SANITIZED DECISIONS -- DOCKET NOS. 02-204 U & 02-205 C -- BY GEORGE V. PIPER-- SUBMITTED FOR DECISION ON BRIEFS AND COMPUTATIONS ON 09/12/03 – DECISIONS ISSUED – 10/03/03

SYNOPSIS

PURCHASERS' USE TAX AND CONSUMERS' SALES AND SERVICE TAX -- PRIOR TO EFFECTIVE DATE OF 1998 AMENDMENT TO W. VA. CODE § 11-15-2(o), CONTRACTORS AT COAL PREPARATION PLANTS WERE CONTRACTORS AND NOT PRODUCERS OF NATURAL RESOURCES – W. Va. Code § 11-15-2(o), prior to being amended effective June 10, 1998, provided that the alteration of real property which did not constitute directly engaging in exploring, developing, severing or reducing to possession of natural resource products constituted "contracting," and not the "production of natural resources." Accordingly, the consumers' sales and service tax exemption provided by W. Va. Code § 11-15-9(b)(2), for certain purchases directly used in the activity of "production of natural resources" is not applicable to such contracting activities for the prior time period. *See also* W. Va. Code 11-15A-3(a)(2)(same rule for purchasers' use tax).

PURCHASERS' USE TAX AND CONSUMERS' SALES AND SERVICE TAX – ON OR SUBSEQUENT TO EFFECTIVE DATE OF 1998 AMENDMENT TO W. VA. CODE § 11-15-2(o), CONTRACTORS PERFORMING WORK ON DEWATERING STRUCTURES AND ASSOCIATED FACILITIES ARE PRODUCERS OF NATURAL RESOURCES – As of June 10, 1998, W. Va. Code § 11-15-2(o) provides that the construction, installation or fabrication of dewatering structures, and their associated facilities and apparatus, by contractors or subcontractors at a coal mine or coal production facility constitute the "production of natural resources."

DECISION

The Field Auditing Division (the "Division") of the West Virginia State Tax Commissioner's Office ("the Commissioner") conducted an audit of the books and records of the Petitioner. Thereafter, on January 9, 2002, the Director of the Division issued a purchasers' use tax assessment against the Petitioner. The assessment was issued under the authority of the Commissioner, pursuant to the provisions of Chapter 11, Articles 10 and 15A of the West

Virginia Code. The assessment was for the period of January 1, 1998, through September 30, 2001, for tax and interest, for a total assessed liability of $ (no additions to tax were assessed).

Also, on January 9, 2002, the Director of the Division issued a consumers' sales and service tax assessment against the Petitioner, pursuant to the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code, for the same period, for tax and interest, for a total assessed liability of $ (no additions to tax were assessed).

Written notice of both assessments was served on the Petitioner on January 11, 2002.

Thereafter, by hand delivery on March 4, 2002, the Petitioner timely filed with the predecessor of this tribunal, the Office of Hearings and Appeals of the State Tax Department, petitions for reassessment. Subsequently, written notice of a hearing on the petitions was sent to the Petitioner and a hearing was held on October 29, 2002, in accordance with the then-effective provisions of W. Va. Code § 11-10-9.

Subsequent to the evidentiary hearing in this matter the parties reached an agreement respecting some of the work performed by the Petitioner. They agreed that certain jobs met the statutory definition of "production of natural resources," and that the tax on the Petitioner's purchases used or consumed in the performance of those jobs should be removed from the assessment. The tax attributable to these jobs totaled $. The Petitioner conceded that the tax assessments were correct with respect to certain other jobs. The tax amount conceded totaled $.

Subsequently, by letter dated February 18, 2003, Petitioner's counsel remitted payment for the conceded liability in the amount of $ to toll the running of interest.

This matter was submitted on September 12, 2003, for decision on briefs and revised computations.

FINDINGS OF FACT

1. As it relates to the matters in controversy herein, the Petitioner is engaged in the business of providing materials to other persons or entities who are engaged in the business of mining coal and preparing it for sale.

2. The materials that the Petitioner supplies are primarily for the purpose of providing power to and controlling coal moving equipment, such as conveyer belts and coal loading facilities, that is part of coal preparation plants.

3. The Petitioner provided the materials pursuant to a number of contracts, referred to as "jobs." The jobs are summarized as follows:

Job #1:

The work performed was related to a conveyor extension. The taxpayer was adding wiring and controls at the preparation plant, so that the conveyors could be automatically controlled from the prep plant. There are about ten to fifteen conveyers between the mine and the prep plant.

Job #2:

The work performed involved wiring the substation that fed power to the prep plant and to the conveyors feeding the prep plant.

Job #3:

The work performed involved computers, controls, and motor control centers that automated and controlled conveyor belts feeding the prep plant.

Job #4:

Performed engineering services and supplied drawings, supplied starters to control a pump at a pond from which water was pumped to the preparation plant for the purpose of cleaning coal.

Job #5:

Upgraded conveyor belts, increasing their capacity by hooking up larger motors, and automated the conveyor belts.

Job #6:

Automated a conveyor belt installed by others.

Job #7:

Performed wiring and automation for conveyors between the preparation plant and the rail load-out. The belt went to a "stacking tube." There were automatic feeders under the stacking tube that fed coal into rail load-out, where it was loaded into railroad cars.

Job #8:

Automated conveyors running between the slope belt coming from the mine to coal storage silos.

Job #9:

Disconnected and reconnected transformers after they were "changed out."

Job #10:

Installed an analyzer that analyzes coal for PTU or ash content. Connected it and tied it into a PLC located between the preparation plant and the load-out, to analyze coal coming out of the preparation plant.

Job #11:

Installed wiring and automation equipment for a fine coal processing plant, which separates fine coal from refuse.

Job #12:

Upgraded conveyors from the mine to a storage silo and from the storage silo to the preparation plant. The upgrade included automation of the conveyors.

Job #13:

Hooked up a raw coal crusher, which crushes coal between the mine and preparation plant.

Job #14:

Upgraded conveyors to handle more tonnage and supplied an automation system.

Job #15:

Installed a pumping system that pumps slurry from ponds to the preparation plant and cleans it. Provided automation for the pumps.

Job # 16:

Working on a Milltronics unit, which tells how much coal is in a bin, allowing the operator to add or remove coal, as necessary.

Job Nos. 17 & 18:

Provided automation with respect to a rail load-out facility.

Job #19:

Automated a synfuel coal processing facility for a rail load-out.

4. Any time there is a prep plant involved in the processing of the coal, water (generally with magnetite) is added to the coal to help separate out the refuse. There is moisture in the coal at the time it is mined. After completion of the process whereby the impurities are removed, the coal is wet. It is then dried by one or more of several processes, such as centrifugal, screen mold, or thermal dryers.

The taxpayer's Chief Executive Officer testified that a preparation plant is a "dewatering facility". He testified that there is moisture in coal when it comes out of the mine. This is due to natural moisture and the use of water in the mine. The coal goes through a breaker, for the purpose of removing pure rock. From there it goes to a dewatering tower, where it is screened, crushed, and washed. The coal is then dried by means of screens that vibrate, and then by centrifugal dryers. Also used are solid bowl centrifuges, which turn very slowly. For the fine coal, disk filters are used to make the coal into cakes, which further reduces moisture. Thermal dryers may also be used.

On cross-examination, the taxpayer's Chief Executive Officer testified that water is added to the coal at the prep plant. It has undergone some dewatering previously in a dewatering screen and rotary breaker. It comes into the preparation plant process with some inherent moisture and some water that is added at the mine.

DISCUSSION

The issue presented by this petition for reassessment is whether the purchases of services, machinery, supplies and material by the Petitioner are exempt from consumers' sales and service tax under W. Va. Code § 11-15-9(b)(2), because those purchases are directly used or consumed in the activity of the "production of natural resources." *See also* W. Va. Code § 11-15A-3(a)(2) (corresponding purchasers' use tax exemption). As amended in 1998, and as relevant, in part, to this petition, W. Va. Code § 11-15-2(o) provided:

> 'Production of natural resources' means, . . . , the performance, by either the owner of the natural resources or another, of the act or process of exploring, developing, severing, extracting, reducing to possession and loading for shipment and shipment for sale, profit or commercial use of any natural resource products . . . and *the construction, installation or fabrication of* ventilation structures, mine shafts, slopes, boreholes, [and] *dewatering structures, including associated facilities and apparatus, by the producer or others, including contractors and subcontractors, at a coal mine or coal production facility*. . . . *All work performed to install or maintain facilities up to the point of sale for severance tax purposes would be included in the 'production of natural resources' and subject to the direct use concept.* 'Production of natural resources' does not include the performance or furnishing of work, or materials [and] work, in fulfillment of a contract

> for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for the alteration, improvement or development of real property, by persons other than those otherwise directly engaged in the activities specifically set forth in this subsection as 'production of natural resources.' (Emphasis added.)

