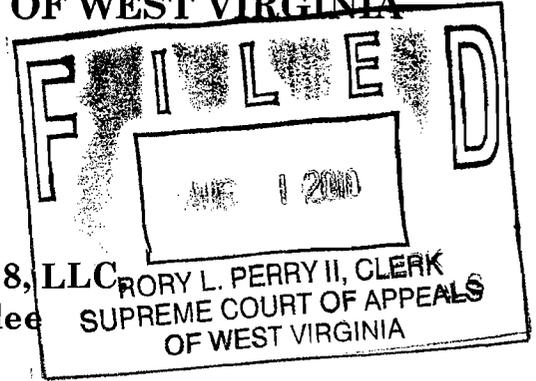


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

No. 35632

**FOUNTAIN PLACE CINEMA 8, LLC**  
**Petitioner-Below, Appellee**

**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**



v.

**CRAIG A. GRIFFITH, as State Tax Commissioner,**  
**Respondent-Below, Appellant**

Honorable Roger L. Perry, Judge  
Circuit Court of Logan County  
Civil Action No. 09-AA-1

**AMENDED AND CORRECTED BRIEF OF THE APPELLEE**

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## I. INTRODUCTION

This is a brief by the taxpayer/appellee, Fountain Place Cinema 8, LLC (“Fountain Place”), in response to a brief by Craig A. Griffith, State Tax Commissioner (“Tax Commissioner”) from an order of the Honorable Roger L. Perry, Judge of the Circuit Court of Logan County, vindicating the Legislature’s intent to promote “destination-oriented recreation and tourism” in the State of West Virginia by giving tax credits.

In his effort to reverse the Circuit Court’s decision, not only does the Tax Commissioner raise issues never presented to the Circuit Court, he presents issues not raised in his petition for appeal.

First, the Tax Commissioner’s brief raises for the first time as a separate assignment of error the allegation that the Circuit Court applied the “wrong statutory construction.” Compare Petition for Appeal at i with Brief of West Virginia State Tax Department at i.

Second, in his petition for appeal, the Tax Commissioner argued that, “The Circuit Court adopted a **30-30 Rule** for tax credits which Ignores the clear statutory language,” Petition for Appeal at i (emphasis supplied), but now argues, “The Circuit Court Adopted a **40-30 Rule** for Tax Credits Which is Not Found in the Statutory Language,” Brief of West Virginia State Tax Department at i (emphasis supplied), which raises the question, “Which is it – a ‘30-30 Rule’ or a ‘40-30’ Rule?”

Third, in his petition for appeal, the Tax Commissioner predicated his statutory construction argument on the maxim that “undefined terms will be given

their ordinary, everyday meaning,” Petition for Appeal at 2, but in his brief argues, “The man on the street provides the simplest test for the ordinary meaning of the key phrase at issue with the tax credit. Ask the man on the street one question: If you traveled 30 miles to watch a movie, would you consider yourself a tourist?,” Brief of West Virginia State Tax Department at 5, even though “tourist” is not the term at issue and this Court has never condoned public surveys as a means of divining legislative intent.

Fourth, in his petition for appeal, the Tax Commissioner argued that language in an unrelated statute defining “entertainment destination center” should be used to interpret different language in the statute at issue in this case, Petition for Appeal at 12-13, but in this case argues that the “legislative findings” of that different statute, as well as its definition of “tourism attraction,” should be used to interpret different language in the statute at issue in this case, Brief of West Virginia State Tax Department at 8-10. Moreover, the Tax Commissioner now extensively relies<sup>1</sup> upon regulations by an entirely different agency, the Division of Tourism, defining “independent activity,” “local market,” “destination camping,” “destination inn or bed and breakfast,” and “destination,” Brief of West Virginia State Tax Department at 11-14, 25, that are not only entirely different than the terms at issue in this case, but were not argued to the Circuit Court because they

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<sup>1</sup> Indeed, the Tax Commissioner spends so much of his brief discussing the purpose, language, and definitions in the Tourism Development Act and the Division of Tourism’s regulations, see Brief of West Virginia State Tax Department at iii – iv, that it is easy to be confused about what statutory terms are actually at issue in this case.

had not even been promulgated at the time of the Circuit Court's ruling.<sup>2</sup> Post-decision regulations by a different agency under a different statute defining different terms poor resources for determining legislative intent<sup>3</sup> and, moreover, it is unfair to the Circuit Court to rely upon regulations that were not promulgated until months after the Circuit Court's decision.

Finally, nowhere in the Tax Commissioner's petition for appeal did the phrase "in pari materia" appear, which in Latin means "upon the same matter or subject,"<sup>4</sup> because the Economic Opportunity Tax Credit Act does not involve "the same matter or subject" as the Tourism Development Act, but it appears in his brief, no fewer than five times. Brief of West Virginia State Tax Department at 7, 9, and 10.

The Tax Commissioner has never disputed that the relevant terms in this case are undefined and, because they are undefined, there is an ambiguity created as to the application of the statute. In determining upon whom the burden should fall of undefined terms in a tax statute, the Court Court properly ruled, based upon the evidence and arguments presented to it, that the burden should fall on the State as either the Legislature or the Tax Commissioner could have removed the

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<sup>2</sup> See Brief of West Virginia State Tax Department at 11 n. 2 ("The legislative regulations promulgated by the Division of Tourism were amended in 2010 and became effective May 27, 2010.")

<sup>3</sup> Even the Tax Commissioner begrudgingly concedes that "the two statutes authorize tax credits against different tax bases." Brief of West Virginia Tax Commissioner at 17.

<sup>4</sup> *Manchin v. Dunfee*, 174 W. Va. 532, 535 n.4, 327 S.E.2d 710, 713 n.4 (1984).

ambiguity by defining those terms. The Tax Commissioner's new argument that this Court should overrule its prior cases holding that ambiguous tax credit statutes must be construed in favor of the taxpayer should be rejected and this Court should affirm the judgment of the Circuit Court of Logan County.

## II. STATEMENT OF FACTS

Fountain Place agrees with the Tax Commissioner's assessment that the relevant facts are relatively undisputed, but does not agree with the Tax Commissioner's characterization of those facts. Rather, Fountain Place submits that Judge Perry's order correctly sets forth the facts that are dispositive of application of the statute involved:

1. Fountain Place owns and operates a 26,000 square-foot, eight-screen movie theater in Logan that was constructed in 2006. The theater has stadium seating, curved screens, and Dolby Surround sound, seats approximately 1,250 people, and includes an arcade area with approximately 15 games. Approximately 200,000 patrons visit Fountain Place Cinema each year. According to marketing studies conducted by Fountain Place, about thirty percent of those patrons are residents of eastern Kentucky.

2. By letter dated October 15, 2007, Fountain Place applied to the Tax Commissioner for a tax credit under the EOTCA, W. Va. Code §§ 11-13Q-1, et seq. (State's Ex. 1 to Official Transcript of April 16, 2008 Evidentiary Hearing (hereinafter "Hearing Tr.").)

