IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35476

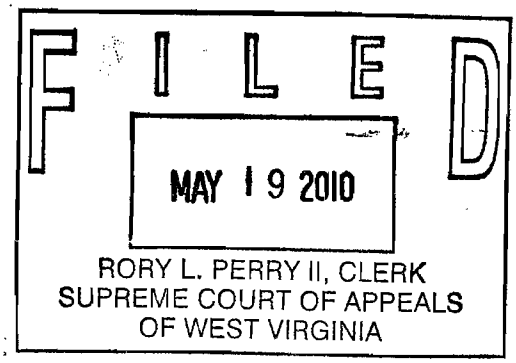
CRAIG A. GRIFFITH,
Acting State Tax Commissioner of
West Virginia,

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 REPLY

~~PETITION FOR APPEAL~~

SCOTT E. JOHNSON (WVSB No. 6335)
ASSISTANT ATTORNEY GENERAL
Attorney General's Office
Building 1, Room W-435
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
(304) 558-2522

TABLE OF CONTENTS

Page

I. ARGUMENTS IN RESPONSE 1

A. The Heartwoods err in their discussion of the Standard of Review 1

B. Because the Heartwoods did not object in circuit court to the Commissioner raising any new issues, the issues are properly before this Court because the Heartwoods waived waiver 2

C. The Heartwoods taking advantage of I.R.C. § 631, shows they are engaged in timbering 3

D. Read together, West Virginia Code § 11-23-3(b)(b) and West Virginia Code § 11-1A-10(b) establish that the Heartwoods are not engaged in farming and are, thus, subject to the Business Franchise Tax 6

E. When read in context, agriculture and farming does not reach growing trees 8

F. The Circuit Court's decision is inconsistent with legislative intent 9

V. CONCLUSION 10

TABLE OF AUTHORITIES

Page

Accord Dyalwood, Inc. v. United States,
588 F.2d 467, 469 (5th Cir. 1979) 5

Bar 70 Enterprises, Inc. v. Tosco Corp.,
703 P.2d 1297, 1306 (Colo. 1985) 9

Black & Decker Corp. v. C.I.R.,
986 F.2d 60, 63-64 (4th Cir. 1993) 2

Burnside v. Burnside,
194 W. Va. 263, 265, 460 S.E.2d 264, 266 (1995) 2

Case v. Los Angeles Lumber Products Co.,
308 U.S. 106, 114 (1939) 9

CB & T Operations Co., Inc. v. Tax Comm'r,
211 W. Va. 198, 564 S.E.2d 408 (2002) 4

Cf. State v. Riley,
201 W. Va. 708, 714 n.6, 500 S.E.2d 524, 530 n.6 (1997) 10

Charter Communications VI, PLLC v. Community Antenna Serv., Inc.
211 W. Va. 71, 77, 561 S.E.2d 793, 799 (2002) 9

C.I.R. v. Court Holding Co.,
324 U.S. 331, 334 (1945) 5

City of Peoria v. Brink's Home Security, Inc.,
No. 1 CA-TX 09-0001, 2010 WL 1729404, at * 2 (Ariz. Ct. App. Apr. 29, 2010) 2

Cox v. Amick,
195 W. Va. 608, 613 n.1, 466 S.E.2d 459, 464 n.1 (1995) 9

Dolan v. U.S. Postal Service,
546 U.S. 481, 486 (2006) 9

Dyal v. United States,
342 F.2d 248, 252 (5th Cir. 1965) 4

Eck v. C. I. R.,
99 T.C. 1, 4 (1992) 5

Estate of Waters v. C.I.R.,
48 F.3d 838, 842 (4th Cir. 1995) 2

Expedited Transp. Sys., Inc. v. Vieweg,
207 W. Va. 90, 98, 529 S.E.2d 110, 118 (2000) 9, 10

Fall River County v. South Dakota Dep't of Rev.,
552 N.W.2d 620, 624 (S.D.1996) 2

