

**RECENT CASES IN THE  
UNITED STATES SUPREME COURT &  
WEST VIRGINIA COURTS**

**WV TAX INSTITUTE  
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*Dawson v. Steager*,  
139 S. Ct. 698, 203 L. Ed. 2d 29 (2019)

- James & Elaine Dawson
  - Full exemption from
  - WV personal income tax for 2010 & 2011 CY's
  - W. Va. Code 11-21-12(c)(6)
- 
- Retired US Marshall
  - *Davis v. Michigan* (1988)
  - 4 USC 111

# WV Supreme Court affirmed Tax Department's position:

We concluded, however, that West Virginia's limited, multi-tiered series of tax exemptions differed from the "schemes invalidated by the [United States] Supreme Court in that there is no intent in the West Virginia scheme to discriminate **against** federal retirees; rather, the intent is to give a benefit to a very narrow class of former state and local employees."

*Steager v. Dawson*, 2017 WL 2172006, \*4, (emphasis in original) (Not published in S.E. 2d); quoting *Brown v. Mierke*, 191 W. Va. 120 at 123, 443 S.E. 2d 464 at 465 (2017).

## United States Supreme Court framed the issue:

If you spent your career as a state law enforcement officer in West Virginia, you're likely to be eligible for a generous tax exemption when you retire. But if you served in federal law enforcement, West Virginia will deny you the same benefit. The question we face is whether a State may discriminate against federal retirees in that way.

*Dawson v. Steager*, 139 S. Ct. 698 at 702.

# US Supreme Court ruled:

- ❖ A State violates 4 USC 111
- ❖ When a State treats state retirees better than federal retirees **AND**
- ❖ There are no significant differences between the two classes
- ❖ To justify the disparate treatment

*Dawson v. Steager*, at 703.

Key Point: Same Job Duties

*Ashland Specialty Company, Inc., v. Steager*,  
241 W. Va. 1, 818 S.E. 2d 827 (2018), *cert. denied* 127 S. Ct. 2714.

**WV Supreme Court:**

- Ashland Specialty sold Non-Approved Brands
- Tax applied a civil penalty
- 500% of retail value of delisted cigarettes sold in WV
  
- Civil Penalty
  - \$159,398 for sale of
  - 12,230 Packs of delisted cigarettes
  - W. Va. Code 16-9D-8(a)
  
- **Maximum Penalty \$61,150,000**

# *In Petition for Writ of Certiorari*

Ashland argued Tax Department failed to:

- exercise discretion
- consider mitigating factors



# Primary Questions Presented:

- Was the penalty grossly disproportionate to the offense and unconstitutional under the Eighth Amendment's Excessive Fines Clause and *United States v. Bajakajian*?
- In light of the myriad criteria currently employed by state and federal courts to evaluate gross disproportionality, should the Court resolve the multiple splits and affirmatively adopt factors, like those in *Cooper Industries v. Leatherman*, to decide whether a civil monetary penalty is grossly disproportionate to the underlying offense?

**Petition for Certiorari --- Denied.**

# WEST VIRGINIA SUPREME COURT DECISIONS

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*Mercer Mall v. Gearhart*

No. 18-0213, 2019 WL 1110329 (March 11, 2109)

Memorandum Decision; Not reported in S.E. 2d.

# Competing Valuations 2017 TY

## Mercer Mall

- Protested valuation
- Mall's Valuation \$10,000,000
- Licensed Real Estate Appraiser
- Income Approach to Value

## Mercer County Assessor

- Assessor Gearhart  
\$19,011,800
- Cost Approach to Value

# Procedural History

## Board of Equalization & Review

February 2017

- Approved Assessor Gearhart's Value
- Circuit Court remand to develop
- evidentiary record

- BE &R second hearing
- Approved Assessor's Value

November 2017

- Circuit Court Mercer County
- Affirmed Assessor Gearhart's Valuation

# Mercer Mall appealed

- Mall's Appraisal under Income Approach was superior
- BE & R summarily rejected Income Approach to Value
- BE & R erroneously relied on Cost Approach to Value

# Supreme Court noted

## Questions about underlying income data

- ❑ Data provided by Mall to its Appraiser
- ❑ Data was **not** confirmed by Mall's tax statements, income statements or any other documentation
- ❑ Data **excluded** income from one large retail outlet
- ❑ Data was **not** provided to Assessor Gearhart for review

*Mercer Mall*, at \* 3.