3. Specifically, Fountain Place noted that it was a new business "engaged in the activity of destination-oriented recreation and tourism." *Id.*

4. Fountain Place's application noted that for the tax year 2006 it had a Qualified Investment of \$3,931,763 and a New Jobs Percentage of 10%. *Id.*

5. Pursuant to the provisions of the EOTCA, the maximum credit allowed to Fountain Place is \$39,317.63 per year, for the tax years 2006 through 2015.

6. By letter dated November 16, 2007, the Tax Commissioner denied the EOTCA credit sought by Fountain Place. State's Ex. 2 to Hearing Tr.

7. As justification for denying Fountain Place's request, the Tax Commissioner simply stated that "Fountain Place Cinema 8, LLC is not . . . eligible" for the EOTCA credit "[b]ased upon information available to" it. *Id.*

8. On January 17, 2008, Fountain Place filed an appeal to the OTA of the Tax Commissioner's denial of the EOTCA credit. Pet'r Ex. 1 to Hearing Tr.

9. After an administrative hearing held on April 16, 2008, and briefing by the parties, the OTA affirmed the Tax Commissioner's denial of the EOTCA credit by Final Decision dated March 2, 2009.

10. Both the Tax Commissioner and the OTA agreed with Fountain Place that the phrase "destination-oriented recreation and tourism" is ambiguous because it is not defined in the Act and no legislative rule explaining the credit exists. OTA Final Decision at 5.

11. The OTA concluded, however, that "a 'destination-oriented' location should be the draw itself, not merely ancillary to its surroundings. An entity engaged in the business of 'destination-oriented recreation and tourism,' then, must, at least, in and of itself draw travelers to its location while offering refreshment through an activity that amuses or stimulates." OTA Final Decision at 7.

12. The OTA then held that Fountain Place was not entitled to the EOTCA credit because "[n]o reliable evidence has been presented which would show that patrons travel to Logan, West Virginia for the primary purpose of viewing movies at Fountain Place Cinema. . . . Indeed, the evidence tends to show instead that Petitioner's business benefits from its proximity to the Hatfield-McCoy Trail System and the cluster of businesses surrounding it." OTA Final Decision at 8.<sup>5</sup>

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<sup>5</sup> Order at 2-3 (footnote omitted).

With respect to the issue of whether there was evidence that “patrons travel to Logan, West Virginia for the primary purpose of viewing movies at Fountain Place Cinema,” Judge Perry concluded as follows:

32. **The evidence in the record indicates that a certain percentage of Fountain Place’s customers are traveling from areas outside the Logan area for the purpose of watching a movie.**

33. According to Diana Barnette, the managing member of Fountain Place, the theater draws about 200,000 customers per year. Hearing Tr. 15:14.

34. Of the 200,000, Ms. Barnette testified that “about thirty percent (30%)[,]” or **60,000, of the customers visit from the Commonwealth of Kentucky.** *Id.* 15: 17-18.

35. Fountain Place was able to ascertain the number of customers that visit from Kentucky **by conducting a marketing study in which it offered free movie passes to customers who were willing to provide their zip codes.** *Id.* 16:1-6.

36. In addition to drawing 30% of its customers from Kentucky, Ms. Barnette testified that another 10% of Fountain Place’s customers are individuals visiting the Hatfield-McCoy Trail System (hereinafter “the Trail”). *Id.* 17:7-12.

37. Ms. Barnette and Fountain Place arrived at the 10% number based on conversations and interactions with customers visiting the theater. *Id.* 31:3-6.

38. The 80,000 number demonstrates that **Fountain Place has succeeded in drawing customers from areas outside the Logan area for the purpose of watching a movie.**<sup>6</sup>

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<sup>6</sup> Order at 10-11 (emphasis supplied and footnotes omitted). Of course, this is directly contrary to the Tax Commissioner’s assertion that there was “no verifiable evidence of the number of movie goers who came to Logan for the primary purpose of watching a movie at Fountain Place Cinema.” Brief of West Virginia State Tax Department at 3.

Moreover, with respect to the Tax Commissioner's characterization of the Fountain Place evidence as "anecdotal" and his complaint that it shows the same films as do theatres in other cities, Judge Perry observed:

Although the Tax Commissioner notes that this is anecdotal evidence, **it offered no evidence to the contrary.**<sup>7</sup>

Although the Tax Commissioner notes that Fountain Place shows the same films as do theatres in cities such as Cleveland, New York, Columbus, Pittsburgh, and other cities, **Fountain Place's evidence centered upon customers traveling from Kentucky, not those remote locations.** Moreover, the fact that someone does not "vacation" in Logan for purposes of "watching a movie," as noted by the Tax Commissioner, is dispositive of whether Fountain Place is a "destination-oriented recreation and tourism" business.<sup>8</sup>

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<sup>7</sup> Order at 11 n.23 (emphasis supplied). As this Court has observed, even the United States Supreme Court has held that something as important as whether restrictions on commercial speech advance a legitimate governmental interest can be satisfied by "anecdotal evidence":

The United States Supreme Court has explained that this burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Florida Bar v. Went for It, Inc.*, 515 U.S. at \_\_\_, 115 S. Ct. at 2377, 132 L. Ed.2d at 550 (citations omitted). **The Supreme Court indicated that such demonstration may be made through anecdotal evidence.** *Id.* In reviewing the transcripts of this case, we believe that we have found sufficient evidence to meet this prong of the test.

*Lawyer Disciplinary Board v. Allen*, 198 W. Va. 18, 27, 479 S.E.2d 317, 326 (1996)(emphasis supplied). Obviously, if a governmental body can satisfy its burden under the First Amendment by presenting anecdotal evidence that its restrictions on speech serve a legitimate governmental interest, a taxpayer can satisfy its burden under a statute by presenting anecdotal evidence that a certain percentage of out-of-state customers came to West Virginia for the sole or primary purpose of doing business with the taxpayer.

<sup>8</sup> *Id.* at n.24 (emphasis supplied).

Accordingly, Judge Perry correctly ruled that Fountain Place presented sufficient evidence under what the Tax Commissioner concedes is an ambiguous statute to satisfy the criteria for the tax credit.<sup>9</sup>

### III. DISCUSSION OF LAW

#### A. STANDARD OF REVIEW

In his order, Judge Perry set forth the appropriate standards of review as follows:

1. This case is not about any evidentiary dispute as the material facts are undisputed, but rather is about the proper application of state law. Consequently, determining what is meant by the phrase “destination-oriented recreation and tourism,” as that phrase is used in W. Va. Code § 11-13Q-19(a)(5), presents a pure question of law subject to *de novo* review.

