

January 1984

## Taxation

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### Recommended Citation

Wendel B. Turner, *Taxation*, 86 W. Va. L. Rev. (1984).

Available at: <https://researchrepository.wvu.edu/wvlr/vol86/iss2/26>

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## TAXATION

During the survey period, West Virginia law with respect to taxation was simultaneously undergoing both extensive study by the West Virginia Tax Study Commission<sup>1</sup> and significant changes such as the beginning of implementation of the Property Tax Limitation and Homestead Exemption Amendment of 1982.<sup>2</sup> Other changes were wrought by decisions of the West Virginia Supreme Court of Appeals with respect to municipal service fees and Carrier Income Tax application. The court also dealt with property tax and business and occupation tax issues during the survey period.

### I. MUNICIPAL SERVICE FEES

*Hare v. City of Wheeling*, 298 S.E.2d 820 (W. Va. 1982).

*City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 308 S.E.2d 527 (W. Va. 1983).

The taxation decisions of the West Virginia Supreme Court of Appeals during the survey period which have caused the most significant public controversy and elicited the greatest reaction from the affected parties were *Hare v. City of Wheeling*<sup>3</sup> and *City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*<sup>4</sup> These decisions appear to be a reversal of previous holdings<sup>5</sup> which authorized the imposition by municipalities of certain user fees based on the value of property under the West Virginia Code.<sup>6</sup>

In *Hare*, the court held that a Wheeling municipal police service fee which was tied to the value of property in the city was an *ad valorem*<sup>7</sup> pro-

<sup>1</sup> WEST VIRGINIA TAX STUDY COMMISSION, INTERIM REPORT TO THE WEST VIRGINIA STATE LEGISLATURE, A TAX SYSTEM FOR WEST VIRGINIA IN THE 1980's (Jan. 1983) (available from the Tax Study Commission) [hereinafter cited as W. VA. TAX STUDY]. The West Virginia Tax Study Commission was created by House Concurrent Resolution No. 18 of the West Virginia State Legislature on March 13, 1982. The resolution mandated the Tax Study Commission to "recommend improvements in our state tax structure and related improvements in the structure of political subdivisions of the state . . ." *Id.* at 7. The final report of the commission will be submitted to the legislature in January of 1984.

<sup>2</sup> W. VA. CONST. art X, § 1b. Though the West Virginia Legislature has not yet enacted laws to fully implement the amendment, the amendment itself mandates a reappraisal of all real property in West Virginia. The tax commissioner has begun that reappraisal.

<sup>3</sup> 298 S.E.2d 820 (W. Va. 1982).

<sup>4</sup> 308 S.E.2d 527 (W. Va. 1983).

<sup>5</sup> The court in *McCoy v. City of Sistersville*, 120 W. Va. 471, 199 S.E. 260 (1938), upheld the imposition of a fire service fee based on property value. In *City of Charleston v. Board of Educ.*, 209 S.E.2d 55, 57 (W. Va. 1974), the court characterized a value-based fire service fee as a user fee and not a tax. The court in *Hare*, 298 S.E.2d at 825 n.7, dismissed these holdings as irrelevant since the particular issue of the conflict between the fees and the limitation amendment was not directly considered in those cases.

<sup>6</sup> W. VA. CODE § 8-13-13 (1976) provides in part as follows:

Notwithstanding any charter provisions to the contrary, every municipality which furnishes any essential or special municipal service, including, but not limited to, police and fire protection, . . . shall have plenary power and authority to provide by ordinance for the installation, continuance, maintenance, or improvement of any such service, to make

erty tax subject to the restrictions of the Tax Limitation Amendment of 1932.<sup>8</sup> Similarly, *Pitrolo* determined that a Fairmont fire service fee charged against the owners of buildings in relation to the value of those buildings was also unconstitutional for the same reason.<sup>9</sup> Both municipal ordinances were held to violate section 1 of article X of the Constitution of West Virginia because each city had already exhausted its maximum property taxing authority allowed under the amendment.<sup>10</sup> These decisions disallowed a major source of revenue for a significant number of municipalities in West Virginia.<sup>11</sup>

The court recognized the distinction between a user fee and a property tax. A user fee is a direct charge for a specific service collected from those who benefit from the service.<sup>12</sup> A property tax is a levy which is not related to benefits conferred, but instead is tied to the value of property.<sup>13</sup> The court rejected the argument in both cases that the municipal fees in question were user fees by concentrating on the clear evidence that the amount of the fees was *ad valorem*, that is, according to value.<sup>14</sup> Both *Hare* and *Pitrolo* rest heavily on an unstated assumption that an *ad valorem* basis necessarily makes a municipal fee an *ad valorem* tax.<sup>15</sup> The court did not take notice of

reasonable regulations with respect thereto, and to impose by ordinance upon the users of such service reasonable rates, fees and charges to be collected in the manner specified in the ordinance . . . .

