No. 31735 – *Mt. State Bit Service, Inc., a West Virginia corporation, v. State of West Virginia, Department of Tax and Revenue*

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Starcher, J., concurring:

I concur in the majority's holding and reasoning. I write separately to respond to several misguided contentions asserted in the dissenting opinion filed by two of my colleagues.

Initially, I note that the dissenting opinion mistakenly claims that the majority opinion extended an across-the-board use tax exemption to the taxpayer for *all* of the taxpayer's business activities. The dissenting opinion wrongly states that the majority's ruling transformed a seller of blasting materials into a coal miner.

This distortion of the majority opinion by my dissenting colleagues is just wrong. The majority gives cognizance to the Legislature's intent of promoting the coal industry via the use of its tax policy.

Nowhere in the majority opinion was there a wholesale alteration of the character of the taxpayer's business as the dissent suggests. A careful reading of the opinion reveals that the exemption from use taxes approved by the majority applies *only to the taxpayer's performance of blasting services when involved in direct connection with the activity of coal mining.* Critically, the majority opinion centered upon the nature of the transactions at issue: the sale *and* utilization by the taxpayer of blasting materials to sever

embedded coal. Only those specific blasting activities by the taxpayer directly related to the production of coal were found to be entitled to the use tax exemption.[1]

Furthermore, the dissent makes the exaggerated claim that the taxpayer – and, for that matter, any business that conducts any activity involving exploring, developing, severing, extracting, reducing to possession or loading for shipment of coal – will in the future completely "escape tax liability." The dissenting opinion appears to have overlooked a critical fact that the taxpayer in this case conceded the applicability of the consumer sales/service tax to its direct retail sales of blasting materials that were not accompanied by the taxpayer's expertise in using those materials, and to its other business activities.

The use tax exemption at issue in this case was extended to the subject taxpayer upon the majority's well-reasoned conclusion that, based on existing statutory and regulatory definitions, the taxpayer's provision of blasting materials and blasting services qualify as items directly used in connection with the production of natural resources. All other activities of the taxpayer, which do not directly involve the production of natural resources, are taxable.

My colleagues also incorrectly argue in their dissenting opinion that principles of statutory construction were violated to reach this conclusion. Nothing could be farther from the truth. Well-ensconced principles of statutory construction authorize courts

[1]At issue in this case were the sales of blasting materials to customers who then required the taxpayer to use those blasting materials to sever coal from its bed because the customer involved did not employ a licensed blaster. The taxpayer, in this instance, was directly involved in mining coal.

interpreting legislative enactments to "change 'and' to 'or' and vice versa" where such conversion is necessary to harmonize the statutory provisions or to ensure that the intention of the Legislature is correctly effectuated. *Carper v. Kanawha Banking & Trust Co.*, 157 W.Va. 477, 517, 207 S.E.2d 897, 921 (1974) (quoting 50 Am.Jur. *Statutes* § 281 (1944).[2] In accord *Cogan v. City of Wheeling*, 166 W.Va. 393, 396, 274 S.E.2d 516, 519 (1981); *State v. Wester*, 269 Neb. 295, 300, 691 N.W.2d 536, 540 (2005) ("The laxity in the use of the conjunctive 'and' and the disjunctive 'or' is so frequent that the doctrine has been accepted that they are interchangeable and that one may be substituted for the other if to do so is necessary to give effect to any part of a statute or to effectuate the intention of the Legislature."); *Sharp v. State*, 817 N.E.2d 644, 647 (Ind.App. 2004) ("The words 'and' and 'or' as used in statutes are not interchangeable, being strictly of a conjunctive and disjunctive nature respectively, and their ordinary meaning should be followed if it does not render the sense of the statute dubious."); *Cruz v. Trotta*, 363 N.J.Super. 353, 358, 833 A.2d 72, 75 (2003) ("The words 'or' and 'and' are [often] used interchangeably, and the determination of whether the word 'and' as used in a statute should be read in the conjunctive or disjunctive depends primarily upon the legislative intent."); *Ex Parte Uniroyal Tire Co.*, 779

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[2]In Syllabus Point 20 of *Carper v. Kanawha Banking & Trust Co.*, the Court plainly held:

> Because of the frequent inaccurate usage of the disjunctive "or" and the conjunctive "and" in statutory enactments, courts have the power to change and will change "and" to "or" and vice versa, whenever such conversion is necessary to effectuate the intention of the Legislature and give effect to the overall provisions of a statute.

So.2d 227, 234 (Ala. 2000) (observing that "'this Court is at liberty in ascertaining the intent of the legislature to construe the disjunctive conjunction "or" and the conjunctive conjunction "and" interchangeably'"); *South East Pub. Serv. Corp. v. Commonwealth*, 165 Va. 116, __, 181 S.E. 448, 449 (1935) (recognizing that "'[w]henever it is necessary to effectuate the obvious intention of the Legislature, the courts have the power to change and will change "and" to "or," and vice versa'"); *see generally* 73 Am.Jur.2d *Statutes* § 156 (2001); 17 Michie's Jurisprudence *Statutes* § 60 (1994).

The majority properly determined that the definition of a "producer of natural resources" could not have been intended to be limited to only those business entities who performed the entirety of the list of mining activities supplied in conjunctive fashion in *W.Va. Code*, 11-15-2(t). The majority did not reach this decision in a vacuum, but only after looking to the additional statutory and regulatory provisions concerning "direct use." *W.Va. Code*, 11-15-9(g); 11-15-2(n)(2)(B); 110 W.Va.R. *Taxation* §§ 15.123.4.3.7; 15.123.4.3.7.b.4. Given that the Legislature expressly identified "blasting equipment and explosives" as qualifying activities under the "direct use" test, the majority determined that the activity under discussion (blasting) was clearly identified by the Legislature as subject to use tax exemption.

Unlike my dissenting colleagues, I am not willing to so quickly assume that the Legislature has enacted an absurd statute, one that creates a tax exemption from which no taxpayer could ever benefit. Furthermore, I recognize that the Legislature has had several

opportunities to change the statute, but I also recognize that it is difficult to enact a statute, and even more difficult for the Legislature to alter, amend, or repeal that statute. In sum, the Legislature's intent in enacting this statute is clear; the verbiage it chose to carry out that intent may have been sloppy, and sheer legislative inertia makes it well-nigh impossible to correct that language.

Consequently, the majority fairly reasoned that a statutory interpretation which limited the definition of "producer of natural resources" solely to those business entities who perform the entire litany of identified mining activities without exception – the interpretation suggested in the dissenting opinion – would fly in the face of clearly expressed legislative intent, as well as common sense. The correctness of this determination was further suggested by the Legislature's determination that entities performing only one particularized aspect of mining-related activities such as reclamation or waste removal are entitled to the exemption as natural resource producers. All of these factors combined strongly compelled the decision reached by the majority – a decision that comports with the overall spirit of the regulations promulgated by the Tax Department with regard to identifying exempt and non-exempt coal mining related activities.

Though the dissenting justices suggest that the majority's ruling will have disastrous financial consequences upon the State, that contention is clearly not supported by the record. Nothing was presented to this Court, in the briefs, the record or the oral arguments, to suggest that the Court's adoption of the taxpayer's argument would lead to

financial ruin for the State. Neither the Tax Department nor the taxpayer presented any evidence regarding the financial impact of this case on tax collections from the state's coal industry. The dissenting opinion is therefore engaging in sheer speculation by asserting otherwise.

Accordingly, I respectfully concur.