The taxpayer relies on the italicized portion of this subsection to support its contention that its purchases are exempt from consumers' sales and service tax and purchasers' use tax.[1]

The taxpayer contends that its work is performed on dewatering structures, or facilities and apparatus associated with dewatering structures. The work it performs consists, in large part, of wiring and installation of automation equipment or conveyor belts that transport coal from the mine to the coal preparation plant, through various stages of the coal preparation plant, and from the plant to clean-coal storage silos and on to the load-out.

The taxpayer contends that a coal preparation plant is a dewatering structure. It maintains that when coal leaves the mine, it is too wet to be saleable. It contains "inherent" moisture, but may also be wetter than in its natural state because of water used or added during the mining process. When it is transferred to the preparation plant, it may undergo any number of processes, depending on its size and its purity. Many of the processes remove moisture from the coal. Several processes add moisture to the coal, for the purpose of removing impurities or separating the coal from refuse. However, once the impurities are removed from the coal and it is separated from the refuse, much, if not all of the water added, as well as some of the inherent moisture in the coal, is removed.

The Commissioner responds by contending that because water may be added at one or more stages in the processing of the coal, the preparation plant is not, strictly speaking, a "dewatering structure." This argument loses sight of the fact that the preparation plant operates as an integrated unit performing a unitary function. Different processes are applied to the coal at

[1] The underlined portion is language that was added to the statute by the 1998 amendment thereto. The 1998 amendment became effective June 10, 1998. The current codification is W. Va. Code § 11-15-2(b)(13)(A)-(D).

the preparation plant. In some processes, water may be added for specific purposes, such as separating coal based on size or to aid in the removal of impurities. Once this is accomplished, water is then removed. The water removed includes water added in the preparation plant and some of the coal's inherent moisture. Water may be added to the coal, but only temporarily and for limited purposes. The end purpose of processing coal in a preparation plant is not to increase the moisture content of the coal. It is to remove moisture from it, to dewater it. When considered as a unit, a coal preparation plant constitutes a "dewatering structure."

Accordingly, it is **DETERMINED** that the coal processing plants upon which the Petitioner performed work constitute "dewatering structures," as that term is used in W. Va. Code § 11-15-2(o).

Most of the Petitioner's work was performed on conveyors and other equipment used to move raw coal from the mine to the prep plant, and to move processed coal from the prep plant to the point where it is loaded for shipment. It also performed work on a pump at a pond providing water and coal slurry to prep plants, facilities providing power to preparation plants and their associated facilities, a coal analyzer, a raw coal crusher, a coal bin, a coal loading facility and a coal load-out facility.

W. Va. Code § 11-15-2(o) provides that "production of natural resources" includes work performed on "facilities and apparatus" associated with a "dewatering structure."

Merriam Webster's Third New International Dictionary defines "apparatus" as "a collection or set of materials, instruments, appliances, or machinery designed for a particular use," or a "compound instrument or appliance designed for a specific mechanical . . . action or operation." It defines "facility" as "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate

some particular end." The items on which the Petitioner performed work clearly constituted "facilities or apparatus."

Merriam Webster defines "associate," as a verb, to mean "closely connected, joined or united with another (as in interest, function, activity, or office): sharing in responsibility or authority." It is apparent that the facilities or apparatus upon which the taxpayer performed work are "associated" with the dewatering structure. Some of these facilities or apparatus transport raw coal from the mine to the preparation plant, and processed coal from the preparation plant to the rail load-out. Others pump coal slurry or water to the preparation plant. Others provide electrical power to the preparation plant. Some analyze coal. Some crush raw coal going to the preparation plant. These functions are either necessary to operation of the preparation plant, or they facilitate operation thereof. As such, this equipment constitutes facilities or apparatus associated with a dewatering structure.

Accordingly, it is **DETERMINED** that work performed by the Petitioner during the audit period was performed on facilities or apparatus associated with preparation plants, which are dewatering structures. Consequently, except as set out below, the taxpayers' purchases are exempt from consumers' sales and service tax and purchasers' use tax.

W. Va. Code § 11-15-2(o) was amended in 1998, by Chapter 303 of the Acts of the Legislature. The Legislature added to the list of activities considered to be "production of natural resources." The added activities included construction, installation and fabrication of ventilation structures, mine shafts, slopes, bore holes and dewatering structures, including associated facilities and apparatus, by producers or others, including contractors and subcontractors. By expressly providing that the work described in the amendment could be performed by contractors

or subcontractors, the Legislature clearly intended to create an exception to the limitations contained in the last sentence of § 11-15-2(o).[2]

The amendment had an effective date of June 10, 1998. Thus all of the taxpayer's purchases subsequent to that date, which were used or consumed in any of the activities described in § 11-15-2(o), are exempt from consumers' sales and service tax and purchasers' use tax.

Accordingly, it is **DETERMINED** that all purchases made by the taxpayer directly used or consumed in the production of natural resources, as defined by § 11-15-2(o) on or after June 10, 1998, are not subject to either consumers' sales and services tax or purchasers' use tax. W. Va. Code § 11-15-9(b) (2).

This determination is supported by the portion of the statute providing that all work performed to maintain facilities up to the point of sale for purposes of the severance tax is included in "production of natural resources," and is subject to the direct use concept. The Legislature certainly took into consideration this provision when it passed the 1998 amendment to § 11-15-2(o). It intended mining, transporting the coal to the preparation plant, processing the coal through the preparation plant, transporting it to the rail load-out, and loading the coal on rail cars for sale to customers to be part of "production of natural resources."

In considering that portion of the statute providing that all work up to the point of sale for severance tax purposes is included in "production of natural resources," the commissioner maintains that there is no "point of sale," for purposes of the severance tax. It contends that the

[2] The Commissioner's policy was upheld by the Office of Tax Appeals' statutory predecessor in *In the Matter of the Petitions of North American Drillers*, 2000 W. Va. Tax LEXIS 117 (Docket Nos. 95-457 U & 95-167RC March 7, 2000). That decision was reversed on appeal by the Circuit Court of Monongalia County, West Virginia. *North American Drillers v. Palmer*, Docket # 00-C-AP-39 (July 18, 2003).

tax is determined by "gross value," and is not triggered by any "point of sale." This is not entirely true.

110 C.S.R. 13A, § 2.7 provides, in relevant part:

> § 2.7 **Gross Value** – The term 'gross value' in the case of natural resources means the market value of the natural resource product, in the immediate vicinity, where severed, determined after application of post production processing generally applied by the industry to obtain commercially marketable or useable natural resource products. *The value of natural resource products produced shall be determined by the gross proceeds of sales in every instance in which a bona fide sale of such products is made at the point where production ends, and whether sold at wholesale or retail.*

This Legislative rule clearly demonstrates that gross value is determined ordinarily by the gross proceeds of sale, made at the point where production ends. While the language of the 1998 amendment does not track the language of 110 C.S.R. 13A, § 2.7, which preexisted it, the language is similar. Thus, the commissioner's argument is not sound.

It is **DETERMINED** that, for purposes of W. Va. Code § 11-15-2(o), as amended effective June 10, 1998, the taxpayer is engaged in the "production of natural resources." Consequently, its purchases for direct use in that activity are exempt pursuant to the provisions of W. Va. Code § 11-5-9(b) (2).

For the statute as it existed prior to June 10, 1998, the Tax Commissioner has held that activities of the nature engaged in by the taxpayer were taxable.[3] *In the Matter of the Petitions of North American Drillers*, 2000 W. Va. Tax LEXIS 117 (Docket Nos. 95-457 U & 95-167RC March 7, 2000). On appeal, that decision was recently reversed by the Circuit Court of Monongalia County, West Virginia. *North American Drillers v. Palmer*, Docket # 00-C-AP-39 (July 18, 2003). With respect to this taxpayer, for the period preceding the 1998 amendment, this tribunal must determine whether it will follow the decision of the Circuit Court of

[3] The matter was decided by the Office of Hearings and Appeals of the State Tax "Department." By statute, the independent West Virginia Office of Tax Appeals has succeeded to most of the jurisdiction of the Office of Hearings and Appeals.

