

April 1988

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Recommended Citation

Ellen R. Archibald, *Proposed Nonproduction or Excess Acreage Tax: Viable Revenue Source or Unconstitutional Property Tax*, 90 W. Va. L. Rev. (1988).

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PROPOSED “NONPRODUCTION” OR “EXCESS ACREAGE” TAX: VIABLE REVENUE SOURCE OR UNCONSTITUTIONAL PROPERTY TAX?

In an attempt to create new funding for critically needed public services, West Virginia legislators in both the House of Delegates and the Senate submitted versions of an “excess acreage tax” during the 1987 legislative session. (Both bills were tabled, but one author has presented a revised version, a “nonproduction tax,” to the State Legislature in 1988). Analysis of the bills will show that either a nonproduction tax or an excess acreage tax fits the definition of a property tax more closely than that of a license or privilege tax.

As a property tax, a nonproduction tax or an excess acreage tax raises questions of state constitutionality primarily because such a tax is based on mere ownership, not value, of real property, and because it impacts holders of real property only, in a state in which all forms of property are to be taxed equally and uniformly under West Virginia Constitution of 1872 article 10, section 1. Tax exemptions in the bills as introduced appear to violate the state constitution.

Reconsideration of the constitutionality of property tax classification, through which different forms of property might legitimately be taxed differently, might lead to more effective taxation and increased revenues, as well as to incentives for jobs and for development of West Virginia’s natural resources, than would the excess acreage tax proposed in 1987 or the nonproduction tax proposed in 1988.

I. THE BILLS AND THE DRAFTERS’ PURPOSES

House Bill 3198, introduced April 7, 1987 by Delegates Thomas Knight and James Humphreys, both of Kanawha County, would have amended existing West Virginia Code 11-12-75. This section was first enacted in 1905 to charge corporations a one-time five cents per acre tax for the privilege of owning more than ten thousand

acres of land in the state.¹ The statute's constitutionality has never been tested.

The proposed amendment to article 12, "Business Franchise Registration Tax," would have changed classes of taxpayers and types of holdings subject to the tax, as well as the threshold, amount, and frequency of taxation. In proposing a tax to be paid by all corporations, partnerships, or sole proprietorships "owning, holding, or leasing more than two thousand acres," the drafters of H.B. 3198 wished to place the tax burden upon those actually controlling use of the land.²

Delegate Knight's 1988 proposal³ is not an amendment but an entirely new Code section, considerably more detailed than H.B. 3198. House Bill 4635, introduced February 22, 1988, is entitled "Nonproduction Tax on Acreage," article 12B of Chapter 11, West Virginia Code; it would cover "[e]very person, trust or estate, partnership, corporate or controlled group, as these terms are defined [in § 11-13C-2], holding, owning, leasing or having a controlling legal interest . . ." in West Virginia real property "not in production" during the tax year.⁴ This bill would impose an annual tax of two dollars per acre "on each separate interest" in unproductive property, i.e., two dollars each on the interests in coal, in oil or gas, in other minerals, in timber or other natural resources, in addition to two dollars on surface.⁵

Reporting and collection rulemaking authority are delegated to the state tax commissioner;⁶ the bill provides for the Tax Department

1. W. VA. CODE § 11-12-75 (1982) 1931 W. VA. Acts ch. 46 removed the word "annual" that modified "tax" in the Code, and added the current final sentence of the first paragraph § 11-12-75, to the effect that a corporation that has paid the tax would not need to pay it again.

2. Interview with Delegate Thomas Knight, W. Va. House of Delegates (Aug. 12, 1987).

3. See Appendix A.

4. Although the tax as written would reach individuals holding land for personal use, Delegate Knight lays primary emphasis upon business holders.

5. The bill does not address determination of the existence of minerals or "producible and marketable" timber where legal title to such interests is not severed from surface ownership.

6. W. VA. CODE ch. 29A, "State Administrative Procedures," (1986 Replacement Vol.), enacted in 1982, "requires of the Legislature that the rules and regulations of . . . agencies . . . should be reviewed by the Legislature in a manner properly respectful of the separation of powers but in keeping with the legislative force and effect of rules, regulations and regulations." W. VA. CODE § 29A-1-

to receive \$55,000 of annual revenues to cover its expenses in administering the tax. Net revenues would be allocated one-third to county school boards for educational projects to promote economic development and one-third to county commissions for public purposes to promote economic development. The legislature would allocate the final third to local programs benefiting senior citizens.

The nonproduction tax bill contains exemptions and credits to soften the tax's impact. The first one thousand unproductive acres of any of the listed interests would be exempt, along with actively farmed land. Other exemptions cover privately owned recreational land for which users are charged access fees; power and natural resource transmission rights of way; and acreage which cannot be made productive without invading or violating surface owners' rights.

Under H.B. 4635 taxpayers may take credit for the previous year's nonproduction tax on acres made productive in the current year. A credit for business investment to make real property interests productive could offset as much as 25% of the tax, with excess credit to be carried forward for up to four years.⁷

Each taxpayer could offset up to 25% of the annual tax by West Virginia unemployment compensation contributions for new employees hired to make acreage productive; this credit could continue for nine successive years if the employment continued.⁸ An employer would thus face increased excess acreage taxes if workers were laid off.

1. A state agency must submit any proposed rule to the Legislative Rule-Making Review Committee, and no rule can be implemented until the entire legislature has voted on it. W. VA. CODE § 29A-3-12(b).

Although § 29A-3-2(b) would allow the legislature to exempt a particular rule from compliance with the act, no cases were found which interpreted the scope of such exemptions under the 1982 statute. Cases decided under the old administrative procedures act, which did not require specific legislative approval before rules were implemented, indicated that "[t]he Legislature may not vest uncontrolled discretion in the Executive to promulgate rules and regulations, but must provide the Executive to promulgate rules and regulations, but must provide Executive with sufficient standards or policy for guidance [citations omitted]." *State ex. rel. Barker v. Manchin*, 279 S.E.2d 622, 631 (W. Va. 1981). Given the stated purpose of the 1982 act, any exemption granted by the legislature would presumably be valid only if the legislature specified strict guidelines.

7. This provision uses definitions from W. VA. CODE § 11-13C-3 (1987 Replacement Vol.), in an attempt to avoid conflict between the nonproduction tax and business incentive programs.

8. This provision is also keyed to W. VA. CODE § 11-13C-3; see *supra* note 7.

Delegate Knight believes, based upon state records of large land-owners, that natural resources companies, especially coal companies, that are also large employers would find the offset an incentive to avoid layoffs. Delegate Knight points out that in a severe economic downturn in which coal companies saw no alternative to closing mines, increased nonproduction taxes would provide West Virginia a cushion against lost personal and corporate income and severance taxes. On the other hand, large real property holders who do not have a large West Virginia work force would bear a relatively greater tax burden because their offset credit would be small.⁹

Delegates Knight and Humphreys sought in H.B. 3198,¹⁰ and Delegate Knight seeks in H.B. 4635 to increase state tax revenues, to induce sale of some land holdings not currently available for alternative development, and to offer employers an incentive to hire West Virginia workers or to maintain employment levels. To the extent that a nonproduction tax would encourage large acreage holders to sell land not currently generating income, Delegate Knight feels that, at the right price, new owners could afford to develop land not now considered viable for development.¹¹

Senate Bill 635,¹² introduced February 23, 1987 by Senator Thomas Chafin of Mingo County, would add a new section to article 1, chapter 7, "County Commissions Generally," of the West Virginia Code. The new § 7-1-3dd¹³ entitled "Authorization to tax corporations holding more than ten thousand acres of land," would give county commissions discretionary authority to levy against corporations an annual tax of ten cents per acre for land owned in the county in excess of ten thousand acres.

The Chafin excess acreage tax is intended to raise funds for county public services, particularly in counties where Senator Chafin be-

9. Interview with Delegate Thomas Knight, W. Va. House of Delegates (Aug. 12, 1987).

10. Because H.B. 4635, the 1988 nonproduction tax bill, appears to incorporate the features of H.B. 3198, this paper will deal only with the 1988 bill, as the current version of the proposed tax.

11. Delegate Knight, *supra* note 9.

12. See Appendix B.

13. The section number should probably be W. VA. CODE § 7-1-3ee, since W. VA. CODE § 7-

believes that out-of-state holders of large tracts are not now charged their fair share of taxes. Senator Chafin feels a need for increased taxation of large, particularly out-of-state, landholders, and because his goals are generally similar to those of Delegates Knight and Humphreys, he believes that the House and Senate bills should be considered together.¹⁴

II. CONSTITUTIONAL CONCERNS

A. Defining Property and Excise Taxes

1. Difference in Computation Basis

The West Virginia Constitution of 1872 is similar to that of many states in providing for taxation of real and personal property "in proportion to its value," and for taxation of "privileges, franchises, and incomes of persons and corporations" as the legislature shall decide.¹⁵ Legislators are not restricted to the ad valorem method in enacting new excise taxes, as they are in adding to property tax burdens, but statutes proposed or enacted do not always fit neat definitions of property and excise taxes.¹⁶ Many courts have discussed attributes of each kind of tax in categorizing disputed tax measures.¹⁷

14. Interview with Senator Thomas Chafin, W. Va. Senate (Sept. 22, 1987).

15. W. VA. CONST. art. X, § 1.

16. An "ad valorem" tax is, literally, based upon the value of the property taxed. An excise tax, whether called privilege tax, license tax, occupation tax, or business tax, is levied "upon the manufacture, sale, or consumption of commodities . . . , upon licenses to pursue certain occupations, and upon corporate privileges." T. COOLEY, 2 CONSTITUTIONAL LIMITATIONS 988 (8th ed. 1927); T. COOLEY, THE LAW OF TAXATION § 45 (4th ed. 1924).