Glynn Land Co. v. United States,
602 F. Supp. 346, 349 (S.D. Ga. 1985) 4, 5

Hartman v. State,
152 P.3d 1118, 1122 n.8 (Alaska 2007) 3

Helvering v. Elkhorn Coal Co.,
95 F.2d 732, 734 (4th Cir. 1937) 2

Helvering v. Rankin,
295 U.S. 123, 131 (1935) 2

Helvering v. Tex-Penn Oil Co.,
300 U.S. 481, 491 (1937) 2

Hutchison v. City of Huntington,
198 W.Va. 139, 151, 479 S.E.2d 649, 661 (1996) 7

In re Newberry's Estate,
138 W. Va. 296, 300, 75 S.E.2d 851, 853 (1953) 9

King v. St. Vincent's Hosp.,
502 U.S. 215, 221 (1991) 8

Louisiana Work. Comp. Corp. v. Louisiana Ins. Guar. Ass'n,
20 So.3d 1047, 1059 n.13 (La. Ct. App. 2009) 7

Mijares v. Shipley,
592 P.2d 414, 415 (Colo. 1979) 8

Norton v. United States,
551 F.2d 821, 823 n.4 (Ct. Cl. 1977) 4

Ouderkirk v. C.I.R,
TC-Memo 1977-120 (Apr. 27, 1977) (same). Section 631(a) & (b) 5

Palace Laundry, Inc. v. Chesterfield County,
666 S.E.2d 371, 374 (Va. 2008) 2

Philips v. Philips,
106 W. Va. 105, 144 S.E. 875, 876 (1928), superseded by statute as stated
in *Selvy v. Selvy*, 115 W. Va. 338, 177 S.E. 437 (1934) 9

Pirian v. In-N-Out Burgers, No. SACV061251DOCMLGX,
2007 WL 1040864, at *3 (C.D. Cal. Apr. 7, 2007) 8

Sanford's Estate v. Commissioner of Internal Revenue,
308 U.S. 39, 51 (1939) 9

Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19, 25 n.6 (988)
(quoting NLRB v. Federbush Co., 121 F.2d 954, 957 (CA2 1941) (L. Hand, J.) 8

Shrewsbury v. State Comp. Comm'r.,
127 W. Va. 360, 32 S.E.2d 361, 364 (1944) 9

Southern Pacific Transportation Co. v. Commissioner of Internal Revenue,
75 T.C. 497 (1980) 4

State v. Ellsworth,
175 W. Va. 64 n.8, 69, 331 S.E.2d 503, 508 n.8 (1985) 9

State v. George,
185 W. Va. 539, 542, n.10, 408 S.E.2d 291, 294 n.10 (1991) 10

State v. Kerns,
183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990) 9

State v. Richards,
206 W. Va. 573, 577 n.6, 526 S.E.2d 539, 543 n.6 (1999) 9

State v. Harden, 62 W. Va. 313, 58 S.E. 715, 730 (1907),
overruled on other grounds by Wiseman v. Calvert, 134 W. Va. 303, 59 S.E.2d 445 (1950) 8

State v. Zain,
207 W. Va. 54, 61, 528 S.E.2d 748, 755 (1999) 7

Suzy's Zoo v. C.I.R.,
273 F.3d 875, 878 (9th Cir. 2001) 1

Syl. Pt. 1, *Mowery v. Hitt*,
155 W. Va. 103, 181 S.E.2d 334 (1971) 6

Syllabus Point 2 of *Click v. Click*,
98 W. Va. 419, 127 S.E. 194 (1925) 10

Tennant v. Marion Health Care Found., Inc.,
194 W. Va. 97, 459 S.E.2d 374 (1995) 9

Tokatly v. Ashcroft,
371 F.3d 613, 618 (9th Cir. 2004) 3

United States v. Brown Wood Preserving Co.,
275 F.2d 525, 528 (6th Cir. 1960) 5

United States v. Stallard,
273 F.2d 847, 850 (4th Cir. 1959) 4

U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.,
508 U.S. 439, 448 (1993) 9

