defined in the business franchise tax statute, with the result that the Partnerships were not "doing business" so as to be subject to the business franchise tax.

As discussed in subsection D below, because the issue in this case is whether the statutes impose tax on the Partnerships in the first place (rather than merely whether a statutory exemption applies to exempt the Partnerships from a tax that the statutes otherwise impose) the statute at issue is to be construed strictly against the State and in favor of the taxpayer. "The rule is well established in this jurisdiction and elsewhere that tax levying statutes are, in case of doubt, to be construed strongly against the government and in favor of the taxpayer." *Estate of Glessner v. Carman,* 146 W.Va. 282, 291, 118 S.E.2d 873, 878 (1961).

B. THE APPELLEE PARTNERSHIPS ENGAGE IN AGRICULTURE AND FARMING.

West Virginia Code § 11-23-3(b)(8) defines "agriculture and farming" for purposes of the exclusion from the definition of "doing business" and thus determines whether the tax is imposed. It states in full:

> *Doing business.* The term "doing business" means any activity of a corporation or 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.

The activity of agriculture and farming shall mean such activity, <u>as above defined</u>, 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.

W.Va. Code § 11-23-3(b)(8) (Emphasis added).

This definition describes both the types of activities that are considered agriculture and farming and the manner and the extent to which the corporation or partnership must conduct those activities to qualify for the exclusion. The first paragraph describes the types of activities, and the second paragraph describes the manner and extent to which the partnership must conduct the activities.

1. <u>The Partnerships Engage in Qualifying Activities.</u>

The Partnerships engage in qualifying activities under the first paragraph of section 11-23-3(b)(8), as their only activity is the production of woodland products (but not timbering activity) by means of cultivation of the soil or any other plant production.[1]

The primary product of the Partnerships is standing timber, a woodland product. (Stipulation ¶ 11, R. 270.) The Partnerships limit their activities to cultivating the woodlands to produce viable and sustainable stands of timber. They design forestland management plans on a tract-by-tract basis, paying careful attention to each property's unique attributes, including timber quality, biological habitat, and species diversity. (Stipulation ¶ 12, R. 270.) The management of the woodlands involves multiple activities required to grow a crop of trees,

---

[1] The growing of timber also falls within the concept of the production of "fiber," another qualifying activity under the statute. *See* subsection E.1. *infra*.

including replanting or naturally regenerating trees in areas that have been harvested, herbaceous weed control, woody vegetation control, fire control, and the selection of individual trees for sale and removal. (Stipulation ¶ 14, R. 270.) The Partnerships' forest management practices focus on the management of the space between trees to assure optimal sunlight, moisture and soil conditions for quality tree growth. (Stipulation ¶ 15, R. 270.) These management practices are designed to produce a sustainable yield of standing timber, while maintaining habitat for wildlife, promoting biological diversity, stabilizing watersheds and protecting soil fertility. (Stipulation ¶ 18, R. 271.)

In light of the parties' stipulations, the Circuit Court correctly found "compelling evidence that, through their management practices, which account for such variables as soil quality, light conditions, residual stand composition and spacing, climate and existing timber volume, the Partnerships cultivate and manage the woodlands in order to produce a sustainable yield of standing timber, a woodland product." (Final Order at 9, R. 574.)

2. <u>The Partnerships Do Not Engage in "Timbering Activity."</u>

It is also clear that the Partnerships are not engaged in any "timbering activity" so as to be carved out of the legislature's definition of farming and agriculture by the statute's parenthetical "(but not timbering activity)." "Absent specific statutory definitions, words in a statute are presumed to have their ordinary and common meaning." *W. Va. Health Care Cost Review Auth. v. Boone Memorial Hosp.*, 196 W.Va. 326, 472 S.E.2d 411, 422 (1996) (citations omitted). The plain, common meaning of the term "timbering" is the "cutting of timber." *See* Webster's Third New International Dictionary 2394 (1986). The term "timbering" refers to the actual logging or harvesting of the standing timber; it does not encompass the planting, cultivation, and production of the standing timber. The loggers or wood processors that buy the standing timber from the Partnerships are engaged in timbering; the Partnerships are not.

a. The Legislature defines "timbering" as severance of timber.

Although the business franchise tax statute does not define "timbering," the West Virginia Legislature has consistently used the term "timbering" to mean the activities associated with the actual severance and logging of timber as opposed to the activities associated with the care and growing of timber prior to harvesting.

Pursuant to the Logging Sediment Control Act (the "Act"), persons who "conduct timbering operations, purchase timber or buy logs for resale" must obtain a timbering license from the Forestry Division. W. Va. Code § 19-1B-4 (entitled "Timbering license required").[2] The Partnerships are not subject to the licensing requirements of the Act because they do not conduct timbering operations. The Legislature defines "timbering operations" as the "activities directly related to the severing or removal of standing trees from the forest as a raw material for commercial processes or purposes." W. Va. Code § 19-1B-3(e). Implementing regulations specifically state that timbering operations "includes all aspects of logging, including but not limited to severing and delimbing of trees, cutting of the delimbed tree into logs either at the point of severing or at a landing, the preparation of any skid and haul roads and the skidding or otherwise moving of logs to landings." W. Va. Code St. R. § 22-2-2.21. These definitions do

---

[2] The Act also requires notification to the Forestry Division prior to beginning "timbering operations" on any specific tract of land. W. Va. Code § 19-1B-6 (entitled "Notification of duration of timbering operations or harvesting timber for sale"). The notice must specify the location and expected duration of the timbering operations, describe the sediment control practices to be used by the logger during the timber harvesting operation, and acknowledge that "best management practices" (that is, the sediment control measures used to reduce soil runoff from land disturbances associated with commercial timber harvesting) will be used in the harvest. *Id.* Further, if the Forestry Division finds that sediment control practices are not being used in particular timbering operations, it can take actions ranging from suggesting corrective action to suspending the license of the person conducting the timbering operation. W. Va. Code § 19-1B-5 (entitled "Compliance orders, suspension of timbering operating license").

not refer in any way to the cultivation, growing, and caring of the trees prior to the beginning of timbering operations.

The Legislature has also used the term "timbering" in the severance tax provisions to signify the actual cutting or severance of the trees, rather than the activities related to growing the trees. The severance tax applies to the business of "severing timber for sale." W. Va. Code § 11-13A-3b. Since "severing" in the context of the timber severance tax is strictly defined as "the physical removal of the [standing timber] from the earth," the Partnerships themselves are not subject to the tax. W. Va. Code § 11-13A-2(c)(11), (8). Indeed, the parties have stipulated in this case that "[t]he Partnership's business activities . . . are not subject to the severance tax." (Stipulation ¶ 19, R. 271.) The Partnerships sell standing timber. Unrelated logging companies or wood processors purchase the standing timber from the Partnerships so that at the time the timber is severed, it is owned by the logging company or wood processor, who is therefore liable for the severance tax.