2. The Court must reverse, vacate, or modify the OTA’s decision if the substantial rights of the Petitioner has been prejudiced because the administrative findings, inferences, conclusions, decision or order are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority or jurisdiction of the agency; (c) made upon unlawful procedures; (d) affected by other error of law; (e) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Id.*

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<sup>9</sup> Of course, this case is not about a governmental grant or even a tax deduction, but is merely about **a tax credit**, not a refund. If any business eligible for this particular tax credit, including Fountain Place, is unprofitable and owes no taxes, then the “tax credit” provides absolutely no economic benefit to the taxpayer nor does it place an economic burden on the State. Similarly, if a taxpayer, including Fountain Place, is only marginally profitable and owes taxes less than the amount of the credit, any economic benefit to the taxpayer and economic burden on the State is reduced accordingly. Therefore, although the **potential** economic benefit to Fountain Place is \$393,176.30, the reality is that Fountain Place may enjoy little, if any, of that economic benefit over tax years 2006 through 2015 because of its failure to turn a profit.

3. Finally, deference to agency interpretation is due only so long as “the agency interpretation is not in conflict with the plain language of the statute,” but “[a] statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.”<sup>10</sup>

Applying these standards of review, Judge Perry correctly concluded, “When considering the 80,000 individuals that visit Logan to view the most recent movie releases, it is evident that Fountain Place has succeeded in creating economic opportunity, and thereby satisfies the socioeconomic intent and purpose of the EOTCA.”<sup>11</sup>

**B. THE CIRCUIT COURT CORRECTLY HELD THAT THE PHRASE “DESTINATION-ORIENTED RECREATION AND TOURISM” IS AMBIGUOUS AND, THUS, MUST BE CONSTRUED TO GIVE EFFECT TO THE INTENT OF THE LEGISLATURE AND THE GENERAL PURPOSE OF THE ECONOMIC OPPORTUNITY TAX CREDIT ACT.**

The Court will note that the Tax Commissioner concedes that the statute at issue is ambiguous because the term “destination-oriented recreation and tourism” is not defined. Brief of West Virginia Tax Department at 5 (“the Tax Department . . . concluded that the term is not clear and unambiguous”). The Tax Commissioner further concedes that the term is subject to judicial construction. *Id.* (“If a statute includes a term that is not defined, then courts must construe the statute.”). Thereafter, however, the Tax Commissioner’s analysis fails in three respects.

First, even though it concedes that the statute is not clear, the Tax Commissioner is forced to argue, if its interpretation is to be sustained, that the

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<sup>10</sup> Order at 3-4 (footnotes and citations omitted).

<sup>11</sup> Order at 15.

statute is clear: “the definition . . . adopted by the Circuit Court emphasized the recreational aspect and minimized the significance of the destination contrary to the clear language of the statute.” Brief of West Virginia State Tax Department at 5 (emphasis supplied). Obviously, a statute cannot be both “clear” and “not clear.”

Second, in its petition for appeal, the Tax Commissioner ignored the rule of statutory construction that “tax laws are strictly construed, and when there is doubt regarding the meaning of such laws they should be construed in favor of the taxpayer.”<sup>12</sup> Now, in his brief, he argues that this Court should overrule its long line of precedent applying this rule because, according to the Tax Commissioner, “the prevailing rule in the vast majority of states and in the field of federal taxation is exactly the opposite.”<sup>13</sup> Indeed, the Tax Commissioner asks this Court,<sup>14</sup> because he implicitly recognizes that without doing so, Judge Perry’s ruling is correct, to overrule *Brockway Glass Co., Inc. v. Caryl*, 183 W. Va. 122, 394 S.E.2d 524 (1990) and *Andy Bros. Tire Co., Inc. v. State Tax Commissioner*, 160 W. Va. 144, 233 S.E.2d 134 (1977). Brief of West Virginia Tax Department at 21-22. The Tax Commissioner, however, is incorrect and the only two cases cited by him for “the

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<sup>12</sup> *Wooddell v. Dailey*, 160 W. Va. 65, 68, 230 S.E.2d 466, 469 (1976)(citing *State ex rel. Battle v. Baltimore and Ohio Railway Co.*, 149 W. Va. 810, 143 S.E.2d 331 (1965), *cert. denied*, 384 U.S. 970, 86 S. Ct. 1859, 16 L. Ed. 2d 681 (1966); *State v. Carman*, 145 W. Va. 635, 116 S.E.2d 265 (1960)).

<sup>13</sup> Brief of West Virginia State Tax Department at 20.

<sup>14</sup> For obvious reasons, the Tax Commissioner did not make the argument to Judge Perry that he overrule this Court’s cases holding that where there is doubt regarding the meaning of tax laws, they should be construed in favor of the taxpayer.

prevailing rule in the vast majority of states and in the field of taxation,” *id.* at 20, are neither state court decisions nor treatises on taxation, but distinguishable opinions from the First Circuit and the Fourth Circuit.

The first case cited by the Tax Commissioner is *Norfolk Southern Corp. v. Comm’r of Internal Revenue*, 140 F.3d 240 (4<sup>th</sup> Cir. 1998), but the issue in that case did not involve resolving a dispute between a taxing authority and a taxpayer regarding an ambiguous tax statute, but involved a clear and unambiguous statute. Specifically, in *Norfolk*, the tax statute provided “for an investment tax credit for cargo containers ‘used in the transportation of property to and from the United States.’” *Id.* at 242. The taxpayer, however, despite the clear language of the statute, argued that, “the phrase ‘used in the transportation of property to and from the United States’ includes not only containers *actually* so used but also containers outside the United States held *available* for such use.” *Id.* (emphasis in original). Moreover, not only was the tax statute in *Norfolk* clear and unambiguous, the Commissioner of Internal Revenue, unlike the Tax Commissioner in this case, had promulgated a revenue ruling “which required taxpayers claiming tax benefits for investment in cargo containers to prove that their containers were ‘used substantially in the direct transportation of property to or from the United States during each taxable year of its recovery period.’” *Id.* Indeed, under the ruling, “direct transportation” was defined as “the transportation of property by the container with the United States as the origin or terminus of the trip for the container and the property. Thus, a container is not engaged in the direct

transportation of property to or from the United States merely because it transports property from one foreign country to another foreign country.” *Id.* Here, of course, the Tax Commissioner could have promulgated a regulation defining “destination-oriented entertainment and tourism” in the manner he now advocates before this Court, but no regulations were so promulgated. Under these circumstances, a Fourth Circuit decision expressly concluding, “we find that the language of the statute is clear,” *id.* at 245, is of no precedential value in a case where even the Tax Commissioner concedes the statute is “not clear and unambiguous.”<sup>15</sup>

The second case cited by the Tax Commissioner is *MedChem (P.R.), Inc. v. Comm’r of Internal Revenue*, 295 F.3d 118 (1<sup>st</sup> Cir. 2002), like *Norfolk*, did not involve a dispute between a taxing authority and a taxpayer over an ambiguous tax statute. Rather, as the *MedChem* court noted, “The Commissioner rejects M-PR’s ‘plain meaning’ reading of the statute . . . .” *Id.* at 124; see also *id.* at 123 (“The Tax Court rejected M-PR’s statutory plain meaning argument.”). The First Circuit mentioned, in passing, the taxpayer’s burden of establishing entitlement to a credit, but its reference to construction of ambiguous tax credit statutes was plainly dicta as it decided the case based upon the taxpayer’s plain meaning arguments.