<sup>7</sup> *Ad Valorem* means according to value. BLACK'S LAW DICTIONARY 52 (5th ed. 1979).

<sup>8</sup> 298 S.E.2d at 826. W. VA. CONST. art. X, § 1 sets limits on the maximum levels of property taxation which may be imposed on each of four classes of property in West Virginia. The amendment provides in part:

[T]he aggregate of taxes assessed in any one year upon personal property . . . shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants one dollar; and upon all other property situated outside of municipalities, one dollar and fifty cents; and upon all other such property situated within municipalities, two dollars . . . .

<sup>9</sup> 308 S.E.2d at 532.

<sup>10</sup> *Id.*; 298 S.E.2d at 826.

<sup>11</sup> At least 46 municipalities in West Virginia now impose police protection fees and 49 impose fire protection fees though the exact number which use an *ad valorem* basis is not stated. W. VA. TAX STUDY, *supra* note 1 at 33.

<sup>12</sup> W. VA. CODE § 8-13-13 (1976).

<sup>13</sup> 308 S.E.2d at 529.

<sup>14</sup> *Id.* at 530-31, the court cites extensive authorities which distinguish taxes and fees. In *McCoy*, 199 S.E.2d at 264, the court found:

We are unable to accept as sound the argument advanced that the word "users" be given a meaning under which a special class of property owners are laid under a burden which in all fairness, should be borne by all alike in proportion to property valuation under general taxation.

<sup>15</sup> 308 S.E.2d at 531-33. In *Hare* the court states: "We hold that where certain ordinances of the city of Wheeling impose upon owners of property a police service charge based upon the value

the possible existence of a hybrid class of fees which might be labeled *ad valorem* fees: user fees in which the direct benefits conferred upon the user of a service are directly proportional to the value of the user's property benefited by the service.<sup>16</sup>

The court's heavy emphasis in these decisions on the *ad valorem* nature of the charges levied against property owners has led municipalities around the state to quickly attempt to fashion new service fees on property owners. These newly designed fees do not rely on property valuation but on some other factors more closely related to the level of service provided, such as a square footage basis for a fire service fee.<sup>17</sup>

When the court is given the opportunity to rule on these new fee structures, it may find these fees to be reasonably related to the services provided and therefore bona fide fees not subject to the Tax Limitation Amendment. Such a decision would represent a retreat from the holdings of *Hare* and *Pitrolo*. The more likely result is that the court will again judge these fees by their operation and effect and not by their labels.<sup>18</sup> When a municipality has exhausted its *ad valorem* taxing authority on property, any additional property tax, even though not itself based on value, would necessarily cause the total property tax burden to exceed the permissible limits. The crucial question, then, is not whether a charge on property is *ad valorem*, but whether it is a tax or a user fee.

A distinction between user fees and property taxes which was not addressed in either case relates not to the *ad valorem* nature of the assessment, but to the basic character of the service supported by the charge. User fees charged against property owners must be related to special benefits to the property,<sup>19</sup> while property taxes may be used for general governmental expenses. In *State ex rel. City of Huntington v. Heffley*,<sup>20</sup> the court held that a

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of property . . . such ordinances impose, in fact, an *ad valorem* tax upon property." 298 S.E.2d at 826.

<sup>16</sup> Though not labeled as *ad valorem* fees by the court, the fire service charges in dispute in *McCoy* and *Charleston* were treated as if such a hybrid class of fees existed.

<sup>17</sup> *Sutton v. City of Parkersburg*, No. 83-C-306 (Cir. Ct. Wood County Apr. 14, 1983). This is the first test of a square footage based fire fee to reach the courts. Here the court held the square footage system of Parkersburg Ord. 781.01-05 to be a user fee and not an *ad valorem* tax, though an exemption for churches and other non-profit organizations was disallowed as being contrary to uniformity requirements.

