
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

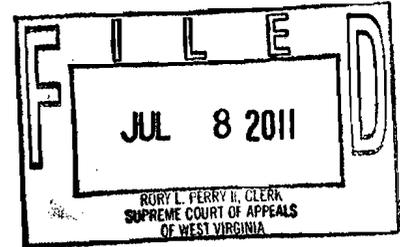
**PILGRIM'S PRIDE CORPORATION, and
PILGRIM'S PRIDE CORPORATION OF
WEST VIRGINIA, INC.,**

Petitioners,

v.

**CHRISTOPHER G. MORRIS,
State Tax Commissioner of the
State of West Virginia, and
JIM B. WRATCHFORD,
County Assessor of Hardy County,
West Virginia,**

Respondents.



PETITIONER'S REPLY BRIEF

Respectfully submitted,

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PILGRIM'S PRIDE CORPORATION OF
WEST VIRGINIA, INC.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii-iii
I. INTRODUCTION	1-2
II. THE ASSESSOR’S AND THE TAX DEPARTMENT’S RESPONSES DO NOT PRESENT ANY COMPELLING ARGUMENTS AND FAIL TO ADDRESS THE ISSUES RAISED IN PETITIONER’S SUPPLEMENTAL BRIEF	
A. The Assessor and the Tax Department Misapply the Farming Operation Exemption Test.....	2-3
1. The assessor and the Tax Department Agree that Pilgrim’s Pride Meets the First Element of the Farming Operation Exemption Test.....	3
2. The Tax Department Concedes That Pilgrim’s Pride Satisfies the Second Element of the Farming Operation Exemption Test.....	3-5
3. The Assessor’s and Tax Department’s Arguments With Respect to the Third Element of the Farming Operation Exemption Test Are Irrelevant	5
a. <i>The Assessor and the Tax Department’s Attempt to Characterize Pilgrim’s Pride As a Food Processor Is Misleading</i>	<i>5-6</i>
b. <i>The Emphasis on the Location of Pilgrim’s Pride’s Facilities Is a Red Herring.....</i>	<i>6-8</i>
c. <i>The Assessor and the Tax Department’s Emphasis on the Ownership of the “Grow Out” Farm Is Without Legal Significance.....</i>	<i>8-9</i>
d. <i>The Tax Department’s Argument With Respect to the Heartwood Forestland Fund Decision Is Unpersuasive</i>	<i>9-11</i>
e. <i>The Tax Department Misstates Pilgrim’s Pride’s Argument With Respect to the Principal Activity Requirement.....</i>	<i>11-12</i>
B. The Tax Department’s Narrow Reading of the Subsistence of Livestock Exemption Is Unsupportable.....	12-14
III. Conclusion	14-15

TABLE OF AUTHORITIES

	Page
 CASES	
<u>W. Va. , S.E.2d , 2010 WL 4708996 (W. Va. Nov. 2010)</u>	10
<u>Coordinating Council for Independent Living, Inc. v. Palmer</u> 546 S.E.2d 454 (W.V. 2001)	13
<u>Heartwood Forestland Fund</u>	10
<u>Morris v. Heartwood Forestland Fund Limited</u>	10
<u>State v. Miller</u> 350 S.E.2d 724 (1986)	13
 STATUTES	
W.Va. Code § 11-1A-3	12
W.Va. Code § 11-1A-3(g)	9, 10
W.Va. Code § 11-1A-3(i)	11
W.Va. Code § 11-1A-10(a).....	11
W.Va. Code § 11-1A-10(b)	11, 12
W. Va. Code § 11-1A-10(a) and (b)	11
W.Va. Code § 11-3-9(a)(21)	7, 12
W.Va. Code § 11-3-9(a)(21) and (28)	1, 8
W.Va. Code § 11-3-9(a)(28).....	2, 7
W.Va. Code § 11-23-3(b)(8).....	9, 10, 11

OTHER AUTHORITIES

110 C.S.R. 1A, § 2.6.6.3.c.2.12

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Merriam-Webster’s Collegiate Dictionary, 526 (10th ed. 1993)13

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PETITIONER'S REPLY BRIEF

I. INTRODUCTION

This case boils down to a single issue: should the tax exemptions in W. Va. Code §§ 11-3-9(a)(21) and (28) be applied as they are written or can the Assessor for Hardy County (the "Assessor") and the State Tax Department (the "Tax Department") apply the exemptions as they believe the exemptions should have been written. All other issues are subsumed in this predominant and overriding question. While the Assessor and Tax Department purport to agree that "[t]he definition must be applied as written,"¹ their analysis suggests otherwise.