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<sup>15</sup> The reference to a taxpayer’s “burden” in *Norfolk* referenced a taxpayer’s “evidentiary burden,” not a rule of statutory construction, which is clear from the Fourth Circuit’s opinion: “taxpayers bear the **burden of proving** entitlement to the credits they claim on their returns.” *Norfolk*, *supra* at 244 (emphasis supplied). Obviously, Fountain Place had the burden of coming forward with evidence that it was engaged in a “destination-oriented recreation and tourism” activity and, as indicated in Judge Perry’s order, it did so. It bears no such burden, however, with “proving” that its interpretation of the statute is correct because statutory interpretation is a legal issue, not a factual one. On this matter, the Tax Commissioner is just simply wrong.

As the Tax Commissioner concedes in his brief, this Court has held that ambiguous tax statute, including ambiguous tax credit statutes, should be construed in favor of the taxpayer. Brief of the West Virginia State Tax Department at 21-22. And, this Court should not abandon this rule of construction as it is the Legislature and the Tax Commissioner who have the power and authority to more clearly define terms used in tax statutes, including tax credit statutes, and not the taxpayers.<sup>16</sup>

Finally, it advocates a “man on the street” interpretation of the term “destination-oriented recreation and tourism” that has no basis in the law and asks the wrong question:

The man on the street provides the simplest test for the ordinary meaning of the key phrase at issue with the tax credit. Ask the man on the street one question: If you traveled 30 miles to watch a movie, would you consider yourself a tourist? The answer will be no.

Brief of the West Virginia State Tax Department at 5. Obviously, courts do not resolve questions of statutory interpretation by conducting surveys. More importantly, the Tax Commissioner’s brief asks the wrong question.

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<sup>16</sup> This Court is not alone in construing ambiguous tax credit statutes in favor of the taxpayer. See, e.g., *Sutkowski v. Director, Div. of Taxation*, 312 N.J. Super. 465, 475, 712 A.2d 229 (1998) (“Even if there is an ambiguity attendant to the issue of a tax credit, the rule of construction is one that favors the taxpayer, not the government.”). A court’s interpretation of a tax statute is no different an endeavor that interpreting any other statute and applying traditional rules of statutory construction does not constitute an intrusion on legislative prerogative as the Tax Commissioner suggests. Brief of West Virginia State Tax Department at 22. Again, if the Legislature or even the Tax Commissioner wanted to give the term “destination-oriented recreation and tourism” a more definite meaning, they could have done so by statutory or regulatory definition. In the absence of such definition, however, it is entirely appropriate when gleaned legislative intent to construe ambiguous terms in a light most favorable to the taxpayer.

Fountain Place does not contend that someone who travels thirty miles to watch a movie is a tourist, but the statute uses the term “destination-oriented recreation and tourism” and there was more than sufficient evidence in the record that 60,000 people travel from the Commonwealth of Kentucky, more than “30 miles,” not only to “watch a movie,” but to visit restaurants, shopping, and other businesses in the Logan vicinity, including about 20,000 additional people who visit both Fountain Place and the Hatfield McCoy Trail.

So, the question is not, “If you traveled 30 miles to watch a movie, would you consider yourself a tourist,” but rather “If 30 percent of your customers traveled to your recreational attraction from another state and another 10 percent of your customers traveled from outside your area to visit both your recreational attraction and another local recreational attraction, would your business be engaged in ‘destination-oriented recreation and tourism?’”

To that proper question, Judge Perry currently answered in the affirmative, because there is no historical, textual, or contextual support for the Tax Commissioner’s argument that if any aspect of a business is “ancillary” to another business which is a “destination-oriented recreation and tourism” business, the tax credit is unavailable:

42. The Tax Commissioner and the OTA classified Fountain Place as an “ancillary business” that “is not, in itself, a destination-oriented tourism facility.” (Hearing Tr. 34:11-12; OTA Final Decision at 7.) Such a classification is inappropriate for two reasons.

43. First, exactly why the Tax Commissioner and the OTA believe that an “ancillary business” cannot qualify as a “destination-oriented

recreation and tourism” industry or business activity is unclear. Nowhere in the EOTCA is there language indicating that the Legislature meant to exclude an “ancillary business” from the credit. See W. Va. Code § 11-13Q-1, et seq.

44. Second, what the Tax Commissioner and the OTA failed to acknowledge, is that Fountain Place is a stand alone tourist destination that enhances the Logan area’s ability to market itself as a tourist destination.

45. Fountain Place’s value as a stand alone tourist destination is evident from the letters written by the managing director of the Hatfield-McCoy Convention & Visitors Bureau (hereinafter “the Bureau”) and the president of the Logan County Chamber of Commerce (hereinafter “the Chamber”), both of which confirm the theater’s role in developing the Logan area into a tourist destination. See Pet’r Exs. 3 and 4 to Hearing Tr.

46. There is nothing in the statute that indicates that the Legislature intended to exclude “ancillary businesses” from the benefits of the statute. Indeed, as long as a business is engaged in “destination-oriented recreation and tourism,” it is qualified for the tax credit and given the evidence that Fountain Place is playing a vital role in developing the Logan area into a tourist destination leads supports the conclusion that the theater is engaged in a destination-oriented recreation and tourism industry or business activity.<sup>17</sup>

In other words, merely because the Hatfield-McCoy Trail is also a “destination-oriented recreation and tourism” business in southern West Virginia does not exclude Fountain Place as another “destination-oriented recreation and tourism” business both on its own and in association with the Trail.

The Circuit Court properly applied this Court’s precedents concerning the construction of ambiguous tax credit statutes and this Court should decline the Tax Commissioner’s invitation to overrule those precedents. The Legislature could have

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<sup>17</sup> Order at 12-13 (emphasis supplied).

defined the term “destination-oriented recreation and tourism” in the statute or, alternatively, the Tax Commissioner could have defined those terms through regulation, but neglected to do so. As the Circuit Court properly held, Fountain Place, not the State, should benefit from any doubt in the meaning of this undefined term, particularly in light of the evidence presented by Fountain Place.

**C. THE CIRCUIT COURT CORRECTLY HELD THAT THE OTA ERRED BY AFFIRMING THE TAX COMMISSIONER’S DENIAL OF THE EOTCA CREDIT BASED UPON AN ERRONEOUS INTERPRETATION AND APPLICATION OF THE PHRASE “DESTINATION-ORIENTED RECREATION AND TOURISM” UNDER W. VA. CODE § 11-13Q-19(a)(5).**

Following this Court’s directives concerning the interpretation of ambiguous statutes, particularly ambiguous tax statutes, Judge Perry carefully analyzed each of the words in the term “destination-oriented recreation and tourism” as follows:

28. “Destination” is defined as “the place to which a person or thing is going or sent . . . .”

29. “Recreation” is defined as “refreshment in body or mind, as after work, by some form of play, amusement, or relaxation.”

30. “Tourism” is defined as “tourist travel, especially when regarded as a source of income for a country, business, etc.” “Tourist” includes “one who makes a tour; one who makes a journey for pleasure.” “Travel” is defined as “the act or process of traveling[,]” with “traveling” relating to “a passing from place to place; the act of performing a journey.”