Monongalia County. Having thoroughly reviewed the Circuit Court decision, this tribunal is of the opinion that the Circuit Court failed to address the entire statute in rendering its decision.

Unquestionably, the Circuit Court was correct in determining that "[s]ales of services, machinery, supplies and materials directly used or consumed in the activit[y] of production of natural resources" were exempt from consumers' sales and service tax and the purchasers' use tax. W. Va. Code § 11-15-9(g) [1994].[4] The Circuit Court then looked to W. Va. Code § 11-15-2(o) to determine whether North American Drillers was engaged in the "production of natural resources."

That portion of W. Va. Code § 11-15-2(o) considered by the Court provided:

> 'Production of natural resources' means, except for oil and gas, the performance, by either the owner of the natural resources or another, of the act or process of exploring, developing, severing, extracting, reducing to possession and loading for shipment and shipment for sale, profit or commercial use of any natural resource products and any reclamation, waste disposal or environmental activities associated therewith . . . .

The Circuit Court then stated, "The problem is that this definition, as originally enacted, was silent regarding whether or not contracting companies who *assisted* coal mining, but were not actually doing the coal mining themselves, were also to be considered to be in the 'production of natural resources,' and therefore entitled to an exemption." *North American Drillers v. Palmer*, slip op. at 6. The Court concluded that this language was "broad, inclusive and ambiguous" and that it could include the taxpayer. The Court then looked to other factors in interpreting the statute as it existed prior to the 1998 amendment, as well as considering the effect of the 1998 amendment as it lent guidance to the periods preceding the effective date of that amendment.

> Ambiguity is a term connoting doubtfulness, doubleness of meaning or indistinctness or uncertainty of an expression used in a written instrument. It has been declared that courts may not find ambiguity in statutory language which laymen are readily able to comprehend; nor is it permissible to create an obscurity or uncertainty in a statute by reading in an additional word or words.

[4] This section, redesignated as § 11-15-9(b)(2), is functionally the same provision that is currently in effect.

Crockett v. Andrews, 153 W. Va. 714, 718-19, 172 S.E.2d 384, 387 (1970). When read in its entirety, § 11-15-2(o) [1994] does not meet this definition of "ambiguous." Its language is not in doubt. Its meaning is distinct and certain.

The problem with the Circuit Court's holding, that the statute is ambiguous, is that it did not consider the complete definition of "production of natural resources" as set out in W. Va. Code § 11-15-2(o) [1994]. The "ambiguity" found by the Circuit Court resulted from its failure to give consideration to the last sentence of § 11-15-2(o) [1994].

When construing general and specific statutory provisions related to the same topic, it is necessary to consider those provisions in a manner consistent with one another.

> '"Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly." Syl. pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975).' Syl. pt. 1, *State ex rel. Lambert v. County Commission of Boone County*, 192 W. Va. 448, 452 S.E.2d 906 (1994).

Syl. pt. 12, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995). The first sentence and the last sentence of § 11-15-2(o), as amended in 1994, clearly relate to the same subject matter. Therefore, the Circuit Court should have considered the entire statute in determining whether or not the statute was ambiguous.

The last sentence of W. Va. Code § 11-15-2(o) [1994] provided:[5]

> 'Production of natural resources' does not include the performance or furnishing of work, or materials [and] work, in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for the alteration, improvement or development of real property, by persons other than those otherwise *directly engaged in the activities specifically set forth in this subsection as 'production of natural resources*.' (Emphasis added.)

[5] Except for a minor change, to account for a change in format to this subsection, the current, 2003 version of the statute still provides the same thing in W. Va. Code § 11-15-2(b)(13)(D).

The plain language of this sentence limits those who are engaged in the "production of natural resources," as defined in the first sentence of the subsection. It *expressly* provides that fulfillment of a contract for the alteration or improvement of real property is not "production of natural resources," unless the person performing the contract is "directly" engaged in one of the activities set out in the first sentence of the subsection. A person or entity engaged in the alteration or improvement of real property pursuant to a contract must be "directly engaged" in exploring, developing, severing, extracting, reducing to possession and loading for shipment and shipment for sale, profit or commercial use a natural resource product in order to be engaged in the "production of natural resources." One who engages in the broader activity of altering or improving real estate, who is performing work assisting one who is engaged in the "production of natural resources," but who is not directly engaged in one of the activities set out in the first sentence of § 11-15-2(o) [1994], is not engaged in the "production of natural resources." Contrary to the holding of the Circuit Court, the statute clearly is not "silent" regarding whether one who "assists" a producer of natural resources is engaged in the "production of natural resources."

"One canon of statutory construction is to follow the statute's plain, unambiguous language." *State v. Berrill*, 196 W. Va. 578, 584, 474 S.E.2d 508, 514 (1996). "Courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Appalachian Power Co. v. State Tax Dept*, 195 W. Va. 573, 586, 466 S.E.2d 424, 437 (1995); and *Martin v. Randolph Co. Board of Education*, 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995). This office must look to the plain, unambiguous language of the entire statute. It must presume that the Legislature meant what it said in the statute, and give effect to the entire statute.

> A fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention and purpose of the Legislature as expressed in the statute. Absent plain language that would indicate . . . legislative intent . . ., we will not assume the intent . . . from legislative silence. To do so would suggest the Legislature lacks the ability to draft a statute with such clarity, and we refuse to indulge in so cynical a view of the legislative process.

State ex rel. Sowards v. County Commission, 196 W. Va. 739, 747, 474 S.E.2d 919, 927 (1996). Applying this principle, this office must conclude that if the Legislature had intended that those taxpayers described in the last sentence of § 11-15-2(o) [1994] were to be considered as engaging in the "production of natural resources," it would have stated that they were engaged in that activity, by including them in the first sentence of § 11-15-2(o) [1994], instead of providing that they were not engaged in such activity by including them in the last sentence of that subsection.

North American Drillers was drilling bore holes for others who were engaged in the production of natural resources. Drilling bore holes is not one of the activities "specifically set forth" in the first sentence of § 11-15-2(o)[1994]. Correctly, the Circuit Court viewed the taxpayer's activity as being more in the nature of "assisting" in coal mining. Looking at the last sentence of that section, drilling bore holes satisfies two of the statutory conditions. It improves the real property on which the coal mining activities take place, insofar as it aids, assists and facilitates the producer's mining activity by ventilating and dewatering the mines. It also alters the real property. Thus, in drilling bore holes and ventilation shafts, North American Drillers was fulfilling contracts for both the alteration and improvement of real property. As such, its activity was defined by the Legislature as *not* being the "production of natural resources." Consequently, North American Drillers was expressly and clearly *not* engaged in the "production of natural resources."[6]

[6] The Circuit Court stated that had the statute, as it existed prior to the 1998 amendment, provided a clear, unambiguous definition of who was entitled to the exemption, then it would be easier to conclude that the amendment was, in fact, an "actual 'amendment.'" In fact, the statute was clear and unambiguous insofar as it

It is unclear why the Circuit Court did not consider the last sentence of § 11-15-2(o) [1994]. Regardless of the reason, the result is that this portion of the Circuit Court's decision is based on a flawed premise. Its premise is that the statute is silent with respect to whether or not a contractor who is altering or improving real property is a "producer of natural resources." In fact, the 1994 statute was not silent. It expressly and unambiguously provides that the activity engaged in by the taxpayer in *North American Drillers* is not the "production of natural resources." It is simply not subject to any other reading. This tribunal is convinced that this oversight is a fatal flaw in the decision of the Circuit Court which justifies this tribunal in not following the Circuit Court's decision.

This tribunal is also of the opinion that the Circuit Court was in error in its application of the rules of construction regarding the effect of the 1998 amendment. The Circuit Court made two decisions in this respect. First, it determined that in amending the statute, the Legislature did not really amend the statute. Instead, it described the Legislature's action as a "retroactive clarification" to the statute, as originally enacted. *North American Drillers v. Palmer*, slip op. at 6. It concluded that the language in W. Va. Code § 11-15-2(o) [1994] and § 11-15-9(g) [1994][7] was so broad and inclusive, that North American Drillers was included in that language. It concluded that the Legislature deemed it necessary to clarify the statute in response to the Tax Commissioner's decision in *In the Matter of the Petitions of North American Drillers*, *supra*.