The City of Morgantown has also proposed a new fire service fee based solely on square footage of buildings in the city. A prior proposed ordinance would have apportioned fire service fees on the basis of a complicated rate system combining gallons per minute of water flow and insurance rating factors. That proposed rate system was rejected by Morgantown City Council. Interview with Willard Lorensen, member of Morgantown Fire Fee Task Force (Sept. 2, 1983).

<sup>18</sup> 308 S.E.2d at 529.

<sup>19</sup> See *State ex rel. City of Huntington v. Heffley*, 127 W. Va. 254, 268, 32 S.E.2d 456, 463 (1944), for a discussion of the meaning of "special benefits to property."

<sup>20</sup> *Id.*

municipal fee for a purpose which benefits the community as a whole cannot be viewed as a special benefit to property within the municipality. Should the court accept this distinction between fees and taxes, it must invalidate any fees levied against property for support of general governmental services where the tax limitation has been reached. Though labeled as a fee, such a charge would clearly be a tax subject to the Limitation Amendment. The court would have to characterize police and fire services as special benefits to property in order to escape this dilemma.

Even if the court is able to avoid the apparent inherent conflict between the Tax Limitation Amendment and municipal ordinances which place the costs of police and fire protection on property owners, the court will still be faced with the issue of uniformity of application of fees,<sup>21</sup> an issue it was not required to address in *Hare* or *Pitrolo*. Further, there may well also be a fundamental federal constitutional prohibition of such non-uniform fees. The United States Supreme Court, in *Norwood v. Baker*,<sup>22</sup> dealt with special assessments on property. The Court held that:

[t]he exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation.<sup>23</sup>

This prohibition as it relates to special assessments against property has been consistently followed in other jurisdictions.<sup>24</sup> Therefore, this "taking" issue may serve to prohibit the imposition of special user fees on property owners for support of general governmental services such as police and fire protection.

West Virginia's Tax Limitation Amendment is at loggerheads with the very real and urgent needs of municipalities for revenues to support vital services such as police and fire protection. Now that the court has recognized the existence of this fundamental conflict, it is difficult to see how it can be satisfactorily resolved short of either drastic reductions in municipal services or a change in the West Virginia Constitution. The court may in fact be indirectly suggesting that the Tax Limitation Amendment of 1932 is fundamentally incompatible with the needs of modern local governments. By its deci-

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<sup>21</sup> 298 S.E.2d at 822-23. Appellants argued that W. VA. CODE § 8-13-13 does not allow for some users, but not all users of police service to be liable for user fees. However, the court did not need to address this issue since the case was decided on constitutional grounds.

<sup>22</sup> *Norwood v. Baker*, 172 U.S. 269 (1898).

<sup>23</sup> *Id.* at 279.

<sup>24</sup> See *Buettner v. City of St. Cloud*, 277 N.W.2d 199 (Minn. 1979); *Furey v. City of Sacramento*, 24 Cal. 3d 862, 598 P.2d 844, 157 Cal. Rptr. 684, *appeal dismissed*, 444 U.S. 976 (1979); *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980). Though *Norwood* and these cases refer to special assessments used to pay for various public improvements, it may be analogized to a special user fee against property used to support general governmental services.

sions the court may be creating pressure for a change in the state's basic property taxation system.<sup>25</sup>

## II. CARRIER INCOME TAX

*C & P Telephone Co. v. Rose*, 307 S.E.2d 620 (W. Va. 1983).

*C & P Telephone v. Rose*<sup>26</sup> represents a reversal of the court's recent trend toward expanding the limits of applicability of the Gross Carrier Income Tax.<sup>27</sup> The court reversed a decision of the Circuit Court of Kanawha County, which had issued a deficiency judgment against the company in the amount of \$6,591,687.94. This represented the tax on C & P's receipts for transmission of interstate telephone calls through its West Virginia lines.<sup>28</sup> C & P Telephone Company of West Virginia is an independent company with all of its facilities located within the State of West Virginia. It is a subsidiary of American Telephone and Telegraph Company (AT&T), which is affiliated with the twenty-two other AT&T subsidiaries throughout the United States.<sup>29</sup>

Justice Neely, writing for the court, did not find it necessary to reach the commerce clause and due process issues which usually dominate these types of interstate commerce cases.<sup>30</sup> Instead, this case was decided purely on the basis of construction of the meaning of the taxing statute.<sup>31</sup> The court held

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<sup>25</sup> The court's decision in *Killen v. County Comm'n*, 295 S.E.2d 689 (W. Va. 1982), which required assessments on true and actual value of property, would have caused a similar effect on the property tax system had it not been essentially nullified by the Property Tax Limitation and Homestead Exemption Amendment of 1982.