31. Thus, “destination-oriented recreation and tourism” consists of traveling from one location to another for the purpose of amusement and/or relaxation, when such travel provides a source of income to a business entity.<sup>18</sup>

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<sup>18</sup> *Id.* at 9 (footnotes and citations omitted).

In its petition for appeal, the Tax Commissioner's only criticism of this analysis was "the Circuit Court emphasized the recreational aspect and minimized the significance of the destination contrary to the clear language of the statute," Petition for Appeal at 5, but as noted in Fountain Place's response, the Tax Commissioner, before the ALJ, OTA, and Circuit Court, **conceded** that the statute is not clear, but is ambiguous.

Moreover, there is no basis for the assertion that the Legislature intended that more emphasis be placed on the word "destination" than on the word "recreation." Indeed, because both words are used in the term "destination-oriented recreation and tourism," both obviously are entitled to the same overall importance.

As the Circuit Court noted in an analysis that was anything but dismissive of "destination," the evidence plainly supports the conclusion that Fountain Place is a "destination-oriented recreation and tourism" business:

31. [T]his "overly technical" definition of the phrase at issue **should not be read so broadly as to include an activity requiring travel from any location to any other location without regard to the distance between the two places.** Similarly, it **should not be read so broadly as to include any activity of amusement and/or relaxation without regard to traditional and conventional ideas of what activities constitute tourism or recreation.** Without more specific legislative guidance as to the applicability of the phrase "destination-oriented recreation and tourism," courts are left to ascertain the meaning of the phrase – however, application of this phrase should not be made without consideration of "common-sense" and should not yield an absurd result.

32. Construction of the phrase at issue cannot occur by looking at the words in a vacuum. A court must look at the structure and

purpose of the Act, as well as the factual circumstances of each case.<sup>19</sup> A determination of whether a business participates in “destination-oriented recreation and tourism” must be made by an application of the facts to the circumstances surrounding the business or activity. **These circumstances include, but are not limited to, (1) the economy of the region, (2) the availability of other recreational choices in the area, (3) the cultural significance of the business or activity, (4) the business’s distance from other similar businesses, (5) the amount of patronage from local or nearby customers versus customers from farther away. . . .**

34. The evidence in the record indicates that a certain percentage of Fountain Place’s customers are traveling from areas outside the Logan area for the purpose of watching a movie.

35. According to Diana Barnette, the managing member of Fountain Place, the theater draws about 200,000 customers per year. Hearing Tr. 15:14.

36. Of the 200,000, Ms. Barnette testified that “about thirty percent (30%)[,]” or 60,000, of the customers visit from the Commonwealth of Kentucky. *Id.* 15: 17-18.

37. Fountain Place was able to ascertain the number of customers that visit from Kentucky by conducting a marketing study in which it offered free movie passes to customers who were willing to provide their zip codes. *Id.* 16:1-6.

38. In addition to drawing 30% of its customers from Kentucky, Ms. Barnette testified that another 10% of Fountain Place’s customers are individuals visiting the Hatfield-McCoy Trail System (hereinafter “the Trail”). *Id.* 17:7-12.

39. Ms. Barnette and Fountain Place arrived at the 10% number based on conversations and interactions with customers visiting the theater. *Id.* 31:3-6.

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<sup>19</sup> Obviously, this observation by Judge Perry completely undermines any “slippery slope” argument by the Tax Commissioner as he recognized that each case must be judged on its separate merits as to whether it satisfies the “destination-oriented recreation and tourism” requirement.

40. The 80,000 number demonstrates that Fountain Place has succeeded in drawing customers from areas outside the Logan area for the purpose of watching a movie. <sup>20</sup>

The Tax Commissioner's argument in its petition for appeal that Fountain Place is "merely ancillary to the destination-oriented recreation and tourism provided by the Hatfield McCoy Trail System," Petition for Appeal at 6, had no factual basis in the evidence of record, which is why none was cited. There was, for example, no testimony concerning scores of ATVs on the Fountain Place parking lot where mud-caked off-the-road riders decided to cap off their outdoor adventure by catching a movie.

Accordingly, in its brief, the Tax Commissioner has abandoned this "ancillary" argument, which was the only one presented to Judge Perry and the Office of Tax Appeals, in favor of a new "*in pari materia*" argument, attempting to extrapolate from completely different statutes and regulations, some of which were not even adopted until after Judge Perry's and the Office of Tax Appeals' rulings, meanings for the term "destination-oriented recreation and tourism."<sup>21</sup>

"Obviously," as the Tax Commissioner acknowledged in this petition for appeal, "watching a good movie is entertaining and recreational." Petition for

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<sup>20</sup> Order at 9-11 (emphasis supplied and footnotes omitted).

<sup>21</sup> Certainly, this Court has previously held that "[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl pt. 3, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975). But, as even the Tax Commissioner concedes, "Admittedly, there are significant differences between the EOTC Act and the West Virginia Tourism Development Act." Brief of the West Virginia State Tax Department at 9 (emphasis supplied).

Appeal at 6. Moreover, as the Tax Commissioner concedes in his brief, Fountain Place presented evidence that its movie theatre is an entertainment “destination.” Brief of the West Virginia State Tax Department at 6. Thus, because there was evidence that about 80,000 people annually travel from Kentucky to Fountain Place, not to ride the Hatfield McCoy Trail, but to watch a movie, the requirement that the business be involve in “destination-oriented recreational and tourism” is more than satisfied, particularly where the local business community, including restaurants, shops, gas stations, and others derive additional economic benefits from those coming to Fountain Place.

As Judge Perry, who lives in the community, held:

41. This Court finds that applying these facts, as found by Judge Bishop below, to the law, namely this Court’s interpretation of the phrase “destination-oriented recreation and tourism” within the statute in question, are sufficient to support a finding that Fountain Place is “destination-oriented recreation and tourism” and thereby eligible for the Economic Opportunity Tax Credit. **Fountain Place[ ] is one of the few “attention getting” attractions in the region, and its classification as “destination-oriented recreation and tourism” must be determined by evaluating its status in the context of a rather economically stagnant area. In the context of this area, this facility has a status more akin to a “Dixie Stampede” or “Medieval Times” attraction than a conventional theatre.** A particular business that is “destination-oriented recreation and tourism” in one location or set of circumstances may not be in another. A movie theatre, laser tag arena, miniature golf course, go-kart track, themed restaurant/attraction, outdoor adventure business, or other service/entertainment business may be “destination-oriented recreation and tourism” in Logan, West Virginia but not in Charleston, West Virginia; Huntington, West Virginia; the New River Gorge area of West Virginia; West Virginia highland areas or major tourist locations across America such as Las Vegas, Nevada; New York, New York; or Gatlinburg, Tennessee depending on the facts. A business in

any other area must be considered according to its own factual circumstances on a case-by-case basis. . . .

