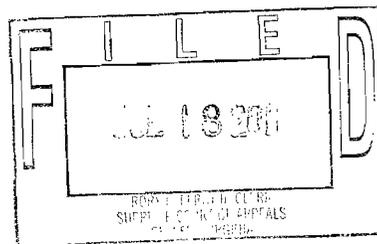


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 11-0666**



FEROLETO STEEL COMPANY, INC.,

Petitioner,

v.

THOMAS A. OUGHTON, ASSESSOR OF BROOKE COUNTY,  
COUNTY COMMISSION OF BROOKE COUNTY and  
WEST VIRGINIA STATE TAX COMMISSIONER,

Respondents.

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**BRIEF OF PETITIONER FEROLETO STEEL COMPANY, INC.**

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## I. ASSIGNMENTS OF ERROR

**Assignment of Error No. 1:** The Brooke County Circuit Court erred in granting the Respondent, West Virginia State Tax Commissioner's (the "Tax Commissioner") Motion for Summary Judgment and by not granting Feroletto Steel Company, Inc.'s Motion for Summary Judgment, erroneously ruling that Feroletto Steel Company, Inc.'s steel coils were not exempt from the *ad valorem* tax under the Freeport Amendment based upon its process of cutting steel coils into narrower steel coils.

**Sub-issue (a):** The Brooke County Circuit Court erred in holding that Feroletto Steel Company, Inc.'s steel coils were not entitled to exemption from *ad valorem* taxation under the Freeport Amendment to the West Virginia Constitution. W. Va. Const. art. X, § 1c (1986).

**Sub-issue (b):** The Brooke County Circuit Court's Memorandum of Opinion and Order, dated March 16, 2011, which granted the Tax Commissioner's Motion for Summary Judgment, does not contain sufficient findings of fact and conclusions of law, to permit meaningful appellate review, as required by well established West Virginia law.

## II. STATEMENT OF THE CASE

### A. **Statement of Relevant Facts**

Feroletto Steel Company, Inc., ("Feroletto"), maintains a warehouse facility located in the Half Moon Industrial Park, in Weirton, Brooke County, West Virginia. (Petitioner's Appendix Record, hereinafter "Pet'r's App. R." at 24, 29, 62.) Feroletto's business consists only of providing flat rolled steel coils to its five out-of-state customers which it cuts according to its customer's request, repackages the narrower strips of steel and ships the coils to its customers. (Pet'r's App. R. at 5-9, 29-30, 77, 94-96, 98-100.)

To fill its customer's orders, Feroletto purchases flat rolled coils of steel from various steel companies outside the state of West Virginia and stores them in its warehouse. (Pet'r's App. R. at 77.) These steel coils, warehoused by Feroletto, are of varying widths and thickness. (Pet'r's App. R. at 30, 71, 97.)

Feroletto takes coils of the specified thickness and length and cuts the steel into the widths and lengths ordered by its customers. (Pet'r's App. R. at 29-30.) Feroletto's customers state with specificity the widths and lengths of the strips of flat steel they require. (Pet'r's App. R. at 98-100.) After cutting the steel into the specified widths and lengths, Feroletto repackages the steel into coil form and ships the steel coils to its customers. (Pet'r's App. R. at 5-8.) Occasionally, Feroletto will receive orders for uncut steel coils and will ship such uncut coils to those customers. (Pet'r's App. R. at 29-30.)

From 1995 to 2008, Feroletto sought and received an exemption for its warehoused steel coils from *ad valorem* taxation, as provided by Article X, Section 1c of the West Virginia Constitution, commonly known as the Freeport Amendment. (Pet'r's App. R. at 3, 8, 29-30.)

## **B. Procedural History**

On or about January 20, 2010, Feroletto filed an application seeking to have its steel coils exempt from *ad valorem* taxation pursuant to the express terms of the Freeport Amendment to the West Virginia Constitution. (Pet'r's App. R. at 5-8.) On January 21, 2010, Thomas A. Oughton, the Brooke County Assessor, recommended that the application be denied and submitted the application and his recommendation to the Tax Commissioner. (Pet'r's App. R. at 9.)

In Property Tax Ruling 10-59 (Pet'r's App. R. at 11-14) the Tax Commissioner ruled that "the cutting and forming of steel coils to the individual customer's specifications results in a

product of different utility.” (Pet’r’s App. R. at 14.) Further, that “the tangible personal property in the form of steel coils awaiting processing and owned by Feroletto Steel Co., Inc. is not tangible personal property which is moving in interstate commerce, and therefore, is not exempt from ad valorem taxation under the Freeport Amendment.” (Pet’r’s App. R. at 14.)

Feroletto timely filed its Petition in the Circuit Court of Brooke County, West Virginia seeking to have the Court reverse the ruling of the Tax Commissioner and order that Feroletto’s steel coils be exempt from *ad valorem* taxation pursuant to the express terms of the Freeport Amendment. (Pet’r’s App. R. at 3-14.) All Respondents answered the Petition and sought the approval of the Property Tax Ruling. (Pet’r’s App. 15-17, 20-22.)