West Virginia Code § 11-13A-16a requires nonresidents subject to the severance tax (*i.e.,* those that sever timber) to give the Tax Commissioner notice before beginning their "timbering" operation at any specific location. Persons such as the Partnerships, however, who merely own standing timber and sell harvest rights to others, are not required to give notice under this severance tax provision because they are not engaged in timbering operations (the severance of timber).

b. The dictionary defines "timbering" as "cutting of timber."

The Legislature's consistent use of the term "timbering" is not surprising. As mentioned above, the dictionary meaning of the term means "cutting of timber." *See* Webster's Third New International Dictionary 2394 (1986).

c. West Virginia courts understand "timbering" means actual logging.

As a result of this widespread usage and ordinary meaning, West Virginia courts have used the term timbering as a synonym of logging. For example, in *Bullman v. D&R Lumber Co.*, 195 W. Va. 129, 131, 464 S.E.2d 771, 773 (1995), the plaintiff sued a logging company for wrongfully cutting his timber. In describing the lower court's proceedings, the court in *Bullman* stated that the logging company was found liable for the "wrongful removal of trees and excavation of a logging road on [the plaintiff's] property when it was timbering a contiguous tract." *Id.* In describing the evidence against the logging company, the court stated that "two neighbors informed the plaintiff that a logging company that was timbering in the area may have trespassed on her land to cut some trees." *Id.* at 133, 464 S.E.2d at 774. The plaintiff asked her stepfather "to walk through the area to investigate the timbering." *Id.* In other words, the court used "timbering" to mean the actual logging of the standing timber. *See also Chesser v. Hathaway*, 190 W. Va. 594, 595, 439 S.E.2d 459, 460 (1993) (using "timbering" as a verb to describe the defendant's acts of cutting the plaintiff's standing timber).

d. Other state courts similarly recognize that timbering means the actual severance of timber.

These West Virginia opinions are in good company. Many other state courts also consistently use "timbering" to signify the actual logging activity, rather than the cultivation of the trees prior to logging. *See, e.g., Allen v. Vuley*, 635 N.Y.S.2d 821, 823 (N.Y. App. Div. 1996) (using "timbering activities" to mean the cutting of standing timber); *Green Pond Corp. v. Township of Rockway*, 2 N.J. Tax 273, 285-86 (N.J. Tax Ct. 1981) (using "timbering activity" to mean the harvesting of standing timber); *Huber v. Serpico*, 176 A.2d 805, 807 (N.J. Super. Ct. App. Div. 1962) (using "timbering operations" to mean the cutting and removing of standing

timber); *Singleton v. McLeod*, 8 S.E.2d 908, 912 (S.C. 1940) (using "timbering operations" to mean the cutting of standing timber); *Aiken v. McMillan*, 106 So. 150, 159-60 (Ala. 1925) (using "timber operations" and "timbering of the lands" to mean the cutting and removing of standing timber); *Becker v. Donalson*, 75 S.E. 1122, 1125 (Ga. 1912) (using "timbering" to mean the logging of standing timber).

Although the Commissioner tries to discount the overwhelming weight of all of these cases by stating that whether timbering equates with severing and removal operations was not specifically at issue in the cases, West Virginia State Tax Commissioner's Brief (hereinafter "Appellant's Br.") at 6, the Commissioner does not cite a single case that uses "timbering" in any other way. The cases cited above, the legislature's definition of the term in other statutes, as well as the dictionary definition of timbering all make it clear that the common meaning of the term is severing trees.

e. The Partnerships never cut or remove the timber.

The Partnerships never cut or sever standing timber, and they never engage others, in an agency or any other capacity, to cut the standing timber on the Partnerships' behalf. (Stipulations ¶ 23; ¶ 32, R. 272, 273.) Instead, the Partnerships convey the rights and obligations to cut standing timber to unrelated third parties, such as independent loggers, sawmill owners, or other wood processors in exchange for the payment of money. (Stipulations ¶ 24, R. 272.) Since the Partnerships are not engaged in the cutting and logging of the timberlands, their activities do not constitute "timbering activity" as that term is used by both the West Virginia Legislature and the West Virginia courts and as that term is understood in common usage and in the industry.

f. The Partnerships' activities are not "directly related to" cutting or removing the timber.

In his brief, the Tax Commissioner does not try to argue that "timbering" encompasses the growing and cultivation of trees.[3] Instead, the Commissioner cites the language of West Virginia Code § 19-1B-3(e) quoted above – but ignores the implementing regulation – and asserts that the Partnerships' merely selecting trees for sale, and requiring the unrelated parties who purchase the standing trees and conduct their own timbering operations on the Partnerships' land to seek permission before building roads or other improvements on the land, means that the Partnerships are also engaged in "timbering." (Appellant's Br. at 8-9.) The Logging Sediment Control Act definition encompasses only "activities directly related to the severing or removal of standing trees from the forest," and the regulation gives as examples delimbing, cutting the felled tree into logs, preparing skid and haul roads, and moving the logs to landing areas. There is simply nothing in this statutory scheme to suggest, or that leaves room for an inference, that the owner of the land and standing timber engages in "timbering" simply by exercising its fundamental legal rights as a landowner: deciding which trees to sell; requiring the purchaser to operate in a fashion required by West Virginia law; making sure it approves of roads or other improvements built on its property; or otherwise requiring the purchaser to leave the property in a specified condition.

---

[3] Note that the Tax Commissioner's header B on page 5 of his brief asserts that timbering activity encompasses the growing, managing, and furnishing of timber; yet nowhere in the entire discussion under that header on pages 5 through 11 of his brief is the Tax Commissioner ever so bold as to assert that timbering includes the growing and cultivation of trees, much less provide any support for such an assertion.