As an initial matter, it should be noted that there is nothing in the language of the amendment to clearly show that the Legislature intended the amendment to be a "retroactive

---

provided that North American Drillers, and others similarly situated, were not engaged in the "production of natural resources." Thus, following the rationale of the Circuit Court on this point, this lack of ambiguity indicates that the 1998 amendment to W. Va. Code § 11-15-2(o) was, in fact, an "amendment." This will be more fully discussed below.

[7] The 1998 amendment made some minor changes to this section, but it is substantively the same.

clarification." If the Legislature had intended the amendment to be a clarification, it could easily have indicated its intention. For example, in 2002, the Legislature amended W. Va. Code § 33-6-30, in response to the decision in *Mitchell v. Broadnax*, 208 W. Va. 36, 537 S.E.2d 882 (2000). The amendment contained the following language:

> It is the intent of the Legislature that the amendments in this section enacted during the regular session of two thousand two are: (1) A clarification of existing law as previously enacted by the Legislature, including, but not limited to, the provisions of subsection (k), section thirty-one of this article; and, (2) specifically intended to clarify the law and correct a misinterpretation and misapplication of the law that was expressed in the holding of the Supreme Court of Appeals of West Virginia in the case of *Mitchell v. Broadnax*, 208 W. Va. 36, 537 S.E.2d 882 (W. Va. 2000). These amendments are a clarification of the existing law as previously enacted by this Legislature.

The amendment in *Broadnax* clearly demonstrated that the Legislature wanted to "clarify" the previously enacted statute. The 1998 amendment to W. Va. Code § 11-15-2(o) contains no such clear expression of legislative intent. It speaks neither to clarifying existing law as previously enacted, nor to clarifying the law and correcting a misapplication thereof by the Tax Commissioner.[8]

In *Van Nuis v. Los Angeles Soap Co.*, 36 Cal. App. 3d 222, 228, 111 Cal. Rptr. 398, 402 (1973), the California Court of Appeals articulated the rule respecting amendments to statutes:

> The cardinal rule of statutory construction is that the intention of the Legislature must be ascertained and given effect. [Cites omitted.] An intention to change the law is indicated by a material change in the language of a statute. [Cite omitted.] '"The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act."' [Cites omitted.]

Id. at 228, 111 Cal. Rptr. at 402. This statement articulates the most logical approach to legislative amendments. The Legislature's intent to amend the statute is evidenced by its materially changing the statutory language. If the Legislature did not intend to amend the statute, but instead intended to merely "clarify" the statute, it would have articulated its intention in that respect. It did not.

Even if the Legislature had clearly stated an intention to clarify the statute because of an erroneous interpretation, the clarification would still be entitled to only a prospective application.

> 'The usual purpose of a special interpretive statute is to correct a judicial interpretation of a prior law which the legislature considers inaccurate. Where such statutes are given any effect, the effect is prospective only. Any other result would make the legislature a court of last resort.' 1A *Sutherland on Statutory Construction* § 27.4, at 632-33 (6th ed. 2002 rev.)

Findley v. State Farm Mutual Automobile Insurance Co., __ W. Va. at __, n. 16, 576 S.E.2d at 817, n. 16. Applying this principle of law, even if the Circuit Court were correct in concluding that the amendment was merely a clarification intended to put into effect that which the Legislature intended in the first place, it is entitled only to prospective application.

The Circuit Court's conclusion, that this "clarification" was "retroactive," is also clearly contrary to the express provisions of W. Va. Code § 2-2-10(bb), which provides, "A statute is presumed to be prospective in its operation unless expressly made retrospective." The Supreme Court has consistently held that a statute is presumed to be prospective in its application, unless the Legislature intended otherwise. This intention on the part of the Legislature must be shown by "clear, strong and imperative words or by necessary implication." Syl. pt. 3, *Findley v. State Farm Mutual Automobile Insurance Co.*, __ W. Va. __, 576 S.E.2d 807 (2002); *Gallant v. Jefferson Co. Comm.*, 212 W. Va. 612; 618, 575 S.E.2d 222, 228 (2002); Syl. pt. 3, *Conley v. Workers' Comp. Div.*, 199 W. Va. 196; 483 S.E.2d 542 (1997); *Public Citizen, Inc. v. First National Bank*, 198 W. Va. 329, 335, 480 S.E.2d 538, 544 (1996); Syl. pt. 1, *Myers v. Morgantown Health Care Corp.*, 189 W. Va. 647, 434 S.E.2d 7 (1993); Syl. pt. 4, *Arnold v. Turek*, 185 W. Va. 400, 407 S.E.2d 706 (1991); Syl. pt. 2, *State ex rel. Manchin v. Lively,* 170 W. Va. 672, 295 S.E.2d 912 (1982); Syl. pt. 3, *Shanholtz v. Monongahela Power Co.*, 165 W. Va. 305, 270 S.E.2d 178 (1980 *State v. Bannister*, 162 W. Va. 447, 453, 250 S.E.2d 53, 57

[8] In *Findlay v. State Farm Mutual Automobile Insurance Company*, *infra*., the Court held that the use of even this language did not entitle the statute to retroactive application.

(1978); Syl. pt. 1, *Loveless v. Workmen's Compensation Commissioner*, 155 W. Va. 264, 184 S.E.2d 127 (1971); Syl. pt. 1, *Roderick v. Hough*, 146 W. Va. 741, 124 S.E.2d 703 (1961); Syl. pt. 4, *Taylor v. State Compensation Commissioner*, 140 W. Va. 572, 86 S.E.2d 114 (1955); *State ex rel. Conley v. Pennybacker*, 131 W. Va. 442, 446, 48 S.E.2d 9, 11 (1948); *Lester v. State Compensation Commissioner*, 123 W. Va. 516, 520, 16 S.E.2d 920, 924 (1941); *Jenkins v. Heaberlin*, 107 W. Va. 287, 288-289, 148 S.E. 117, __ (1929); *Fairmont Wall Plaster Co. v. Nuzum*, 85 W. Va. 667, 672, 102 S.E. 494, 496 (1920); *Morris, Adm'r v. Westerman*, 79 W. Va. 502, 516, 92 S.E. 567, 573 (1917); Syl. pt. 2, *Harrison v. Harman*, 76 W. Va. 412, 85 S.E. 646 (1915); Syl pt. 1, *Thomas v. Higgs & Calderwood*, 68 W. Va. 152, 69 S.E. 654 (1910); Syl. pt. 3, *Barker v. Hinton*, 62 W. Va. 639, 59 S.E. 614 (1907); Syl. pt. 2, *Burns v. Hays*, 44 W. Va. 503, 30 S.E. 101 (1898); *Walker v. Burgess*, 44 W. Va. 399, 400, 30 S.E. 99, 100 (1898); *Casto v. Greer*, 44 W. Va. 332, 334, 30 S.E. 100, 101 (1898); Syl. pt. 3, *Rogers v. Lynch*, 44 W. Va. 94, 29 S.E. 507 (1897); Syl. pt. 5, *State v. Mines*, 38 W. Va. 125, 18 S.E. 470 (1893); and Syl. pt. 3, *Stewart v. Vandervort*, 34 W. Va. 524, 12 S.E. 736 (1890). Nothing in the 1998 amendment to W. Va. Code § 11-15-2(o) constitutes "clear, strong and imperative words" evidencing a legislative intent that the statute operate retroactively. In fact, the amendment is silent with regard to retroactivity. As is the case here, in the absence of clear, strong and imperative words to the contrary, the statute must be applied prospectively, unless it is retroactive by "necessary implication."

In considering whether there exists a "necessary implication" that the statute is to be given retroactive operation, the Supreme Court has said that legislative intent to give the statute retroactive application must be "necessarily implied from the language of the statute which would be inoperative if not given retroactive force and effect." *Peak v. State Compensation*

Commissioner, 141 W. Va. 453, 91 S.E.2d 625 (1956); *State ex rel. Conley* v. *Pennybacker*, *supra*; *Lester* v. *State Compensation Commissioner*, *supra*; *Fairmont Wall Plaster Company* v. *Nuzum*, *supra*; *Harrison* v. *Harman*, *supra*; *Barker* v. *Hinton*, *supra*; *Burns* v. *Hays*, *supra*; *Walker* v. *Burgess*, *supra*; *Casto* v. *Greer*, *supra*; *Rogers* v. *Lynch*, *supra*; *State* v. *Mines*, *supra*; *Stewart* v. *Vandervort*, *supra*. As stated in *Harrison* v. *Harman*, *supra*:

> 'Every reasonable doubt is resolved against a retroactive operation of the statute.' *Stewart v. Vandervort*, 34 W. Va. 524, 530, 12 S.E. 736. 'Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.' *U. S.* v. *Heth*, 3 Crauch. 413; *Chew Heong* v. *U. S.*, 112 U.S. 536, 28 L. Ed. 770, 5 S. Ct. 255. To put retroaction into a statute by implication, the language must be such that it cannot operate at all otherwise than retrospectively. *State* v. *Mines*, 38 W. Va. 125, 18 S.E. 470; *Casto* v. *Greer*, 44 W. Va. 332, 30 S.E. 100. *Every word in this act can operate otherwise*. (Emphasis added.)