Discovery was conducted, including the depositions of James Hillas, Feroletto’s senior vice-president, (Pet’r’s App. R. at 67-90) and James Shevlin, Feroletto’s Weirton warehouse general manager (Pet’r’s App. R. at 91-111), which are included in the Appendix Record of this appeal. After the completion of necessary discovery, both sides filed competing motions for summary judgment. (Pet’r’s App. R. at 23-31, 39-45, 46-48, 49-133.)

In an opinion of barely one and one-half pages, containing no findings of fact, no conclusions of law and no meaningful analysis or discussion, Judge Arthur M. Recht granted summary judgment in favor of the Tax Commissioner by Memorandum of Opinion and Order dated March 16, 2011. (Pet’r’s App. R. at 208-09.) Judge Recht ruled, “there can be no exemption from *ad valorem* taxation under West Virginia Constitution, Article 10 1c because the product is one of a ‘different utility’ when the steel coil is converted from a generic utility to a specific utility.” (Pet’r’s App. R. at 208-09.) Judge Recht makes no mention of the motion for summary judgment filed on behalf of Feroletto other than to mention that there were “competing Motions for Summary Judgment”. (Pet’r’s App. R. at 208-09.)

### **III. SUMMARY OF ARGUMENT**

The Freeport Amendment to the West Virginia Constitution exempts certain items of personal property traveling in interstate commerce from the West Virginia *ad valorem* tax. The exemption still applies when an item of personal property is cut, so long as a product of different utility does not result. Feroletto maintains steel coils which are cut into narrower steel coils and then shipped out-of-state. The mere cutting of a larger steel coil into a smaller steel coil is expressly permissible under West Virginia law and does not result in a product of different utility. Therefore, Feroletto's steel coils are entitled to exemption from the West Virginia *ad valorem* tax, and Judge Recht erred in ruling to the contrary.

When a West Virginia circuit court grants a motion for summary judgment, it is required to issue findings of facts and conclusions of law. When Judge Recht granted the Tax Commissioner's Motion for Summary Judgment he did not supply the factual and legal basis of the conclusion, issuing a less than two page opinion, failing to meet the minimum standard for granting summary judgment under settled West Virginia law.

### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This case is appropriate for a Revised Rule 20 oral argument because it involves an issue of first impression and illuminates inconsistent decisions of lower tribunals. To date, the Supreme Court of Appeals of West Virginia has not issued a published opinion respecting the West Virginia Constitutional Amendment (W. Va. Const. art. X, § 1c) and the West Virginia Code sections (W. Va. Code §§ 11-5-13 and 11-5-13a) applicable to this appeal. Additionally, at least two other circuit courts have held certain items of personal property as exempt from the West Virginia *ad valorem* tax even though some of the items of personal property underwent more extensive processing than the items at issue here. See Mongold Lumber Enterprises, Inc. v.

Paige, Randolph Co. Cir. Ct., Civ. Action No. 95-C-51 (September 27, 1995) (Pet'r's App. R. 143-45); See also American Woodmark Corporation v. Paige, Hardy Co. Cir. Ct., Civ. Action No. 92-P-19 (December 28, 1992) (Copy attached.). The decision here is in direct conflict with the decisions of other circuit courts, and if permitted to stand, would mean that the *ad valorem* tax exemptions are not being equally and uniformly applied. A uniform and equal application of tax law is mandated by the West Virginia Constitution. W. Va. Const. art. X, § 1 (1932). Argument is therefore necessary to more effectively present the apparent issues of this important taxation issue of first impression.

Pursuant to the time limitations prescribed by Revised Rule 20, twenty (20) minutes of oral argument is requested.

## **V. ARGUMENT**

### **A. STANDARD OF REVIEW**

“A circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. pt. 1, Davis v. Foley, 193 W. Va. 595, 457 S.E.2d 532 (1995).

“In reviewing summary judgment, [the Supreme Court of Appeals of West Virginia] will apply the same test that the circuit court should have used initially, and must determine whether ‘it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.’” Murray v. State Farm Fire and Casualty Company, 203 W. Va. 447, 482, 509 S.E.2d 1, 6 (1998) (citing Syl pt. 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963)).