The Tax Commissioner's basic argument is that "but for" the fact that the Partnerships sell the trees and permit purchasers to build roads when needed to access the trees, the purchasers would not be able to sever and remove the trees and, therefore, the Partnerships' activities are "directly related to" the purchasers' severing and removal. Of course, but for planting the trees and the sun shining on the seedlings, neither would the trees be there for the purchasers to sever and remove. As one court has noted, "[t]he plain, natural, and ordinary meaning of 'directly' is 'without any intervening space or time.' [citations omitted] The plain, natural, and ordinary meaning of 'related' is 'connected by reason of an established or discoverable relation.'" *Willamette Egg Farms, Inc. v. Dep't of Revenue*, 14 P.3d 609, 612 (Or. 2000) (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY, 641 & 1916 (unabridged ed. 1993)). *Willamette* found that equipment used for raising egg-laying chickens was not directly related to egg production. *Id.* at 613 ("The process of raising chickens that might, in time, lay eggs is not the same as the process of maintaining chickens that are laying eggs. That is, the maturation process, and the equipment used to facilitate that process, is not the same as the production of eggs.").

Though the exercise of the Partnerships' landowner rights may precede actual timbering operations, they are not "activities directly related to the severing or removal of standing trees from the forest." *Cf. Olshan v. Tenet Health Sys. City Ave., LLC*, 849 A.2d 1214, 1217 (Pa. Super. Ct. 2004) (finding the phrase 'health care services' "relates to medical care and directly related activities" but not "ancillary services, such as hiring physicians, drafting rules, or supervising and reviewing the work of health care professionals."). As found by the court below, the Partnerships activities relate to the cultivation and management of the woodlands. The

severance and removal of the timber – the timbering activity – is performed by completely separate, independent, unrelated parties with their own business interests and concerns.

The U.S. Supreme Court has warned against the dangers of reading too broadly limiting phrases such as "directly related to." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (U.S. 1995). In determining the pre-emptive scope of a federal statute, the Court noted that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, **relations stop nowhere.**'" *Id.* (emphasis added and quoting H. James, RODERICK HUDSON, xli (New York ed., World's Classics 1980)). Here, the Tax Commissioner not only must shoehorn the Partnerships' activities into the words "related to" but must also try to force them into the words "directly related to." As the regulations confirm, the Partnerships' development of timber management plans and requiring approval of roads built on their land just do not fit in the phrase "directly related to the severing or removal of standing trees." Accordingly, the Partnerships' mere exercise of rights fundamental to landownership does not constitute "timbering activities" nor "activities directly related to the severing or removal of standing trees from the forest."

The Tax Commissioner argues that the Partnerships somehow are elevating "form over substance" by ensuring that they are not severing the timber. (Appellant's. Br. 9-11.) In truth, the economic substance of the Partnerships' activities comports precisely with the form of those activities. The Partnerships do not incur the cost of harvesting timber and do not own the cut logs. It is undisputed that the buyers of the Partnerships' standing timber do not act as agents of the Partnerships in any way. (Stipulations ¶¶ 23-25, R. 272) Since the Partnerships' sell only standing timber under IRC § 631(b) and neither harvest timber nor sell cut logs, the tax-exempt

partners are not subject to the unrelated business income tax, and taxable partners generally are entitled to long-term capital gain. *See* IRC §§ 512(b)(5), 631(b), 1231(b); (*see also* Stipulation ¶ 27, R. 273.) Moreover, the loggers are responsible for the severance tax (Stipulation 19, R. 271) and, as noted above, must comply with the Logging Sediment Control Act. Thus, in every way, the substance and form of the Partnerships' activities align.

Thus, since the Partnerships are engaged in the production of standing timber by the cultivation and other management of their woodlands, and they are not engaged in the logging of the timber, the Partnerships' activities are the type that are considered "agriculture and farming" under the first paragraph of section 11-23-3(b)(8).

3. The Partnerships' Agriculture and Farming Activities Are Sufficiently Extensive to Qualify for the Exclusion.

The second paragraph of section 11-23-3(b)(8) describes the manner and extent to which a corporation or partnership must conduct the activities specified in the first paragraph in order to qualify:

> The activity of agriculture and farming shall mean such activity, as defined above, 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.

W. Va. Code § 11-23-3(b)(8).

This second paragraph provides two qualifications for the manner and extent of an entity's agriculture and farming activity. First, the agriculture and farming activity will qualify if it involves the use of at least five acres of land. Second, the agriculture and farming activity will qualify if it produces at least $1000 of product per annum "through the conduct of the business

of farming *as the principal activity of the corporation or partnership in the manner described* in W. Va. Code § 11-1A-10." W. Va. Code St. R. § 110-23-3.10.2.

The Partnerships meet both of these qualifications. First, each of the Partnerships owns over 30,000 acres of woodlands in West Virginia, well over the five-acre requirement. (Stipulation ¶ 29, R. 273.) Second, the business of farming produces over $1,000 of product per annum and is conducted by each Partnership as its principal activity in the manner described in W. Va. Code § 11-1A-10. (Stipulation ¶¶ 28-30, R. 273.)

C. THE LIMITED CROSS-REFERENCE TO PROPERTY TAX DOES NOT CHANGE THE BUSINESS FRANCHISE TAX DEFINITION OF AGRICULTURE AND FARMING.

The Tax Commissioner contends in essence that the definition of "agriculture and farming" set forth in the first paragraph of section 11-23-3(b)(8) should be disregarded in light of the limited cross-reference to the property tax statute found in the last clause of the second paragraph of section 11-23-3(b)(8).

1. The Commissioner's Construction of the Cross-Reference Ignores the Plain Language of the Statute.

The second paragraph of 11-23-3(b)(8) is not intended to change the general definition of agriculture and farming provided in the immediately preceding paragraph of the statute. To make this point perfectly clear, the legislature expressly stated in the opening of the second paragraph that it is not changing the overall definition provided in the first paragraph: "The activity of agriculture and farming shall mean such activity, as above defined . . . ."

It then goes on to add a requirement, a substantiality requirement, as to the extent of the taxpayer's activities necessary for the exclusion. This substantiality requirement does not change the types of activities that qualify as agriculture and farming activities as provided in the first paragraph. Rather it merely tells the taxpayer the minimum amount of these activities it must have to qualify for the exclusion. A person may satisfy the substantiality requirement by (i)

conducting its agriculture and farming operations on a minimum number of acres (at least 5) or (ii) producing a minimum level of annual production (at least $1000) through the conduct of agriculture and farming as its principal business activities.[4] As stipulated, Petitioners satisfy both of these requirements.