Nothing in the language of W. Va. Code § 11-15-2(o), as amended in 1998, gives any indication that it would somehow be rendered inoperative if it were not given retroactive application. Every word in the 1998 amendment can operate prospectively. The language is not such that it cannot operate at all otherwise than retrospectively. Stated differently, the statute operates as well prospectively as retroactively. In fact, a prospective application makes more sense, since it does not undo past transactions. It is not enough that the language is general enough to cover past transactions to justify a retroactive construction. Every reasonable doubt is resolved against a retroactive operation of the statute. *Stewart* v. *Vandervort, supra*.

After determining that the statute was retroactive based on its construction respecting the language of the statute, the Circuit Court next resorted to legislative history to construe the statute. The Court determined that it was necessary to construe, rather than to apply, the statute because it found the statute to be ambiguous.

The Office of Tax Appeals is convinced that, in *North American Drillers*, it was not necessary to construe the statute. As set forth above, the Circuit Court's determination that the statute was ambiguous was based on its consideration of only a portion of the statute. The

Circuit Court failed to consider the entire statute. Because there is no ambiguity in the statute, when considered as a whole, the legislative history, to the extent that it exists, is irrelevant.

> [T]he courts in *Jones*, *Heyman*, and *Gill* stated the Fifth Circuit violated the canon of not resorting to legislative history unless a statute is unclear or ambiguous. [Cites omitted.]
>
> We agree with *Jones*, *Heyman*, and *Gill* that an analysis of legislative history is not necessary where a statute is clear and unambiguous. As we stated in Syllabus Point 1 of *State v. Boatright*, 184 W. Va. 27, 399 S.E.2d 57 (1990):
>
> > '"Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed." Syllabus Point 1, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).'
>
> We further said in *Boatright*, 'one canon of statutory construction is to follow the statute's plain, unambiguous language. "When the statute is unambiguous on its face, there is no real need to consider its legislative history."' 184 W. Va. 29, 399 S.E.2d at 59 (Citations omitted.)

W. Va. DHHR ex rel. Wright v. David L., 192 W. Va. 663, 668, 466 S.E.2d 646, 651 (1994). "One canon of statutory construction is to follow the statute's plain, unambiguous language. When the statute is unambiguous on its face, there is no real need to consider its legislative history." *State v. Berrill*, 196 W. Va. 578, 584, 474 S.E.2d 508, 514 (1996). The law in West Virginia is clear. Where a statute is plain and unambiguous, there is no need to resort to rules of statutory construction in order to interpret the statute.

> As the United States Supreme Court once remarked: '[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to [words of] the statute.' *Greenwood v. United States*, 350 U.S. 366, 374, 76 S. Ct. 410, 415, 100 L.Ed. 412, 419 (1956).

State ex rel. Allen v. Stone, 196 W. Va. 624, 630, 474 S.E.2d 554, 560 (1996).

The Office of Tax Appeals is also of the opinion that, for several reasons, the "legislative history" relied on by the Circuit Court does not support its conclusion that the 1998 amendment to W. Va. Code 11-15-2(o) should be given a retroactive application. The Circuit Court stated:

> [T]here is a significant amount of evidence, some of which could be classified as 'quasi-legislative history,' . . . which supports the defendant's argument that companies such as themselves were intended be given an exemption under § 11-15-9(b)(2). . . . [T]his evidence includes written correspondence between Speaker of the West Virginia House of Delegates, Bob Kiss, who personally worked on the creation and enactment of the statutes at issue, in which Speaker Kiss

> asserts that companies such as the plaintiff company were intended to be given an exemption from the sales and use tax.[9]

This "evidence" presents several problems.

One problem with the Circuit Court's consideration of this "quasi-legislative history" is that it considered "evidence" that was not part of the administrative record. A review of the record of the administrative hearing reveals that no "evidence," in the form of correspondence to which Speaker Kiss was a party,[10] was ever made a part of the record developed before the Tax Commissioner. In fact, the "evidence" considered by the Circuit Court consisted of documents attached to the "Brief of Appellant" and "Reply Brief of Appellant" filed with the Circuit Court of Monongalia County.

In *Frymier-Halloran v. Paige*, 193 W. Va. 687, 458 S.E.2d 780 (1995), the Supreme Court held:

> 3. The same standard set out in the State Administrative Procedures Act, *W. Va. Code, 29A-1-1*, et seq., is the standard of review applicable to review of the Tax Commissioner's decisions under *W. Va. Code, 11-10-10(e)* (1986). Thus, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.
>
> 4. The circuit court may inquire outside the administrative record when necessary to explain the Tax Commissioner's action. When a failure to explain the action effectively frustrates judicial review, the circuit court may obtain from the agency, either through affidavits or testimony, such additional information for the reasons for the Tax Commissioner's decision as may prove necessary. The circuit court's inquiry outside the record is limited to determining whether the Tax Commissioner considered all relevant factors or explained the course of conduct or grounds of the decision.
>
> 5. Once a full record is developed, both the circuit court and this Court will review the findings and conclusions of the Tax Commissioner under a clearly erroneous and abuse of discretion standard unless the incorrect legal standard was applied.

In reviewing W. Va. Code § 11-10-10(e), the Supreme Court stated:

---

[9] This tribunal is in complete agreement with the Circuit Court, that the 1998 amendment applied to the taxpayer in that case, as well as this one. The area of disagreement is the retroactive application of the amendment.

[10] It should be noted that several of the documents, primarily the correspondence referred to by the Circuit Court, would be inadmissible hearsay. It was not established that the Tax Commissioner was afforded a meaningful opportunity to object to such new "evidence" before the Circuit Court.

> We conclude the circuit court is not obligated *nor constitutionally permitted* to conduct a *de novo* appeal. Rather, we find, unless the request to receive new evidence comes within the limited exceptions we authorize in this opinion, the circuit court only may permit the introduction of additional evidence by remanding the case to the Tax Commissioner for a new or supplemental hearing so that a complete record can be developed for judicial review. (Emphasis added.)

Id. at 693, 458 S.E.2d at 786. The Supreme Court stated that in an appeal from a decision of the Tax Commissioner pursuant to W. Va. Code § 11-10-10, a circuit court may set aside the administrative decision only where it is clearly wrong in view of the reliable, probative and substantial evidence on the whole record or where it is arbitrary, capricious, characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Id*. at 695, 458 S.E.2d at 788.[11] The Court then went on to identify circumstances constituting those limited exceptions.

It noted that review may be expanded beyond the record or some limited discovery conducted where there is an allegation that the Tax Commissioner failed to mention a significant fact or issue having a substantial impact on the tax liability; where the Tax Commissioner failed to adequately discuss some reasonable alternative; or where the Tax Commissioner otherwise failed to adequately deal with some stubborn problem or serious criticism. A circuit court may inquire outside the record when necessary to explain the Tax Commissioner's action; when the Tax Commissioner relies on documents not included in the administrative record; when supplementation is necessary to explain technical terms or complex subject matter; or when the taxpayer makes a showing of bad faith.[12]

In its decision, the Circuit Court did <u>not</u> identify <u>any</u> of the reasons authorized by the Supreme Court to justify supplementing the record. In fact, the Tax Commissioner addressed the

[11] All appeals from decisions of the West Virginia Office of Tax Appeals are to be heard pursuant to the provisions of W. Va. Code § 29A-5-4. W. Va. Code § 11-10A-19(f). The prior provisions of W. Va. Code § 11-10-10 are not applicable to appeals from this tribunal.