**B. JUDGE RECHT ERRED IN GRANTING THE TAX COMMISSIONER'S MOTION FOR SUMMARY JUDGMENT AND NOT GRANTING FEROLETO'S MOTION FOR SUMMARY JUDGMENT**

**1. Feroleto's Cutting of Steel Coils Does Not Disqualify the Property from Being Exempt from the West Virginia *Ad Valorem* Tax Under the Express Terms of the "Freeport Amendment."**

Generally, 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. State ex. rel. Battle v. Baltimore and Ohio Railroad Co., 149 W. Va. 810, 839, 143 S.E.2d 331, 348 (1965); Cert. denied, 384 U.S. 970, 86 S.Ct. 1859, 16 L.Ed2d 681 (1966). (State ex. rel. Battle v. Baltimore and Ohio Railroad Co., involved a privilege tax imposed on a railroad.) See also Wooddell v. Dailey, 160 W. Va. 65, 68, 230 S.E.2d 466, 469 (1977). "[W]hen tax legislation is clearly intended to create a socioeconomic benefit [the Supreme Court of Appeals of West Virginia] [has] concluded that such legislation should be given a broad construction to achieve the beneficial and remedial purposes it is intended to promote." Apollo Civic Theatre, Inc. v. State Tax Com'r, 223 W. Va. 79, 87, 672 S.E.2d 215, 223 (2008). See also Andy Bros. Tire Co., Inc. v. West Virginia State Tax Com'r., 160 W. Va. 144, 147, 233 S.E.2d 134, 136 (1977) ("This court has always attempted to construe socioeconomic legislation to effectuate recited legislative intent."); Brockway Glass Co., Inc. v. Caryl, 183 W. Va. 122, 124-25, 394 S.E.2d 524, 526-27 (1990) (liberally construing tax credit legislation in favor of the taxpayer).

The tax law under consideration in this appeal is West Virginia Constitution Article X, Section 1c, commonly called the Freeport Amendment. House Joint Resolution 1 proposing the Freeport Amendment to the Constitution was adopted by the West Virginia Legislature during the second extraordinary session of 1986 and adopted by the voters at the general election held November 4, 1986 to incentivize development of warehousing in West Virginia to take

advantage of goods moving in interstate commerce over West Virginia's many Interstate highways and navigable waterways. 1986 W. Va. Acts Second Extraordinary Session 1124. The amendment was adopted by the Legislature and ratified by the voters at a time when West Virginia was struggling to recover from the devastating national recession of the early 1980's. The Freeport Amendment was adopted during the same time a number of important changes were made in West Virginia's tax code all aimed at stimulating economic development and creating jobs. For example, the rates of the business and occupation taxes were being reduced. 1985 W. Va. Acts 1472, 1482, 1561 & 1563. That tax and the annual tax on incomes of certain carriers were eliminated for most businesses beginning July 1, 1987. 1985 W. Va. Acts 1472, 1486 & 1487. The business investment and jobs expansion tax credit was enacted in 1985 to stimulate growth in manufacturing. 1985 W. Va. Acts 1567. In 1986, the personal income tax was revised by expanding the base and reducing the rates of tax from a top marginal rate of 13% to a top marginal rate of 6.5% for tax years beginning after December 31, 1986. 1987 W. Va. Acts 764. It can, thus, be comfortably stated that the Freeport Amendment is socio-economic legislation.

The Freeport Amendment provides:

Notwithstanding any other provision of this Constitution, tangible personal property which is moving in interstate commerce through or over the territory of the State of West Virginia, or which was consigned from a point of origin outside the State to a warehouse, public or private, within the State for storage in transit to a final destination outside the State, whether specified when transportation begins or afterward, but in any case specified timely for exempt status determination purposes, shall not be deemed to have acquired a tax situs in West Virginia for purposes of ad valorem taxation and shall be exempt from such taxation, except as otherwise provided in this section. Such property shall not be deprived of such exemption because while in such warehouse the personal property is assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled, or

repackaged for delivery out of state, unless such activity results in a new or different product, article, substance or commodity, or one of different utility. Personal property of inventories of natural resources shall not be exempt from ad valorem taxation unless required by paramount federal law.

W. Va. Const. art. X, § 1c (1986) (Emphasis added.).

The Freeport Amendment embodies a tax exemption. Ordinarily, if rules of construction are necessary, laws of tax exemption are narrowly construed against the taxpayer. See Owens-Illinois Glass Company, 151 W. Va. 655, 154 S.E.2d 854 (1967). However, the Freeport Amendment, an exemption, is embodied within the West Virginia Constitution. Constitutional provisions are given more weight and authority than statutory provisions. See Syl. pt. 2, Simms v. Sawyers, 85 W. Va. 245, 101 S.E. 467 (1919) (“The provisions of the Constitution, the organic and fundamental law of the land, stand upon a higher plane than statutes, and they will as a rule be held mandatory in prescribing the exact and exclusive methods of performing the acts permitted or required.”). If questions arise about how to construe a constitutional provision, then constitutional construction is “in the main governed by the same general rules applied in statutory construction.” Syl. pt. 1, Winkler v. State School Building Authority, 189 W. Va. 748, 434 S.E.2d 420 (1993); Syl. pt. 1, State ex rel. Holmes v. Gainer, 191 W. Va. 686, 447 S.E.2d 887 (1994). Therefore, the Freeport Amendment is a socio-economic constitutional tax provision, which, under the well established rules of construction in West Virginia, should be interpreted broadly in favor of the taxpayer, Ferroto. The Legislature said as much in W. Va. Code § 11-5-13a(a), discussed infra, (“[i]t is the intent of the Legislature that the provisions of this section are to be liberally construed in favor of a person claiming exemption from tax pursuant to the provisions of section one-c, article ten of the West Virginia Constitution, this section and section thirteen of this article.”)