17. See, e.g., *Hixon v. School Dist.*, 187 Ark. 554, 60 S.W.2d 1027 (1933) (1% tax levied upon value of all state and county warrants paid held a property tax); *Thompson v. Kreutzer*, 112 Miss. 165, 72 So. 891 (1916) (excess acreage tax held a property tax); *J. & A. Freiburg Co. v. Dawson*, 274 F. 420 (W.D. Ky. 1920), *aff'd sub nom.* *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288 (1921) (warehouse tax upon withdrawal of liquor held a property tax); *Bromley v. McCaughn*, 280 U.S. 124 (1929) (federal gift tax held to be an excise tax, not a direct tax); *Society for Savings v. Coite*, 73 U.S. (6 Wall.) 594 (1868) (annual .75% tax on deposits of savings societies held to be a franchise tax); *Wanamaker v. School Dist. of Philadelphia*, 441 Pa. 567, 274 A.2d 524 (1971) (B & O tax using assessed value held not a property tax); *Reif v. Barrett*, 355 Ill. 104, 188 N.E. 889 (1933) (Retailers Occupation Tax held a privilege tax), *overruled on other grounds*, *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E.2d 633 (1969); *Hare v. City of Wheeling*, 298 S.E.2d 820 (W. Va. 1982) (police service fee held a property tax); *Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 308 S.E.2d 527 (W. Va. 1983), *cert. denied*, 466 U.S. 958 (1984) (fire service fee held a property tax).

Property . . . is not only the physical thing which may be the subject of ownership, but is the ownership itself. The essential attributes of ownership are the rights of dominion, possession, enjoyment, and disposition, and these rights are included within the protective provisions of the [state] Constitution to the same extent as the physical things to which they pertain.¹⁸

The Supreme Court of Mississippi, in *Thompson v. Kreutzer*,¹⁹ ruled unconstitutional an annual twenty cents per acre tax on owners of more than one thousand acres of Mississippi timber land. Landowners contended that the tax was a property tax which violated the state constitutional provision that "property shall be taxed in proportion to its value," but the Attorney General argued that the privilege of ownership could be separately taxed. The court agreed with the landowners because a "tax on a thing is a tax on all its essential attributes; . . . a tax on a thing owned is necessarily a tax on the right of ownership . . . [and] no tax can be imposed on the right of ownership which is not also a tax on property."²⁰

After the Kentucky legislature enacted a tax on removal of liquor from bonded warehouses, plaintiff liquor merchant in *J. & A. Freiburg Co. v. Dawson*²¹ argued in federal court that the measure was an unconstitutional property tax. The tax was not equal and uniform²² for all taxpayers, as required for a Kentucky property tax, but was rather imposed only upon liquor distributors. Both sides agreed that the tax could be upheld if it were found to be an excise tax, equal and uniform for all liquor distributors but not necessarily for all occupations. The court noted that legislators passing the tax under the Kentucky Constitution's provision for "license fees on . . . occupations" had in effect created a new occupation, that of owning, storing, and withdrawing liquor.²³

An excise tax could be levied when an act is performed, in this case at the time liquor was removed from a bonded warehouse, and

18. *Hixon*, 187 Ark. at 556, 60 S.W.2d at 1028 (citations omitted). ARK. CONST. art. XVI, § 5 (1874, amended 1980), similar to W. VA. CONST. art. X, § 1, provides that "[a]ll real and tangible property subject to taxation shall be taxed according to its value, No one species of property for which a tax may be collected shall be taxed higher than another species of property of equal value"

19. *Thompson*, 112 Miss. 165, 72 So. 891.

20. *Id.* at 167, 72 So. at 891-92.

21. *J. & A. Freiburg Co.*, 274 F. 420.

22. See *infra* text accompanying notes 76-100.

an excise tax could be measured by the amount of property involved in the act, here the amount of liquor removed.²⁴ However, because this tax became effective when passed, and because owners could not retrieve their own property without payment of the tax, “[u]nder no principle can the mere allowance of this property to remain in existence . . . be considered as a [taxable] privilege”²⁵

The district court in *J. & A. Freiburg* concluded that the state’s “real purpose [was] . . . to levy a substantial tax upon this . . . property, as property, and that the form of an occupation or excise tax was adopted in order that an object might be accomplished which the Kentucky Constitution forbade.”²⁶ Citing *Thompson v. Kreutzer*, the district court held that “the mere right to own and hold property cannot be made the subject of excises.”²⁷ Justice Brandeis, affirming *J. & A. Freiburg* in *Dawson v. Kentucky Distilleries & Warehouse Co.*,²⁸ reasoned that “[t]o levy a tax by reason of ownership of property is to tax the property. . . . It cannot be made an occupation tax or license tax by calling it so.”²⁹

Justice Brandeis’ opinion in *Dawson* departed from the Supreme Court’s traditional view that only real estate taxes were direct taxes.³⁰ A “direct tax,” subject to apportionment by population under the United States Constitution, article I, section 9, clause 4, is thought of as an ad valorem property tax on the state or local level.³¹ An “indirect tax,” or excise tax, not subject to apportionment, must be equal and uniform within each class of taxpayers,³² but not necessarily for all taxpayers under state constitutional provisions.³³

The Supreme Court reconciled the traditional view with *Dawson*, in which the warehouse activity tax had been ruled a direct property

24. *Id.* at 432.

25. *Id.* at 433.

26. *Id.*

27. *Id.* at 434.

28. *Dawson*, 255 U.S. 288.

29. *Id.* at 294.

30. The Court’s first decision expressing this view was *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

31. T. COOLEY, *THE LAW OF TAXATION*, *supra* note 16, §§ 38, 52, 108.

32. The fourteenth amendment minimum; *see infra* notes 84-85 and accompanying text.

33. T. COOLEY, *THE LAW OF TAXATION*, *supra* note 16 at §§ 38, 52, and 108.

tax, in *Bromley v. McCaughn*.³⁴ The Court explained that measures such as gift and estate taxes were “imposed upon the exercise of one of the numerous rights of property, but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner regardless of the use or disposition made of his property.”³⁵

The Court’s record of differentiating property and excise taxes stemmed from the belief when the Constitution was written that such taxes as gift taxes were not direct taxes and were therefore not required by the Constitution, article 1, section 8, to be uniform for all citizens. In addition, the Court had always been reluctant to “enlarge by construction, limitations upon the sovereign power of taxation by Article I, section 8, so vital to the maintenance of the National Government.”³⁶ The Supreme Court stated in *Society for Savings v. Coite*³⁷ that a property tax is calculated on the basis of property value, even if the valuation includes privileges that pertain to ownership. By contrast, an excise, franchise, license, or privilege tax does not depend on value, but rather on the taxpayer’s exercise of privileges.³⁸

The Supreme Court of Mississippi rejected a taxpayer’s contention that the corporate income tax was a property tax subject to the equal and uniform requirement of the Mississippi Constitution of 1890.³⁹ Rather, income tax was held to be an excise tax “imposed on the performance of an act,” that of producing or receiving income.⁴⁰

The Supreme Court of Pennsylvania, in *Wanamaker v. School Dist. of Philadelphia*,⁴¹ distinguished property ownership from use,

34. *Bromley*, 280 U.S. 124.

35. *Id.* at 137. The Court also pointed out that the graduated income tax, which is both direct and inherently unequally apportioned, is saved from the federal constitutional apportionment required by the sixteenth amendment.

36. *Id.*

37. *Coite*, 73 U.S. (6 Wall.) 594.

38. *Id.* at 603.

39. *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4, *suggestion of error overruled*, 126 Miss. 655, 89 So. 369 (1921), *dismissing appeal* 260 U.S. 710 (1923).

40. *Id.* at 52, 88 So. at 5.

41. *Wanamaker*, 441 Pa. 567, 274 A.2d 524.

which is “just one of the several rights incident to ownership.”⁴² Philadelphia’s business use and occupation tax, computed by a formula using assessed value of commercial and industrial real estate, was not considered a property tax that violated the state’s equal and uniform restrictions.⁴³ Because actual days of business use were also factored into the formula, the tax’s “legal incidence [was] on the privilege of using, making it a true excise tax.”⁴⁴

Delegate Knight’s 1988 bill purports to levy the nonproduction tax upon the actor who takes advantage of a privilege, in this case, “[e]very person, trust or estate, partnership, corporation or controlled group. . . .” Under S.B. 635 the tax would be limited to corporations. In both cases, however, the tax would be levied against a holder who has not yet exercised any privilege incident to ownership or control.

H.B. 4635 and S.B. 635, despite language implying a franchise or privilege tax, appear to be property taxes because they are levied upon the most basic of property rights, that of holding property. Each bill fails the constitutional requirement that property be taxed “in proportion to its value”⁴⁵ because each sets a flat tax amount per acre without regard to value of the property.

2. Difference in Tax Purpose

The purpose, rather than the source, of a tax can also serve to differentiate a property from a non-property tax. Holding a Retailers Occupation Tax to be a privilege tax rather than a property tax, which would be valid only if equally and uniformly levied upon all property owners, the Supreme Court of Illinois, in *Reif v. Barrett*,⁴⁶ described a property tax as one “levied merely for the purpose of raising revenue . . . [with no] attempt to control the use, operation, or regulation of the property.”⁴⁷ An occupation, excise, or privilege tax, on the other hand, is intended

42. *Id.* at 572, 274 A.2d at 526.

43. *Id.* at 575, 274 A.2d at 527.

44. *Id.*

45. W. VA. CONST. art. X, § 1.

46. *Rief*, 355 Ill. 104, 188 N.E. 889.