<sup>26</sup> 307 S.E.2d 620 (W. Va. 1983).

<sup>27</sup> W. VA. CODE § 11-12A-2 (Supp. 1983) provides:

Every motor vehicle carrier operating on the public highways of this State and every railroad car carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft, for the transportation of passengers or freight, doing business in the State shall pay to the State an annual tax for each calendar year. This tax shall be equal to the gross income from all business beginning and ending within the state multiplied by the respective rates as follows: . . . .

*Western Md. Ry. v. Goodwin*, 282 S.E.2d 240 (W. Va. 1981), *appeal dismissed*, 456 U.S. 952 (1982), imposed the Carrier Income Tax on switching fees and demurrage income from railway cars moving in interstate commerce. *West Virginia Motor Delivery Co. v. Goodwin*, decided in the same opinion, imposed the Carrier Income Tax on the trucking charge for delivery of meats to West Virginia customers which had been shipped from out of state.

For a comprehensive treatment of the court's recent decisions with respect to the Carrier Income Tax, see Lathrop, *Due Process and Commerce Clause Considerations under West Virginia Business and Occupation and Carrier Income Taxes—J.C. Penny to Milacron*, 85 W. VA. L. REV. 307 (1983) [hereinafter cited as Lathrop].

<sup>28</sup> 307 S.E.2d at 621.

<sup>29</sup> *Id.*

<sup>30</sup> See Lathrop, *supra* note 27.

<sup>31</sup> W. VA. CODE § 11-12A-2 (Supp. 1983).

that the company's receipts for carrying interstate calls was not income from business "beginning and ending within the state."<sup>32</sup>

The court based this ruling on two factors. First, Neely pointed out a unique technical characteristic of interstate phone calls, namely that no business transaction occurs unless someone in another state picks up a phone to complete a connection. This out-of-state transaction (picking up the phone) is absolutely required for a transaction to occur. Therefore, Neely concluded, that such business activity cannot begin and end in West Virginia.<sup>33</sup> Second, Neely found the method by which C & P is reimbursed for its interstate service to be a crucial factor. C & P is paid a set percentage of all interstate phone revenues of AT&T. The court held that this fact separates the company's income from direct connection to its in-state activities.<sup>34</sup>

Both of these rationales are confusing at best, since the company's facilities are completely within the state and all its services are performed inside the state. Neely asserted in his opinion that the use of this statutory phrase to decide the case will free taxing authorities and taxpayers alike "from the necessity of engaging in nebulous, even metaphysical analysis"<sup>35</sup> of interstate taxing issues. However, this new standard may create more questions than it answers.

While the *Complete Auto* test<sup>36</sup> and its subsequent interpretations provide an established framework for analysis of the permissible limits of taxation of interstate commerce, the court proposed the use of a bare definition. Business beginning and ending within West Virginia is that which is a "separate, distinct, time-consuming operation and not incidental to the interstate movement of goods."<sup>37</sup>

This definition, which, unlike *Complete Auto*, has had no extensive interpretation, provides little basis on which to predict the outcome of future

<sup>32</sup> 307 S.E.2d at 624.

<sup>33</sup> *Id.* The court seems to be defining business very broadly to include the out of state components of an interstate telephone transmission rather than confining the meaning of business to those parts of the transaction handled by C & P of West Virginia. The breadth of the definition thus determined the outcome of the case.

<sup>34</sup> *Id.* This requirement that there be a direct relationship between the business beginning and ending in West Virginia and the method of payment for the business transacted is a new concept. The fact that part of the interstate phone revenues paid to C & P may have originated in another state is held to be a dispositive factor by the court.

<sup>35</sup> *Id.* at 623.

<sup>36</sup> A tax on interstate commerce can be applied to an activity "with a substantial nexus with a taxing State, [be] fairly apportioned . . . not discriminate against interstate commerce, and [be] fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1979).

<sup>37</sup> 307 S.E.2d at 623 (quoting *Western Md. Ry.*, 282 S.E.2d at 247).

disputes over Carrier Income Tax liability in West Virginia as long as the current statute remains unchanged.<sup>38</sup>

The most likely result of the *C & P Telephone* case is that the legislature will be encouraged at its earliest opportunity to modify the language of the statute to extend its coverage to the limits of constitutional boundaries. This case would seem to indicate, however, that the court, even in the face of a changed statute, may be disposed to embark on a period of contracting rather than expanding the applicability of the Carrier Income Tax. There is no indication as yet however that this change of direction will also spill over into the Business and Occupation Tax arena.