The Assessor and the Tax Department argue that Pilgrim's Pride Corporation and Pilgrim's Pride Corporation of West Virginia, Inc. (collectively, "Pilgrim's Pride") should be precluded from claiming tax exemptions available to other taxpayers, but their arguments

¹ Tax Department's Response at 10.

seemingly rely on their policy goal of preventing large taxpayers from qualifying for the statutory exemptions, not on the law as written. If the Assessor and the Tax Department want to amend the language of the statutes under examination, Pilgrim's Pride respectfully suggests that the West Virginia Legislature, not this Court, is the appropriate vehicle for such change.

Pilgrim's Pride is sympathetic to the Assessor's wish to supplement the county fisc, but notwithstanding this laudable intention, treating large taxpayers differently from all other taxpayers is not the answer envisioned by the West Virginia Legislature when enacting the exemptions in question. Pilgrim's Pride is proud to be a corporate citizen of West Virginia and deserves fair and equal treatment under its laws. As such, Pilgrim's Pride should be permitted to claim tax exemptions when it satisfies the statutory requirements for the exemptions set forth by the West Virginia Legislature. The Assessor and the Tax Department cannot and should not be permitted to force Pilgrim's Pride to jump through additional hoops to claim tax exemptions available to all other qualifying taxpayers.

It is in this light that Pilgrim's Pride considers the specific points raised by the Assessor and Tax Department in their respective Responses to Supplemental Brief of Pilgrim's Pride Corporation and Pilgrim's Pride Corporation of West Virginia, Inc. (the "Responses").

II. THE ASSESSOR'S AND THE TAX DEPARTMENT'S RESPONSES DO NOT PRESENT ANY COMPELLING ARGUMENTS AND FAIL TO ADDRESS THE ISSUES RAISED IN PETITIONER'S SUPPLEMENTAL BRIEF

A. The Assessor and the Tax Department Misapply the Farming Operation Exemption Test

The position of the Assessor and Tax Department – that Pilgrim's Pride cannot claim the *ad valorem* property tax exemption in W. Va. Code § 11-3-9(a)(28) (the "Farming Operation Exemption") – is based on criteria that are not in the statute. To claim the exemption, Pilgrim's

Pride must only: (1) employ personal property exclusively in agriculture; (2) annually produce products of agriculture for sale; and (3) use such personal property to produce these products of agriculture on a farm or farming operation.² That is all the West Virginia Legislature requires.

1. The Assessor and the Tax Department Agree that Pilgrim's Pride Meets the First Element of the Farming Operation Exemption Test

The Assessor and the Tax Department concede that Pilgrim's Pride satisfies the first requirement necessary to claim the Farming Operation Exemption—its personal property is employed exclusively in agriculture. Specifically, the Tax Department notes, “[c]learly, raising chickens would fall within the general rubric of agriculture by anybody’s definition of the term.”³

2. The Tax Department Concedes That Pilgrim's Pride Satisfies the Second Element of the Farming Operation Exemption Test

The Tax Department also concedes that Pilgrim's Pride produces agricultural products for sale.⁴ And in doing so, it concedes that Pilgrim's Pride meets the second element of the Farming Operation Exemption. While the Assessor purports to “absolutely agree with the legal analysis” of the Tax Department, its contention that Pilgrim's Pride does not produce products of agriculture is directly contrary to the Tax Department's concession.

² The Tax Department suggests that Pilgrim's Pride misstates the third element of the Farming Operation Exemption test in its Supplemental Brief. The Tax Department argues that the third element of the test is not whether Pilgrim's Pride produces “products of agriculture on a farm or farming operation,” but “whether the personal property is used on a farm or farming operation.” The Farming Operation Exemption states very clearly that the “farm or farming operation” must “produc[e] for sale agricultural products.” Thus, Pilgrim's Pride contends that it did not misstate the third element, but agrees that the personal property must also be used on the farm or farming operation to qualify for the exemption.