47. *Id.* at 109, 188 N.E. at 892.

to regulate and control a given business or occupation, or . . . for the privilege of . . . operating a given occupation, trade, or profession An occupation tax may be levied under the general police powers of the state, where its purpose is to regulate or control a given occupation, or it may be levied under the general sovereign powers of the state, where its sole purpose is to raise revenue.⁴⁸

One author⁴⁹ compared West Virginia Code of 1937 § 11-12-66 (now § 11-12-75), the one-time five cents per acre tax on corporations holding more than ten thousand acres, with the Mississippi annual tax of twenty cents per acre levied upon individuals as well, held unconstitutional in *Thompson v. Kreutzer*. The West Virginia tax attempted to separate for tax purposes the privileges of acquiring and holding land from the bundle of land ownership rights subject only to ad valorem property taxation.⁵⁰

A "pure license tax is payment for some special privilege or immunity, and underlying it, is always the thought of regulation, the revenue derived being of secondary importance."⁵¹ Dayton concluded that § 11-12-66, the original West Virginia excess acreage tax, was probably valid as a license tax because it was "levied upon a corporation an artificial creature of the state which exercises the privileges of corporate activity by the grace of the state."⁵² Nevertheless, that the state might have the power so to tax corporations

48. *Id.*

49. Dayton, *Excise Taxes in Their Relationship to Property Taxes*, 46 W. VA. L.Q. 21, 32 (1939).

50. *Id.* at 31-32.

51. *Id.* at 24.

52. *Id.* at 32. "A corporation is a creature of statute and is afforded only such power as the law which creates it allows." *Penberthy Electromelt Co. v. Star City Glass Co.*, 148 W. Va. 419, 422-23, 135 S.E.2d 289, 292 (1964) (a foreign corporation which had failed to comply with W. VA. CODE § 31-1-79, authorizing corporations to do business in this state, did not have the privilege of suing in state court).

Nor may a corporation contend that it is treated unfairly merely because corporations are treated differently from individuals. A state law taxing personal property of corporations and other non-individuals, but not that belonging to individuals, was held not to violate the fourteenth amendment equal protection clause. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 *reh'g denied*, 411 U.S. 910 (1973). Only "invidious" or "palpably arbitrary" discrimination by a state against corporations would be unconstitutional, *id.* at 360 (quoting *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 530 (1959), and corporate taxpayers in *Lehnhausen* failed to demonstrate that the statute was arbitrary. However, the Supreme Court's default presumption of constitutionality and the state's argument that relieving individuals of the tax was a step toward complete repeal of the tax did not specifically address the question of whether a valid basis for such differentiation existed.

does not contradict the revenue-producing property tax quality of § 11-12-66 (now § 11-12-75).

The stated purpose of H.B. 4635 and S.B. 635 is to raise needed revenues while encouraging development of idle land, particularly mineral land. Yet neither the nonproduction tax nor the excess acreage tax purports to regulate such development. Each fits the *Reif v. Barrett* definition of a property tax, not an excise tax, and therefore appears subject to property tax limitations.

3. Confusion in Tax Terms

Merely calling a tax an excise or privilege or occupation tax does not make it one.⁵³ In two recent West Virginia decisions, the Supreme Court of Appeals ruled that police and fire service fees were property taxes.

In *Hare v. City of Wheeling*,⁵⁴ a police service fee was determined under a city ordinance according to the assessed value of property. The court held that the fee was not a proper municipal charge under West Virginia Code § 8-13-13:⁵⁵ because a tax based upon property values was *per se* a property tax, and because Wheeling taxes were already at the maximum amount allowed under the Tax Limitation Act of 1932 and West Virginia Code § 11-8-6,⁵⁶ any addition would be unconstitutional.⁵⁷

53. *Thompson*, 112 Miss. 165, 72 So. 892; *J. & A. Freiburg*, 274 F. at 433; *Dawson*, 255 U.S. at 294; *Hukle v. City of Huntington*, 134 W. Va. 249, 255, 58 S.E.2d 780, 783 (1950) (“consumers sales tax” on theatre and amusement park admissions was invalid exercise of municipality’s authority to impose a gross sales tax; the court would “classify taxation on the basis of realities, rather than what the tax is called in the taxing statute . . .”); *Owens v. Fosdick*, 13 So. 2d 700, 153 Fla. 80 (1943) (because the Florida Constitution prohibits income tax, the state could not capitalize and tax appellant’s right to receive income from irrevocable trusts; where a tax in effect circumvents the constitutional prohibition, “it cannot be upheld, no matter in what terminology the taxing statute is couched . . .”).

54. *Hare*, 298 S.E.2d 820.

55. In contrast, the court upheld in 1981 a flat \$48 municipal waste disposal fee on each “owner or occupant of a residential unit” because the flat fee was reasonable and based upon actual users of the specific service. *Ellison v. City of Parkersburg*, 168 W. Va. 468, 284 S.E.2d 903 (1981) (quoting PARKERSBURG, W. VA. CODE § 955.07 (1979).

56. See *infra* note 72 and accompanying text.

57. *Hare*, 298 S.E.2d at 826.

Taxpayers seeking to overturn the Wheeling ordinance argued that it was unfair because it affected only property owners, not all users of police services; non-property-owners would not be taxed at all under the ordinance's calculation method. The court declined to discuss this point because it found the maximum property tax question dispositive.⁵⁸

Likewise, in *City of Fairmont v. Pitrolo Pontiac-Cadillac*,⁵⁹ the city used easily available property assessments as the basis for a fire service fee. The Supreme Court of Appeals, broadly defining property taxes as those based upon property values,⁶⁰ held the fee invalid under the *Hare* rationale. The City contended that property values, reasonably related to need for fire protection (unlike the more attenuated connection between police services and property values in *Hare*), were a fair basis for fire service fees, but the court again did not address that question.⁶¹

The court in *Pitrolo* distinguished its 1968 acceptance of a paving fee calculated upon front foot assessment⁶² as an apportionment method, not a property tax question.⁶³ It rejected a 1938 fire service fee based upon a special assessment of structures, the assets to be protected from fire,⁶⁴ as precedent for Fairmont's fee: the older case dealt primarily with uniformity of the levy, not with its underlying basis of property values.⁶⁵

Although Justice Neely's dissenting opinion in *Pitrolo* contended that the service charges were calculated on property assessments because property values bore a direct relationship to services provided,⁶⁶ the majority believed that "the character of a tax is determined not by its label but by analyzing its operation"⁶⁷ Justice Neely noted that overruling *McCoy*, the 1938 fire service fee

58. *Id.* at 822-23.

59. *Pitrolo*, 308 S.E.2d 527.

60. *Id.* at 532.

61. *Id.*

62. *City of Moundsville v. Steele*, 152 W. Va. 465, 164 S.E.2d 430 (1968).

63. *Pitrolo*, 308 S.E.2d at 532.

64. *McCoy v. City of Sisterville*, 120 W. Va. 471, 199 S.E. 260 (1938).

65. *Pitrolo*, 308 S.E.2d at 533.

66. *Id.* at 536 (Neely, J., dissenting).

67. *Pitrolo*, 308 S.E.2d at 529.

case, served only to prohibit an equitable method of funding an essential municipal service.⁶⁸ Ironically, he emphasized the actual operation of a fire service fee to demonstrate that it was a true municipal fee under § 8-13-13, for which “property value [is used] as an accurate indirect measurement of the use of fire protection . . . ,” not a property tax to raise revenues for general government needs.⁶⁹

Both the nonproduction tax and the excess acreage tax appear to be property taxes phrased in excise tax terms. Unlike service fees held to be property taxes in *Hare* and *Pitrolo*, neither the nonproduction tax nor the excess acreage tax bears any relationship to services provided, and neither should be upheld as an excise tax merely because it adopts an excise tax calculation method. Justice Neely’s strong dissent in *Pitrolo*, that the fee’s basis was related to its purpose, would not hold up in the case of a flat excess acreage tax for which the main purpose is revenue production. An excess acreage tax is far more fundamentally a property tax than the service fees in *Hare* and *Pitrolo*.

S.B. 635, unlike the nonproduction tax bill, proposes enabling legislation rather than tax enactment: county commissions would choose whether to enact the S.B. 635 tax. It is similar to West Virginia Code § 11-12-75, the five cents per acre corporate tax; because only corporations would be subject to the ten cents per acre county tax, this excess acreage tax could arguably fit the privilege or franchise tax definition.⁷⁰

Otherwise, the property tax problems of the nonproduction tax would apply to the S.B. 635 tax.

B. State Constitutional Limitations on Taxes

1. Dollar Limits

Since 1932, West Virginia property taxes have been limited to an annual total of fifty cents per one hundred dollars assessed value

68. *Id.* at 536 (Neely, J., dissenting).

69. *Id.*

70. Dayton, *supra* note 49, at 31; *see also supra* note 52.

for personal property used in agriculture and agricultural products while owned by the producer, and intangibles;⁷¹ one dollar per hundred dollars assessed value for owner-occupied residential property and farm property occupied and cultivated by the owner or a tenant; one dollar fifty cents per one hundred dollars assessed value for all other property outside municipalities; and two dollars per one hundred dollars assessed value for all other property within municipalities.⁷² The 1932 Tax Limitation Amendment was designed to reduce taxes during the Depression and to limit the taxing power of local authorities, whose levies were by far the bulk of government charges against property.⁷³

When the City of Huntington tried to exceed the 1932 property tax limits to cover both current needs and repayment of past debts, the West Virginia Supreme Court of Appeals ruled in *Bee v. City of Huntington*⁷⁴ that the amendment "makes no exception in favor of the exigencies or the necessities of local government [T]he several limitations on direct taxes are absolute"⁷⁵ The court cited an older case on the point that local authorities must use taxes to serve "the public interest, but must keep within the limit; and, if that be not adequate for public wants, all that can be said is, 'So the constitution is written.'"⁷⁶

Justice McGraw's concurring opinion in *Pitrolo* addressed the same issue.⁷⁷ While granting Justice Neely's assertion that striking down Fairmont's fire service fee as an improper property tax would strap city finances, Justice McGraw reiterated that a local government could not abrogate constitutional limits in place since 1932.⁷⁸

Thus if precedent is followed, any proposed property tax would be unconstitutional if it caused aggregate property taxes to exceed

71. Intangibles were exempted from property tax by a 1984 constitutional amendment, W. VA. CONST. art. X, § 1a, but the exemption is not to be effective until the new statewide assessments are implemented. The amendment would allow the legislature to enact an intangibles tax in future.