2. The Commissioner's Construction Stretches the Meaning of the Cross-Reference Beyond Recognition.

It is also clear from the tax statutes themselves that the cross-reference in the franchise tax statute is not intended to pick up the special treatment of forestry in the property tax definition of farming and incorporate it into the franchise tax definition of agriculture and farming. The cross-reference in section 11-23-3(b)(8) cannot be intended to adopt all of the rules contained in section 11-1A-10, not only because doing so would vitiate the first paragraph of section 11-23-3(b)(8), but also because the property tax statute contains rules that are obviously irrelevant to the franchise tax. In full, section 11-1A-10, entitled "Valuation of Farm Property", provides:

> (a) With respect to farm property, the tax commissioner shall appraise such property so as to ascertain its fair and reasonable value for farming purposes regardless of what the value of the property would be if used for some other purpose, and the value shall be arrived at by giving consideration to the fair and reasonable income which the property might be expected to earn in the locality wherein situated, if rented. The fair and reasonable value for farming purposes shall be deemed to be the market value of such property for appraisement purposes.

---

[4] These types of substantiality requirements are not uncommon in West Virginia tax law. For example, W.V. Regulation 110-1A-2 currently contains these thresholds for property tax purposes. And, W.V. Regulation 110-15-2.16 currently requires that a taxpayer have at least $1000 of sales of agricultural products to be considered to be engaged in "commercial production of an agricultural product" so as to be entitled to certain sales tax exemptions. Prior to 1990, in order to qualify for the sales tax exemption, commercial producers of agricultural products were also required to have produced on not less than five acres of land. *See* Administrative Notice, West Virginia State Tax Department, January 19, 1990, CCH ¶200-387.

> (b) A person is not engaged in farming if he is primarily engaged in forestry or growing timber. Additionally, a corporation is not engaged in farming unless its principal activity is the business of farming, and in the event that the controlling stock interest in the corporation is owned by another corporation, the corporation owning the controlling interest must also be primarily engaged in the business of farming.

Section 11-1A-10 contains rules about various topics related to property tax, including how farm property is to be valued, the special exclusion of forestry, and how to determine whether a corporation's principal business activity is farming. The legislature could not have intended the cross-reference in the franchise tax statute to incorporate all of section 11-1A-10 because most of section 11-1A-10 is irrelevant to the franchise tax. First, annual revaluation of specific tangible assets for property tax purposes, the entire subject of most of section 11-1A-10, is irrelevant to determination of the treatment of a particular entity for franchise tax purposes.

Second, forestry and growing timber is excluded from the definition of "farm property" for property tax purposes because different, special property tax valuation provisions apply to managed timberland. *See* W. Va. Code § 11-1C-10. But the special exclusion of forestry for the particular purposes of the property tax is irrelevant to the franchise tax and inconsistent with the franchise tax definition of agriculture and farming provided in the first paragraph of section 11-23-3(b)(8). *See* W. Va. Code § 11-23-1 ("The Legislature finds and declares that this franchise tax is imposed on the privilege of doing business in this state, and that this tax is not an ad valorem property tax imposed on the property of corporations and partnerships doing business in this state.") In fact, the parenthetical in section 11-23-3(b)(8) "but not timbering activity" would be meaningless if the cross-reference were intended to remove all forestry and growing timber

from the franchise tax definition of agriculture and farming.[5] Both the property tax valuation and property tax forestry exclusion are irrelevant to the franchise tax and were not intended to be incorporated by the cross-reference at the end of the substantiality requirement in section 11-23-3(b)(8).

The language of the cross-reference is directed and limited to the manner of determining a person's "principal business activities." The only part of section 11-1A-10 that deals with principal activities is the last sentence, which discusses how to determine whether a corporation has a principal activity of farming. That is the only piece of section 11-1A-10 that the cross-reference at the end of section 11-23-3(b)(8) incorporates into the franchise tax. The franchise tax statute refers to the property tax statute for rules about how to determine whether agriculture and farming are the "principal business activities" of the taxpayer. It does not adopt the portions of the property tax statute that are irrelevant, and directly inconsistent with, the franchise tax definition of agriculture and farming.

3. <u>The Commissioner's Construction Disregards His Own Regulation's Interpretation of the Cross-Reference.</u>

This reading is confirmed by the Commissioner's own regulation, as the Office of Tax Appeals and the Circuit Court correctly held. W. Va. Code St. R. § 110-23-3.10.2 states that the $1000 annual product requirement must be met "through the conduct of the business of *farming*

[5]A statute must be construed as a whole, so as to make all parts harmonize and to give meaning to each. *E.g., Bullman v. D & R Lumber Co.*, 195 W. Va. 129, 133, 464 S.E.2d 771, 775 (1995). For the same reason, despite the Petitioner's contention to the contrary, there is no disharmony between the Partnerships' management of their timberland, as certified for property tax purposes, and the fact that they are engaged in the activities of agriculture and farming for business franchise tax purposes. Similarly, a farming corporation's status for income tax purposes under article 24 of chapter 11 (taxable) is entirely independent of its status for business franchise tax purposes under article 23 of that same chapter (exempt).

as the principal activity of the corporation or partnership *in the manner described in* W. Va. Code §11-1A-10 et seq. and the regulations related thereto." (Emphasis added.) The only manner in which section 11-1A-10 deals with "principal activity" is in relation to stating that a controlling owner of a corporation must also be primarily engaged in farming in order for the corporation to be deemed to have a principal activity of farming. Thus, the regulations confirm that the principal activity requirement is the only piece of section 11-1A-10 that is intended to be incorporated into the franchise tax statute.

It is unimaginable that the legislature would express its supposed intent to exclude the growing of trees from the definition of agriculture in the franchise tax by first defining agriculture to include the production of woodland products and then using a limited cross-reference to the property tax rules about determining principal business activities as a way to indicate that it did not mean what it said in the first place. If the legislature had intended to incorporate the property tax definition of farming and its various exclusions, then it would have simply adopted the property tax definition—period.

As the Office of Tax Appeals and Circuit Court properly held, based on a plain reading of the franchise tax statute as a whole, including the specific language of the cross-reference, it is clear that the cross-reference does not incorporate the property tax rule excluding forestry and growing trees from the definition of farming. To the extent the Court here has any doubt about the proper interpretation of section 11-23-3(b)(8) or its cross-reference, however, such doubt should be resolved in favor of the taxpayers under the established rules of statutory construction for tax statutes.