³ Tax Department's Response at 3; *see also*, Assessor's Response at 2.

⁴ Tax Department's Response at 3.

Instead, the Assessor claims that Pilgrim's Pride does not actually engage in the "creation and agriculture part of the [chickens' lifespan]." This accusation rings hollow given that the Assessor concedes that Pilgrim's Pride's personal property is employed exclusively in agriculture.⁵ Moreover, it recognizes that Pilgrim's Pride hatches the chickens it processes.⁶ What is Pilgrim's Pride doing if not creating these birds?

The Assessor claims that Pilgrim's Pride does not "produce" chickens, but "merely acts in a manner of protecting their investment."⁷ The lengths to which Pilgrim's Pride goes to protect its investment – formulating its own proprietary feed formula, providing all veterinary care, specifying animal husbandry methods that must be used by the independent growers, retaining control over a host of materials that may come into contact with the chickens while in the independent growers' care, and requiring adherence to specific guidelines for animal welfare – qualify Pilgrim's Pride as an active participant in the agricultural process, and not a mere passive investor. To claim, as the Assessor does, that Pilgrim's Pride "lacks involvement in a major part in the creation of the product" is to simply ignore the extensive involvement of Pilgrim's Pride as spelled out in the Broiler Production Agreement.⁸ For these reasons, the Assessor's attempt to analogize Pilgrim's Pride to a "person buying and owning stock through a stock broker" fails. Pilgrim's Pride is simply not a passive investor.

Ultimately, the Assessor's argument must fall short because Pilgrim's Pride actively produces chicken meat, a product of agriculture. There is no viable retail market for the live chickens that the third-party growers house during the "grow out" process. Instead, these birds

⁵ Assessor's Response at 2.

⁶ Assessor's Response at 2-3.

⁷ Assessor's Response at 4.

⁸ See generally, Pilgrim's Pride Corporation Boiler Production Agreement, §§ F(1), (2), (3), (11), (12), (13) and G(2).

only become a marketable product when they are processed into chicken meat. Thus, the Assessor is incorrect in its assertion that Pilgrim's Pride does not produce agricultural products. The Tax Department concedes as much.

3. The Assessor's and Tax Department's Arguments With Respect to the Third Element of the Farming Operation Exemption Test Are Irrelevant

a. *The Assessor and the Tax Department's Attempt to Characterize Pilgrim's Pride As a Food Processor Is Misleading*

When arguing that Pilgrim's Pride does not satisfy the third element of the Farming Operation Exemption, the Assessor and the Tax Department attempt to cast Pilgrim's Pride as a mere third party chicken processor that has no role in the development of the chickens that it processes.⁹ It is for this reason, they claim, that Pilgrim's Pride cannot operate a farming operation. This logically-flawed reasoning is simply contrary to the established facts.

The Assessor and the Tax Department's tactic is best illustrated by the Tax Department's opening remark in its Response: "Is a commercial food processing plant a farm or farming operation?"¹⁰ The Tax Department is very simply begging the question and assuming that only the fresh processing segment of Pilgrim's Pride's operations is relevant in determining whether a farm or farming operation exists. By characterizing Pilgrim's Pride as a "commercial food processing plant," the Tax Department is ignoring all of the critical phases of Pilgrim's Pride's business that precede the processing phase—*i.e.*, the hatchery, the feed mill, the live haul operation, and the grow-out process. Pilgrim's Pride's operation must be viewed in its entirety in order to determine whether it qualifies as a farming operation. The Assessor and the Tax

⁹ Assessor's Response at 2; Tax Department's Response at 2.

¹⁰ Until its Response, the Tax Department had affirmatively stated that the Protein Conversion Plant—part of Pilgrim's Pride's processing phases—qualified as a farming operation. *Tax Department's Response to Petition for Appeal* at 10. *See also, Circuit Court Order* at 15 (recognizing Tax Department's concession with respect to the fresh processing plant).