West Virginia Div. of Environmental Protection v. Kingwood Coal Co.,
200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997) 2

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) 5

Wilmington Trust Co. v. United States,
1979 WL 3928, 1 (Ct. Cl.) 4

STATE CODES

W. Va. Code § 11-1A-10(b) 6, 7

W. Va. Code § 11-23-3(b)(8) 6, 7, 8, 9

MISCELLANEOUS

26 C.F.R. § 1.611-1 3

35 Am. Jur.2d *Federal Taxation* ¶ 20885 4

Hearings on Revenue Revision of 1943 Before the House Ways and Means Committee,
78th Cong., 1st Sess. 795-844 (1943) 5

I.R.C. § 611 (1954) 3

I.R.C. § 631(b) (1954) 3, 4, 5

Representing the Arkansas Timber Owner in Timber Sale Transactions: Some Contract Drafting Considerations, 8 U. Ark. Little Rock L.J. 637, 652 (1986) 3

Timber Disposition: A Primer on Obtaining Favorable Tax Treatment, 57 J. Mo. B. 24, 27 (2001) 4

Treas. Reg. § 1.611-1(b)(1) (1960) 3

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 REPLY BRIEF

I.

ARGUMENTS IN RESPONSE

A. The Heartwoods err in their discussion of the Standard of Review.

The Heartwoods argue that factual determinations are reviewed under a clearly erroneous standard. APPELLEE'S BR. at 8. They then argue that the circuit court's conclusion that they do not engage in timbering activity should also be so reviewed. *Id.* This is incorrect as it fails to recognize that the conclusions of the circuit court are conclusions purely relating to legal questions, or, at best mixed questions of fact and law which are reviewed de novo.

"A mixed question of law and fact exists when primary facts are undisputed and ultimate inferences and legal consequences are in dispute." *Suzy's Zoo v. C.I.R.*, 273 F.3d 875, 878 (9th Cir. 2001). "[M]ixed questions of law and fact that require the consideration of legal concepts and involve the

exercise of judgment about the values underlying legal principles are reviewed *de novo*." *Burnside v. Burnside*, 194 W. Va. 263, 265, 460 S.E.2d 264, 266 (1995). This is true of tax cases *Estate of Waters v. C.I.R.*, 48 F.3d 838, 842 (4th Cir. 1995) ("mixed questions of law and fact that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles are reviewed *de novo*."). Thus, whether a statute or regulation imposes a tax under a given set of facts is a mixed question of law and fact. *Black & Decker Corp. v. C.I.R.*, 986 F.2d 60, 63-64 (4th Cir. 1993); *Palace Laundry, Inc. v. Chesterfield County*, 666 S.E.2d 371, 374 (Va. 2008); *City of Peoria v. Brink's Home Security, Inc.*, No. 1 CA-TX 09-0001, 2010 WL 1729404, at * 2 (Ariz. Ct. App. Apr. 29, 2010). "While [this Court is] bound by the [OTA's] findings of evidentiary facts, [it is] not bound by [a legal] conclusion set forth in [an] opinion and embodying a mixed question of law and fact." *Helvering v. Elkhorn Coal Co.*, 95 F.2d 732, 734 (4th Cir. 1937) In other words, "[u]nless the finding of the Board [of Tax Appeals] involves a mixed question of law and fact, the court may not properly substitute its own judgment for that of the Board[,]" *Helvering v. Rankin*, 295 U.S. 123, 131 (1935), if an "ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact . . . , on . . . review, the court may substitute its judgment for that of the Board." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937). Consequently, this Court owes no deference to either the OTA or the circuit court. *West Virginia Div. of Environmental Protection v. Kingwood Coal Co.*, 200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997) (quoting *Fall River County v. South Dakota Dep't of Rev.*, 552 N.W.2d 620, 624 (S.D.1996) ("'De novo refers to a plenary form of review that affords no deference to the previous decisionmaker.'").