72. W. VA. CONST. art. X, § 1; W. VA. CODE §§ 11-8-5 to 6 (1987).

73. *Bee v. City of Huntington*, 114 W. Va. 40, 51, 171 S.E. 539, 544 (1933) (Kenna, J., concurring).

74. *Id.* at 40, 171 S.E. at 539.

75. *Id.* at 47, 171 S.E. at 542.

76. *Brannon v. County Court*, 33 W. Va. 789, 796, 11 S.E. 34, 36 (1890).

77. *Pitrolo*, 308 S.E.2d at 540 (McGraw, J., concurring).

limits set during the Depression of the 1930's. A non-production tax of two dollars per acre per real property interest would obviously exceed those limits. S.B. 635, if judged a property tax, would violate the state constitution if it pushed total taxes on any property over the constitutional limit, just as service fees as property taxes in *Hare* and *Pitrolo* were unconstitutional because they caused total property taxes to exceed constitutional limits.⁷⁹

2. "Equal and Uniform" and "No One Species" Clauses

Although the "equal and uniform" phrase is included in many state constitutions, some states have required taxation to be equal and uniform only within each class of property or privileges considered separately.⁸⁰ Others have ruled that property taxation must be equal and uniform across the board for all types of property, although excise taxes may be equal and uniform only within each class.⁸¹ The latter interpretation, currently accepted in West Virginia, effectively forbids classification of property by types, each of which might otherwise be taxed differently.

The Property Tax Limitation and Homestead Exemption Amendment of 1982 provided for the first statewide reappraisal and, once the reappraisal is implemented, for assessment "uniform as to all classes of property defined in section one of this article"⁸² Assessment and taxation in accord with this section shall be deemed to be equal and uniform for all purposes."⁸³

The Supreme Court, holding state taxes to be each state's concern under our federal system, has found the fourteenth amendment Equal Protection Clause standard to be met even if a state allows multiple

79. S.B. 635 would be subject to W. VA. CONST. art. X, § 7, limiting county taxes to no more than ninety-five cents annually per one hundred dollars assessed value unless three fifths of the voters approve.

80. Matthews, *The Function of Constitutional Provisions Requiring Uniformity in Taxation* (pt. 1), 38 KY. L.J. 31, 46 (1949-50).

81. *Id.*

82. See *supra* note 72 and accompanying text.

83. W. VA. CONST. of 1872, art. X, § 1b(A) (amended 1982).

classes of property or privileges for tax purposes.⁸⁴ The basis for any such classification must be reasonably related to the purpose of the tax and not arbitrary or capricious.⁸⁵

West Virginia taxes, both excise and property, are to be "equal and uniform" for taxpayers affected, but property taxes are also subject to the qualification that "no one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value."⁸⁶ The "no one species" clause in conjunction with the "equal and uniform" clause was earlier construed to mandate equal and uniform taxation within each class of West Virginia property. In *Charleston & S. Bridge Co. v. Kanawha County Court*,⁸⁷ the court approved classification for valuation purposes but not for taxation itself. The taxpayer disputed a statutory valuation method based upon annual earnings, rather than mere real estate value, of toll bridges and ferries, but the court held that the legislature could validly decree such a valuation method for property taxes. "[T]he same species of property throughout the state should be assessed at the same rate, according to its value . . . [;]"⁸⁸ a "tax upon all business of the same class, which is uniform as to that kind of business, is not unconstitutional."⁸⁹ Citation in later cases confused the issue of valuation with that of actual taxation.⁹⁰

84. *Allied Stores of Ohio*, 358 U.S. 522 (state tax exemption for goods owned by a nonresident and stored in a warehouse within the state did not deny equal protection to a resident taxpayer); *United Fuel Gas Co. v. Battle*, 153 W. Va. 222, 167 S.E.2d 890, cert. denied, 396 U.S. 116 (1969) (a party assailing a privilege tax classification, here the W. Va. Business & Occupation Tax, must show that the classification is "arbitrary and unreasonable").

85. *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 560 (1902) (Illinois statute, making criminal all combinations in restraint of trade, except those by farmers, held to violate fourteenth amendment arbitrary classification standard); *Brown-Forman Co. v. Kentucky*, 217 U.S. 563 (1910) (Kentucky license tax on persons blending or diluting liquor, but not on distillers of straight liquor, held not to violate the fourteenth amendment by arbitrarily classifying taxpayers); *Allied Stores of Ohio*, 358 U.S. at 527; *United Fuel Gas Co.*, 153 W. Va. at 251, 167 S.E.2d at 907.

86. W. VA. CONST., art. X, § 1.

87. *Charleston & S. Bridge Co. v. Kanawha County Court*, 41 W. Va. 658, 24 S.E. 1002 (1896), error dismissed, 168 U.S. 704 (1897).

88. *Id.* at 667, 24 S.E. at 1005.

89. *Id.* at 658, 24 S.E. at 1002, Syl. Pt. 4.

90. W. NEWHOUSE, 2 CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 1564, 2300 n.18 (2d ed. 1984); *Christopher v. James*, 122 W. Va. 665, 12 S.E.2d 813 (1940), overruled, *In re Assessment of Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649 (1959) (the court relied upon *Charleston & S. Bridge* in dismissing taxpayer's claim of discriminatory taxation, but the opinion

The Supreme Court of Appeals, in *In Re Assessment of Kanawha Valley Bank*,⁹¹ rejected the older cases to the extent that they con-
doned classifications of property for tax purposes.⁹² The court held
that the “Legislature has the power and the duty to designate the
manner in which the actual value of different kinds or ‘species’ of
property may be ascertained, but when such value has been ascer-
tained, all species of property must be taxed equally in proportion
to its value.”⁹³ Discriminatory rates or assessments of different kinds
of property are “forbidden, whether the taxpayer owns much prop-
erty or a small amount of property.”⁹⁴

Kanawha Valley Bank protested that bank stocks were assessed
at one hundred per cent of their value while real estate, for example,
was assessed at as little as forty per cent of its value for tax purposes;
evidence indicated that bank stock was probably the only type of
property assessed at one hundred per cent of its value.⁹⁵ In holding

does not reflect any basis for taxpayer’s mention of the equal and uniform clause of W. VA. CONST.,
art. X, § 1); *In re Tax Assessments*, 126 W. Va. 506, 30 S.E.2d 513 (1944), *aff’d sub nom.* Charleston
Fed. Sav. & Loan Ass’n v. Alderson, 324 U.S. 182, *reh’g denied*, 324 U.S. 888 (1945) (taxpayers
complained that securities forming part of value bank stock was assessed at 100% of face value,
while other businesses’ financial assets were valued at 70% or less of face value; the court held valid
the assessor’s reasonable value standard where the banks’ securities were of the highest quality, but
risk of nonpayment justified a lower valuation of others’ debt securities).

91. *Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649 (followed in *Killen v. Logan County
Comm’n*, 295 S.E.2d 689 (W. Va. 1982)).

92. The *Kanawha Valley Bank* court found seven prior verdicts justified on their facts. In four
of these cases, the court had dealt mainly with the valuation method. (*See Charleston & S. Bridge
Co.*, 41 W. Va. 658, 24 S.E. 1002; *In re National Bank of West Virginia*, 137 W. Va. 673, 73 S.E.2d
655 (1952); *In re Hancock Co. Fed. Sav. & Loan Ass’n*, 125 W. Va. 426, 25 S.E.2d 543 (1943); *Tax
Assessments*, 126 W. Va. 506, 30 S.E.2d 543). In two of the cases, taxpayers failed to prove unfair
tax assessments. (*See Banker’s Pochahontas Coal Co. v. County Ct.*, 135 W. Va. 174, 62 S.E.2d 801
(1950); *In re Tax Assessments Against the Southern Land Co.*, 143 W. Va. 152, 100 S.E.2d 555
(1957)). In one case which dealt with state income tax rather than property tax, the court referred
to the taxpayer’s reliance upon the equal & uniform clause of art. X, § 1. (*See Christopher*, 122 W.
Va. 665, 12 S.E.2d 813).

The *Kanawha Valley Bank* court stated:

We cannot accept the view that any of [the seven] cases would have been decided
contrary to the principles herein enunciated if the evidence of discrimination between species
of property had been as clear as it is in this case, and the taxpayer had relied solely upon
the ‘property’ provisions of Section 1, Article X, thus presenting . . . the precise question
. . . in this case.

Id. at 385, 109 S.E.2d at 671.

93. *Id.* at 386-87, 109 S.E.2d at 672.

94. *Id.* at 389, 109 S.E.2d at 673.