[12] W. Va. Code 29A-5-4(f), relating to review of an administrative decision before a circuit court, provides, in relevant part, "The review shall be conducted by the court without a jury and shall be upon the record made before the agency, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court."

issue of retroactivity and legislative history in his decision. There is nothing in the Circuit Court's decision to indicate that it held an evidentiary hearing for the purpose of supplementing the record. It apparently determined that it would find the 1998 amendment to be retroactive based, in part, on legislative history, or as it described it, "quasi-legislative history," that was not part of the administrative record. This tribunal is convinced that the Circuit Court's reliance on this "quasi-legislative history" was improper.

Instead of considering the opinions of the Speaker of the House and a lobbyist, as expressed in correspondence, a more accurate picture of the legislative history of this section can be gleaned from reviewing the evolution of the statutory scheme applicable to producers of natural resources and contractors who perform work for producers of natural resources. A review of the evolution of the statutes demonstrates that the 1998 amendment was truly an amendment to the statute and not, as the Circuit Court concluded, a "retroactive clarification."

The two statutes that primarily apply to this situation are W. Va. Code § 11-15-2, as it has defined and presently defines "production of natural resources" and "contracting," and W. Va. Code § 11-15-9, insofar as it formerly exempted those engaged in the activity of contracting and insofar as it has exempted and continues to exempt those engaged in the activity of the production of natural resources.

Prior to the amendments passed in 1989, W. Va. Code § 11-15-9(g) provided that sales of services, machinery, supplies and materials to those engaged in either the activity of contracting or the production of natural resources, and directly used in that activity, were exempt from the consumers sales and service tax. The definition of "contracting" was formerly set out at W. Va. Code § 11-15-2(o), and the definition of "production of natural resources" was formerly set out at W. Va. Code § 11-15-2(t). Since sales to those engaged in "contracting" and "production of

natural resources" were exempt, the distinction between the two activities for purposes of this exemption was of little significance.

In 1989, the statutes were amended. The primary purpose of the amendments was to remove the exemption from consumers' sales and service tax for purchases directly used or consumed by those engaged in the activity of contracting. This purpose was achieved by eliminating the word "contracting" from the exemption contained in W. Va. Code § 11-15-9(g). It also added W. Va. Code § 11-15-8a, which provided an exemption from consumers sales and service tax for sales of contracting activities, but expressly provided that purchases of tangible personal property and services by one engaged in "contracting" were subject to the tax. The definition of "contracting" included activities that were later set out in the last sentence of W. Va. Code § 11-15-2(o) [1994], which is now substantially §11-15-2(b)(13)(D), unless the activity was one described in the first sentence of § 11-15-2(o). The definition of "production of natural resources" was not amended in 1989.

The statutory scheme was amended again in 1994. The 1994 amendment retained the exemption for contracting services, and still required contractors to pay consumers sales and service tax on their purchases. The amendment substantially amended the definition of "production of natural resources."[13] After the amendment, W. Va. Code § 11-15-2(o) provided:

> 'Production of natural resources' means, *except for oil and gas,* the performance, by either the owner of the natural resources or another, of the act or process of exploring, developing, severing, extracting, reducing to possession and loading for shipment and shipment for sale, profit or commercial use of any natural resource products and any reclamation, waste disposal or environmental activities associated *For the natural resources oil and gas, 'production of natural resources' means the performance, by either the owner of the natural resources, a contractor or a subcontractor, of the act or process of exploring, developing, drilling, well-stimulation activities such as logging, perforating or fracturing, well-completion activities such as the installation of the casing, tubing and other machinery and equipment and any reclamation, waste disposal or environmental activities associated therewith, including the installation of the gathering system or other pipeline to transport the oil and gas produced or environmental activities associated*

[13] The amendment moved the definition of "contracting" from subsection (o) to subsection (c), and the definition of "production of natural resources" from subsection (t) to subsection (o).

> *therewith and any service work performed on the well or well site after production of the well has initially commenced. All work performed to install or maintain facilities up to the point of sale for severance tax purposes is included in the 'production of natural resources' and subject to the direct use concept. 'Production of natural resources' does not include the performance or furnishing of work, or materials [and] work, in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for the alteration, improvement or development of real property, by persons other than those otherwise directly engaged in the activities specifically set forth in this subsection as 'production of natural resources'.*

The italicized language was added to the statute in 1994.

The 1994 amendment to the statute provides important guidance to the present action. The last sentence excluded "contractors" from the definition of those engaged in the "production of natural resources," unless they were performing one of the specific activities described in the first sentence of the subsection.[14] The second sentence distinguished oil and gas from all other natural resources. Insofar as the second sentence expressly included within the definition of "production of natural resources" work performed not just by the owner of the oil and gas, but also work performed by contractors and subcontractors, it created an exception to the last sentence of § 11-15-2(o). In other words, including "contractors" and "subcontractors" in the second sentence evidenced a legislative intent that they were intended to be producers for purposes of the activity of producing oil and gas. There is no similar provision respecting "contractors" and "subcontractors" in the first sentence of § 11-15-2(o), relating to all other natural resource products. Considering this in conjunction with the language of the last sentence of the subsection, which expressly provides that contractors are not engaged in the production of natural resources, the only logical conclusion is that the Legislature did not intend to include "contractors" and "subcontractors" within the definition of "production of natural resources" for

[14] The last sentence of §11-15-2(o) [1994] was virtually identical to the definition of "contracting," as set forth in § 11-15-2(c)(1)[1994], except as it related to removal or demolition of a building or structure. From this, it must be concluded that the last sentence of §11-15-2(o) [1994] refers to contractors. The activity of "contracting" includes work performed by both "contractors" and "subcontractors." W. Va. Code § 11-15-2(c)(1) [1994]. Therefore, where referred to in this decision, unless otherwise apparent from the context, use of the term "contractors" should also include "subcontractors."

work performed for producers of other natural resources, unless they were *directly* engaged in an activity identified in the first sentence of that subsection.

While this tribunal does not find the statute to be ambiguous, the Circuit Court did. If the statute is deemed to be ambiguous, then this would justify application of the principle *expressio unius est exclusio alterius*. As stated in *Co-Ordinating Council for Independent Living, Inc. v. Palmer,* 209 W. Va. 274, 546 S.E.2d 454 (2001):

> Thus, it is clear that W. Va. Code § 11-13A-3(a) does not intend to tax *all* health care services but only *particular* ones. As such, '"*inclusio unius est exclusio alterius*," the expression that "one is the exclusion of the others," has force in this case. This doctrine informs courts to exclude from operation those items not included in the list of elements that are given effect expressly by statutory language.' *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 630 n. 11, 474 S.E.2d 554, 560 n. 11 (1996).

Id. at 281-282, 546 S.E.2d at 641-642.

The Legislature expressly included contractors and subcontractors as engaging in the production of natural resources when they performed work for those engaged in the production of oil and gas. It did not include them as engaging in the production of natural resources when they performed work for those engaged in the production of other natural resources, unless they were "directly engaged" in one of the activities expressly set forth in the first sentence of subsection (o). Applying the principle of *expressio unius est exclusio alterius* to W. Va. Code § 11-15-2(o) [1994], it must be presumed that the Legislature specifically intended to exclude contractors and subcontractors as engaging in the production of natural resources, except for purposes of oil and gas production. The courts, and this tribunal, must presume that this omission in the first sentence of W. Va. Code § 11-15-2(o) [1994] was intentional. If the Legislature had intended to treat contractors and subcontractors as engaging in the production of natural resources under the first sentence of this subsection, it would have expressly done so.

The last sentence of the subsection, as amended in 1994, provided that contactors were not producers of natural resources. The second sentence of the 1994 amendment created an express exception to this general rule respecting contractors, providing that contactors involved in producing oil and gas were engaged in the production of natural resources. No such express exception was contained in the first sentence of the subsection. The Circuit Court held, in effect, that the Legislature intended contractors to be treated identically by both the first and second sentences, even though the sentences contain language that is substantially different in this regard. In effect, the Circuit Court's holding is that this treatment was made express by the second sentence, while it was merely implied by the first sentence. It is not logical to assume that the Legislature intended identical treatment for two different classes of contractors, yet attempted to achieve identical treatment by two provisions that are somewhat contradictory.

If, as held by the Circuit Court, the Legislature had, by implication, intended that contractors performing work for others engaged in the production of all other natural resources were to be treated as engaging in the production of natural resources, it would not have enacted the last sentence of the subsection at the same time. If this is what the Legislature intended, the last sentence would have contradicted the first two sentences of the subsection.