B. Because the Heartwoods did not object in circuit court to the Commissioner raising any new issues, the issues are properly before this Court because the Heartwoods waived waiver.

The Heartwoods claim that the Tax Commissioner waived presentation in this Court of arguments not raised in the OTA. However, nowhere in any brief that the Heartwoods filed in circuit

court did they raise the issue of waiver. It is "well-established" that a party may "waive waiver." *E.g., Tokatly v. Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004). Such a waiver of waiver occurs, when, as here, a party asserts before a court of last resort that an issue is waived because it was not asserted before an administrative agency, but the objecting party did not raise the issue of waiver in an intermediate appellate court. *Hartman v. State*, 152 P.3d 1118, 1122 n.8 (Alaska 2007) (citation omitted) ("The State points out that Hartman did not raise this issue before the hearing officer. But, in its brief and arguments before the superior court, the State did not raise the waiver issue. The State, therefore, has waived the right to argue that Hartman waived the search issue.").

C. The Heartwoods taking advantage of I.R.C. § 631, shows they are engaged in timbering.

The Heartwoods do not contest that they engage in conduct precisely to bring them within the special tax treatment afforded by section 631(b) of the federal Internal Revenue Code. APPELLEE'S BR. at 19-20. The Heartwoods retain an economic interest in the trees which they sell. Rec. at 272. An "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 the . . . severance of the timber, to which he must look for a return of his capital." 26 C.F.R. § 1.611-1.[1] "An 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 the severance and sale of the . . . timber, to which he must look for a return of his capital." *United States v.*

[1]"Despite its requirement of the retention of an economic interest in the timber sold, I.R.C. § 631(b) (1954) does not define the concept. Accordingly, reference must be made to another Code provision that employs the concept, specifically, I.R.C. § 611 (1954) and a regulation promulgated under it, Treas. Reg. § 1.611-1(b)(1) (1960). I.R.C. § 611 permits a deduction for the depletion of certain natural resources. Under I.R.C. § 611, the concept of an economic interest is used to identify the taxpayer entitled to claim the deduction." Christopher R. Kelly, *Representing the Arkansas Timber Owner in Timber Sale Transactions: Some Contract Drafting Considerations*, 8 U. Ark. Little Rock L.J. 637, 652 n.41 (1986).

Stallard, 273 F.2d 847, 850 (4th Cir. 1959). In other words, "[i]t is essential that the consideration for the transaction [under 631(b)], whether payable in cash or in kind, be contingent upon the severance of the timber, and payable to the owner solely out of the proceeds from the natural resource itself." *Dyal v. United States*, 342 F.2d 248, 252 (5th Cir. 1965). *See also Norton v. United States*, 551 F.2d 821, 823 n.4 (Ct. Cl. 1977) (no retained economic interest in timber where the purchase price was not dependent on the amount of timber cut). For a section 631(b) disposal to occur, there must be a contract and "the purchaser [must be] obligated under contract to cut the timber, then the I.R.C. § 631(b) contractual disposal requirement is satisfied." Mark A. Williams and Kent N. Schneider, *Timber Disposition: A Primer on Obtaining Favorable Tax Treatment*, 57 J. Mo. B. 24, 27 (2001). Under section 631(b), "[t]he disposition must be made pursuant to a mutually binding and enforceable contract. Not only must the owner surrender his right of ownership to the standing timber and the right to cut it, the buyer must assume and be bound by an obligation to purchase and cut it." Christopher R. Kelly, *Representing the Arkansas Timber Owner in Timber Sale Transactions: Some Contract Drafting Considerations*, 8 U. Ark. Little Rock L.J. 637, 652 (1986) (footnote omitted).[2]

"It is the substance, not just the form, of a commercial transaction that determines its tax consequences." Syl. Pt. 6, *CB & T Operations Co., Inc. v. Tax Comm'r*, 211 W. Va. 198, 564 S.E.2d 408