95. *Id.* at 353, 109 S.E.2d at 653.

that the rate of bank stock valuation must be reduced to parity with other property tax assessments, the court noted that a higher percentage assessment had the same effect as a higher tax rate for a given type of property.⁹⁶ However, the 1932 Tax Limitation Amendment did not “empower any taxing official or the Legislature to do by indirection what it could not do directly.”⁹⁷

The court stated in *In Re Tax Assessments*⁹⁸ that “[w]hile our State Constitution requires uniformity and equality in taxation, no one has ever believed that either could be attained as a practical matter,”⁹⁹ but the court in *Kanawha Valley Bank* returned to “doctrinal purity[,]” mandating no classification¹⁰⁰ except for the four maximum property tax rates enumerated in the West Virginia Constitution (1872), article 10, section 1.

Testimony in *Kanawha Valley Bank* suggested the existence of a *de facto* property tax classification system.¹⁰¹ Reality was, and is, that the court’s command is in conflict with local practice in administration of property taxes.¹⁰² The court recognized the problem and demanded that assessors, though not required to be perfect, correct their working interpretation of the property tax system.¹⁰³

A property tax of the type proposed in H.B. 4635 or in S.B. 635 fails the “equal and uniform” test because a flat fee per acre would constitute a different percentage of the value of parcels of equal acreage but different assessed values.¹⁰⁴ In each case, legislation would segregate the group of taxpayers with acreage beyond the exempt amount and would tax that group and its property rel-

96. *Id.* at 388, 109 S.E.2d at 672.

97. *Id.* at 387, 109 S.E.2d at 672. See *supra* note 72 and accompanying text.

98. *Tax Assessments*, 126 W. Va. 506, 30 S.E.2d 513.

99. *Id.* at 515, 30 S.E.2d at 517.

100. W. NEWHOUSE, *supra* note 90, at 1569.

101. *Kanawha Valley Bank*, 144 W. Va. at 353, 109 S.E.2d at 653; see also W. NEWHOUSE, *supra* note 90, at 1575.

102. W. NEWHOUSE, *supra* note 90, at 1575.

103. *Kanawha Valley Bank*, 144 W. Va. 346, 391, 109 S.E.2d 649, 674.

104. Professor Newhouse notes that, where there is a “territorial element,” a tax should be equal and uniform within the taxing unit, e.g., the county in the case of most property taxes. W. NEWHOUSE, *supra* note 90, at 1585. However, the effect would be the same either statewide under H.B. 4635, or within each county adopting an excess acreage tax under S.B. 635.

actively more heavily than property of like value not part of an taxed holding.

The property to be segregated under either bill differs only in quantity, not in kind, from other real property, and the bills do not explicitly attempt to classify property by type. The nonproduction and excess acreage taxes would lay additional tax only upon real property, contravening the presently followed construction of the "no one species" clause by taxing one type of property more heavily than others.

Even if S.B. 635 were construed as an excise tax because it applies to corporations, its provisions appear to fail the equal and uniform requirement for non-property taxes.¹⁰⁵ For example, if a corporate owner of coal underlying multiple surface tracts shared the per acre tax with a corporate surface owner on the basis of relative assessed values of coal and surface, each corporation would bear a lower burden than a corporate coal owner paying, presumably, the entire tax because the surface was owned by a non-corporation. Secondly, where two corporate owners' per acre surface assessments differed, the owner of coal underlying both tracts would bear different fractional shares of the flat excess acreage tax in each case, resulting in a varying excess acreage tax even if all the corporate holdings were fairly assessed for real estate tax purposes.

3. Property Exempted

Property expressly exempt from ad valorem taxation in West Virginia includes property used for educational, literary, scientific,

105. *Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649; *Arslain v. Alderson*, 126 W. Va. 880, 30 S.E.2d 533 (1944); *United Fuel Gas Co.*, 153 W. Va. 222, 167 S.E.2d 890.

The Supreme Court of Appeals, in *Douglass v. Harrisville*, 9 W. Va. 162, 165 (1876), noted that the art. X, § 1 equal and uniform restriction did not apply to counties or municipalities. However, in that case the court dealt with a city tax subject to a uniformity requirement under W. VA. CONST. art. X, § 9. Although no similar constitutional provisions specifically covers county taxes, W. VA. CODE § 11-8-10a (1987) and the Supreme Court of Appeals' mention of W. VA. CONST. art. X, § 1 among constitutional provisions pertinent to county taxes, in *Meador v. County Court*, 141 W. Va. 96, 104, 87 S.E.2d 725, 731 (1955), indicates no difference among state, county, and municipal taxes in this respect. W. VA. CODE § 11-8-6b (1987) provides for maximum county levies on each of the four classes of property described in the 1932 Tax Limitation Amendment, in the same proportions as state taxes under the Tax Limitation Amendment. In any case, the federal fourteenth amendment would mandate uniformity at least within each class.

religious, or charitable purposes, all cemeteries, and public property.¹⁰⁶ The provision of the West Virginia Constitution, article 10, section 1, that

'all property both real and personal shall be taxed,' certainly shows . . . the intent of the framers . . . to declare in most explicit terms, that *all* property in the state should bear its equal share of the burdens of the Government, and that there should be no property exempted from taxation, unless it was specifically excepted in the Constitution itself.¹⁰⁷

A legislative exemption granted to the Chesapeake & Ohio Railway until its profits reached a certain level was unconstitutional because a profit-making enterprise was not a constitutionally tax-exempt entity.¹⁰⁸

Conversely, property used for the stated nonprofit purposes is to be exempt from all property taxes,¹⁰⁹ although property owned by nonprofit organizations and leased for private profit purposes is not exempt.¹¹⁰ Taxpayers sued the Cabell County Assessor for exempting the Odd Fellows Lodge from real estate tax on its real estate leased to a hotel chain. Construing strictly the constitutional provision that "property *used* . . . for charitable purposes . . . may be exempted," the West Virginia Supreme Court of Appeals held unconstitutional West Virginia Code § 11-3-9, providing tax exemptions for all property owned by a charity.¹¹¹

Both H.B. 4635, the 1988 nonproduction tax bill, and H.B. 3198, the 1987 excess acreage bill, purport to exempt a stated amount of acreage and farmland but neither mentions acreage held by colleges, universities, and other nonprofit organizations. Under the West Virginia Constitution of 1872, article 10, section 1, privately-owned acreage, even farmland, could not constitutionally be exempted from

106. W. VA. CONST. art. X, § 1; W. VA. CODE § 11-3-9 (1987).

107. *Chesapeake & O. Ry. v. Miller*, 19 W. Va. 408, 435 (1882), *aff'd*, 114 U.S. 176 (1885) (emphasis in original); *see also In re Hillcrest Mem. Gardens, Inc.*, 146 W. Va. 337, 119 S.E.2d 753 (1961) (although cemetery was not exempt from tax under § 11-3-9, the company's personal property was not).

108. *Miller*, 19 W. Va. 408.

109. W. VA. CONST. art. X, § 1; W. VA. CODE § 11-3-9 (1987).

110. *Central Realty Co. v. Martin*, 126 W. Va. 915, 30 S.E.2d 720 (1944).

111. *Id.* at 920, 30 S.E.2d at 724 (emphasis in original quote from the W. VA. CONST.; W. VA.

CODE § 11-3-9 has been amended to conform to the use restriction.
<https://researchrepository.wvu.edu/wvlr/vol90/iss3/10>

a property tax, but nonprofit holders of large amounts of land would be exempt (presumably only to the extent that they qualified for the basic nonprofit use tax exemption).

4. Technical Limitation

Provisions in the 1988 nonproduction tax bill for an offset of business expansion expenditures and new employee unemployment compensation contributions appear to violate the West Virginia Constitution (1872), article 6, section 30, mandating that no more than one topic be dealt with in one statute. The offsets could be viewed as a detail of tax computation, yet because they would dramatically alter the tax's impact on some, but not all, taxpayers, one might argue that the offsets are unconstitutionally concealed while they are part of this bill.¹¹²

III. EFFECT AND EFFECTIVENESS OF A NONPRODUCTION OR EXCESS ACREAGE TAX

A. Finance

A tax whose first goal is revenue production should produce the needed revenue while impacting private resource allocation as little as possible.¹¹³ Those of equal taxpaying capacity should bear the same tax, but unequal taxpaying capacity should be reflected in different, but equitably apportioned, tax bills. Both bills indicate mixed objectives of revenue production and social engineering through fiscal policy.

Delegate Knight estimated, based on state records of large landholders, that his original excess acreage tax would produce \$60,000,000 for the state in its first year.¹¹⁴ Because of offset credits in the 1988 bill, he believes that a reasonably accurate estimate of nonproduction tax revenues can be made only when the state begins to keep consolidated records of all land ownership statewide.¹¹⁵

112. *General Elec. Co. v. A. Dandy Appliance Co.*, 143 W. Va. 491, 103 S.E.2d 310 (1958).

113. A. SMITH, *THE WEALTH OF NATIONS* 777 (E. Cannon ed. 1937).

114. Interview, *supra* note 2.

115. Interview with Delegate Thomas Knight, W. Va. House of Representatives (Feb. 28, 1988).

Representatives of the coal, oil and gas and timber industries, speaking at a public meeting in September, 1987, did not contradict Delegate Knight's estimate of \$60,000,000 for an excess acreage tax. However, they emphasized the immediate problems for their companies and the longer range effects of corporate difficulties on the state.¹¹⁶

Mr. John Henning, Senior Vice President, Exploration and Production, Columbia Natural Resources, pointed out that Columbia had approximately 3,400 producing wells in West Virginia at that time, but that an excess acreage tax of two dollars fifty cents per acre per year on the company's holdings would make about 1,100 of those wells uneconomical, forcing the company to plug and abandon them. In such a case, at least some of Columbia's 1,750 employees in West Virginia would be affected by reductions and transfers. Further, the company would find it difficult to justify exploration costs in West Virginia; under the general rubric of exploration costs are included acquisition of title or leases to acreage surrounding an anticipated valuable gas pool, 25 "buffer zones" to protect Columbia's investment in the gas land from drainage. Mr. Henning indicated that his firm would most likely increase its activity in neighboring states of Kentucky and Virginia if an excess acreage tax were passed in West Virginia.¹¹⁷

Mr. Richard Grist, Manager, Appalachian Group, Georgia Pacific Corp., noted that his company owned over 290,000 acres of timberland in West Virginia and would be severely impacted by an excess acreage tax.¹¹⁸ Businesses involved in land-intensive timber use found it unrealistic to say that any particular number of acres was an excess.¹¹⁹

While Delegate Knight believes that industry objections are made in an attempt to protect what he believes to be unfairly high profits,

116. Public Meeting in the House Chamber for the West Virginia Legislature Joint Committee on Government and Finance (Sept. 12, 1987) (Among business interest represented were Pocahontas Land Company, a subsidiary of the Norfolk & Western Railway Corp.; CXS Minerals; Columbia Natural Resources, a subsidiary of the Columbia Gas System, Inc.; Georgia Pacific Corp; and Western Pocahontas Properties Limited Partnership).