Department's attempt to beg the question cannot be permitted to succeed. The Assessor and the Tax Department cannot simply wish away Pilgrim's Pride's involvement throughout the entire chicken meat production process.

Moreover, as Pilgrim's Pride explained in its *Supplemental Brief*, chicken producers are not precluded from claiming the Farming Operation Exemption unless they are third-party food processors.¹¹ Pilgrim's Pride is not a third-party food processor because it owns the birds it processes throughout the entire poultry production process – from egg to packaged chicken meat.

b. *The Emphasis on the Location of Pilgrim's Pride's Facilities Is a Red Herring*

The Assessor and the Tax Department also claim that Pilgrim's Pride cannot qualify as a farm or farming operation due to the location of its processing facilities when, simply put, there is no requirement that a farm or farming operation be located in any particular setting. While downtown Moorefield may not conjure up images of bucolic splendor, it is nonetheless where Pilgrim's Pride processes its birds into saleable agricultural products. This is what the definition of "farm" requires—that the land be used to produce agricultural products for sale, consumption or use. As noted above, the Tax Department concedes that the chicken meat from the fresh plant constitutes a product of agriculture.¹² There is no other statutory requirement. Thus, the argument is irrelevant.

Moreover, when arguing this issue, the Assessor inappropriately attempts to act as a fact and expert witness. In his analysis, the Assessor contrasts his personal experiences growing up close to the Pilgrim's facilities to the idyllic rolling hills and picturesque scenes of grazing

¹¹ Supplemental Brief at 7-8.

¹² Tax Department's Response at 3.

animals he associates with “real” farming. Reliance on such aesthetic ideals makes poor tax policy.

In reality, the characteristics noted by the Assessor simply relate to the size of the farming operation. Where a small farmer may have one corner of his only barn dedicated to tools used in maintaining his one tractor, a large farming operation may have an entire building, and more than one person, dedicated to maintaining multiple pieces of equipment. And while Pilgrim’s Pride may have a fresh processing facility, a small farmer may rely on a sharp knife, a bucket, and a killing cone. But the difference in size does not dictate a difference in how the entities are treated with respect to the property tax exemptions, which do not provide for any distinction based on the size of the farming operation. Both the small farmer and the large farming operation may be involved in producing products of agriculture, and both should be qualified to take advantage of the personal property tax exemptions available for property used on a farm or farming operation.

It is true that a big, modern farming operation may certainly look different than a Norman Rockwell depiction of a small family farm. But tax law is driven by the black letter of statutes, and the exemptions at issue in this case make no distinction between small and large producers of agricultural products. The exemptions in this case are relatively new – W. Va. Code § 11-3-9(a)(21) was enacted in 1998, and W. Va. Code § 11-3-9(a)(28) was enacted in 2006. They were not drafted and enacted by the West Virginia Legislature at a time when every “farm or farming operation” matched the Assessor’s pastoral vision. Moreover, at the time the exemptions were enacted, Pilgrim’s Pride had already been operating in West Virginia for several years. The West Virginia Legislature was certainly well aware that modern farming operations involved metal buildings, asphalt parking lots, fences and equipment for moving large

numbers of animals and could have precluded such farming operations from claiming the exemption. The West Virginia Legislature did not.

The Assessor claims that, because Pilgrim's Pride is so important to the economy of Hardy County, it should be responsible for paying more property tax than if the same exact business was carried on by many smaller farmers. If Hardy County was home to a hundred small chicken farmers, each of which mixed their own feed, provided their own medicines, and tried to market their own butchered chickens to retail outlets, and each of which met the Assessor's picture of a family farm, then all of the personal property employed by those hundred farms in the production of their chickens would be exempt under W. Va. Code §§ 11-3-9(a)(21) and (28), and the effect of those exemptions on Hardy County's finances would be just as great as if all that production was attributable to one producer.

c. *The Assessor and the Tax Department's Emphasis on the Ownership of the "Grow Out" Farm Is Without Legal Significance*

Both the Assessor and the Tax Department emphasize that Pilgrim's Pride cannot operate a farm or farming operation because it does not own the land worked by the third party growers. The exemptions at issue in this case apply only to personal property. Pilgrim's Pride is not claiming any exemption based on the real property owned by the independent growers in this case. Ownership of the real property where the chickens are temporarily housed has nothing to do with whether personal property of Pilgrim's Pride is "used on a farm or farming operation." In this case, Pilgrim's Pride's entire operation constitutes a farming operation because it directly results in the production of agriculture products, and so the personal property used in that production qualifies as exempt from personal property tax.