### III. BUSINESS AND OCCUPATION TAX

*Hydraulics, Inc. v. Dailey*, 301 S.E.2d 605 (W. Va. 1983).

*Williams and Co., Inc. v. Dailey*, 303 S.E.2d 737 (W. Va. 1983).

*Armco, Inc. v. Hardesty*, 303 S.E.2d 706 (W. Va. 1983).

*Teavee Oil and Gas, Inc. v. Hardesty*, 297 S.E.2d 898 (W. Va. 1982).

During the survey period, the West Virginia Supreme Court of Appeals continued to use the same analysis of commerce clause and due process clause challenges to the Business and Occupation Tax on interstate businesses which it has used since *J. C. Penny Co., Inc. v. Hardesty*.<sup>39</sup> The court continued to apply the *Complete Auto* test,<sup>40</sup> while virtually ignoring that prong of the test which requires that the tax be fairly apportioned among the states involved in the subject business transaction giving rise to the taxable income.<sup>41</sup>

In *Armco, Inc. v. Hardesty*,<sup>42</sup> the Tax Commissioner appealed a ruling of the Circuit Court of Kanawha County which had held that certain divisions of Armco, Inc. were not subject to West Virginia's Business and Occupation Tax.<sup>43</sup> Armco is an Ohio corporation with four separate divisions, each of which conducts business in West Virginia. While Armco's mining division has a substantial presence in the state, both with respect to local employees and local facilities, the other three divisions have no such in-state contacts.<sup>44</sup> *Williams and Co., Inc. v. Dailey*<sup>45</sup> involved a similar situation. Williams and Co., Inc. is a Pennsylvania corporation which has three branch stores in West

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<sup>38</sup> *Id.* at 624-25. The court clearly states that the "beginning and ending" test has a narrower spectrum than the constitutionally permissible *Complete Auto* test.

<sup>39</sup> 264 S.E.2d 604 (W. Va. 1980). See also Lathrop, *supra* note 27 for a discussion of the case.

<sup>40</sup> 430 U.S. at 279.

<sup>41</sup> *Id.*

<sup>42</sup> 303 S.E.2d 706 (W. Va. 1983), *cert. granted*, 52 U.S.L.W. 3449 (Dec. 12, 1983) (No. 83-297).

<sup>43</sup> *Id.* at 708.

<sup>44</sup> *Id.* at 708-09.

<sup>45</sup> 303 S.E.2d 737 (W. Va. 1983).



Virginia. It also makes sales directly from the company's Pittsburgh office. Only the business and occupation tax on sales from the Pittsburgh office were at issue in the case. As in *Armco*, the Circuit Court of Kanawha County had ruled that the sales of the Pittsburgh division were not subject to Business and Occupation Tax.<sup>46</sup>

In both *Armco* and *Williams*, the court looked at each company's total operations in West Virginia as a single unitary business, even though each company operated separate independent divisions within West Virginia. The use of the unitary business concept resulted almost by definition in a finding of a sufficient nexus between each company and the state.<sup>47</sup> Justice Miller cited substantial authority in support of the use of the unitary business concept to establish the required nexus to support taxation.<sup>48</sup> When the court turned to consideration of the apportionment prong of the *Complete Auto* test, the analysis weakened considerably.

The opinion cites the state's varying rates of Business and Occupation Tax on different types of business activity as an indication of fair apportionment,<sup>49</sup> but this in-state apportionment of the tax burden has no relationship to apportionment of the tax base among the states involved. Justice Miller found that the total West Virginia receipts of each company were properly a part of the West Virginia tax base.<sup>50</sup> Unlike previous decisions in which the self-apportionment nature of the Business and Occupation Tax was simply summarily stated,<sup>51</sup> he did provide some support for this holding from other jurisdictions, but the cited cases all deal with two rather specialized types of business income: travel agency and leasing.<sup>52</sup>

In *Hydraulics, Inc. v. Dailey*,<sup>53</sup> the court found justification for taxing the

<sup>46</sup> *Id.* at 738-39.

<sup>47</sup> 303 S.E.2d at 714.