117. *Id.*

118. *Id.*

119. *Id.*

due to low taxation in West Virginia, it seems that longer range effects of a nonproduction or excess acreage tax are at least unpredictable.

Such taxes might well influence those owning or leasing thousands or millions of undeveloped acres to sell holdings, but future development of mineral resources would, in the coal industry's opinion, be much more difficult because large amounts of reserves under "unified control" are needed to justify development expenditures.¹²⁰ The excess acreage tax and, even with offset credits, the nonproduction tax appear to counter state tax incentives for business investment passed by the West Virginia Legislature in 1985 and 1986,¹²¹ at least for any industry needing a large amount of real property interests.

Several authors, reviewing the problems of coal land taxation in West Virginia, have suggested that higher taxation of coal lands may discourage mining geared to conservation of resources, as coal operators develop the easiest-to-reach seams in order to cover taxes with proceeds of production.¹²² Nearly a half-century ago, one writer proposed a combination of a "mortmain" tax on excess mineral reserves, to discourage accumulation beyond those required for prudent investment, and lowered ad valorem taxes on the total of land under development plus a "reasonable ratio" of reserves to land in production.¹²³ However, this concept, described during the period when equality and uniformity of taxation by class was accepted in West Virginia,¹²⁴ would be unacceptable under the current West Virginia interpretation of the "no one species" clause as prohibiting tax classifications of property.¹²⁵

120. Campbell, Johnson, and Hays, *Ad Valorem Taxation of Coal Bearing Lands in West Virginia - A Viewpoint of the Coal Industry*, 76 W. VA. L. REV. 343, 358 (1974).

121. W. VA. CODE, §§ 11-13C-1 to -13 (Business Investment and Jobs Expansion Credit); *id.* §§ 11-13D-1 to -9 (Business and Occupation Tax Credit for Industrial Expansion and Revitalization and for Research and Development Projects); *id.* §§ 11-13E-1 to -7 (Business and Occupation Tax Credit for Coal Loading Facilities) (1987).

122. Thompson, *State and Local Taxation of the Bituminous Coal Industry*, 76 W. VA. L. REV. 297, 298 (1974); Campbell, Johnson, and Hays, *supra* note 120; Williams, *Conservation of Mineral Resources: A Brief Survey*, 47 W. VA. L.Q. 247, 267 (1941).

123. Williams, *supra* note 122, at 268.

124. See *supra* note 90 and accompanying text.

125. See *supra* note 91 and accompanying text. This paper does not consider controlled development. Disseminated by The Research Repository at WVU, 1988

B. Administration

Leases have not been considered within the scope of West Virginia Code § 11-12-75,¹²⁶ on which H.B. 3198 was based, but H.B. 3198 and H.B. 4635 specifically impose a tax on lessees, as well as owners. Under current law, leaseholds may be separately assessed as personal property, so that the real estate value and the leasehold together total the real estate's value.¹²⁷ Otherwise, the full real estate value is presumed to include all component part values.¹²⁸ The two dollars per acre tax under H.B. 4635, the 1988 nonproductive tax bill, would presumably require assessment of all leaseholds of each real property interest and adjustment of underlying real estate assessments so that the tax could be fairly apportioned among owners and lessees.

In practice, parties commonly contract for one party (usually the lessee) to pay the total property taxes. Implementation of a non-production tax would raise questions of contractual liability for the tax, since neither a lessor nor a lessee could have foreseen a tax of the type or magnitude of a nonproduction tax.

IV. SHOULD RESTRICTIONS ON PROPERTY CLASSIFICATION AND AMOUNTS OF TAXATION BE CHANGED?

A. History

A limitation on property taxation since the state's beginning, the West Virginia "no one species" clause "was simply intended to make just that much more specific . . . the first declaration that all property shall be taxed alike according to its value [T]his section does not in any manner restrict the legislature in the imposition of

opment under the public trust doctrine or the suggestion of "development rights easements" vested in the State as the dominant estate. See Note, *The Public Trust Doctrine: A New Approach to Environmental Preservation*, 81 W. VA. L. REV. 455 (1979); Note, *Agricultural Land Preservation by Local Government*, 84 W. VA. L. REV. 961, 980 (1982).

126. 46 Op. Att'y Gen. 413 (W. Va. 1956).

127. W. VA. CODE § 11-5-4 (1987); *Great Atl. & Pac. Tea Co. v. Davis*, 278 S.E.2d 352 (W. Va. 1981).

128. *Great Atl. & Pac. Tea Co.*, 278 S.E.2d at 352.

taxes on privileges or anything else that is not property."¹²⁹ The drafters of the West Virginia Constitution of 1863 wished to avoid the Virginia system¹³⁰ under which certain classes of property were either under-assessed or exempted from ad valorem taxation.

Development of new kinds of property in the industrial expansion after the Civil War led states and the federal government to seek new sources of funding as taxes on real estate, the traditional source of wealth, became inadequate for increasing government expenses.¹³¹ To provide for equal and uniform taxation while reaching new types of property and implementing new types of taxation, some states allowed uniformity by class of property.¹³² In this century many states have permitted property classification for tax purposes because of problems with the older system requiring equality and uniformity across all types of property.¹³³

Classification of property with respect to the "no one species" clause normally refers to types of property subject to different taxes or different rates of tax.¹³⁴ The 1932 Tax Limitation Amendment's classification limiting aggregate tax burdens is a hybrid of quantity (by dollar limit) and quality (by use or location) classification, but it is unclear whether its drafters considered the possibility of different kinds of taxes on different classes, particularly since equality and uniformity by class were accepted at that time. The legislature's rejection of several proposals that would have allowed multiple property types for tax purposes, just before it passed the Tax Limitation Amendment,¹³⁵ does not necessarily mean that no classification was felt to be equitable. Kemble White, a former president

129. J. PAXTON, 3 DEBATES & PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA 68 (Ambler ed. 1939).

130. VA. CONST., art. IV, § 22-23.

131. Matthews, *supra* note 80, at 45.

132. *Id.*

133. *Id.*; J. HELLERSTEIN, STATE TAXATION 30 n.5 (1983). See, e.g., MD. CONST. art. XV; PA. CONST. art. VIII, § 1. Pennsylvania has also enacted statutes for "split level" property taxation, under which land and improvements are separately assessed and taxed. 72 PA. STAT. ANN., tit. 5341.7 (Purdon 1987).

134. Matthews, *The Function of Constitutional Provisions Requiring Uniformity in Taxation* (pt. 2), 38 KY. L.J. 177 (1949-50).

135. S.J. Res. 6, Reg. Sess. (1929); S.J. Res. 1, Reg. Sess. (1932).

of the West Virginia Bar Association and member of the Constitutional Commission of 1929, reported that the Commission unanimously felt that giving "general classification" powers to the legislature would not reduce or make fairer the tax burden but would "eventually make it more unequal."¹³⁶ However, the Commission suggested "a classification amendment limited largely to intangibles, in order to bring that form of wealth within the effective reach of revenue laws[,]"¹³⁷ indicating that Commission members understood and saw need for the power of controlled classification of property to broaden the tax base.

Without classification of different types of property, taxes cannot differentiate among uses and productivity of real and personal property. Taxes based solely on ownership reflect the older view that ad valorem taxation is the only fair way to share the cost of government,¹³⁸ but ad valorem taxation does "not provide the legislator or taxpayer with any realistic standard to use in judging the legal effect of specific tax legislation, or of the uniformity provisions"¹³⁹ Further, "[p]ractical defects in the ad valorem system show up . . . in the administration of the general property tax because of inequalities in assessment"¹⁴⁰

Where the Montana Constitution contained one tax provision apparently precluding property classification and another specifically mandating "uniform [taxes] on the same class of subjects" the court described the advantages of the second approach:

In theory, the doctrine of classification seeks to . . . shift the burden of taxes from property, as such, to productivity, or in other words, to impose the burdens of government upon property in proportion to its use, its productivity, its utility, its general setting in the economic organization of society, so that everyone will be called upon to contribute according to his ability to bear the burdens, or as nearly so as may be, and to relieve administrative officers from the apparent

136. White, *The Amendments Proposed by the West Virginia Constitutional Commission*, 38 W. VA. L.Q. 1, 11 (1931).

137. *Id.*

138. Matthews, *supra* note 134, at 194.

139. Matthews, *supra* note 80, at 83.

140. Matthews, *supra* note 134, at 204.

necessity of continuing the legal fiction of full valuation in the face of contrary facts.¹⁴¹

West Virginians seem to classify property regardless of the *Kanawha Valley Bank* ruling against classification. For example, a 1973 Attorney General's opinion stated that proposed "freeport" legislation, exempting inventory stored in a commercial warehouse from property tax, would be unconstitutional because it classified property.¹⁴² A 1986 constitutional amendment overcame the problem by exempting from ad valorem taxation "tangible personal property . . . in interstate commerce" temporarily stored in a West Virginia warehouse.¹⁴³

By the circular logic of deeming any tax that uses assessments as its basis to be a property tax, the Supreme Court of Appeals held municipal service charges in *Hare*¹⁴⁴ and *Pitrolo*¹⁴⁵ unconstitutional because in each case total taxes on the properties would then have exceeded the constitutional limits. Justice Neely's *Pitrolo* dissent offered a rationale for removing a fire service fee, even one based on property assessments, from the constantly-debated property tax category:

There is no correlation between the ownership of land *per se* and the need for fire protection, but there is an almost perfect correlation between ownership of buildings and personal property and the use of fire protection services

A fee differs from a tax not in its method of collection, but in the perfect correlation between use of government services and payment for the service.¹⁴⁶

Like the *Kanawha Valley Bank* interpretation of the "no one species" clause, the 1932 Tax Limitation Amendment has restricted new forms of taxation in West Virginia.