To the extent that the Assessor and the Tax Department are alleging that Pilgrim's Pride does not participate in the "grow out" process of its chickens, both the parties' contractual

agreement as well as the stipulated facts prove that Pilgrim's Pride has an active role in every phase of the chicken production process including the "grow out" phase. This subject has been discussed extensively¹³ and will not be repeated herein per this Court's instructions. The Assessor and Tax Department have refused to specifically address the evidence presented by Pilgrim's Pride on this issue. Instead, they merely accuse Pilgrim's Pride of using its personal property to transform chickens produced by an unrelated party into a saleable product. It is difficult to see how Pilgrim's Pride is "piggybacking," as the Tax Department puts it, on the third-party growers. Pilgrim's Pride hatches the birds, produces their feed, participates in the "grow out" process, and processes them for sale. It owns the birds at all times from egg to finished product. The third-party contractors are simply being hired to assist Pilgrim's Pride in this process.

d. *The Tax Department's Argument With Respect to the Heartwood Forestland Fund Decision Is Unpersuasive*

The Tax Department claims that Pilgrim's Pride does not qualify as a producer of the chickens prior to processing. The Tax Department's claim relies on a provision in Chapter 11, Article 23 of the West Virginia Code, which addresses West Virginia's business franchise tax. This provision, in relevant part, defines "doing business" for purposes of the business franchise tax.¹⁴

This definition of what constitutes "doing business" for business franchise tax purposes also includes a definition for "the activity of agriculture and farming." Like the definition of "farming purposes" for property tax purposes found in W. Va. Code § 11-1A-3(g), "the activity of agriculture and farming" for business franchise tax purposes includes poultry production.

¹³ See *Supplemental Brief* at 9-10.

¹⁴ W. Va. Code § 11-23-3(b)(8).

Nonetheless, the definition for business franchise tax purposes specifically excludes “any manufacturing, milling or processing of such products by persons other than the producer thereof.” A similar exclusion is not found in the definition of “farming purposes” for property tax purposes.¹⁵ Yet Respondents claim that this “producer” requirement applies for property tax purposes because “[t]he West Virginia Legislature has expressly tied the W. Va. Code § 11-23-3(b)(8), tax to *ad valorem* property tax exemptions.” Such a position is inconsistent with this Court’s ruling in the recent case of *Morris v. Heartwood Forestland Fund Limited*, in which this Court would not allow the Tax Department to intermix the property tax and business franchise tax sections of the Code.¹⁶

The Tax Department now claims that it did not argue that the business franchise tax section of the West Virginia Code should be used to interpret the definitions found in the *ad valorem* property tax section of the West Virginia Code. Nonetheless, in its own words, the “Tax Department examined the definition of ‘doing business’ found in W.Va. Code § 11-23-3(b)(8) in order to determine whether Pilgrim’s Pride’s principal business activity is the [business] of farming.”¹⁷ The purpose of this inquiry was to ultimately determine whether Pilgrim’s Pride qualified for the Farming Operation Exemption from *ad valorem* tax. In short, even in its own defense, the Tax Department admits that it was using definitions in the business franchise tax section to inform its reading of an *ad valorem* tax exemption, which runs afoul of this Court’s decision in *Heartwood Forestland Fund*. In any event, its argument that Pilgrim’s Pride is not engaging in “the activity of agriculture and farming” seems to miss the mark given

¹⁵ Cf. W. Va. Code § 11-1A-3(g).