The most reasonable interpretation of the Freeport Amendment in relation to this appeal is that personal property moving through the State of West Virginia for storage in transit is exempt from *ad valorem* taxation, and it is not to lose the exemption when, during storage, it is processed, cut or repackaged for delivery out of state. Only if the cutting or repackaging of the personal property results in a new or different product or one of different utility can the State of West Virginia tax such personal property.

In the present matter, the Tax Commissioner urged and Judge Recht ruled that when Feroletto takes a “generic” steel coil and cuts it to different widths according to customer order, the steel coil is “converted” from a “generic utility” to a “specific” utility”, thereby creating a product with a “different utility”, and thereby losing the exemption from *ad valorem* taxation. (Pet’r’s App. R. at 208-09.) The ruling that a product of generic utility was converted to a specific and “different utility” resulting in the lost exemption is wrong.

Whatever one might say about the activities at Feroletto’s Weirton warehouse, however one might characterize the activities or in whatever light the activities might be seen (see, e.g., the Feroletto Site Visit DVD [Pet’r’s App. R. at 112] which, by video, shows the activities carried out at Feroletto’s warehouse and the machinery used in those activities), the fact remains undisputed that the only thing that Feroletto does is receive coils of steel which originate from manufacturers outside of the State of West Virginia, cut those coils of steel into narrower strips of steel, repackage the narrower strips of steel into coils and ship the coils of narrower strips of steel onto its five customers who are located out of the State of West Virginia. Feroletto does nothing else. Feroletto does not chemically treat the steel in any way. It does not submerge the steel into any container to add any additional coating onto the steel. It does not bend or mold the steel into any shape or form. It does not modify the edges of the steel in any way. It does not

thin or thicken the steel. It does not stretch, shrink or constrict the steel. It does nothing but cut the steel. Feroletto's activities fit squarely within the four corners of the exemption provided by the Freeport Amendment.

Following the adoption of the Freeport Amendment in 1986, the West Virginia legislature enacted, in 1987, West Virginia Code § 11-5-13, which legislatively repeats the identical provisions of the Freeport Amendment in providing for the exemption from *ad valorem* taxation. In total, West Virginia Code Section 11-5-13 provides:

(a) Tangible personal property which is moving in interstate commerce through or over the territory of the state of West Virginia, or which was consigned from a point of origin outside the state to a warehouse, public or private, within the state for storage in transit to a final destination outside the state, whether specified when transportation begins or afterward, but in any case specified timely for exempt status determination purposes, shall not be deemed to have acquired a tax situs in West Virginia for purposes of ad valorem taxation and shall be exempt from such taxation, except as otherwise provided herein.

(b) Such property shall not be deprived of such exemption, because while in the warehouse the personal property is assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled, or repackaged for delivery out of state, unless such activity results in a new or different product, article, substance or commodity, or one of different utility.

W. Va. Code § 11-5-13. (Emphasis added.). That the legislation was enacted repeating the identical constitutional provision would seem to reinforce the exemption.

Along with the legislation, companion West Virginia Regulations, § 110-3-3.6.1 and 110-3-3.6.2, were enacted again repeating and re-emphasizing the provisions of the Freeport Amendment. The regulations provide:

§110-3-3.6.1. Tangible personal property which is moving in interstate commerce through or over West Virginia, or which was consigned from a point of origin outside of West Virginia to a

public or private warehouse in this State for storage in transit to a final destination outside this State shall be exempt from ad valorem property taxation. . .

§ 110-3-3.6.2. The exemption shall be allowed if the property, while in the warehouse, is assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled, or repackaged for out-of-state delivery so long as the activity does not result in a new or different article, product, substance or commodity, or one of different utility.

W. Va. Code St. R. § 110-3-3.6.

Thereafter, the West Virginia legislature enacted West Virginia Code § 11-5-13a, which provides:

This section is intended to clarify the intent of the Legislature and the citizens in establishing the exemption from ad valorem property taxation granted by section one-c, article ten of the West Virginia constitution and section thirteen of this article as it pertains to goods held in warehouse facilities in this state awaiting shipment to a destination outside this state. This section codifies policies applied by agencies and departments of this state upon which persons have relied. It is the intent of the Legislature that the provisions of this section are to be liberally construed in favor of a person claiming exemption from tax pursuant to section one-c, article ten of the West Virginia constitution, this section and section thirteen of this article.

W. Va. Code § 11-5-13a(a) (Emphasis added.). West Virginia Code § 11-5-13a(a) requires a contrary construction of tax exemption legislation in favor of the taxpayer claiming exemption from taxation under the Freeport Amendment than generally is accorded under case decision. See, e.g., Syl. pt. 3, Owens-Illinois Glass Company v. Battle, supra.