50. As noted above, Fountain Place has succeeded in bringing 80,000 individuals to its facilities from areas located outside the Logan area. Additionally, Fountain Place has partnered with the [Hatfield-McCoy Convention & Visitors] Bureau to provide tourists with a recreational facility other than trail riding. Hearing Tr. 25:12-15. **The relationship between Fountain Place and the Bureau allows the area to be marketed as a full service tourist destination. Such marketing permits the Logan area to draw an increased number of tourists to the area, which in turn encourages capital investment and increases economic opportunity.**<sup>22</sup>

When enacting the EOTCA, the Legislature found “that the encouragement of economic opportunity in this State is in the public interest and promotes the general welfare of the people of this State[;]” therefore, the purpose of the EOTCA is “to encourage greater capital investment in businesses in this State and thereby increase economic opportunity in this State[.]” W. VA. CODE § 11-13Q-2.

A credit under the EOTCA is not permitted “until the person asserting a claim for the allowance of credit under this article makes written application to the commissioner for allowance of credit[.]” W. VA. CODE § 11-13Q-18(b)(1).

In addition to submitting an application to the Tax Commissioner, the EOTCA credit is available only to certain “industries or business activities[.]” one of which is “[d]estination-oriented recreation and tourism . . . .” W. VA. CODE § 11-13Q-19(a)(5).

There is nothing in the statute requiring the taxpayer to be a “vacation” destination; rather, all that is required is that the taxpayer be involved in an

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<sup>22</sup> Order at 11-12, 14 (emphasis supplied).

industry or business activity that involves “destination-oriented recreation and tourism.” Just as the Tax Commissioner’s argument that businesses which are “ancillary” to other “destination-oriented recreation and tourism” businesses are ineligible for the tax credit had no textual or contextual support, the Tax Commissioner’s argument that because a business is not a “vacation-destination,” it is ineligible for the tax credit, has no textual or contextual support.

Likewise, the Tax Commissioner’s argument that because many theatres show the same movies anywhere in the country as Fountain Place, it cannot be a “destination-oriented recreation and tourism” business, has no merit because, as Judge Perry found, there was evidence that 80,000 people traveled annually from Kentucky to view movies at this particular theatre:

Although the Tax Commissioner notes that Fountain Place shows the same films as do theatres in cities such as Cleveland, New York, Columbus, Pittsburgh, and other cities, Fountain Place’s evidence centered upon customers traveling from Kentucky, not those remote locations. Moreover, the fact that someone does not “vacation” in Logan for purposes of “watching a movie,” as noted by the Tax Commissioner, is [not] dispositive of whether Fountain Place is a “destination-oriented recreation and tourism” business.<sup>23</sup>

Certainly, the Tax Commissioner could not seriously contend that an amusement park would not be a “destination-oriented recreation and tourism” business merely because there are amusement parks in Sandusky, Ohio; Williamsburg, Virginia; Mason, Ohio, and other locations. Whether similar attractions exist in other remote locations is not the issue; rather, whether a particular business engages in an

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<sup>23</sup> *Id.* at 11 n.24.

activity that is “destination-oriented recreation and tourism” is the issue, which Judge Perry correctly concluded Fountain Place satisfies because about 80,000 Kentuckians travel there for the purpose of watching movies, which even the Tax Commissioner concedes is recreational.

The Tax Commissioner’s resort to the definition of “attraction” in another statute involving not tax credits, but direct grants, Brief of West Virginia State Tax Department at 10, has no merit where the term “attraction” appears nowhere in the EOTCA. Moreover, the term “tourism attraction” in the Tourism Development Act, is defined to include an “entertainment facility” or, separately, an “entertainment destination center,” W. VA. CODE § 5B-2E-3(14), which would include Fountain Place. Indeed, the Tax Commissioner has cleverly omitted portions of this statute on page ten of his brief to make it appear that the definition of “tourism facility” excludes an “entertainment destination center,” when (1) subsection (B) removes “entertainment destination center(s)” from the statutory exclusion for facilities “primarily devoted to the retail sale of goods and (2) subsection (C) references “recreational facility” when Fountain Place would qualify as an “entertainment facility” or “entertainment destination center” under the statute, rendering inapplicable the “remain overnight” provision.<sup>24</sup>

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<sup>24</sup> Thus, whether “[i]t is also highly unlikely that the Kentucky residents who patronize Fountain Place Cinema would remain overnight in commercial lodging in any significant numbers,” Brief of the West Virginia State Tax Department at 10, is wholly irrelevant.

Likewise, whether the Division of Tourism would award a grant to a movie theatre, Brief of West Virginia State Tax Department at 10, is irrelevant as the EOTCA does not use the term “attraction;” involves “tax credits,” not “grants;” and uses the term “destination-oriented recreation and tourism.”<sup>25</sup>

Finally, Division of Tourism regulations, which became effective May 27, 2010, months after Judge Perry’s ruling, regarding “destination camping” and “destination bed and breakfast” are also irrelevant. Again, the Division of Tourism regulations involve “direct advertising grants,” not tax credits. W. VA. C.S.R. § 144.1.1 (“This legislative rule governs the application and award criteria for disbursement of direct advertising grants for regional advertising from the “tourism promotion fund.”).

Moreover, although the Tax Commissioner focuses on the definitions of “destination camping” and “destination bed and breakfast,” which may warrant a more narrow agency definition, the Division of Tourism’s definition of just the term “destination,” which is much broader, “A region or area located within the state

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<sup>25</sup> Similarly, the Tax Commissioner’s arguments, predicated upon the definition of “entertainment destination center” in the Tourism Development Act, have no merit. First, that Act was enacted in 2004, two years after enactment of the EOTCA and, thus, it sheds no light on legislative intent two years earlier. Second, the Tourism Development Act uses the term “entertainment destination centers,” not “destination-oriented recreation and tourism.” Finally, in order to qualify as a “entertainment destination center” under the TDA, there is no requirement that the taxpayer engage in the “recreation and tourism” business, e.g., in the case of Fountain Place, that it draws customers from Kentucky. The fact that a “multiplex theatre” in Charleston that draws no customers from outside West Virginia or even outside the immediate Charleston area would not disqualify it from receiving a TDA tax credit, but would disqualify it from receiving an EOTCA tax credit. Thus, comparing the definitions in these two statutes is like comparing apples and oranges. They may both be fruit, but they are clearly not the same fruit.

containing three or more attractions; An independent activity located within the state; A cultural or historic site or event which includes, but is not limited to, fairs or festivals, heritage and historic sites and museums; Entertainment establishments which include, but are not limited to, pari-mutuel gaming establishments, live performing art centers, sporting organizations or arenas, vineyards or wineries; Scenic or natural sites such as show caves or caverns; Theme or Amusement Parks; or Zoos, Aquariums or Wild Animal Parks,” W. VA. C.S.R. §§ 114.2.7.1 - .7 (emphasis supplied), which would include Fountain Place which is both an “independent activity located within the state” and, by the Tax Commissioner’s concession, an “entertainment establishment.”