---

[2]Courts have called section 631(b) disposal contracts *cutting* contracts. *See, e.g.*, *Glynn Land Co. v. United States*, 602 F. Supp. 346, 349 (S.D. Ga. 1985) ("An owner selling pursuant to a cutting contract retains an economic interest in the timber where payments to him under the contract are dependent on severance of timber."); *Southern Pacific Transportation Co. v. Commissioner of Internal Revenue*, 75 T.C. 497 (1980) ("Held the amounts stipulated by the parties to be at issue herein reflect no less than the minimum amounts spent by petitioner on salaries for forestry work which was directly related to the sec. 631(b), I.R.C. 1954, timber-cutting contracts."); *Wilmington Trust Co. v. United States*, 1979 WL 3928, 1 (Ct. Cl. ("Wilmon held its timber property for investment purposes but periodically sold standing trees to purchasers for removal under cutting contracts, the income from which qualified for capital gain treatment under I. R. C. § 631(b)."); 35 Am. Jur.2d *Federal Taxation* ¶ 20885 ("For a disposal of timber with a retained economic interest, the taxpayer may elect to treat the date of payment for cut timber as the date of its disposal if he receives payment under the cutting contract before the timber is cut.").

(2002). "The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant." *C.I.R. v. Court Holding Co.*, 324 U.S. 331, 334 (1945). "To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of [the Legislature]." *Id.*

The entire purpose of section 631(b) retained economic interest tax treatment is "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)[.] Section 117(k) was intended to promote the timber 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 . . . ."); *Glynn Land Co. v. United States*, 602 F. Supp. 346, 351 (S.D. Ga. 1985) ("The legislative history of § 117(k)(2) reveals that the statute's purpose was to give the timber industry additional flexibility in qualifying timber transactions for capital gain treatment"); *Ouderkirk v. C.I.R*, TC-Memo 1977-120 (Apr. 27, 1977) (same). Section 631(a) & (b) "compose a package for the benefit of the timber and lumber industry." *Eck v. C. I. R.*, 99 T.C. 1, 4 (1992). "Indeed, the provisions of sec. 117(k) of the 1939 Code largely followed a proposed draft supplied by the timber industry." *Id.* at 9 n.5 (1992) (citing Hearings on Revenue Revision of 1943 Before the House Ways and Means Committee, 78th Cong., 1st Sess. 795-844 (1943)). The Heartwoods are engaged in timbering activities.[3]

---

[3]To the extent the Heartwoods assert that this issue is not properly before this Court, APPELLEES' BR. at 7, the Heartwoods recognized in their Response to the Petition for Appeal in this Court that, "*The issue has always been whether the Partnerships engage in 'timbering,' and the Circuit Court correctly held, again in a detailed analysis, that they do not.*" Resp. Tax Comm'r Pet'n App. at 11 (emphasis added). The Heartwoods admitted that this issue was (continued...)

D. **Read together, West Virginia Code § 11-23-3(b)(b) and West Virginia Code § 11-1A-10(b) establish that the Heartwoods are not engaged in farming and are, thus, subject to the Business Franchise Tax.**

West Virginia Code § 11-23-3(b)(8) provides:

> 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.
>
> 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.

West Virginia Code § 11-1A-10(b)–which deals with principal activity– in turn provides:

> (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.

The Heartwoods assert that West Virginia Code § 11-1A-10(b) is not totally incorporated into West Virginia Code § 11-23-3(b)(8). APPELLEES' BR. at 21-25. This is correct. The Heartwoods assert that "[t]he 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(b) that deals with principal activities is the last sentence, which discusses how to determine whether a corporation has a principal

---

[3](...continued)
addressed by the Circuit Court. Because this issue was "considered and decided by the court from which the appeal has been taken.[,]" it is properly before this Court. *Compare, e.g.,* Syl. Pt. 1, *Mowery v. Hitt,* 155 W. Va. 103, 181 S.E.2d 334 (1971) ("In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.").

activity of farming." *Id.*. at 24. This, is not correct. The very first sentence of subsection (b) of West Virginia Code § 11-1A-10(b) also answers the question of what is a principal business activity for persons – and persons includes partnerships. *State v. Zain,* 207 W. Va. 54, 61, 528 S.E.2d 748, 755 (1999). There is no inconsistency between West Virginia Code § 11-23-3(b)(8) and West Virginia Code § 11-1A-10(b). If a person is engaged primarily in forestry or growing timber, that person is not engaged in farming, and if a person is not engaged in farming then that person must pay the Business Franchise Tax.