D. THE TAX STATUTE SHOULD BE CONSTRUED STRICTLY AGAINST THE STATE.

It is a settled rule in West Virginia as in other states that tax laws are generally to be construed strictly against the state and in favor of the taxpayer. *Coordinating Council for Independent Living, Inc. v. Palmer,* 209 W. Va. 274, 281, 546 S.E.2d 454, 461 (2001). "Laws imposing a license or tax are strictly construed and when there is doubt as to the meaning of such laws they are construed in favor of the taxpayer and against the State." *Id.* (citations omitted). For example, in *Ohio Cellular RSA Ltd. P'ship v. Board Pub. Works,* 198 W. Va. 416, 481 S.E.2d 722 (1996), the court cited the principle that unclear tax statutes are to be construed in favor of the taxpayer and held, based on statutory construction principles, that FCC licenses were not subject to a property tax imposed on "personal property of every kind whatsoever." *See also* 3A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 66:1 (6th ed.) ("Where there is reasonable doubt of the meaning of a revenue statute, the doubt is resolved in favor of those taxed.").

The only exception to this well-settled rule of strict construction against tax imposition is where the taxpayer is claiming an exemption from taxation. *Wooddell v. Dailey*, 160 W. Va. 65, 68, 230 S.E.2d 466, 469 (1976) (applying these principles to a taxpayer's claim for exemption where the sales tax statute provided that all sales and services are presumed to be subject to tax).[6]

The present case requires the court to follow the general rule for tax statutes—i.e., strictly construe the statute against the State and in favor of the taxpayers—because the statutory provision at issue imposes the tax rather than provides an exemption. The business franchise tax is imposed on companies "doing business" in West Virginia. W. Va. Code § 11-23-6. The

[6] Note that unlike the *Wooddell* case in which the sales tax statutes provided a presumption of taxability as to all sales or services, the business franchise tax at issue in the present case does not provide any such presumption as to taxability.

statutory definition of "doing business" excludes the activities of "agriculture and farming" if the activities are conducted on at least 5 acres of land or produces at least $1000 of product each year through the conduct of agriculture and farming operations as defined in the statute. W. Va. Code § 11-23-3(b)(8). Thus, a company whose activities are limited to "agriculture and farming" and meets the substantiality requirement is not subject to the franchise tax.[7]

The provision at issue is the exclusion of "agriculture and farming" from the definition of whether a person is "doing business" so as to be subject to the tax in the first place. Definitions of what is and what is not taxable activity are different than exemptions from tax. Although "agriculture and farming" is statutorily removed from the definition of "doing business," it is not thereby treated as an exemption for purposes of the statutory construction rule.

Courts in West Virginia and other states do not treat a taxpayer's reliance on definitions of what is subject to tax as claims for exemption. Instead, these definitions are strictly construed against the state because they relate to tax imposition statutes rather than tax exemption statutes. For example, in *Ballard's Farm Sausage, Inc. v. Dailey,* 162 W. Va. 10, 15, 246 S.E.2d 265, 268 & n.3 (1978), the court refused to strictly construe against a taxpayer an exclusion from the old Business and Occupation Tax manufacturing rate classification for "dressing and processing of food." The manufacturing rate statute at issue in that case applied to the "business of manufacturing" but contained a proviso stating: "[h]owever, the dressing and processing of food . . . shall not be considered manufacturing." The court held that the "exception to the general rule of strict construction against tax imposition where the taxpayer is claiming an exemption

[7] A company that is not exclusively engaged in agriculture and farming is subject to the tax based on its other activities. Its tax base is apportioned among its several activities and that portion attributable to the activities of agriculture and farming is exempt from tax. W. Va. Code § 11-23-7(h).

from taxation" did not apply "since the taxpayers [were] not claiming an exemption but [were] merely contesting the rate classification." Instead, the court applied "the time-honored maxim that taxing statutes will be strictly construed against the State and in favor of the taxpayer." The court then held that the taxpayer's sausage manufacturing qualified as "dressing and processing of food" when that phrase was strictly construed against the State and in favor of the taxpayer.

Similarly, in *Comptroller v. Maryland Specialty Wire, Inc.*, 378 A.2d 183 (Md. Ct. App. 1977), a Maryland court clearly held that the rule relating to strict construction of a tax exemption statute against the taxpayer did not apply to a taxpayer's reliance on exclusions from definitions of taxable items. The sales tax statute at issue in that case imposed tax on "retail sales" and defined "retail sale" to not include purchases of items that will be destroyed in a manufacturing operation. Interestingly, the sales tax statutes also provided an express exemption for purchases of items that will be destroyed in a manufacturing operation. Thus, like the present case, there was both an exclusion from the tax imposition statute and an exemption from the tax at issue. The Maryland court determined that since it must first be determined whether the tax applies at all—that is, the tax imposition statute and the proviso to the definition of retail sale must be analyzed before the exemption statute is even relevant—the proper statutory construction rule was to construe the statute strictly against the state:

> The rule relating to the strict construction of a tax exemption statute is not applicable to this case because, the exclusion of tangible personal property . . . where it is destroyed in the manufacture process is by force of the definition [of "retail sale"] and not by inclusion in the exemptions . . . . The rule that is applicable, however, is, where there is doubt as to the breadth of a tax statute, the act should be construed most strongly in favor of the taxpayer and against the taxing authority.

Id. at 186 (citations omitted).

Consistent with the general rules of construction in West Virginia, and just like the food processing definition at issue in *Ballard's Farm,* the agriculture and farming definition at issue here should be strictly construed against the state and most favorably to the Partnerships. Although even a plain reading of the agriculture and farming definition shows that Partnerships' business of cultivating trees qualifies as agriculture and farming and is beyond the scope or coverage of the franchise tax, there can be no doubt that the definition covers Partnerships when viewed through this proper rule of statutory construction.

E. THE COURT SHOULD NOT ADDRESS THE NEW ISSUES RAISED BY THE COMMISSIONER FOR THE FIRST TIME ON APPEAL.

Although not in issue at the time the record was made in this case at the Office of Tax Appeals, the Tax Commissioner argues on appeal that the Partnerships do not produce "woodland products" and, alternatively, that forestry and growing timber is not agriculture or farming or cultivation or plant production under the common understanding of those terms. (Appellant's Br. at 5-6, 11-15.) The Commissioner never raised these issues at the time the record was made in this case at the Office of Tax Appeals. (*See* Reply Brief in Support of State's Position, R. 310-15; Transcript of Oral Argument, R. 60-61.) He did try to raise the "woodland products" issue on appeal to the Circuit Court, but even there, he never questioned that forestry and growing timber are agriculture or farming or cultivation or plant production under the common understanding of those terms. The Tax Commissioner's only argument and issue in the trial proceedings was whether the statute's cross-reference discussed above meant that the special property tax rule that excludes forestry and growing timber from "farming" treatment for property tax purposes should apply for business franchise tax purposes.

"In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which have not been decided by the court from which the case has been appealed."