IV. CONCLUSION

Both the House and Senate proposals highlight the need for tax revision in West Virginia. They attempt to reach taxpayers who the

141. *Hilger v. Moore*, 56 Mont. 147, 151, 182 P. 477, 483 (1919).

142. 55 Op. Att'y Gen. 58 (W. Va. 1973).

143. W. VA. CONST. of 1872, art. X, § 1C (1987).

144. *Hare*, 298 S.E.2d 820.

145. *Pitrolo*, 308 S.E.2d 527.

146. *Id.* at 535-36 (Neely, J., dissenting).

bills' drafters believe do not now contribute their share of state and local government costs, but the bills seem flawed on both constitutional and practical economic grounds. H.B. 4635, like its predecessor H.B. 3198, appears to be unconstitutional because it would be an unequal and non-uniform property tax, because the amount of tax would exceed constitutional limits, and because it provides tax exemptions not authorized by the state constitution. S.B. 635 appears to be unconstitutional at least as an unequal and non-uniform tax on corporations, if not also as a property tax; it also provides an unauthorized tax exemption.

Although the drafters of the original West Virginia Constitution (1863) believed that equal and uniform taxation of all types of property was the fairest method, modern fiscal policy encouraging development and the funding of public services would be better served if property were classified to emphasize use over mere existence. Classification of property for tax purposes has been upheld and overruled by the West Virginia judiciary in the past, but current precedent prohibiting classification may be an unnecessary deterrent to progressive tax policy.

Classification would be consistent with the four classes' dollar limits set in 1932, although the dollar limits might reasonably be raised in light of late twentieth century demand for public services. Formal allowance of classification would also better reflect the reality of property tax administration.

Because the framers of the first West Virginia Constitution and voters since 1863 have affirmed the "no one species" clause, a constitutional amendment, rather than judicial reconsideration of the *Kanawha Valley Bank* rationale, should be used to restructure the West Virginia property tax system. If reasonable classification were allowed, citizens and their representatives could fashion a more effectively targeted and more equitable property tax system.

Ellen R. Archibald

APPENDIX A

H. B. 4635

(By Delegate Knight)

Introduced February 22, 1988

A Bill to amend chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article twelve-b, relating to taxation; establishing a nonproduction tax on acreage and providing for exemptions and credits for production, development and employment to reduce the nonproduction tax; dedicating the tax to and creating special revenue funds for the benefit of certain programs and projects of county boards of education, county commissions and local senior citizen programs; and penalties and procedure.

BE IT ENACTED BY THE LEGISLATURE OF WEST VIRGINIA:

That chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article twelve-b, to read as follows:

ARTICLE 12B. NONPRODUCTION TAX ON ACREAGE.

SECTION 11-12B-1. TAX ON ACRES OF LAND SURFACE, MINERALS, TIMBERS AND NATURAL RESOURCES HELD, OWNED, LEASED OR CONTROLLED WITHOUT PRODUCTION.

Every person, trust or estate, partnership, corporation or controlled group, as these terms are defined in section two, article thirteen-c of this chapter, holding, owning, leasing or having a controlling legal interest therein by trust, power of attorney, power of appointment or otherwise, any acre of land surface, coal, oil, gas or other minerals, timber or other natural resources which are producible and marketable in paying quantities on the first day of July, one thousand nine hundred eighty-eight, and each successive year thereafter, shall pay annually on or before that date to the state a tax of two dollars per acre on each such acre not in production during the tax year. The nonproduction tax shall be paid on each separate interest in whole or in proportion to the part of an interest held, owned,

leased or controlled in each acre of the interest so that a whole interest in an acre of land surface is taxed at the rate of two dollars per acre; a whole interest in an acre of coal is taxed at the rate of two dollars per acre; a whole interest in oil or gas is taxed at the rate of two dollars per acre; a whole interest in a single other mineral is taxed at the rate of two dollars per acre; and, a whole interest in timber or other single natural resource is taxed at two dollars per acre, subject to the exemptions and production credits provided in this article. The state tax commissioner shall collect the tax and prescribe such forms and promulgate such rules as are needed to file, pay and collect the tax; and, in the first year of the tax, such rules may be filed under the provisions of section fifteen, article three, chapter twenty-nine-a of this code; such filing is deemed hereby an emergency and shall not require approval by the secretary of state.

SECTION 11-12B-2. EXEMPTIONS

(a) The first one thousand acres of land surface, coal, oil, gas or other minerals, timber or other natural resources held, owned, leased or controlled by a person, trust or estate, partnership, corporation or controlled group are exempt from the nonproduction tax.

(b) All acres of land surface in production in agriculture, not primarily or substantially standing timber, and used in cultivation, crop rotation, pasturing, storage of products of agriculture or machinery or implements, Christmas tree production or other actual agricultural purposes are exempt from the nonproduction tax.

(c) All acres of land surface actually used primarily and substantially for recreational purposes by a business enterprise which sells, rents, leases or charges the public or its membership for the privilege of its use for recreational purposes are exempt from the nonproduction tax.

(d) All acres of land surface used in the transmission by wire, conduit or pipe of electricity, communications, water, coal, oil, gas or other minerals or natural resources are exempt from the non-production tax.

(e) All acres of coal, oil, gas or other minerals, timber or other natural resources which cannot be placed into production without an invasion or violation of the rights of the surface owner as provided by common law, statute, lease, right-of-way, agreement or court order.

SECTION 11-12B-3. CREDITS FOR PRODUCTION, DEVELOPMENT AND EMPLOYMENT.

(a) Any person, trust or estate, partnership, corporation or controlled group holding, owning, leasing or controlling, or which holds, owns, leases or controls in the future, any acre of land surface, coal, oil, gas or other minerals, timber or other natural resources and is subject to the nonproduction tax shall, when filing the tax reports for payment of the nonproduction tax each year, be allowed a credit to reduce the tax due in the current year in an amount equal to the portion of nonproduction taxes paid in the previous year which are attributable to those acres taxed which were brought into production since the first day of July of the previous year and remain in production through the first day of July of the current year, but such credit, plus other credits hereinafter provided, shall not exceed the amount of tax due in the current year and credits in excess of that amount which is applied in the current year may not be carried forward to be taken in future years and neither may they be carried backward to be taken as refunds or future years credit against the nonproduction tax except as hereinafter provided in subsections (b) and (c) of this section. The credits allowed in subsections (a), (b) and (c) of this section must be taken to the maximum allowed in the first year and in every successive year thereafter in which the credit was available to reduce the tax. Any credit not so taken in any year shall be forfeited. However, acres of surface land, coal, oil, gas or other minerals, timber or other natural resources brought into production after the effective date of this article shall be allowed credits in every year that such acre continues in or is not taken out of production through the first day of July and such credits shall be applied to reduce the nonproduction tax as herein provided.

(b) Any such taxpayer shall also be allowed a credit for the total sum of any qualified investment in any business facility or business

expansion, as defined in section three, article thirteen-c of this chapter, brought into use in this state on or after the effective date of this article, to reduce the nonproduction tax due in any current or future year by up to an amount equal to twenty-five percent of the nonproduction tax due in the current year and thereafter up to said twenty-five percent for the lesser of four successive additional years or until an amount equal to the total sum of the qualified investment has been taken as a credit or credits against nonproduction taxes due, but the application of this credit along with other credits allowed in any year shall not exceed the amount of tax due in the current year, and credits which are or were available but unapplied may not be carried forward to be taken as future year's credit against the nonproduction tax except to the extent herein allowed and no credit may be carried backward to be taken as a refund or otherwise taken to reduce past nonproduction tax obligations. An investment is a qualified investment if the business facility or expansion is brought into use in this state, on or after the effective date of this article and in the year preceding the first day of July when the credit therefrom must first be applied, in whole or in part, to the nonproduction tax then due, to produce, process, add value to, manufacture a product from, utilize, warehouse or store, ship or use in industry or commerce the land surface, coal, oil, gas or other minerals, timber or other natural resources produced and severed from any acre subject to the nonproduction tax and held, owned, leased or controlled as provided in section one of this article.