# Supreme Court ruled:

- Legislative Rule authorizes 3 approaches to value
  - For Industrial & Commercial Properties
    - Cost
    - Income
    - Market Sales
  - W. Va. State Rules 110-3-3.2.1.
- ✓ Tax Commissioner has discretion
  - ✓ To select most appropriate Valuation Methodology
  - ✓ Syll. Pt. 5, *American Bituminous Power Partners*
  - Valuations set by an Assessing Officer
  - Are **presumed** to be correct
  - Syll. Pt. 7, *In re Tax Assessment Against Pocahontas Land Company, Inc.*

*Mercer Mall*, at \*3.

# WV Supreme Court ruled:

In light of this standard we decline to find that the circuit court erred in not compelling the Commission to use the income approach to valuation.

*Mercer Mall*, at \*3



*Penn Virginia Operating Company, LLC, v.  
Phyllis Yokum, Assessor of Randolph County, et al.*  
242 W. Va. 116, 829 S. E. 2d 747 (2019)

2016 TY

Managed Timberland Case

Randolph County PTR 16-36

Barbour County PTR 16-42

Upshur County PTR 16-40

# Managed Timberland Valuation

## W. Va. Code § 11-1C-10(d)(1)

- “... the owner must **ANNUALLY** certify...”
- That property meets definition of Managed Timberland

## W. Va. State Rules § 110-1H-13

- Owner shall apply
- Annually **before September 1**
- Application dated
- September 17, 2015
- 16 Days **AFTER** deadline

# PTR 16-36

- ✓ September 1 hard deadline
- ✓ Tax Department CANNOT certify property as Managed Timberland
- ✓ **ONLY** Forestry can designate property for Managed Timberland Valuation
- ✓ Since property was **NOT** certified as Managed Timberland for 2016 TY, Property **MUST** be valued at Market Value
  
- ✓ Property Tax Assessments increased
- ✓ \$523,555 Combined

## **Penn Virginia appealed to Circuit Courts**

- Consolidated
- Circuit Court of Randolph County
- Affirmed all three PTR's
  
- Penn Virginia appealed to Supreme Court

# Penn Virginia appealed to Supreme Court

## **Argued:**

- ❖ Legislative Rule has two routes of appeal
- ❖ Forestry only listed of one option for appeal

## **Supreme Court ruled:**

Pursuant to W. Va. C.S.R 110-1H-3.3, a property owner whose managed timberland application has been denied may, on or before November 1 of the assessment year, file an appeal of the denial with the Director of the West Virginia Division of Forestry.

- Syll. Pt. 3, *Penn Virginia v. Yokum, et al.*

# End Result

- Remand to Circuit Court
- Entry of an Order
- Directing Director of the Division of Forestry to
- Review whether Penn's application may be **CONSIDERED**
- For 2016 TY

## Director of Forestry

- Granted  
Managed Timberland  
Valuation
- Penn Virginia for 2016 TY.

*Murray Energy v. Steager*

241 W. Va. 629, 827 S.E. 2d 417 (2019)

Challenged Valuation of Coal Properties

Marshall County

2016 TY

What is the True & Actual Value

For Coal Producing Properties?

# Legal Issues

## Murray Energy argued:

W. Va. Code § 11-3-1(a)

- ✓ Valued at
- ✓ What a willing **BUYER**
- ✓ Would pay a willing **SELLER**
- ✓ As of July 1

## State Tax Department argued:

- ✓ W. Va. Code § 11-6K-1
- ✓ Directs Tax to value
- ✓ Natural Resource Properties
  
- ✓ Legislative Rule
- ✓ Specifics of the Valuation Methodology

# Murray's Statutory Challenge:

## Legislative rule

violates statutory mandate

Which requires that property

## MUST be valued

True and Actual Value

## Legislative Rule

Directs PTD to determine

❖ Statewide Steam Coal Price  
Per Ton

❖ Seam Thickness Average

Use of AVERAGES in Valuation  
does not determine

True and Actual Value



# Statewide Steam Coal Price Per Ton

Based on Legislative Rule

## **Property Tax Division**

- ❖ SSCPPT \$60.35 / Ton
- ❖ 3 Year Rolling Average

## **Murray Energy demanded**

- ❖ Spot Price \$41.08 / Ton
- ❖ As of July 1, 2015
- ❖ Based on industry publications