Mowery v. Hitt, 155 W.Va. 103, 181 S.E.2d 334, 338 (1971) (citations omitted); *Wang-Yu Lin v. Shin Yi Lin*, 224 W.Va. 620, 687 S.E.2d 403, 407-408 (2009) ("because this issue was not raised and decided below, we decline to address it for the first time on appeal"). The Court applies this principle in tax cases as in any other cases. "Our general rule is that when non-jurisdictional questions have not been refined, developed and adjudicated by the trial court, they will not be decided on appeal in the first instance." *In re 1994 Assessments of Property of Righini*, 197 W.Va. 166, 475 S.E.2d 166, 172 (1996) (citations omitted); *see also Duquesne Light Co. v. State Tax Dept.*, 174 W.Va. 506, 327 S.E.2d 683, 688 (1984); *In re Morgan Hotel Corp.*, 151 W.Va. 357, 151 S.E.2d 676, 680 (1966). The only exception to this rule is where the issue is constitutional in nature, which is not the case here. *Whitlow v. Bd. of Educ. of Kanawha County*, 190 W.Va. 223, 438 S.E.2d 15, 18 (1993).

There are three justifications for the rule foreclosing a party from raising a new issue on appeal:

> . . . when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. **When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal.** Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

Id. (emphasis added).

By not raising the issues below, the Tax Commissioner here indicated his understanding that timber is a woodland product and that forestry and growing timber are agricultural. More importantly, because those matters were not in issue when the record was made, the Partnerships did not introduce testimony from foresters and others about the agricultural processes of growing timber and the usage of the various terms in the industry. All of the reasons for the rule that this

Court does not review new issues on appeal are supported here, and this Court should reject the new issues raised by the Tax Commissioner for that reason alone.

In any event, as discussed in more detail below, it is clear that standing timber is a woodland product and that forestry and growing timber is agriculture and farming within the meaning of the franchise tax statute. If standing timber was not a woodland product, the exclusion for "but not timbering activity" would be meaningless and unnecessary to exclude timber harvesting activities. Similarly, if forestry and growing timber were not generally considered agriculture and farming, then the legislature would not have needed to specifically exclude those activities from "farming" treatment for property tax purposes. The fact is that forestry and growing timber are generally considered agriculture, but for property tax purposes specifically, the legislature chose to exclude this segment of agriculture from the special property tax treatment of farming and apply another special property tax treatment for managed timberland to that segment of agriculture alone. Thus, even if this Court chooses to address the Tax Commissioner's newly-raised issues, it should reject them.

1. <u>Standing Timber Is Both a Woodland Product and Fiber.</u>

The Tax Commissioner attempts to restrict the reading of the business franchise tax statute's reference to "woodland products" in the definition of "doing business" by employing a strict reading of a regulatory definition of "woodland products" that applies only for certain ad valorem property tax purposes.[8] (Appellant's Br. at 12.) West Virginia has a different property

[8] The Tax Commissioner's citations to courts' treatment of the Internal Revenue Code are inapposite. The federal government does not have an analogous franchise or ad valorem property tax regime. While courts strive to give consistent meanings to the same term within the Internal Revenue Code, *U.S. v. Olympic Radio & Television, Inc.*, 349 U.S. 232, 236 (1955), this approach to statutory construction does not directly translate to the interpretation of two distinct

tax regime for farm property as opposed to timberlands (and for "managed timberlands" versus other timberlands). *See* W. Va. Code §§ 11-1A-10, 11-1A-11; W. Va. Code R. §§ 110-1A-2, 110-1H-1 et seq. Accordingly, lengthy rules have been promulgated to differentiate one type of property from another for property tax purposes.

Upon enacting the business franchise tax statute, the Legislature demonstrated its awareness of the separate property tax regime when it incorporated by reference a specific and relatively narrow provision of the latter in the former. *See* W. Va. Code §11-23-3(b)(8), referencing W. Va. Code § 11-1A-10. That the Legislature, in enacting the business franchise tax statute, chose not to make a similarly express reference to a specific definition of "woodland products" found only in an entirely separate property tax regulation is fully consistent with the Office of Tax Appeals' and the Circuit Court's finding that the standing timber grown in the Partnerships' woodlands are "woodland products" for business franchise tax purposes. To conclude otherwise would be akin to arguing that corn growing in a cornfield is not a cornfield product.

In any event, the growing of timber also clearly falls within the concept of the production of "fiber," another qualifying activity under the statute, as well as the final phrase "or any other plant . . . production." W. Va. Code § 11-23-3(b)(8). The Tax Commissioner's statement that "Timber is not used for producing fiber," (Appellant's Br. at 11 n.8), is misinformed. In a brief overview of the "paper making process," the Supreme Court of Louisiana noted that "[r]aw timber and/or wood chips are composed of *fibers* of cellulose, hemicellulose, and lignin.

---

state tax regimes: the business franchise tax and property tax. *See also* W. Va. Code § 11-23-1 ("The Legislature finds and declares that this franchise tax is imposed on the privilege of doing business in this state, and that this tax is not an ad valorem property tax imposed on the property of corporations and partnerships doing business in this state.")

Cellulose and hemicellulose are the major components of the cell walls of plants, while lignin is the 'glue' that holds the cellulose materials together." *Int'l Paper, Inc. v. Bridges*, 972 So.2d 1121, 1123, fn1 (La. 2008) (emphasis added). *See also Noss Co. v. U.S.*, 588 F.Supp. 1408, 1410 (Ct. Int'l Trade 1994) (describing the process of "digesting" wood chips to break down the fibers in the wood into a pulp slurry).

Timber is clearly a source for woodland products and fiber. In fact, many courts have reviewed controversies involving fiber production. *See, e.g., Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 847 (8th Cir. 1995) (reviewing an environmental assessment of a U.S. Forest Service Ranger District with a Forest Plan that included a stated goal of "improving the quality and quantity of wood fiber."); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 85, fn 2 (1984) (finding that a state law requiring that pulpwood be subjected to a "breakdown process to a point where the wood fibers have been separated" prior to shipping it outside of the state violated the Commerce Clause); *Longview Fibre Co. v. Commissioner*, 71 T.C. 357, 359 (1978) (reviewing the proper amount of commission income on timber sales for a company whose "principal business [was] the manufacture of paper and related products derived from wood fiber"); and *McMillan v. Gurdon Lumber Co.*, 75 S.W.2d 229, 229 (Ark. 1934) (noting that while the timber contract at issue called for trees fit for lumber purposes, some "trees are now used for the manufacture of useful articles other than lumber, such as paper and chemicals distilled from the wood fiber.").