West Virginia Code § 11-5-13a(b) provides:

Goods which have been moved to a warehouse or storage facility, at which no substantial alteration takes place, to await shipment to a destination outside this state are deemed to be moving in interstate commerce over the territory of the state and therefore are exempt from ad valorem property tax and do not have a tax situs in West Virginia for purposes of ad valorem taxation.

W. Va. Code § 11-5-13a(b) (Emphasis added.). Just what is meant by the language “at which no substantial alteration takes place” is unclear. However, what is certain is that the language cannot be interpreted to restrict or void the directions provided by the preceding section, § 11-5-13a(a), nor the exemption provided by the Freeport Amendment when only cutting is done by the taxpayer. Cutting, which is expressly permitted by the Constitution, statute and regulatory provisions, does not result in a product of a different utility and does not remove the exemption.

Every word of the Freeport Amendment and of West Virginia Code §§ 11-5-13 and 11-5-13a must be read and given effect according to its plain meaning; not in derogation of other words. “Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed.” Syl. pt. 2., State ex rel. West Virginia Citizen Action Group v. Tomblin, Nos. 101494, 10-4004, 2011 WL 263735 (W. Va. January 18, 2011) (citing Syl. pt. 3, State ex rel. Smith v. Gore, 150 W. Va. 71, 143 S.E.2d 791 (1965). “[S]ignificance and effect must, if possible, be given to every section, clause, word or part of [a] statute.” Meadows v. Wal-Mart Stores, Inc., 207 W. Va. 203, 530 S.E.2d 676 (1999).

Thus, the Freeport Amendment, augmented and re-emphasized by West Virginia Code § 11-5-13, augmented and re-emphasized by regulatory provisions § 110-3-3.6.1 and 110-3-3.6.2, and amplified by West Virginia Code § 11-5-13a(a) is the only instance in which such a clear enunciation in favor of the taxpayer has been proclaimed in West Virginia. Surely those provisions mean something, and they must be applied according to their plain and ordinary meaning. See also Barr v. NCB Management Services, Inc., et al, No. 35709, 2011 WL 2446640 (W. Va. June 14, 2011) (“[I]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their

common, ordinary and accepted meaning in the connection in which they are used.”). Therefore, “cut” should mean “cut,” “exempt” should mean “exempt,” and “liberally construed in favor of a person claiming exemption,” should mean just that. Yet, if simply cutting strips of steel into narrower strips of steel results in a product of different utility, as Judge Recht has ruled, then the constitutional, statutory and regulatory provisions with respect to efforts to preserve the exemption when the only activity is cutting the product are rendered meaningless. That cannot be done.

The Tax Commissioner has had opportunities to address applications seeking exemptions under the Freeport Amendment in the past. A review of a sampling of those rulings provides some understanding of the tax treatment afforded by the Tax Commissioner in several instances.

Property Tax Ruling 02-14, issued on February 28, 2002, involved an application by Bayer Corporation seeking an exemption of certain products used in the automotive and construction industries. (Pet’r’s App. R. at 147-59.) The activities at Bayer involved the mixing of various chemicals or chemical groups to create an end use product, the combination of chemicals with a catalyst to start a chemical reaction, to which oxides are then added to bring the chemicals to the proper OH content which is then heated to quicken the reaction time. (Pet’r’s App. R. at 150-59.) The application of acid and water to various chemicals was also carried out. (Pet’r’s App. R. at 150-59.) The Tax Commissioner concluded that various raw materials were “consumed in the manufacturing process” in creating “new and different” products. (Pet’r’s App. R. at 164.) The exemption was denied. (Pet’r’s App. R. at 165-66.) Nothing so involved as creating new chemical products occurs at Feroleto’s warehouse.

Property Tax Ruling 04-02, issued on January 6, 2004, involved an application by A.E., Inc. seeking an exemption of certain rolls of aluminum. (Pet’r’s App. R. at 168-75.) At A.E.’s

plant in Upshur County, West Virginia, A.E. receives coils of thick aluminum, runs the aluminum through machinery which stretches the aluminum lengthwise, but not widthwise, to make the aluminum thinner, runs the aluminum through a furnace to reduce the brittleness caused by the thinning process, repeatedly thins the aluminum according to the customer orders, and cuts the aluminum to customer specified lengths and widths. (Pet'r's App. R. at 168-70.) The Tax Commissioner concluded that the activities carried out by A.E. transformed the aluminum into thinner, more pliable aluminum, and ruled that the exemption did not apply. (Pet'r's App. R. at 174-75.) Feroletto does not carry out any such treatment of the steel under consideration.