¹⁶ ___ W. Va. ___, ___ S.E.2d ___, 2010 WL 4708996 (W. Va. Nov. 2010)

¹⁷ Tax Department’s Response at 9.

that it concedes that Pilgrim's Pride's personal property is used exclusively in agriculture.¹⁸ Thus, the Tax Department erred in relying on W.Va. Code § 11-23-3(b)(8) in its analysis.

e. *The Tax Department Misstates Pilgrim's Pride's Argument With Respect to the Principal Activity Requirement*

The Tax Department argues that Pilgrim's Pride should be required to meet the principal activity requirement of W. Va. Code § 11-1A-10(b) in order to claim the Farming Operation Exemption.¹⁹ In its *Supplemental Brief*, Pilgrim's Pride explained that W. Va. Code § 11-1A-10(b) actually interprets W. Va. Code § 11-1A-10(a), which provides a special valuation rule for farm property.²⁰ The Tax Department claims that Pilgrim's Pride's argument is based solely on the title of the statute under review. This is a mischaracterization of Pilgrim's Pride's argument.

To the contrary, the relationship between W. Va. Code § 11-1A-10(a) and (b) is clear from the language of the statute itself. W. Va. Code § 11-1A-10(a) provides that "the tax commissioner shall appraise [farm] property so as to ascertain its fair and reasonable value for farming purposes" while W. Va. Code § 11-1A-10(b) provides a special rule to determine when the property of a corporation is considered farm property. Thus, the relationship between these subsections is readily apparent. The Tax Department argues in the alternative that even if W. Va. Code § 11-1A-10(b) relates to a special valuation rule, it should still be applied here because

¹⁸ Tax Department's Response at 3.

¹⁹ In its Response, the Tax Department states that "Pilgrim's Pride seems to concede the principal activity requirement for corporations." *Tax Department's Response* at 8. Pilgrim's Pride has not and does not concede this issue. Instead, Pilgrim's Pride's argument that the principal activity requirement does not apply is an alternative argument to Pilgrim's Pride's argument that it satisfies the principal activity requirement.

²⁰ The Tax Department contests Pilgrim's Pride's characterization of W. Va. Code § 11-1A-10(a) as a special valuation rule and claims that it merely reiterates W. Va. Code § 11-1A-3(i). The Code section cited by the Tax Division is merely the definitions of "value," "market value," and "true and actual value." While this definition generally discusses farms, it is W. Va. Code § 11-1A-10(a) that provides the valuation rule specifically addressing farm property.

it generally pertains to farming.²¹ If the Tax Department applies W. Va. Code § 11-1A-10(b), it must apply the regulations interpreting the statute as well. As noted in the *Supplemental Brief*, regulations interpreting W. Va. Code § 11-1A-10(b) state that a corporation “shall be deemed to be primarily engaged in the business of farming if, the wholesale value of farm commodities or products . . . is fifty percent (50%) or more of the annual gross income of the corporation.” 110 C.S.R. 1A, § 2.6.6.3.c.2. The Tax Department concedes that Pilgrim’s Pride generated annual sales of \$7.1 billion of agricultural products for the 2009 fiscal year.²² This constitutes substantially all of Pilgrim’s Pride’s revenues for the 2009 fiscal year. Thus, even if the principal activity test were applied as the Tax Department requests, Pilgrim’s Pride satisfies it.

B. The Tax Department’s Narrow Reading of the Subsistence of Livestock Exemption Is Unsupportable

The Tax Department argues that Pilgrim’s Pride cannot claim the *ad valorem* tax exemption found in W. Va. Code § 11-3-9(a)(21) (the “Subsistence of Livestock Exemption”) for personal property located on Pilgrim’s Pride’s feed mill and live haul operations because Pilgrim’s Pride’s chickens are principally located on real property owned by the third party growers.²³ Once again, the Tax Department is imposing requirements not found in the statutes.

The Tax Department’s argument with respect to this issue centers on the meaning of the phrase “livestock on hand” in the Subsistence of Livestock Exemption. Specifically, the statute

²¹ As the Tax Department notes, both parties have relied on W. Va. Code § 11-1A-3, the definitional section of Article 1A, to interpret Article 3. These general definitions are instructive when interpreting undefined terms in Article 3 because the definitions are generally applied in the context of the *ad valorem* tax. Nonetheless, this should not give the Tax Department license to apply subsections in Article 1A out of context while ignoring the regulations interpreting those subsections.

²² Tax Department’s Response at 3.