Other states' regulations also recognize that timber may refer to the production of fiber. *See, e.g.*, Timberlands Productivity Act, CAL. GOV'T CODE § 51104(f) (2010) (defining "Timberland" as "privately owned land, or land acquired for state forest purposes, which is devoted to and used for growing and harvesting timber, or for growing and harvesting timber and

compatible uses, and which is capable of growing an average annual volume of *wood fiber* of at least 15 cubic feet per acre.") (emphasis added) and WASH. ADMIN. CODE § 222-16-010 (2010) (wherein the Washington Forest Practices Board defines a "merchantable stand of timber" as "a stand of trees that will yield logs and/or *fiber*. . . .") (emphasis added).

More importantly, several provisions of the West Virginia Code also recognize that timber may be used for fiber production. *See* W. Va. Code R. § 110-26-2a.8.9.13 (2010) ("Pulpwood" means wood cut or prepared primarily to manufacture into wood pulp, for subsequent manufacture into paper, *fiber* board or other products, depending largely on the species, cut and the pulping process.") (emphasis added). *See also* W. Va. Code R. § 38-2-9.2.i.3 (2010) (specifying the minimum rates for "wood fiber" or "wood cellulose" in mulch to be used in the revegetation efforts of mining operations) and W. Va. Code R. § 38-3-10.3.g (2010) (specifying the minimum rates for "wood fiber" or "wood cellulose" in mulch to be used in the revegetation efforts of quarrying operations). Accordingly, growing timber clearly refers to both the production of woodland products and fiber.

2. <u>The Common Meanings of Agriculture and Farming Include the Partnerships' Activities.</u>

In determining the meaning of words used in legislation, the court must look first to any definitions the legislature stated in the statute itself. Here, the legislature expressly defined what it meant by "agriculture and farming" in the business franchise tax and there is no need to look any further. That express statutory definition in the business franchise tax includes forestry and growing timber. The Tax Commissioner now argues that despite this statutory definition, the common meaning of "agriculture and farming" should control. The Commissioner's argument is irrelevant given the express statutory definition in the business franchise tax statute, but it is

also wrong. The decisions of the lower courts are clearly supported by the plain meanings of agriculture and farming.

In common usage, farming and agriculture include such activities as forestry and tree farming. Courts across the country have recognized this generally-accepted meaning. For example, in finding that "tree farming" may be evidence of actual possession of timberlands, the Georgia Supreme Court noted that "[t]he development of tree farming as a major segment of agriculture has caused this enterprise to move outside of the realm of occasional removal of trees from wild lands and into the mainstream of modern economy and technology." *Cheek v. Wainwright*, 269 S.E.2d 443 ,445-446 (Ga. 1980).[9] *See also Potter v. Houston*, 847 N.E.2d 241, 247 (Ind. Ct. App. 2006) ("unquestionably, 'agriculture' . . . [is] readily defined to include logging or extracting timber."); *IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 657 So.2d 282, 293 (La. Ct. App. 1995) ("Trees in a tree farm or forest are by nature a crop, such as sugar cane or cotton, rather than a product or a mineral."); *Henry v. Bd. of Appeals of Dunstable*, 641 N.E.2d 1334, 1335-1336 (Mass. 1994) ("The planting of evergreen trees for either a saw cut operation or a 'cut your own' Christmas tree farm is within the commonly understood meaning of agriculture or horticulture."); *Amoco Pipeline Co. v. Minn. Valley Landscaping, Inc.*, 481 N.W.2d 557, 560 (Minn. 1992) ("We believe a broad definition of agriculture to include forestry and nursery activities is supported by the common usage of the word as well as by statutes which define agriculture."); *Commonwealth. v. Ricker*, 30 Pa. D. & C.3d 665, 666 (Pa. Com. Pl. 1982) ("forestry products are in fact commonly defined as the products of agriculture."); *U.S. v. Norman G. Jensen, Inc.*, 550 F.2d 662, 664 (C.C.P.A. 1977) ("The cultivation of trees in a

[9] This case casts a long shadow over an older Georgia case, *Collins v. Mills*, 30 S.E.2d 866 (Ga. 1944), cited in Appellant's brief for the proposition that the common meaning of farming does not include forestry or "tree farming." Appellant's Br. at 5.

nursery or tree farm is clearly embraced within the meaning of agriculture as described in dictionaries and technical sources."); *Sapp v. Conrad*, 240 So.2d 884, 887-888 (Fla. Dist. Ct. App. 1970) (finding a trial court erred in denying agricultural classification to taxpayer's lands devoted to timber operations); *Fidler v. Zoning Bd. of Adjustment of Upper Macungie Twp.*, 182 A.2d 692, 694 (Pa. 1962) (noting that 'agriculture' has over time "assumed a much broader meaning" and "[i]n this broad use it includes farming, horticulture, forestry, dairying, sugar making, etc." (quoting Webster's New International Dictionary (2d ed. 1961))); *Sancho v. Bowie*, 93 F.2d 323, 324 (1st Cir. 1937) (finding that agriculture "includes farming, horticulture and forestry." (citing Webster's New International Dictionary (2d ed. 1961) and Bouvier's Law Dictionary)); and *People ex rel. Pletcher v. City of Joliet*, 152 N.E. 159, 159 (Ill. 1926) (noting that "the words 'agricultural purposes' have generally been given [a] comprehensive meaning by the courts of the country" that "includes farming, horticulture and forestry.").

Courts have also readily construed federal employment and commercial statutes to include forestry within the definition of agriculture. In construing the scope of the Migrant and Seasonal Agricultural Worker Protection Act, the 5th Circuit found that "Congress intended that agricultural employment include forestry operations even when not performed on a traditional farm." *Bracamontes v. Weyerhaeuser Co.*, 840 F.2d 271, 276 (5th Cir. 1988). *See also Solis v. Conley's Nursery and Landscaping, Inc.*, 641 F.Supp.2d 1200, 1205 (D.N.M. 2009) (agriculture includes "any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations" (citing the Fair Labor Standards Act, 29 U.S.C. § 203(f) (2010))); and *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d 1163, 1172 (11th Cir. 2003) ("pine straw is an 'agricultural or horticultural

commodity' such that Plaintiffs here were engaged in 'agricultural employment'" under the purview of the Migrant and Seasonal Agricultural Workers Protection Act).