<sup>48</sup> *Id.* at 709-14.

<sup>49</sup> *Id.* at 714. The court seems to confuse and combine the *Complete Auto* requirements of fair apportionment of the tax base among the states with fair relationship of the tax to the services provided by the state. The varying B & O rates indicate only a fair relationship between the tax charged and the value of services provided by the state.

<sup>50</sup> 303 S.E.2d at 716.

<sup>51</sup> See, e.g., *J.C. Penney Co. v. Hardesty*, 264 S.E.2d 604, 610; *Cincinnati Milacron Co. v. Hardesty*, 290 S.E.2d 902, 904 (W. Va. 1982).

<sup>52</sup> The court cited three cases involving the rather specialized situation involving commissions of travel agents from selling tours and accommodations in out-of-state locations: *Ramsey Travel, Inc. v. Kondo*, 53 Haw. 419, 495 P.2d 1172 (1972), *appeal dismissed*, 410 U.S. 949 (1973); *McKinnis Travel Service, Inc. v. Washington*, 78 Wash.2d 229, 472 P.2d 392 (1970); *Pan American World Airways, Inc. v. Virgin Islands*, 459 F.2d 387 (3d Cir. 1972); and only three other cases, *In re Heftel Broadcasting Honolulu, Inc.* 57 Haw. 175, 554 P.2d 242 (1976), *cert. denied*, 429 U.S. 1073 (1977); *In re Grayco Land Escrow Ltd.*, 57 Haw. 436, 559 P.2d 264, *cert. denied*, 433 U.S. 910 (1977); *Collector of Revenue v. Wells Fargo Leasing Corp.*, 393 So.2d 1244 (La. 1981).

<sup>53</sup> *Hydraulics, Inc. v. Dailey*, 301 S.E.2d 605 (W. Va. 1983).

sale of replacement parts to out-of-state customers when those sales are incidental to mining repair services performed in West Virginia. This case dealt with the tax liability of two West Virginia mining machinery repair companies, Hydraulics, Inc. and Morgantown Machine and Hydraulics, Inc.<sup>54</sup> Both companies had received a favorable ruling from the Circuit Court of Kanawha County exempting them from payment of Business and Occupation Tax on the sale of parts to out-of-state customers.<sup>55</sup> These companies picked up the machinery from out of state, brought it to West Virginia for repair, and delivered the machinery back to the out-of-state customers.<sup>56</sup>

While sales to out-of-state customers are normally not subject to the Business and Occupation Tax, the fact that the sale of the replacement parts was inextricably intertwined with the in-state servicing of mining machines was held to subject the entire income from sales and service to the Business Occupation Tax.<sup>57</sup>

Unlike the court's apparent change of attitude toward the Carrier Income Tax, the West Virginia Supreme Court of Appeals has evidently decided to continue extending the tax on businesses involved in interstate commerce to the outer limits of constitutionality. It appears that the only way for such businesses to avoid the tax on their total West Virginia cross-company receipts will be to prove multiple taxation.

The court also considered the effect of administrative regulations under the Business and Occupation Tax on natural gas production. Justice Neely wrote the opinion for the court in *Teavee Oil and Gas Company, Inc. v. Hardesty*,<sup>58</sup> which upheld the State Tax Commissioner's disallowal of the method of valuation of natural gas production used by the taxpayer. Teavee Oil and Gas, Inc. paid Business and Occupation Taxes based on the average purchase price of gas at the well head as authorized by alternative (b) of the Commissioner's regulations.<sup>59</sup> The Tax Commissioner ruled that the value should be determined by alternative (c)<sup>60</sup> which allows use of the gross sales price of the gas less a fifteen percent allowance for transportation costs.

The court reasoned that the intent of the Legislature was to tax natural gas production based on its true and actual value.<sup>61</sup> The court held that

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<sup>54</sup> *Id.* at 606.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 608.

<sup>58</sup> *Teavee Oil & Gas, Inc. v. Hardesty*, 297 S.E.2d 898 (W. Va. 1982).

<sup>59</sup> *Id.* at 899, referring to BOT Regs. § 1.2a(F)(2)(b).

<sup>60</sup> *Id.*, referring to BOT Regs. § 1.2a(F)(2)(c).