# Seam Thickness Average

Based on Legislative Rule

## **Property Tax Division**

- 1800 Tons Per Acre Foot
- Based on US Geological Survey
- Kentucky, Pennsylvania & Ohio
- Use the Same Figure —1800 Tons

## **Murray argued**

- ✓ Seam thickness varies
- ✓ Calculation actually 1,793.97 Tons Per Acre Foot
- ✓ Should not round up to 1800

# Supreme Court focused on:

## **W. Va. Code § 11-1C-10(e)**

- Tax Commissioner shall develop a plan
- For Valuation of **Natural Resources Property**

✓ Does Legislative Rule conflict with statute?

**OR**

✓ Does the Legislative Rule explain the statute?

# Examined Statutory Framework & Legislative Rule

*Chevron* Analysis I

- Explicit Gap in taxation framework
- Tax directed to fill in the Gap

W. Va. Code § 11-6K-1

- Speaks in broad terms
- Does **NOT** explain how to determine
- True and Actual Value of
- Natural Resource Property

# Examined Statutory Framework & Legislative Rule

*Chevron* Analysis II

Tax's interpretation must be **rational**.

Tax Department's Valuation  
**AFFIRMED.**

“We find that there is little question that the regulations here are a rational and necessary means to establish true and actual value.”

*Murray Energy*, at 428-429.

*Dale W. Steager, WV State Tax Commissioner, et al. v. CONSOL Energy, Inc., dba CNX Gas, LLC, et al.*, \_\_\_ W. Va. \_\_\_, 832 S.E. 2d 135 (2019).  
2019 WL 2414962.

*Petition for Rehearing* denied September 5, 2019.

## 2016 TY & 2017 TY

- Valuation Producing Oil & Gas Wells
- Marcellus Shale Horizontal Wells
- Traditional Wells
- Doddridge, Ritchie, Lewis, & McDowell Counties

# Statutory Framework

## W. Va. Code § 11-6K-1

- Tax shall value all industrial and
- Natural Resource Property at 60%
- True and Actual value

## W.Va. Code State R. § 110-1J-4.3.

- ✓ Average Annual Industry  
Operating Expenses
- ✓ Every 5 Years
- ✓ Tax Commissioner shall determine
- ✓ AAIOE per well
- ✓ Which shall be deducted from
- ✓ Working Interest Gross Receipts

# Property Tax Division

2014 CY      Survey  
Marcellus Shale Horizontal Wells

2016 TY      AAIOE  
20% of Gross Receipts  
NTE \$150,000 per well

2017 TY      20% of Gross Receipts  
NTE \$175,000 per well



# Antero Resources

## Marcellus Shale Horizontal Wells

Actual Operating Expenses		Lease Op. Exp.	\$ 31,000
2016 TY	23% Gross Receipts \$ 648,000	✓ Gathering & Compression	280,000
2017 TY	36% Gross Receipts \$ 817,000	✓ Processing	189,000
		✓ Transportation	<u>149,000</u>
		✓ Total Expenses	\$648,000

# Antero demanded

## Compromise Valuation

Deduct

20% Gross Receipts

UNLIMITED

Typical well

> \$ 5,000,000 Gross Receipts

# Traditional Wells

## Tax calculated

- AAIOE**
- 30% Gross Receipts**
- NTE \$ 5,000 per well**

## CNX Gas

- **Actual Expenses**
- **37% Gross Receipts**
- **\$ 5,800 per well**
  
- **Valuation**
- **Deduct 30% Gross Receipts**
- **UNLIMITED**

# Business Court

## Marcellus Shale wells

\$150,000 NTE Amount

- CAP on AAIOE
- Unlimited            **20% GR**

## Traditional Wells

\$ 5,000 NTE Amount

- CAP on AAIOE
- Unlimited            **30% GR**

# Survey Inadequate

## Allowed Post-Production Exps.

- Gathering & Compression
- Processing
- Transportation

➤ Violated Equal & Uniform Clause

➤ Violated Equal Protection Clause

# WV Supreme Court

## Syllabus Point 12:

The provisions contained in W. Va. Code State Rules §§ 110-1J-4 and 110-1J-4.3 (2005) for a deduction of the Average Annual Industry Operating expense requires the use of a **singular monetary average deduction**.