Property Tax Ruling 04-05, issued on February 13, 2004, involved an application by Wheeling-Nisshin, Inc. seeking an exemption of certain coils of steel. (Pet'r's App. R. at 177-83.) In Wheeling-Nisshin's plant in Follansbee, West Virginia, taxpayer took coils of steel, unrolled the coils, ran the strips of steel through a furnace where the steel was heated to a very high temperature, and then submersed the steel in a bath where a coating is applied to the steel. (Pet'r's App. R. at 178-79.) The steel was then sent through a tension leveler to remove any imperfections along the edges and to make certain the steel was of a certain thickness, following which the steel was rolled and packaged. (Pet'r's App. R. at 178-79.) The Tax Commissioner ruled that the coating process constituted a manufacturing process whereby steel of a different character was created for customers, and the exemption was not permitted. (Pet'r's App. R. at 181-82.) No activity occurs at Feroletto's warehouse whereby a coating is applied to the steel.

Property Tax Ruling 05-16, issued on February 28, 2005, involved an application by Swisher International in its Wheeling facility seeking an exemption for its moist and dry snuff tobacco products. (Pet'r's App. R. at 185-93.) Swisher would take bundles of blended tobacco

which had been cut into strips of two to four inches, cut that tobacco into smaller rectangular pieces of approximately 1/8 inch x 1/32 inch, spray the mixture with a flavoring mix, and for moist snuff tobacco products Swisher would dry the tobacco to a certain moisture content, package the tobacco into individual consumer packages and ship the snuff to its customers. (Pet'r's App. R. at 185-90.) For dry snuff tobacco products Swisher would add the flavoring mix then chop and grind the tobacco into a powder-like form, dry the snuff to a certain moisture content and package the dry snuff tobacco products into individual consumer packages and ship the snuff to its customers. (Pet'r's App. R. at 185-90.) The Tax Commissioner concluded that the snuff is a "product of manifestly different utility than the course, strip cut tobacco blend" that was initially received by Swisher and ruled that the exemption did not apply. (Pet'r's App. R. at 192-93.) Again, Swisher's activities involved more than cutting as occurs at Feroletto's facility.

All of the foregoing rulings clearly involved activities at the taxpayer's West Virginia facilities consisting of more than just cutting as present at Feroletto's warehouse, and the Tax Commissioner characterized the activities as manufacturing activities. While the Tax Commissioner also characterized the cutting activities at Feroletto as "manufacturing" activities, the characterization of Feroletto's activities as manufacturing is misplaced and does not serve to address the issue of "utility." In fact, Feroletto has not been able to find an adverse tax ruling by the Tax Commissioner disqualifying the taxpayer from the Freeport exemption where the only activity at taxpayer's facility is cutting the product.

Other circuit court cases, however, have found that when a taxpayer engages in activities that are expressly permitted under the terms of the Freeport Amendment, then exemption from the *ad valorem* tax shall be permitted. In Mongold Lumber Enterprises, Inc. v. Paige, the taxpayer sought exemption for its inventory of logs, green lumber, dried lumber and milled

woodwork. Mongold Lumber Enterprises, Inc. v. Paige, Randolph Co. Cir. Ct., Civ. Action No. 95-C-51 (September 27, 1995) (Pet'r's App. R. 143-45). As this inventory moved in interstate commerce, while in West Virginia, the logs were sawed and either kiln dried or sold while some of the lumber was cut. Property Tax Ruling 94-06, issued February 23, 1994. The Circuit Court of Randolph County, West Virginia, by Order entered the 28<sup>th</sup> day of September 1995, ruled that the taxpayer's inventory did not lose its Freeport Amendment exemption based upon the taxpayer's activities in relation to the inventory, insofar as the inventory was sold out-of-state. (Pet'r's App. R. 143-144). Thus, the taxpayer's cutting of the lumber was permissible, expressly permitted under the Freeport Amendment, and the exemption was retained.

Similarly, the Circuit Court of Hardy County, West Virginia, in American Woodmark Corporation v. Paige, decided that a taxpayer was entitled to exemption when more than just cutting of personal property occurred at the taxpayer's facility. American Woodmark Corporation v. Paige, Hardy Co. Cir. Ct., Civ. Action No. 92-P-19 (December 28, 1992). Lumber items were transported from out-of-state to the American Woodmark facility in West Virginia. While at the West Virginia facility, the lumber items underwent a series of different processes, depending upon the nature of the lumber item. Some lumber items were cut, sanded, drilled, painted, stained and assembled, or any combination thereof, before being shipped to destinations outside of West Virginia. The Circuit Court of Hardy County found that eleven of the twelve disputed lumber items were exempt under the express terms of the Freeport Amendment. These eleven lumber items were subject to limited processing and assembly and ultimately left the American Woodmark facility with the same practical purpose, which is expressly permitted under the terms of the Freeport Amendment. The twelfth lumber item, however, entered the American Woodmark facility as dried lumber and left as a finished cabinet.

The Circuit Court of Hardy County found that only the twelfth item went beyond the boundaries of the Freeport Amendment because a “different product of different utility” resulted.