According to the Circuit Court, the Legislature intended: (1) that contractors performing work for those engaged in the production of oil and gas were engaged in the production of natural resources; and (2) that contractors performing work for those engaged in the production of all other natural resources were engaged in the production of natural resources. If the Circuit Court is correct, then all contractors performing work for those engaged in the production of natural resources are engaged in the production of natural resources.[15] This clearly contradicts

[15] It should be noted that it makes little sense that the Legislature would use two sentences to make all contractors producers of natural resources, when it could have achieved the same result by using a single sentence.

the last sentence of the subsection, which provides that contractors are not engaged in the production of natural resources, unless directly engaged in activities identified in the first sentence of the subsection. All contractors cannot be engaged in the production of natural resources pursuant to the provisions of the first two sentences and, at the same time, not be engaged in the production of natural resources pursuant to the provisions of the last sentence. Under the Circuit Court's interpretation, either the first two sentences are rendered meaningless, or the last sentence is meaningless. Since the specific prevails over the general, *see Cox v. Amick*, *supra*, under the Circuit Court's holding the last sentence, which applies to contractors generally, is rendered meaningless surplusage, not the first two sentences, which apply to specifically identified contractors.

This holding violates the rule of statutory construction that requires all words of a statute to be given meaning. *See e.g. Verizon West Virginia, Inc. v. Bureau of Employment Programs*, 2003 W. Va. Lexis 66, slip op. at 40 (Nos. 30899, 30900, 30901 June 12, 2003); *State ex rel. Appleby v. Recht*, __ W. Va. __, 583 S.E.2d 800 (2002); Syl. pt. 3, *Osborne v. U.S.*, 211 W. Va. 667, 567 S.E.2d 677 (2002); Syl. pt. 7, *Ex parte Watson*, 82 W. Va. 201, 95 S.E. 648 (1918); and Syl. pt. 12, *State v. Harden*, 62 W. Va. 313, 58 S.E. 715 (1907). As stated in *Van Nuis v. Los Angeles Soap Co.*, *supra*, "It will be presumed that every word, phrase and provision used in a statute was intended to have some meaning and to perform some useful office [Cite omitted], and a construction making some words surplusage is to be avoided." *Id*. at 228-229, 111 Cal. Rptr. at 402. Applying this rule to the present action, the last sentence has meaning only if the first sentence is given the plain meaning of the words contained therein, not the implied meaning

---

Why would the Legislature exempt those performing work for others engaged in the production of oil and gas in one sentence, and exempt those performing work for others engaged in the production of all other natural resources in another sentence, if it intended to exempt all who were performing work for others engaged in the production of natural resources?

found by the Circuit Court. Only if the first sentence is read to provide that contractors are not engaged in the production of natural resources is the last sentence prevented from being given no meaning, no function to perform. This is clearly the preferred interpretation.[16]

The conclusion that the first sentence of the 1994 amendment does not provide that contractors are engaged in the production of natural resources is borne out by the 1998 amendment. The 1998 amendment added to the definition of "production of natural resources," by including those who engage in "the construction, installation or fabrication of ventilation structures, mines shafts, slopes, boreholes, dewatering structures, including associated facilities and apparatus, by the producer or others, *including contractors and subcontractors*, at a coal mine or coal production facility." The Legislature, in effect, carved out another exception to the last sentence of W. Va. Code § 11-15-2(o). If the Legislature had already provided that contractors were engaged in the production of natural resources, it would not have been necessary for it to expressly include contractors and subcontractors who perform work related mine shafts, bore holes, dewatering structures, etc.

The historical evolution of the statutes governing the exemption for purchases by those engaged in the production of natural resources leads to a single conclusion. Until the effective date of the 1998 amendment, North American Drillers and others taxpayers similarly situated, such as the taxpayer in this appeal, were not engaged in the activity of production of natural resources. Therefore, they were not exempt for consumers' sales and services tax on their purchases.

[16] In essence, by enacting the second sentence of § 11-15-2(o)[1994], the Legislature created an exception to the "production of natural resources" for producers of oil and gas, including contractors and subcontractors. By enacting the last sentence of § 11-15-2(o)[1994], with respect to all other natural resources, the Legislature excluded the activities of contractors and subcontractors from the definition of "production of natural resources," unless they directly engaged in activities set forth in the first sentence.

As stated by the Supreme Court of Virginia, "[W]e are bound to interpret and give effect to acts of the General Assembly as written. The legislative history can serve here to show only the underlying legislative motive; it cannot contradict the language of the act." *Carter v. City of Norfolk*, 206 Va. 872, 875-876, 147 S.E.2d 139, 142 (1966). As has been demonstrated, the Circuit Court used legislative history to contradict the clear language of the act.

Other aspects of the "quasi-legislative history" relied upon by the Circuit Court also present problems.

The Circuit Court relied on a letter from Speaker Robert Kiss to the Secretary of Tax and Revenue. In his letter, the Speaker expressed some concern respecting the potential for multiple taxation of the activity of producing natural resources. One problem with the Circuit Court's reliance on this letter is that Speaker Kiss never really says what the Court concludes that he says.

In short, the Speaker questions the Tax Commissioner's policy respecting the taxation of contractors who are performing work for persons engaged in the business of "production of natural resources." He expresses some concern about a "two-tier level of gross receipts tax on the natural resource extraction industries." Speaker Kiss goes on to state that he recognizes that there will likely be a gray area, but that it is important to establish a "bright-line standard upon which the imposition and collectability of the tax is clearly delineated." The Speaker suggests that rather than analyzing whether or not the activity engaged in is a "construction activity,"[17] contract drilling, or contract mining, establishing a "bright-line standard" would be more appropriate. He suggests that this more appropriate standard should be based on when the activity takes place, either before the actual severance of the natural resource or after severance.

[17] The Speaker appears to mean a "contracting" activity. As per the statutory definition, "contracting" involves more than construction.

As important as anything that Speaker Kiss says in his letter, he states, "[T]he legislative history is somewhat inadequate," and then proceeds to summarize his discussions with a member of then-Governor Caperton's staff, and with a lobbyist who is a certified public accountant, an official with the Independent Oil and Gas Association of West Virginia, and who was North American Drillers' representative at the administrative hearing.

The biggest problem with the Circuit Court's reliance on Speaker Kiss's letter is that it treats the letter as expressing legislative intent respecting the 1989 and 1994 amendments.[18] As such, it is post-enactment legislative history. The West Virginia Supreme Court has not had occasion to deal directly with post-enactment legislative history. However, in dicta, the Court has stated its opinion respecting the weight to be given to post-enactment legislative history:

> We do not believe that post-enactment legislative history is entitled to substantial consideration in construing a statute.
>
> > 'The use of legislative history in this fashion, and especially postenactment legislative history, is a process that has been soundly criticized . . . . *Continental Can [Co., Inc.] v. Chicago Truck Drivers, et al.*, 916 F. 2d . . . [1154, 1157-58 (7th Cir. 1990)] (stating that postenactment statements "do not count" because the term "'subsequent legislative history' [is] an oxymoron." (citations omitted); 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.06, at 59 (5th ed. 1992) ("Little weight is given to postenactment statements by members of . . . [the legislature]")' *Kofa v. U.S. Immigration & Naturalization Service*, 60 F.3d at 1089.

Appalachian Power Co. v. State Tax Dept, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995), n. 16.

Other courts dealing with post-enactment legislative history have reached similar conclusions. For example, in *Consumer Products Safety Commission v. GTE Sylvania*, 447 U.S. 102, 100 S. Ct. 2051, 64 L.Ed.2d 766 (1980), the Supreme Court stated:

> '[W]e begin with the oft-repeated warning that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' *United States v. Price*, 361 U.S. 304, 313 (1960), quoted in *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963),

[18] As can be seen from the discussion respecting the evolution of W. Va. Code §§ 11-15-2(o) & 11-15-9(g), in order for the 1998 amendment to be considered retroactive based on preexisting law, based on Speaker Kiss's letter, the Speaker had to be expressing his opinion respecting the effect of one or more of the prior amendments.

> n. 13. And ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

Id. at 117-18, 100 S. Ct. at 2061, 64 L.Ed.2d at 778. See also *United States v. United Mine Workers*, 330 U. S. 258, 281-82, 67 S. Ct. 677, 690, 91 L. Ed. 884, 906-07 (1947). The United States Supreme Court distinguished the situation where there is subsequent legislation declaring the intent of a prior statute, noting that with respect to subsequent legislation Congress has formally proceeded through the legislative process. It stated that less formal types of legislative history provide "an extremely hazardous basis for inferring the meaning of a congressional enactment." It went on to say that subsequent legislative history will rarely override a reasonable statutory interpretation that may be gleaned from its language and pre-enactment legislative history. *Consumer Products Safety Commission*, 447 U.S. at 118, 100 S.Ct. at 2061, 64 L.Ed.2d at 778.