<sup>61</sup> *Id.* at 900. The court stated, "[o]bviously it was the intention of the Legislature to tax true and actual value, and the tax commissioner's regulations are designed to establish reasonably convenient and accurate approximations of actual value."

whichever alternative method of valuation set out in the regulations most nearly approximates the true and actual value must be used.<sup>62</sup> This ruling means that a taxpayer may not, at least with the Business and Occupation Tax on natural gas production, follow the common taxpayer practice of using those alternative tax regulations which tend to minimize tax liability.<sup>63</sup>

#### IV. PROPERTY TAXES

*In re Tax Assessments Against Pocahontas Land Co.*, 303 S.E.2d 691 (W. Va. 1983).

*Cook v. Duncan*, 301 S.E.2d 837 (W. Va. 1983).

During the survey period, the West Virginia Supreme Court of Appeals clarified several procedures related to property assessment challenges before county commissions acting as boards of equalization and review in *In re Tax Assessments Against Pocahontas Land Co.*<sup>65</sup> The court also clarified the procedures required to perfect title under a tax deed in *Cook v. Duncan*.<sup>66</sup>

The importance of a clear definition of board of equalization and review procedures has increased with the passage of the Property Tax Limitation and Homestead Exemption Amendment of 1982.<sup>67</sup> This amendment mandates the reappraisal of all real property in West Virginia by 1985. The boards will be the forums in which all challenges to the new appraisals must be initiated.<sup>68</sup> The procedural questions addressed in *Pocahontas Land*, along with previous decisions defining the role and procedures of the boards,<sup>69</sup> will help establish the procedural framework for the many disputes which will certainly arise from so massive a property reappraisal program.

In *Pocahontas Land* a group of McDowell County taxpayers<sup>70</sup> challenged the assessment of surface property owned by the Pocahontas Land Company by presenting to the county board of equalization and review a petition for increased assessment. While the board officially rejected the petition, it pro-

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<sup>62</sup> *Id.*

<sup>63</sup> It is likely that the Tax Commissioner's regulations were promulgated at a time when natural gas prices were fairly stable and the recent rapid increases in prices, which caused a wide divergence in the results of using different alternative calculations, were not contemplated.

<sup>64</sup> The functions and procedures of the boards of equalization and review are set out in W. VA. CODE § 11-3-24 (Supp. 1983).

<sup>65</sup> *In re Tax Assessments Against Pocahontas Land Co.*, 303 S.E.2d 691 (W. Va. 1983).

<sup>66</sup> *Cook v. Duncan*, 301 S.E.2d 837 (W. Va. 1983).

<sup>67</sup> W. VA. CONST. art. X, § 1b.

<sup>68</sup> W. VA. CODE § 11-3-25 (1974).

<sup>69</sup> See *Kemp v. Boyd*, 275 S.E.2d 297 (W. Va. 1981); *Consolidation Coal Co. v. Krupica*, 254 S.E.2d 813 (W. Va. 1979); *Tug Valley Recovery Center, Inc., v. County Comm'n*, 261 S.E.2d 165 (W. Va. 1979).

<sup>70</sup> *Tug Valley* gave taxpayers standing to contest assessments of another property owner before the board.

ceeded to announce its intention to increase the assessment of all Class III surface property to \$300 per acre.<sup>71</sup> Pocahontas Land Co. requested and was granted a hearing which was conceded by all parties to have been "rather chaotic." After the hearing the board ordered the assessments increased, but the board's decision was reversed by the circuit court.<sup>72</sup>

The taxpayers who originally petitioned for the increased assessment of the company's land appealed to the West Virginia Supreme Court of Appeals,<sup>73</sup> which affirmed the lower court's ruling. The court affirmed on two grounds: first, that a quorum of the board of equalization and review must be present during a hearing for its decision based on that hearing to be valid;<sup>74</sup> and second, that the board may not consider data or evidence other than that presented at the formal hearing on a question of disputed assessment.<sup>75</sup> In this case, only one of the three board members was present for the hearing. Further, no evidence was presented at the hearing in support of increased assessments.

The court also provided some guidance for future disputes with respect to notice requirements and the time restraints on board of equalization and review action. Justice Miller wrote that a defective published legal notice required by the West Virginia Code<sup>76</sup> can be cured by either direct notice to the affected landowners by registered mail or by the mere appearance of the landowner at a board hearing on the issue in controversy.<sup>77</sup> Any claim to inadequacy of notice is thus waived by an appearance before the board.