The argument that the Commissioner's reading of West Virginia Code §§ 11-23-3(b)(8) and 11-1A-10(b) somehow negate any portion of either statute is sophistry. The Legislature has used West Virginia Code §§ 11-23-3(b)(8) and 11-1A-10(b) to avoid the very situation involved here–whipsawing tax liability. If the Heartwoods do timber, then they fall within 11-23-3(b)(8) and must pay the Business Franchise Tax. If the Heartwoods do not timber, they grow trees, thus, are not engaged in farming per 11-1A-10(b), first sentence, and must pay the Business Franchise Tax. Read together, no portion of either West Virginia Code §§ 11-23-2(b)(8) or 11-1A-10(b) is rendered nugatory. One or the other is applicable depending on how the Heartwoods characterize themselves.

The Heartwoods' convoluted reading of West Virginia Code § 11-23-3(b)(8) and West Virginia Code § 11-1A-10(b) does not render the statutes ambiguous. "The 'plain meaning' doctrine is not rendered inapplicable whenever a creative party is able to posit possible alternative meanings for statutory language, no matter how tenuous or improbable." *Hutchison v. City of Huntington,* 198 W. Va. 139, 151, 479 S.E.2d 649, 661 (1996). Furthermore, the Heartwoods' reading affronts the venerable principal that a simpler reading is always preferred to a more complicated reading that requires more intermediate steps to justify a conclusion. " The simple answers are in fact the best under our rules of constitutional and statutory interpretation." *Louisiana Work. Comp. Corp. v. Louisiana Ins. Guar. Ass'n,*

20 So.3d 1047, 1059 n.13 (La. Ct. App. 2009)

Finally, assuming for argument's sake, that the Heartwoods are correct that the Legislature could have made West Virginia Code § 11-23-3(b)(8) clearer, this is of no consequence as a statute is not necessarily ambiguous where its wording is awkward, clumsy, or informal. *State v. Harden,* 62 W. Va. 313, 58 S.E. 715, 730 (1907), *overruled on other grounds by Wiseman v. Calvert*, 134 W. Va. 303, 59 S.E.2d 445 (1950). " The fact that the statute could have been drafted with alternate wording that may have been even clearer is of no consequence because the statute as written is not vague or ambiguous." *Pirian v. In-N-Out Burgers*, No. SACV061251DOCMLGX, 2007 WL 1040864, at *3, 2007 U. S. Dist. LEXIS 25384 at 9 (C.D. Cal. Apr. 7, 2007). "The fact that we may believe that a given statute could be better drafted does not entitle this court to void the statute or to go beyond a common sense understanding of the statutory terms." *Mijares v. Shipley,* 592 P.2d 414, 415 (Colo. 1979).

E. When read in context, agriculture and farming does not reach growing trees.

"[T]he meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). "'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used[.]'" *Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19, 25 n.6 (988) (quoting NLRB v. Federbush Co.,* 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)). "The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that

inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). When read in context,[4] West Virginia Code § 11-23-3(b)(8)–with its reference to cultivation and tilling– refers to farming in its traditional sense.[5]

F. The Circuit Court's decision is inconsistent with legislative intent.

The Heartwoods contend that while they should not have to pay the Business Franchise Tax because they are a huge landowner, one who holds less than five acres of land and males less than $1,000 would have to pay the tax. APPELLEE'S BR. at 39. They claim that this is an unfairness that should be taken up by the Legislature. *Id.* However, the issue is not simply unfairness, but rationality.