The activities that occur at Feroletto’s facility are similar to, but consist of even less processing than, those that entitled the personal property in Mongold Lumber Enterprises, Inc. and American Woodmark Corporation to exemption from *ad valorem* tax. The personal property enters the facility, is cut, repackaged and leaves the facility with the same purpose—all activities which are expressly permitted under the Freeport Amendment.

The Mongold Lumber Enterprises, Inc. and American Woodmark Corporation cases and this appeal also demonstrate that Judge Recht’s order creates an unequal and non-uniform application of the Freeport Amendment in the State of West Virginia, in contravention of the West Virginia Constitution. The West Virginia Constitution plainly states that “taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law.” W. Va. Cons. art. X, § 1 (1932). Since the Circuit Courts of Randolph and Hardy County allowed the taxpayer an exemption from the *ad valorem* tax for engaging in activities that are expressly permitted under the terms of the Freeport Amendment while, the Circuit Court of Brooke County disallowed exemption for activities expressly permitted under the terms of the Freeport Amendment, Judge Recht created the unconstitutional situation whereby Brooke County does not tax in uniformity with the other West Virginia counties. Therefore, this Court should decide that Feroletto’s cutting of steel coils is expressly permitted under the terms of the Freeport Amendment and that they are entitled to exemption from the *ad valorem* tax. Ruling this way would bring Brooke County’s handling of the Freeport Amendment in line with the other counties and would create the taxing equality and uniformity mandated by the West Virginia Constitution.

**2. There Are No Findings of Fact and Conclusions of Law to Support Judge Recht’s Memorandum of Opinion and Order Granting the Tax Commissioner’s Motion for Summary Judgment.**

“[A] circuit court’s order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.” Syl. pt. 3, Fayette County National Bank v. Lilly, 199 W. Va. 349, 448 S.E.2d 232 (1997). “In other words, the circuit court’s order must provide clear notice to all parties and the reviewing court as to the rationale applied in granting or denying summary judgment.” Id. at 237. See also Poole v. Berkeley County Planning Commission, 200 W. Va. 74, 488 S.E.2d 349 (1997) (remanding case to circuit court to make specific findings of fact and conclusions of law); Nestor v. Bruce Hardwood Flooring, L.P., 206 W. Va. 453, 526 S.E.2d 334 (1999) (the circuit court “committed reversible error by granting summary judgment without including sufficient findings of fact and conclusions of law in its final order” which contained “conclusory findings” and which was vague “concerning the evidence upon which [the Court] relied,” and because the order failed to sufficiently set forth the factual and legal reasons for the decision); Ayersman v. West Virginia Division of Environmental Protection, 208 W. Va. 544, 542 S.E.2d 58 (2000) (lower court’s summary judgment was deficient because it did “not reveal . . . what finding, if any, it made with regard to the facts at issue.”); Thompson v. Hatfield, 225 W. Va. 405, 693 S.E.2d 479 (2010) (Summary judgment reversed because lower court’s order did not contain “findings of fact and conclusions of law sufficient for meaningful review by this Court” and was “devoid of any legal authority for the circuit court’s decision.”).

In denying the application of Feroletto, the Brooke County Assessor took the position that “only finished goods are eligible for the Freeport exemption from taxation and not raw materials

(coils)". (Pet'r's App. R. at 9.) The argument seems to be that because the steel coils are cut before being shipped to Feroletto's customers, the steel coils are not "finished goods". The Tax Commissioner seems to adopt that proposition in its Ruling in stating that "we are here primarily concerned with the goods in process and the goods (raw materials) waiting to undergo a process whereby it is cut and formed to the specification of an out-of-state customer. We are of the opinion that the processing (i.e., the cutting) is a manufacturing activity." (Pet'r's App. R. at 13.) The Tax Commissioner then concluded that the cutting of the coils is a manufacturing activity that results in a "new or different product, article, substance or commodity, or one of different utility." (Pet'r's App. R. at 13.)

The position of the Tax Commissioner, which was adopted by Judge Recht, is that because Feroletto cuts the steel into narrower strips as specified by its customers, the cut steel is of a "different utility," and therefore the exemption is lost.

Judge Recht's order does not address the application or the effect of the express proviso contained in the Freeport Amendment that "(s)uch property shall not be deprived of such exemption because while in such warehouse the personal property is . . . divided, cut, . . . or repackaged for delivery out of state." The same provisions are repeated in West Virginia Code § 11-5-13 and West Virginia Regulations § 110-3-3.6.1 and 110-3-3.6.2. It is undisputed that the only activity by Feroletto is to cut the flat steel into narrower strips and recoil or repackage the steel as narrower strips of steel, and ship the steel coils to out-of-state customers. We emphasize the process begins with coils of steel and ends with coils of steel. The only difference is that the resulting coils may be narrower than the original coils of steel. The Freeport Amendment clearly anticipates that interstate commerce products may be cut without losing their exemption from taxation. But the order granting summary judgment implicitly and erroneously concludes that

the steel coil as it is received by Feroletto is “a generic coil” with “a variety of non-specific potential uses”, but when it is cut by Feroletto it is “transformed to a product of specific utility” because it has been cut to “conform to the custom dimensions dictated by the needs of the ultimate end user.” (Pet’r’s App. R. at 208-09.)