As to time restraints on board action,<sup>78</sup> the court's decision sanctioned the expansion beyond twenty-eight days of the time allowed for the board to complete its work. The court's decision suggested that the board may begin its review and corrections to entries on the land books before its first official

<sup>71</sup> 303 S.E.2d at 694.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 695. The court decided that the group of taxpayers had standing to pursue an appeal even though they were not directly involved in the board's formal hearing on the assessment increase.

<sup>74</sup> 303 S.E.2d at 699.

<sup>75</sup> *Id.* at 699-701.

<sup>76</sup> W. VA. CODE § 11-3-24 (Supp. 1983) provides:

When it is desired to increase the entire valuation in any one district by a general increase, notice shall be given by publication thereof as a Class II-0 legal advertisement . . . . The date of the last publication shall be at least five days prior to the increase in valuation.

<sup>77</sup> 303 S.E.2d at 698.

<sup>78</sup> The relevant portion of W. VA. CODE § 11-3-24 (Supp. 1983), is:

The county commission shall annually not later than the first day of February, meet for the purpose of reviewing and equalizing the assessment made by the assessor. It shall not adjourn for longer than three days at a time until this work is completed, and shall not remain in session for a longer period than twenty-eight days . . . .

meeting. These actions are purely administrative functions which need not be part of the public hearings process.<sup>79</sup> Miller also intimated, based on case law from other jurisdictions,<sup>80</sup> that the board's meetings may extend beyond twenty-eight days. Such an extension would be allowed if required to complete hearings which are in progress but uncompleted as of midnight of the twenty-eighth day.<sup>81</sup> The exact parameters of this time extension are not made clear.

The court also dealt with procedural questions in *Cook v. Duncan*,<sup>82</sup> where the proper procedures for perfecting title through a tax deed were at issue.<sup>83</sup> The court held that a purchaser at a tax sale must comply *literally* with all statutory requirements in order to obtain good title to such property.<sup>84</sup> Appellant Cook had failed to pay property taxes due for the second half of the 1975 tax year on three lots located in Harper's Ferry.<sup>85</sup> Appellee Duncan purchased the lots at a tax sale in 1976 and was issued a tax deed by the county clerk of Jefferson County in May of 1978.<sup>86</sup> Cook was unsuccessful in having the tax deed set aside at the circuit court level and thus filed this appeal.<sup>87</sup>

The delinquent taxpayer in this case was entitled to have a tax deed set aside on three separate grounds: (1) that the county clerk failed to use due diligence in ascertaining the residence of the delinquent taxpayer so that a notice of right to redeem could be sent to the address most likely to effect actual notification;<sup>88</sup> (2) that merely filing a copy of a subdivision plat containing a description of the subject property fails to meet the explicit requirements of the Code,<sup>89</sup> since an actual new survey by a competent surveyor at the buyer's expense is required;<sup>90</sup> and (3) that the county clerk failed to commence publication of notice within the statutory period.<sup>91</sup>

The *Cook* holding demonstrates the court's continuing respect for the rights of landowners and its attendant reluctance to allow the dispossession of a delinquent property owner should that person appear and contest the is-

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<sup>79</sup> 303 S.E.2d at 700.

<sup>80</sup> *Id.* at 701. *See, e.g.*, *Universal Consol. Oil Co. v. Bryam*, 25 Cal.2d 353, 153 P.2d 746 (1944).

<sup>81</sup> 303 S.E.2d at 701.

<sup>82</sup> *Cook v. Duncan*, 301 S.E.2d 837 (W. Va. 1983).

<sup>83</sup> For a description of the process involved in perfecting title through a tax deed, see *Don S. Co., Inc. v. Roach*, 285 S.E.2d 491 (W. Va. 1981).

<sup>84</sup> 301 S.E.2d at 839.

<sup>85</sup> *Id.* at 838.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 837.

<sup>88</sup> *Id.* at 842.

<sup>89</sup> W. VA. CODE § 11A-3-21 (1974).

<sup>90</sup> 301 S.E.2d at 840.

<sup>91</sup> *Id.*

suance of the tax deed. The court's strict insistence on literal compliance with all statutory requirements may give pause to some potential buyers at tax sales who face an increasingly difficult and expensive task of perfecting title, and who are subjected to a high degree of uncertainty as to the validity of title for up to three years after purchase.<sup>92</sup>

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<sup>92</sup> W. VA. CODE § 11A-3-32 (1974) provides:

[A]ny person entitled to be notified . . . may, on or before October thirty-first of the third year following the sale, institute a civil action to set aside the deed.