Similarly, the Fifth Circuit has rejected an argument that the term 'agricultural labor,' as used in an amendment to the Social Security Act, did not extend to such forestry activities as gum and turpentine collection. *U.S. v. Turner Turpentine Co.*, 111 F.2d 400, 404-405 (5th Cir. 1940) (noting that 'agriculture' "is a wide and comprehensive term and that statutes using it without qualification, must be given an equally comprehensive meaning."). The Fifth Circuit further noted that "if agriculture is the raising of products from the land, then forestry is a part of agriculture." *Id.* at 405 (quoting 2 CYCLOPEDIA OF AMERICAN AGRICULTURE 312). *Cf. U.S. v. Norman G. Jensen, Inc.*, 550 F.2d 662, 668 (C.C.P.A. 1977) (recognizing the "the long-standing intent of Congress that 'agriculture' be most broadly defined and of the legislative history of current laws showing that Congress has . . . regarded the harvesting of a timber crop on a farm to be like any other crop in a general farm program . . . ."); and *In re Glenn*, 181 B.R. 105, 108 (Bankr. E.D. Okla. 1995) (finding that a debtor's timber operations qualified as farming operations for purposes of Chapter 12 relief of the Bankruptcy Code).[10]

State and local regulations also commonly recognize forestry as a part of agriculture. *See Conservation Com'n of Town of Fairfield v. DiMaria*, 989 A.2d 131, 133 (Conn. App. Ct. 2010) ("the words 'agriculture' and 'farming' shall include cultivation of the soil, dairying, *forestry*, raising or harvesting any agricultural or horticultural commodity" (citing CONN. GEN. STAT. §1-1(q))); *Taylor v. Canyon County Bd. of Com'rs*, 210 P.3d 532, 548 (Idaho 2009) (citing a local ordinance that defined agriculture to include "trees grown in row crop fashion"); *Town of Enfield*

---

[10] *In re Glenn* involved a debtor who, like the Partnerships, sold timber off of his own property through timber contracts with a third-party that actually cut the timber. 181 B.R. at 106.

v. Enfield Shade Tobacco, LLC, 828 A.2d 596, 599 (Conn. 2003) (reviewing the scope of a local zoning regulation that defined farming operations to include, among other things, forestry); *McGonigle v. Lower Heidelberg Twp. Zoning Hearing Bd.*, 858 A.2d 663, 671 (Pa. Commw. Ct. 2004) (reviewing local agricultural preservation zoning regulations which defined agriculture to include forestry); and *Sudler Lakewood Land, LLC v. Lakewood Twp.*, 18 N.J. Tax 451, 462 (N.J. Tax Ct. 1999) (granting farmland qualification under the Farmland Assessment Act to a taxpayer owning forestland because the municipality failed to demonstrate "that the minimal level of agricultural activity taking place on the subject woodlands" violated the local zoning ordinance).

Forestry and the cultivation of trees are clearly within the common meanings of agriculture and farming. The Tax Commissioner's arguments to the contrary are against the great weight of authority. Moreover, the Tax Commissioner's duplicative argument that the Partnerships do not engage in agriculture "by means of cultivation," Appellant's Br. at 13, disregards the finding of the lower court that the stipulations provided "compelling evidence that, through their management practices, which account for such variables as soil quality, light conditions, residual stand composition and space, climate and existing timber volume, the Partnerships ***cultivate*** and manage the woodlands . . . ." (Final Order at 9, R. 574 (emphasis added).)

F. THE TREATMENT OF THE PARTNERSHIPS IS THE SAME AS ANY OTHER AGRICULTURAL PRODUCER.

The Tax Commissioner suggests that it is not fair for the Partnerships to get favorable property tax treatment yet also not be subject to the business franchise tax. (Appellant's Br. at 15-16.) However, the treatment of the Partnerships here is entirely consistent with the Legislature's recognition that the Partnerships' activities are within the definition of agriculture and farming for business franchise tax purposes. Farmers of corn or any other crop also get special, favorable property tax treatment even though they, like the Partnerships here, are not subject to the business franchise tax. W. Va. Code § 11-3-1. Accordingly, there is no disharmony between the Partnerships' management of timberland, as certified for property tax purposes, and the fact that they are engaged in agriculture and farming for business franchise tax purposes.

The Tax Commissioner further suggests that it is not fair that landowners with less than 5 acres of timberland or $1000 of income are subject to business franchise tax but the Partnerships are not. (Appellant's Br. at 16-17.) However, the franchise tax does not apply to individuals' businesses of any kind regardless of the amount of land they own or money they make. Furthermore, other farming corporations or partnerships with less than 5 acres or $1000 in income are subject to the franchise tax, whereas larger farming corporations or partnerships are not. W. Va. Code § 11-23-3(b)(8). In any event, this unfounded unfairness the Commissioner alleges should be taken up with the Legislature, rather than the courts. *See, e.g., Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 111, 459 S.E.2d 374, 388 (1995) ("Courts are not at liberty to disregard lawful directives of the Legislature simply because those directives conflict with our notions of fairness."). The rulings of the Office of Tax Appeals and the Circuit Court are fully consistent with the present statutory scheme of the business franchise tax.

V. CONCLUSION

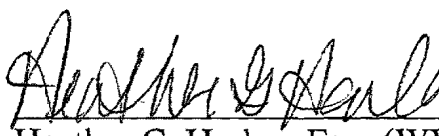
For the reasons set out above, the Partnerships respectfully request that the Court affirm the Circuit Court's decision.

This 5th day of May, 2010.

Respectfully submitted,

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

By Counsel



Heather G. Harlan, Esq. (WV Bar No. 8986)
Michael E. Caryl, Esq. (WV Bar No. 662)
Thomas E. Heywood, Esq. (WV Bar No. 1703)
Bowles Rice McDavid Graff & Love LLP
600 Quarrier Street
Charleston, W. Va. 25301
(304) 347-1100

Daniel R. McKeithen, Esq. (Ga. Bar No. 494330)
W. Scott Wright, Esq. (Ga. Bar No. 778821)
Sutherland Asbill & Brennan LLP
999 Peachtree St., N.E.
Atlanta, GA 30309-3996
(404) 853-8342

Appellees' Counsel

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.	)	No. 35476

CERTIFICATE OF SERVICE

I, Heather G. Harlan, do hereby certify that a true and exact copy of the foregoing *Appellees' Brief* has been served this day, by hand delivery upon the following counsel for the Appellant:

Scott E. Johnson
Assistant Attorney General
Katherine A. Schultz
Senior Deputy Attorney General
Attorney General's Office
Building 1, Room W-435
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

this 5 th day of May, 2010.

Heather G. Harlan

9154314.1