(c) Any such taxpayer shall also be allowed a credit for the total sum of any unemployment compensation contributions paid to the state on behalf of all new employees, as defined in section three, article thirteen-c of this chapter, employed after the effective date of this article and employed to work in a new job created as a result of the taxpayer's bringing any acre subject to the nonproduction tax into production after said effective date or employed to work in a new job created as a result of a qualified investment in a business facility or expansion as provided in subsection (b) above, including such contributions paid on behalf of new employees who are employed to bring any acre into production or to bring into use a qualified business facility or expansion, to reduce the nonproduction tax due in any current or future year by up to an amount

equal to twenty-five percent of the nonproduction tax due for the first year and for every successive year for up to the sum of ten years in which the employment continues to meet or meets the requirements for allowance as a credit, but the application of this credit along with other credits allowed in any year shall not exceed the amount of tax due in any current year and credits which are available in any current year which are not or cannot be applied in that year are forfeited except to the extent that there remains a portion of the credit in excess of the twenty-five percent limitation on application of the credit to reduce the nonproduction tax due in any one year which may be carried forward as herein provided and no credit may be carried backward to be taken as a refund or otherwise taken to reduce past nonproduction tax obligations.

SECTION 11-12B-4. AUTHORITY FOR AND DEDICATION OF NONPRODUCTION TAX FOR BENEFIT OF COUNTY BOARDS OF EDUCATION, COUNTY COMMISSIONS AND LOCAL SENIOR CITIZENS PROGRAMS; CREATION OF SPECIAL FUNDS IN OFFICE OF STATE TREASURER; METHOD AND RATIOS FOR DISTRIBUTION OF SUCH NONPRODUCTION TAX; EXPENDITURE OF SPECIAL FUNDS BY COUNTY BOARDS OF EDUCATION AND COUNTY COMMISSIONS FOR PUBLIC PURPOSES RELATED TO ECONOMIC DEVELOPMENT AND PRODUCTION OF COUNTY RESOURCES; REQUIRING SPECIAL BUDGETS AND REPORTS THEREON; AND DUTIES OF TAX COMMISSIONER AND STATE TREASURER.

(a) The nonproduction tax provided in this article is imposed pursuant to the provisions of section six-a, article ten of the West Virginia constitution. Sixty-six and two-thirds percent of the net proceeds of this nonproduction tax and any interest earned thereon shall be distributed by the state treasurer in the manner hereinafter specified, to the various county boards of education and county commissions of this state in which the acres of land surface, coal, oil, gas or other minerals, timber or other natural resources upon which this tax is imposed are located. The remaining thirty-three and one-third percent of the net proceeds of this tax and any interest earned thereon shall be appropriated by the Legislature to provide additional funding to programs that benefit directly the senior citizens of this state in their needs for improved local programs of nutrition, health care, housing, transportation, economic opportunity, com-

munity and others through existing or new programs as the need may arise such as, but not limited to, the programs of the commissions on aging, meals on wheels, retired senior volunteer programs, senior citizens centers, county and municipal housing authorities, community action and resources programs, home health care and other local programs, among the counties and municipalities of this state.

(b) In addition to the reports and other information required under the provisions of this article the tax commissioner is hereby granted plenary power and authority to promulgate rules requiring the furnishing by each taxpayer of such additional information as may be necessary to compute the county by county allocations required under the provisions of this section of the code. The tax commissioner is also hereby granted plenary power and authority to promulgate such other rules as may be necessary to implement the provisions of this section.

(c) In order to provide a procedure for the distribution of sixty-six and two-thirds percent of the net proceeds of such tax to such county boards of education and county commissions, there is hereby created in the state treasurer's office a special fund to be known as the "nonproduction tax school revenue fund" and another special fund to be known as the "nonproduction tax county revenue fund."

Thirty-three and one third percent of the net proceeds of such tax shall be deposited in the "nonproduction tax school revenue fund" and thirty-three and one-third percent of such net proceeds shall be deposited in the "nonproduction tax county revenue fund," from time to time, as such proceeds are received by the tax commissioner. The moneys in such funds shall be distributed to the respective county boards of education and county commissions entitled thereto in the manner set forth in this section. The remaining thirty-three and one-third percent of the net proceeds of such tax shall be deposited in the general revenue fund of the state for appropriation by the Legislature to local programs for senior citizens as hereinbefore provided.

(d) The moneys in the "nonproduction tax school revenue fund" and the moneys in the "nonproduction tax county revenue fund"

shall be allocated among and distributed annually by the state treasurer in the manner hereinafter specified on the first day of October following their collection during the tax year to the boards of education and county commissions entitled thereto. The state tax commissioner shall, as soon as practicable after collection of the tax but not later than the thirtieth day of July of each year, or later before the first day of October if the state treasurer agrees that after such date there remains ample time to fulfill his or her duties under this article, determine for the benefit of the state treasurer the amount of net proceeds from the nonproduction tax to be distributed county by county to each entity entitled thereto each year. On or before each distribution date, the state treasurer shall determine the total amount of moneys in each fund which will be available for distribution to the respective entities entitled thereto on that distribution date according to proportions equal to the net proceeds of the tax collected on the various herein taxed interests in, under or on land actually situate in each county as determined and reported by the state tax commissioner to the state treasurer each year. After determining the amount each county board of education and county commission is entitled to receive from the respective special revenue funds, a warrant of the state auditor for the sum due to each such entity shall issue and a check drawn thereon making payment of such sum shall thereafter be distributed to such county boards of education and county commissions.

(e) All county boards of education shall create a "nonproduction tax school revenue fund" which shall be the depository for moneys distributed to the county board of education under the provisions of this section. Moneys in such "nonproduction tax school revenue fund," in compliance with this section, may be expanded by the board of education for such educational purposes as the county board of education shall determine to establish and provide exemplary programs of education which by their existence and worth may attract economic development, production of resources and opportunity in the county: Provided, that a line item budgeted amount from the current levy estimate for a county board of education shall be funded at one hundred percent of the preceding year's expenditure from the general fund prior to the use of nonproduction tax school revenue fund moneys for the same general purpose.

(f) All county commissions shall create a "nonproduction tax county revenue fund" which shall be the depository for moneys distributed to the county commission under the provisions of this section. Moneys in such "nonproduction tax county revenue fund," in compliance with this section, may be expended by the county commission for such public purposes as the county commission shall determine to be in the best interest of the people of its respective county in supporting and funding public or private efforts through government programs or projects to aid economic development, production and land and resource utilization in the county including, but not limited to, projects to extend water and sewer infrastructure and service to new industry or lands or areas available and useful for economic development; to build, enlarge or improve industrial parks as recommended by or to be constructed by the county development authority; to build, enlarge or improve general aviation airports as recommended by or to be constructed by the county airport authority and to fund the county development authority for any general or specific purposes relevant to economic development programs or projects: Provided, that a line item budgeted amount from the current levy estimate for a county shall be funded at one hundred percent of the preceding year's expenditure from the county general fund prior to the use of nonproduction tax county revenue fund moneys for the same general purpose.

(g) On or before the twenty-eighth day of March of each year each county board of education and county commission receiving such revenue shall submit to the tax commissioner on forms provided by the tax commissioner a special budget, detailing how such special revenue is to be spent during the subsequent fiscal year. Such budget shall be followed in expending such special revenue unless a subsequent budget is approved by the state tax commissioner. All unexpended balances remaining in said special revenue funds at the close of a fiscal year shall be reappropriated to the budget for the subsequent fiscal year. Such reappropriation shall be entered as an amendment to the new budget and submitted to the tax commissioner on or before the fifteenth day of July of the current budget year.

(h) On or before the fifteenth day of December of each year the tax commissioner shall deliver to the clerk of the Senate and the

clerk of the House of Delegates a consolidated report of the special revenue budgets, created by this section, for all county boards of education and county commissions as of the fifteenth day of July of the current year.

(i) The state tax commissioner shall retain for the benefit of the state from the nonproduction taxes collected an amount not to exceed fifty-five thousand dollars annually as a reimbursement for the expenses of collection and administration of the nonproduction tax by the tax commissioner. The portion of the reimbursement retained from the tax collections on acreage in any one county shall be calculated by applying the same rate to the gross tax collections on acreage in every county.

(j) The “net proceeds of the nonproduction tax” means the total amount of said tax collected less the amount retained by the state tax commissioner as reimbursement for the expenses of collection and administration of the tax.

SECTION 11-12B-5. CRIMES AND PENALTIES; PROCEDURE AND ADMINISTRATION.

The provisions of article nine of this chapter for the crimes and penalties and of article ten of this chapter for procedure and administration are applicable in their entirety to this article.

NOTE: The purpose of this bill is to establish a tax on acres of land surface, coal, oil, gas or other minerals, timber and other natural resources which are held out of economic production; provide exemptions from the tax; provide credits for production, development and employment arising from production on such acreage; dedicate the tax to and create special revenue funds for certain educational, economic development and production of resources programs and projects of the boards of education and county commissions, and to local programs and projects to benefit senior citizens in this state; and to provide for penalties and administration of the tax.

This article is new; therefore, strike-throughs and underscoring have been omitted.

APPENDIX B

Senate bill No. 635

(By Senator Chafin)

[Introduced February 23, 1987; referred to the Committees' Finance]

A BILL to amend article one, chapter seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section three-dd, relating to the authority of a county commission to tax land held by a corporation in excess of ten thousand acres.

Be it enacted by the Legislature of West Virginia:

That article one, chapter seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section three-dd, to read as follows:

ARTICLE 1. COUNTY COMMISSIONS GENERALLY

§ 7-1-3dd. Authority to tax corporations holding more than ten thousand acres of land.

The county commission of any county is authorized to provide by proper ordinance that every corporation holding more than ten thousand acres of land *within the county* shall pay to the county a tax of ten cents per acre each year for the privilege of acquiring and holding land so acquired and held by it in addition to ten thousand acres. The proceeds of any tax enacted by a county commission under the provisions of this section shall be deposited in the county general fund and may be expended for such purpose as the county commission may direct.

NOTE: This bill would authorize a county commission to levy a tax of ten cents per acre per year on land acquired or held by a corporation in excess of 10,000 acres.

This section is new; therefore, strike-throughs and underscoring have been omitted.