The 1998 amendment contains no legislative statement respecting what the Legislature intended in enacting the 1989 and 1994 amendments. As stated by the United States Supreme Court, such a statement, if it existed, would be a "hazardous basis" for determining what the prior Legislatures intended by those amendments. Reliance on Speaker Kiss's letter is, at best, an "extremely hazardous" basis for determining Legislative intent respecting the 1989 and 1994 amendments, since it is one of the less formal expressions of legislative intent referred to by the Court. Since Speaker Kiss's letter is less formal and postenactment, reliance on it is even more hazardous than if it were merely "less formal." As such, reliance on the Speaker's letter should not override a reasonable statutory interpretation that may be gleaned from its language.

Yet another problem with Speaker Kiss's letter is that it may well constitute nothing more than the expression of his personal opinion respecting what the Legislature had intended by the 1989 and 1994 amendments. The United States Supreme Court has discounted the reliability of

the contemporaneous remarks of a single legislator in analyzing legislative history, even the sponsor of a bill. The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S. Ct. 1705, 1722, 60 L.Ed.2d 208, 231 (1979). *See also Weinberger v. Rossi*, 456 U.S. 25, 35 102 S. Ct. 1510, 1517, 71 L.Ed.2d 715, 725 (1982), n 15. The Speaker's letter is even less reliable, since it is a postenactment, not contemporaneous, statement of legislative intent. As such, it is an extremely hazardous basis for determining legislative intent.

This is consistent with the decision of the California Supreme Court in *California Teachers Assoc. v. San Diego Comm. College Dist.*, 28 Cal. 3d 692, 621 P.2d 856, 170 Cal. Rptr. 817 (1981), wherein the Court stated:

> 'In construing a statute we do not consider the motives or understandings of individual legislators who cast their votes in favor of it. [Citations.] Nor do we carve an exception to this principle simply because the legislator whose motives are proffered actually authored the bill in controversy [citation]; no guarantee can issue that those who supported his proposal shared his view of its compass.' [Citation omitted.] A legislator's statement is entitled to consideration, however, when it is a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion. [Citations omitted.]

Id. at 699-700, 21 P.2d at 860, 170 Cal. Rptr. at 821. The Speaker's letter is less a reiteration of what factually transpired leading to the passage of the 1989 and 1994 amendments, than it is an expression of his opinion respecting the meaning of those amendments. The Court went on to say:

> There are sound reasons underlying the rule against admitting statements of personal belief or intent by individual legislators on the issue of legislative intent. In addition to the lack of assurance that anyone shared the legislator's view, . . . , there is concern that letters such as those sent to the Governor on the question of signing the bill may never have been exposed to public view so that those with differing opinions as to the bill's meaning and scope had an opportunity to present their views also.

Id. at 701, 21 P.2d at 861, 170 Cal. Rptr. at 822. The Speaker's letter is one which has, most likely, never been exposed to the public view and to which those with differing opinions have not had the opportunity to respond.

The letter written by Donald Nestor is also of little value in determining what the legislature intended by the 1989 and 1994 amendments.[19] In his letter, Mr. Nestor indicates that he was a lobbyist on behalf of the Independent Oil and Gas Association of West Virginia. Respecting determinations of legislative intent based on the positions taken by lobbyists, the United States Supreme Court has stated:

> Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress. It becomes far more so when we consult sources still more steps removed from the full Congress and speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation. [Cite omitted.] We ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal -- even assuming the precise intent of the group can be determined, a point doubtful both as a general rule and in the instant case.

Circuit City Stores, Inc. v. Adams, 532 U. S. 105, 120, 121 S. Ct. 1302, 1311, 149 L.Ed.2d 234, 250 (2001). Applying that principle to this action, Mr. Nestor's letter has virtually no worth as a statement of legislative intent.

Based on the foregoing discussion, the West Virginia Office of Tax Appeals is convinced that the decision of the Circuit Court in *North American Drillers* is contrary to clearly established law in West Virginia or, where West Virginia law is not clearly established, to the law of other jurisdictions that provide the most logical, sensible approach to the questions presented. It should be pointed out that the Circuit Court did not support its decision with <u>any</u> citations to West Virginia case law, or to the case law of any other jurisdiction. It is, in part, contrary to a West Virginia statute, which the Circuit Court neither cited nor even considered. For these reasons, and with due respect, the Office of Tax Appeals is of the opinion that the Circuit Court's decision in *North American Drillers* is of virtually no persuasive value with respect to the issues decided therein, and this tribunal will not follow that decision.

[19] It must be kept in mind that Mr. Nestor's letter, like that of Speaker Kiss, was not evidence contained in the

CONCLUSIONS OF LAW

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) and 121 C.S.R. 1, § 63.1 (April 20, 2002).

2. Purchases of services, machinery, supplies and materials directly used or consumed in the activity of the production of natural resources are exempt from the West Virginia consumers' sales and service tax and the purchasers' use tax. W. Va. Code § 11-15-9(b)(2) (formerly W. Va. Code § 11-15-9(g)); W. Va. Code § 11-15A-3(a)(2)(corresponding purchasers' use tax exemption).

3. Prior to being amended effective June 10, 1998, W. Va. Code § 11-15-2(o), provided that the alteration or improvement of real property that did not constitute directly engaging in exploring, developing, severing or reducing to possession of natural resource products constituted "contracting," and not the "production of natural resources."

4. Effective June 10, 1998, W. Va. Code § 11-15-2(o) provided that the construction, installation or fabrication of ventilation structures, mineshafts, slopes, bore holes and dewatering structures, and their associated facilities and apparatus, by contractors or subcontractors at a coal mine or coal production facility constitute the "production of natural resources."

5. The Petitioner is a contractor engaged in the construction, installation or fabrication of ventilation structures, mineshafts, slopes, bore holes and dewatering structures, and their associated facilities and apparatus, by contractors or subcontractors at a coal mine or coal production facility.

---

administrative record.

6. The 1998 amendment to W. Va. Code § 11-15-2(o) is not a so-called "retroactive clarification" of previously existing law. It clearly is an amendment to said statute that is entitled only to prospective application, unless the Legislature expressly makes it retroactive by clear, strong, or imperative words, or by necessary implication.

7. The Legislature did not make the amendment retroactive by clear, strong or imperative words, or by necessary implication. Therefore, it is entitled only to prospective application.

8. The decision of the Circuit Court of Monongalia County, in *North American Drillers v. Palmer*, Docket # 00-C-AP-39 (July 18, 2003), which held that the 1998 amendment to W. Va. Code § 11-15-2(o) retroactively applied to periods prior to its effective date, June 10, 1998, is clearly contrary to well established West Virginia law, and, therefore, will not be followed by the West Virginia Office of Tax Appeals.

9. With respect to purchases made prior to June 10, 1998, the Petitioner failed to carry its burden of proving that it was engaged in the activity of production of natural resources pursuant to W. Va. Code §§ 11-15-2(o) and 11-15-9(g) [1994].

10. With respect to purchases made on or subsequent to June 10, 1998, the Petitioner in this matter carried its burden of proof of showing that it was engaged in the activity of the production of natural resources, pursuant to W. Va. Code §§ 11-15-2(o) and 11-15-9(b)(2).

DISPOSITION

WHEREFORE, it is the **DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax and purchasers' use tax assessments issued against the Petitioner for the period of January 1, 1998, through September 30, 2001, should be and are hereby **MODIFIED** in accordance with the above Findings of Fact and Conclusions of

Law. Accordingly, after allowing credit for the payment made by the Petitioner in February, 2003, the consumers' sales and service tax assessment is **MODIFIED** in accordance with the above Conclusions of Law to include **tax** of $ and **interest** on the revised tax, updated through September 15, 2003, of $, for a **total revised** liability of $. Interest on the consumers' sales and service tax liability continues to accrue in the amount of $ per day.

The purchasers' use tax assessment is **MODIFIED** in accordance with the above Conclusions of Law to include **tax** of $ and **interest** on the revised tax, updated through September 15, 2003, in the amount of $, for a **total revised** liability of $. Interest on the purchasers' use tax liability continues to accrue in the amount of $ per day.