AAIOE must be a Dollar Amount

**CANNOT** express AAIOE as a Percentage Deduction.

# ORDINARY OPERATING EXPENSES

Legislative Rule:

"Operating expenses" means only those ordinary expenses which are **directly related** to the maintenance and production of natural gas and/or oil. ...."

Tax Department      Production

Antero Resources

- ✓ Gathering & Compression
- ✓ Processing
- ✓ Transportation

If Gross Receipts are measured at the **Field Line Point of Sale**, then expenses to the POS must be deductible.

# Language in Legislative Rule

## *Chevron I Analysis*

W. Va. Code § 11-6K-1 does

**NOT** address Post-Production  
Expenses

## *Chevron II Analysis*

✓ Gap to be filled

✓ Must not be arbitrary, capricious,  
or manifestly contrary to  
enabling statute

✓ Permissible Construction

# Constitutional Issues

## Syllabus Point 8

Tax Department's Application  
Created Use of Two Valuation  
Methodologies

➤ 20 % GR for some wells

➤ NTE Amount  
\$150,000 for other wells

Violated Equal & Uniform Clause  
Equal Protection Clause



# Supreme Court ruled:

Accordingly, we find that this clear, simply-stated regulation under any common-sense reading plainly contemplates use of a monetary average, which must be applied evenly across the board **to avoid an unconstitutionally impermissible application.**

*Steager v. CONSOL Energy*, \_\_\_\_ \* 13.

AAIOE                      \$150,000 per well

*Antero Resources Corporation v. Dale W. Steager,*  
*State Tax Commissioner of West Virginia*  
Appeal No. 18-1106

Consumers Sales Tax Appeal

Whether rental expenses are directly used or consumed in the  
Production of Natural Resources.

# Audited Antero Resources

Crew Quarters & Related Costs	\$ 257,000
Porta-Potties & Related Costs	704,000
Trash Trailers & Disposal Costs	<u>81,000</u>
Total	\$ 1,042,000

## Office of Tax Appeals

Reduced the Assessment	\$ 23,000
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# Circuit Court Reversed OTA Decision

Tax Department correctly applied statute.

## CONSUMERS SALES TAX exempts:

(2) Sales of services, machinery, supplies and materials  
**directly used or consumed in the activities of manufacturing, transportation, transmission, communication, production of natural resources,.....**

W. Va. Code § 11-15-9(b)(2) (2008).

# **Issues:**

## **Crew Quarters**

One-Third exempt

Two-Thirds Taxable

## **Porta-Potties**

Not specifically authorized under

W. Va. Code § 11-15-9(b)(2)

Legislative Rule

## **Trash Bins**

Not used for debris from

Drilling Activities

## **Appeal Pending**

Antero Resources appealed

Circuit Court Decision to

WV Supreme Court.

# Circuit Court Decisions

*Ronald and Matilda Fowler v. WV  
State Tax Department,*

Civil Action No. 18-P-64

Circuit Court of Upshur County,

Judge Jacob E. Reger

Farm Use Valuation of Property

# Fowlers owned:

Christmas Tree Farm

Parcel 04-03M-22

Parcel 04-03M-20

Assessor Valued at  
Farm Use Valuation

## Parcel 04-3L-0022

+/- 166.5 Acres

Contiguous to the Christmas Tree  
Farm

13 Other People owned

Undivided Interest

7/168<sup>th</sup> Undivided Interest

Fair Market Valuation

# **Tax Department issued**

## **Property Tax Ruling 18-P-36**

An Undivided interest in land cannot be divided or separately assessed for property tax purposes.

Tax Department ruled Assessor correctly denied Farm Use Valuation for an Undivided interest in land.



# Outcome

## Circuit Court ruled:

- Could not apply  
FARM USE VALUATION  
to 7/168<sup>th</sup> UNDIVIDED interest land
- While applying  
FAIR MARKET VALUE  
to the remainder of same tract of land

## Conclusion of Law 3

W. Va. Code § 11-4-9 “...does not authorize a county Assessor to value undivided interests in a single tract of land under two different valuation methods.”