Thus, the Tax Commissioner’s statement, “[I]n order to qualify for the tax at issue, the Taxpayer must prove that the primary motivating factor for its Kentucky customers to travel to Logan, was to see a movie at Fountain Place Cinema,” Brief of the West Virginia State Tax Department at 11, is a sophism. And, the statement, “the legislative regulations are clear. Destination means that the underlying activity must be the primary motivating factor for traveling to West Virginia,” Brief of the West Virginia State Tax Department at 13, is disingenuous. There are no legislative regulations defining “destination-oriented recreation and tourism” and, thus, there are no legislative regulations which can be “clear,” let alone providing that “the underlying activity must be the primary motivating factor for traveling to West Virginia.” Rather, all that is

required is evidence by that the taxpayer is a “destination-oriented recreation and tourism” business.

To limit the availability of the tax credit to business that promote “activities which are offered by West Virginia that tourists can’t do at home,” as suggested on page fifteen of the Tax Commissioner’s brief, is ridiculous. Obviously, all states have amusement parks, museums, performing arts centers, botanical gardens, and other recreation and tourism businesses. Thus, if the tax credit was only available to businesses engaged in promote “activities which are offered by West Virginia that tourists can’t do at home,” no business would qualify. Certainly, the 60,000 Kentuckians who travel to Fountain and the 20,000 who travel to both the Hatfield-McCoy Trail and Fountain Place find something they cannot find closer to home; otherwise, they would not travel significant distances to engage in “recreation and tourism” in the Logan area.

This Court should reject the Tax Commissioner’s efforts at misdirection to irrelevant terms in wholly unrelated statutes, but just as Judge Perry did, should look to the statutory definitions of terms similar to “destination-oriented recreation and tourism” in other states:

54. Other states with similar statutes have included theatres in the definition of recreation and tourism facilities.

55. In South Carolina, for example, the term “Tourism, sports, and recreational facilities” is defined as in a revenue bond statute as “property used for or useful in connection with theme parks, amusement parks, historical, educational or trade museums, cultural centers, or spectator or participatory sports facilities, generally available to the public, including without limitation thereto marinas,

beaches, bathing facilities, golf courses, theaters, arenas, and auditoriums.”

56. Moreover, South Carolina’s statute has been broadly interpreted as including public lodging and restaurant facilities which are not appurtenant to a qualifying facility as long as its primary purpose is to provide services in connection with a qualifying facility.

57. Likewise, in the present case, construction of the phrase at issue in favor of Fountain Place is justified when considering the inclusion of theatres in other state statutes within the definition of recreation and tourism facilities, the ambiguous nature of the phrase “destination-oriented recreation and tourism,” the EOTCA’s failure to provide guidance as to what the Legislature meant by such, and the general proposition that the tax laws are strictly construed in favor of taxpayers.<sup>26</sup>

The Tax Commissioner concedes that, “Watching a good movie is entertaining and recreational,” but argues that, “If you drive 30 miles to watch a movie, are you a tourist?” Brief of West Virginia State Tax Department at 7. The definition of “tourist,” however, is not an issue; rather, the issue is the definition of “destination-oriented recreation and tourism” and as Judge Perry correctly observed, “The Tax Commissioner’s argument that the South Carolina and Connecticut statutes are different misses the point, which is that two states with similar statutes have specifically included theatres in the definition of recreation and tourism facilities.”<sup>27</sup>

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<sup>26</sup> *Id.* at 15-16 (footnotes and citations omitted).

<sup>27</sup> See also ARK. CODE ANN. § 14-164-203(13) (“Tourism attractions and facilities’ means . . . Recreational or entertainment facilities . . . .”); ARK. CODE ANN. § 15-11-503 (“Tourism attraction’ means . . . Recreational or entertainment facilities . . . .”); FLA. STAT. ANN. § 159.27(11) (“Tourism facility’ means property used for or useful in connection with . . . theaters . . . .”); NEV. REV. STAT. 271.234 (“Tourism and entertainment project’ means any publicly owned building or complex of buildings to accommodate or house public and private activities as a part of a multi-faceted center for tourism, including, without limitation . . . theater facilities . . . . and any other structures, fixtures, appurtenances and

**D. THE CIRCUIT COURT NEITHER ERRONEOUSLY APPLIED A “30-30 RULE;” A “40-30 RULE;” NOR A “FIVE PART TEST,” BUT MERELY APPLIED THE LAW TO THE EVIDENCE PRESENTED.**

In his petition for appeal, the Tax Commissioner’s third assignment of error was “The Circuit Court adopted a 30-30 Rule for tax credits which ignores the clear statutory language.” Petition for Appeal at 19.

Now, in his brief, the Tax Commissioner’s third assignment of error is “The Circuit Court Adopted a 40-30 Rule for Tax Credits Which is not Found in the Statutory Language.” Brief of the West Virginia State Tax Department at 23.

Obviously, the Circuit Court could not have erred in adopting a “30-30 Rule” if it applied a “40-30 Rule,” and vice-versa.

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property and other incidentals which are necessary, useful or desirable for such a project, or any combination thereof.”); N.J. STAT. ANN. 34:1A-47 (“Tourism’ means activities involved in providing and marketing services and products, including accommodations, for nonresidents and residents who travel to and in New Jersey for recreation and pleasure. ‘Tourist industry’ means the industry consisting of private and public organizations which directly or indirectly provide services and products to nonresidents and residents who travel to and in New Jersey for recreation and pleasure.”); OKL. STAT. ANN. § 2357.36(10)(a)(2)(“Tourism attraction’ means . . . a recreational or entertainment facility . . . .”); PA. C.S.A. § 1504 (“Tourism.’ An activity which promotes or encourages individuals to travel to a location within this Commonwealth for pleasure.”); S.C. Code § 6-4-5(4) (“Travel’ and ‘tourism’ mean the action and activities of people taking trips outside their home communities for any purpose, except daily commuting to and from work.”); TEX. TAX CODE § 351.001(6)(“Tourist’ means an individual who travels from the individual’s residence to a different municipality, county, state, or country for pleasure, recreation, education, or culture.”); WASH. REV. CODE ANN. § 67.28.080(8)(“Tourist’ means a person who travels from a place of residence to a different town, city, county, state, or country, for purposes of business, pleasure, recreation, education, arts, heritage, or culture.”); W. VA. CODE § 17-16A-5 (“Tourist facility and attraction’ mean . . . recreational facilities . . . and other revenue producing facilities . . . which the Parkways Authority determines may improve, enhance or contribute to the development of the tourism industry in the state.”); WIS. STAT. ANN. 66.0615(1)(e) (“Tourism’ means travel for recreational, business or educational purposes.”).

In reality, the Circuit Court applied neither a “30-30 Rule” nor a “40-30 Rule” nor a “Five Part Test,” which was the Tax Commissioner’s second assignment of error in his petition for appeal and his fourth assignment of error in his brief.

Applying the facts to the law does not constitute promulgating a “rule” nor formulating a “test.” Judge Perry found that 30 percent of Fountain Place’s customers come from Kentucky because that was the evidence. Judge Perry found that another 10 percent of Fountain Place’s customers come to visit both Fountain Place and the Hatfield-McCoy Trail because that was the evidence. He promulgated no “30-30 Rule” or “40-30 Rule,” but just discussed the undisputed evidence.