²³ The Tax Department concedes that personal property used at Pilgrim’s Pride’s hatchery qualifies for the Subsistence of Livestock Exemption.

provides an exemption for: “All property on hand to be used in the subsistence of livestock on hand at the commencement of the assessment year.” The Tax Department claims that “livestock on hand” in the statute means that livestock must be located on Pilgrim’s Pride’s property. The Tax Department cites no authority to support this interpretation.

To the contrary, the phrase “on hand” appears in the statute not once, but twice, and the Tax Department’s interpretation cannot apply to both instances. The phrase “on hand” appears once in the context of “livestock on hand” and again in the context of “property on hand.” While “livestock on hand” is undefined, “property on hand” is defined by 110 C.S.R. 3, § 2.51. The regulation provides that “property on hand to be used in the subsistence of livestock” includes “all personal property primarily, actually, and directly used for, and reasonably necessary for the care or feeding of livestock.” In other words, there is no requirement in the regulation that the property be held in any particular location. Instead, the focus is on how the property is used. While this argument has been raised several times, the Tax Department has not attempted to reconcile its reading of “on hand” with the regulation.

Moreover, as Pilgrim’s Pride explained in its *Supplemental Brief*, “on hand” has been defined to mean “in present possession or readily available.”²⁴ Pilgrim’s Pride believes that this is the better reading of “on hand.” For one, this harmonizes the definition of “on hand” with the definition of “property on hand to be used in the subsistence of livestock” found in 110 C.S.R. 3, § 2.51 because it does not impose a specific location requirement that is not in the Code of State Regulations.

²⁴ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, 526 (10th ed. 1993). This Court has previously referred to dictionaries when determining the commonly accepted usage of undefined terms. *See, e.g., Coordinating Council for Independent Living, Inc. v. Palmer*, 546 S.E.2d 454 (W.V. 2001)(citing WEBSTER’S for the definition of “certain”). *See also, State v. Miller*, 350 S.E.2d 724 (1986)(citing WEBSTER’S for the definition of “Catch-22”).

In its Response, the Tax Department focuses on the location of Pilgrim's Pride's chickens and concludes that "[w]hen seventy-nine percent of the livestock is located with contract farmers, then the livestock is not on hand for the purposes of the property tax exemption." As noted above, this constricted reading of the "on hand" requirement is simply not supportable. When the proper standard is applied, it is clear that even though a number of Pilgrim's Pride's birds are located with third party growers, they are still readily accessible to Pilgrim's Pride and are thus "on hand." After all, the birds are located at all times in Hardy County and Pilgrim's Pride can access these birds whenever it wishes. Pilgrim's Pride retains title to the birds during the entire "grow out" period and can inspect the birds or schedule them for pick up when it chooses.²⁵ Thus, the birds are "on hand" for purposes of the exemption. The Tax Department's reading is contrary to the available guidance, internally inconsistent, and is thus incorrect.

III. CONCLUSION

In sum, neither the Assessor nor the Tax Department can persuasively refute that Pilgrim's Pride is entitled to claim the Farming Operation Exemption from West Virginia *ad valorem* taxes for its vertically integrated chicken operation based on the language in the exemption. Instead, they use everything from imaginary tests to childhood memories to argue that the exemption should not apply. The Tax Department's attempts to deny that Pilgrim's Pride is also entitled to claim the Subsistence of Livestock Exemption for its personal property associated with the feed mill, and live haul operations are similarly unconvincing. Once again, Pilgrim's Pride respectfully requests that this Court overrule the Circuit Court of Hardy County

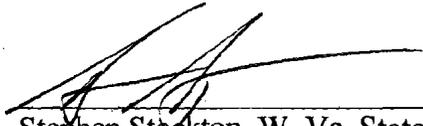
²⁵ Pilgrim's Pride Corporation Boiler Production Agreement, §§ F(1),(3).

and hold that Pilgrim's Pride is entitled to claim the exemptions at issue in this case with regard to its personal property in Hardy County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen Stockton, Counsel for Petitioners, do hereby certify that a true and exact copy of the foregoing Reply Brief of Pilgrim's Pride Corporation and Pilgrim's Pride Corporation of West Virginia, Inc. was served by deposition the same postage prepaid in the United States Mail, this 8th day of July, 2011, addressed as follows:

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