> A well established cannon of statutory construction counsels against . . . an irrational result. "It is the 'duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.' *State v. Kerns*, 183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990)." *Expedited Transp. Sys., Inc. v. Vieweg*, 207 W. Va. 90, 98, 529 S.E.2d 110, 118 (2000).

Charter Communications VI, PLLC v. Community Antenna Serv., Inc. 211 W. Va. 71, 77, 561 S.E.2d 793, 799 (2002). While the Heartwoods quote *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 459

---

[4]To the extent the Heartwoods cite statutes and cases interpreting statutes whose language specifically includes forestry or growing trees within the definition of farming or agriculture, those statutes and cases are inapposite here. Only where statutes contain similar language are cases interpreting them useful. "Decisions of other states are helpful only where statutes considered are similar to the statute under consideration here." *In re Newberry's Estate*, 138 W.Va. 296, 300, 75 S.E.2d 851, 853 (1953). *See also Cox v. Amick*, 195 W. Va. 608, 613 n.1, 466 S.E.2d 459, 464 n.1 (1995). Where language is not analogous or similar, such cases are not useful. *See State v. Richards*, 206 W. Va. 573, 577 n.6, 526 S.E.2d 539, 543 n.6 (1999); *State v. Ellsworth*, 175 W. Va. 64 n.8, 69, 331 S.E.2d 503, 508 n.8 (1985); *Shrewsbury v. State Comp. Comm'r*, 127 W. Va. 360, 32 S.E.2d 361, 364 (1944);.*Philips v. Philips*, 106 W. Va. 105, 144 S.E. 875, 876 (1928), *superseded by statute as stated in Selvy v. Selvy*, 115 W. Va. 338, 177 S.E. 437 (1934).

[5]While the parties may have stipulated that the conduct of the Heartwoods meets the definition of cultivation, such a stipulation is not binding here. However, the Tax Commissioner did not stipulate that the fact that Hearwoods engaged in cultivation rendered the Heartwoods activity farming activity. The application of a statutory term or definition to facts is a question of law or a mixed question of law and fact, over which a court retains full authority to address notwithstanding any stipulations making such a legal conclusion. In other words, parties and courts may be bound by stipulation of facts, but they are not bound by the parties stipulation as to law. *U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 448 (1993); *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 114 (1939); *Sanford's Estate v. Commissioner of Internal Revenue*, 308 U.S. 39, 51 (1939); *Bar 70 Enterprises, Inc. v. Tosco Corp.*, 703 P.2d 1297, 1306 (Colo. 1985).

S.E.2d 374 (1995), APPELLEES' BR. at 39, the statement they quote was not in a syllabus point. *Cf. State v. Riley*, 201 W. Va. 708, 714 n.6, 500 S.E.2d 524, 530 n.6 (1997); *State v. George*, 185 W. Va. 539, 542, n.10, 408 S.E.2d 291, 294 n.10 (1991). In Syllabus Point 2 of *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925), this Court held, "It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity." In short, "[i]t is the 'duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, *unjust* or unreasonable results.'" *Expedited Transp. Sys., Inc. v. Vieweg*, 207 W. Va. 90, 98, 529 S.E.2d 110, 118 (2000) (emphasis in original) (citation omitted).

II.

CONCLUSION

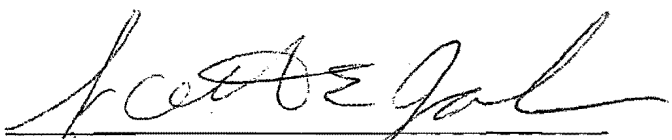
For the above reasons, the circuit court should be reversed.

Respectfully submitted,

WEST VIRGINIA STATE TAX DEPARTMENT,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



SCOTT E. JOHNSON (WVSB No. 6335)
ASSISTANT ATTORNEY GENERAL
Office of the Attorney General
Building 1, Room W-435
State Capitol Complex
Charleston, WV 25305
(304) 558-2522