And, the Tax Commissioner’s observation that Fountain Place is located 30.19 miles from the Kentucky “border” is amusing, Brief of the West Virginia State Tax Department at 23, but not very enlightening, as it is hard to picture 60,000 Kentuckians amassed at the Kentucky border like refugees waiting to travel to Logan to watch a movie. The testimony regarding the percentage of both Kentucky and Hatfield/McCoy Trail visitors, based upon a survey of zip codes and personal observations, is now belatedly accepted by the Tax Commissioner. *Id.* at 23 n.5 (“For the purposes of this appeal, the Tax Department accepts the anecdotal evidence that approximately 10% of the movie patrons are Hatfield McCoy Trail Riders” and that “Fountain Place Cinema draws approximately 30% of its customers from Eastern Kentucky.”) So, it is hard for Fountain Place to see the

point in arguing over a “30/30 Rule” or “40/30 Rule” which was never adopted by the Circuit Court.

Fountain Place had the burden of presenting evidence that it was engaged in “destination-oriented recreation and tourism.” That it is in the business of “recreation” cannot be contested and is not contested by the Tax Commissioner. The only issues were whether it was “destination-oriented” and “tourism,” which was satisfied by the evidence that it is a destination for both in-state and out-of-state patrons and that, in conjunction with the Hatfield-McCoy Trail and other local businesses, its business benefitted the Logan area by the expenditure of funds by out-of-area customers.

Certainly, if 30 percent of the customers of the Marquee Cinema or Southridge Gran Prix/Family Fun Center, Brief of the West Virginia State Tax Department at 24, come from outside West Virginia and 10 percent of additional customers come to frequent another tourism location and other businesses in their local area, that “evidence” would be relevant, but not dispositive of whether they would be entitled to the tax credit. Such evidence, however, based upon its location, is doubtful.

Likewise, restaurants, despite the Tax Commissioner’s use of such businesses as examples, would not qualify for tax credits as they are not engaged in “destination-oriented recreation and tourism.”

Moreover, the Tax Commissioner’s argument that “the Circuit Court’s 40-30 Rule is contrary to the legislative regulations promulgated by the Division of

Tourism,” Brief of the West Virginia State Tax Department at 24, is a non sequitur as the Division of Tourism regulations have no application to the statute at issue. Again, it is telling that the Tax Commissioner’s brief even makes such arguments, rather than focusing on the language of the actual statute at issue.

Finally, representations by the Tax Commissioner notwithstanding, Brief of the West Virginia State Tax Department at 26, the Circuit Court adopted no “five-part test,” but merely applied the evidence presented to the language of the statute:

Construction of the phrase at issue cannot occur by looking at the words in a vacuum. **A court must look at the structure and purpose of the Act, as well the factual circumstances of each case.** A determination of whether a business participates in “destination-oriented recreation and tourism” must be made by **an application of the facts to the circumstances surrounding the business or activity.** These circumstances include, **but are not limited to,** (1) the economy of the region, (2) the availability of other recreational choices in the area, (3) the cultural significance of the business or activity, (4) the business’s distance from other similar businesses, (5) the amount of patronage from local or nearby customers versus customers from farther way.<sup>28</sup>

This was no legal test created from “thin air,” Brief of the West Virginia State Tax Department at 26, but a proper analysis of the law and evidence presented.

Does the Tax Commissioner really suggest, for example, that “the amount of patronage from local or nearby customers versus customers from farther way” is not a relevant factor for determining whether a business is involved in “destination-oriented recreation and tourism?” Does the Tax Commissioner contend that the “cultural significance of the business or activity” is likewise irrelevant? Does the

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<sup>28</sup> Order at 10 (emphasis supplied).

Tax Commissioner really believe Judge Perry would have ruled that a miniature golf course would qualify merely because it is located in an “economically stagnate area?” Such argument is unfair to Judge Perry and should be offensive to this Court. Again, which is it – a five-part test or a one-part test?

Moreover, the Tax Commissioner is quite liberal in re-writing Judge Perry’s order. For example, the order’s “economy of the region,” which Judge Perry clearly meant to include Eastern Kentucky, becomes an “economically stagnate area” referencing only Logan County in the Tax Commissioner’s brief. Brief of the West Virginia State Tax Department at 27. And, the “cultural significance of the business or activity” in Judge Perry’s order becomes “attention getting” in the Tax Commissioner’s brief. *Id.*

Obviously, our Legislature has elected to encourage travel and tourism because areas of our State, like Logan County, need the influx of dollars from outside their area. Kanawha County, for example, is less dependent upon travel and tourism than Fayette County, Pocahontas County, or other rural counties. If businesses in those counties attract customers from outside West Virginia, like Fountain Place; are involved in “recreation and tourism;” and can otherwise satisfy the requirements of the statute, then they should be eligible for this tax credit.

Although you would not know it from the Tax Commissioner’s brief, the stated purpose of the Economic Opportunity Tax Credit Act is quite broad: “The Legislature finds that the encouragement of economic opportunity in this state is in the public interest and promotes the general welfare of the people of this state. In

order to encourage greater capital investment in businesses in this state and thereby increase economic opportunity in this state, there is hereby enacted the economic opportunity tax credit.” W. VA. CODE § 11-13Q-2.

Moreover, contrary to the implications in the Tax Commissioner’s brief, much more is required of taxpayers than merely engaging in a qualified activity. For example, the term “eligible taxpayer” is defined as “any person who makes qualified investment in a new or expanded business facility located in this state and creates at least the required number of new jobs.” W. VA. CODE § 11-13Q-3(b)(9). So, a miniature golf course, one of the Tax Commissioner’s favorite examples, could not qualify.

#### IV. CONCLUSION

The best proof that Fountain Place’s position has not and will not create a “Pandora’s Box” is that even though the tax credit has existed since 2002, the Tax Commissioner references not a single example in the last eight years where any West Virginia taxpayer has applied for a tax credit under the inappropriate circumstances it describes.

In this case, the Circuit Court properly applied the statutory language to the evidence presented in a light most favorable to the taxpayer and correctly concluded that Fountain Place is engaged in “destination-oriented recreation and tourism” and, thus, is eligible for the tax credit.

Wherefore, Fountain Place requests that the judgment of the Circuit Court of Logan County be affirmed.

**FOUNTAIN PLACE CINEMA 8, LLC**

By Counsel

A handwritten signature in black ink, appearing to read 'Arch G. Ramey', is written over a horizontal line.

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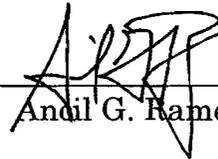
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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2010, I served the foregoing AMENDED AND CORRECTED BRIEF OF THE APPELLEE on all counsel of record, by serving a true copy thereof by certified mail, return receipt requested, in an envelope addressed as follows:

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A handwritten signature in black ink, appearing to read 'AR', is written over a horizontal line.

Andil G. Ramey, Esq.