*The Silver Creek Association, Inc., v.  
Tom Lane, Assessor of Pocahontas County, and  
Dale W. Steager, State Tax Commissioner*

Civil Action No. 18-AA-1  
Circuit Court of Pocahontas County,  
Judge Jennifer Dent

**Property Tax Ruling 18-49**

Taxability of Commercial Space

In a Condominium

Uniform Common Interest Ownership Act

W. Va. Code § 36B-1-101, *et seq.*

# Condominium: The Lodge at Silver Creek

## Silver Creek Properties

- Developed ski resort 1988
- Created the Condominium Carve Out 19,600 Sq. Ft. Commercial Space
- Silver Creek Properties retained ownership paid ad valorem property taxes

## Commercial Space

- All rights owned by Silver Creek Properties were transferred to Snowshoe Mountain
- Assessed to Silver Creek Properties or Snowshoe Mountain

# 2014 Litigation

*The Silver Creek Association v.  
Snowshoe Mountain*

Civil Action No. 14-C-40

Circuit Court of  
Pocahontas County

## Resolved in 2016

- ✓ Snowshoe Mountain transferred
- ✓ Commercial Space to The Silver Creek Association

## 2016 TY

- ✓ Assessor Lane taxed  
The Silver Creek Association
- ✓ Request for Property Tax Ruling

# Requested a PTR

## Silver Creek Association

- Commercial Space is a Common Element
- Taxed to the individual unit owners
- No separate assessment for common elements
- W. Va. Code § 36B-1-105(b)(2)

## Assessor Lane

- Commercial Space outside definition of Common Element
- Properly be classified as a Unit
- Taxed to Silver Creek Association, owner
- Each Unit, including its interest in common elements, is a separate parcel or property
- W. Va. Code § 36B-1-105(b)(1)

# Result

## PTR 18-48

- Ambiguities in documentation
- Tax Department assumed
- Snowshoe Mountain retained certain development rights
- Commercial Space, common elements,
- Transferred all rights to The Silver Creek Association
- Assessed against Successor Declarant, The Silver Creek Association
- W. Va. Code § 36B-1-105(c)

## Circuit Court ruled:

- ✓ “The Deed and the Restated Declaration, and the Revised Declaration Plan clearly describe the Property as constituting part of the Common Elements of The Lodge at Silver Creek.”
- ✓ Classified as Common Elements  
Taxable according to  
W. Va. Code § 36B-1-105(b)(2)

*Publishers Place, Inc., v. WV State Tax Department*  
Civil Action No. 18-C-166  
Circuit Court of Cabell County, Judge Farrell

Publishers Place

Conducts writing seminars in Huntington

**Mission:**

To encourage & promote the publishing arts in  
West Virginia and the Mid-Atlantic states.

# Requested a PTR

Publishers Place

Section 501(c)(3) Entity

Personal property should be exempt from ad valorem taxation as property used for charitable purposes

W. Va. Code § 11-3-9(a)(12)

## PTR 18-28

➤ Insufficient information to demonstrate personal property exclusively for charitable purposes.



# Cross Motions for Summary Judgment

## **Critical Facts**

- 300 Students over 20 years
- Tuition \$175-\$185 per class
- If you publish a book, Publishers Place charges 18% of sales price
- Additional Charges for Editorial Development & Management
- No information regarding Tuition waivers for students

# Circuit Court ruled:

Publishers Place was not exempt.

*Wellsburg Unity Apartments v. County Commission of Brooke County*

- Entity must be a Section 501(c)(3)
- Property must be used exclusively for Charitable Purposes

Syll. Pt. 3.

## Legislative Rule

Defines CHARITY as

✓ a gift

✓ “for the benefit of an indefinite number of persons.”

W. Va. State Rules § 110-3-2.9.

# Circuit Court reviewed

*Global Capital of World Peace v. Matkovich*,  
2017 WL 5192491 (Memorandum Decision)

*Maplewood Community, Inc., v. Craig*,  
607 S.E. 2d 379 (W. Va. 2004)

Restricting Class of Beneficiaries  
to paying customers means that the property is **not** used  
exclusively for charitable purposes.