Under the Tax Commissioner’s and Judge Recht’s reasoning, there could never be a product in interstate commerce that is only cut in West Virginia in any way, manner, degree, shape or form that could be exempt from *ad valorem* taxation. Under this reasoning, simply being cut, the product is “transformed”, the potential customer base is more restricted, so therefore the product has a different utility. The Freeport language in the use of the term “cut” is rendered meaningless. However, the language exists and must have some significance. Nevertheless, Judge Recht’s order jumps to the conclusion that the steel coils are transformed to a specific utility because the coils are cut. The order does not reflect any reasoning or basis for the conclusion that simply cutting the steel “transforms” the steel into a different utility, rather the order states that because the steel is cut a different utility results. The order ignores the impact of West Virginia Code § 11-5-13 (a) and (b) and West Virginia Regulations § 110-3-3.6.1 and .2 which echo the exemption.

The order also fails to acknowledge the impact of West Virginia Code § 11-5-13a(a) which requires “liberal construction in favor of a person claiming exemption”. Rather than apply a “liberal construction in favor of” the exemption, Judge Recht’s order seems to take the opposite approach in favor of the Tax Commissioner to deny the exemption. The Freeport Amendment clearly requires that no exemption be applied to Feroletto’s steel coils. Nevertheless, despite there being no West Virginia Supreme Court of Appeals decision addressing the application of liberal construction of the Freeport Amendment provided by West Virginia Code § 11-5-13a(a),

Judge Recht's order does not contain any discussion of the clear, plain and unambiguous direction provided by the statutory provision to taxpayer's application for exemption.

Counsel for the Tax Commissioner spent considerable effort in discovery to erroneously argue that since Feroletto must cut the steel coils to precise customer specifications to be usable, that the precision cuts transformed the coils into a different product or one of different utility. (See e.g., Pet'r's App. R. at 13-14, 47, 49-50, 71-74, 77, 96-97, 99-101). Throughout the record, the Tax Commissioner did not give any significance to—did not even discuss—the implication of the express provisions of the Freeport Amendment which states that the property “shall not be deprived of such exemption” because it is “cut. . . for delivery out of state.” The Freeport Amendment does not provide that if interstate products are “cut,” the exemption stands, but if interstate commerce products are precisely cut to customer specifications, the exemption is lost. The Tax Commissioner's argument is a boot strap, self-serving argument without constitutional, statutory, regulatory or case law support. The express provision is that interstate commerce products may be cut without losing the exemption. Judge Recht's order failed to acknowledge or even address the issue.

Judge Recht's order does not adequately address, discuss or decide the implication of the Freeport Amendment, the statutory or the regulatory provisions in preserving the *ad valorem* taxation exemption when the interstate commerce products are “cut” and/or “repackaged” in West Virginia for delivery out-of-state. The order does not provide “factual findings sufficient to permit meaningful appellate review”. Syl. pt. 3, Fayette County National Bank v. Lilly, supra.

The factual bases contained in Judge Recht's order now challenged are: “the taxpayer receives a generic product (steel coil) which has a variety of non-specific potential uses”; “the taxpayer takes that coil and cuts it to conform to the custom dimensions dictated by the needs of

the ultimate end user.” (Pet’r’s App. R. at 208-09.) On the basis of those two considerations, the circuit court concluded that “the steel coil is converted (or “transformed”) from a generic utility to a specific utility”, and therefore the exemption is lost. (Pet’r’s App. R. at 209.) The order does not address or discuss the obvious implication of the Freeport Amendment language or the statutory or regulatory provisions referenced hereinbefore that preserves the exemption when products that are in interstate transportation are simply “cut” and “repackaged.” Rather than supply findings of fact and conclusions of law, as required by West Virginia law, Judge Recht summarily concluded that the coils are converted to a new or different utility. Regardless of Judge Recht’s characterization of the steel coils Feroletto purchases as (“generic . . . [with] a variety of non-specific potential uses”), the fact is that all of the coils that come into Feroletto’s hands, with few exceptions, are intended to be cut into dimensions specified by its customers. Feroletto has five out-of-state customers, and the coils that come to Feroletto do not have a “variety of non-specific potential uses”, rather the coils have only the uses of the five customers. The coils are to be cut, and the Freeport Amendment, along with the statutory and regulatory provisions, preserve the exemption when the interstate products are only to be cut.

Judge Recht’s order is deficient in failing to provide sufficient factual or legal basis for the granting of summary judgment in favor of the Tax Commissioner. However, the record is complete and demonstrates that there are no factual issues. Accordingly, upon *de novo* review this Court should consider the issues presented by the competing motions for summary judgment. In that event, Feroletto urges this Court should find that Feroletto’s steel coils are in the course of interstate commerce, that Feroletto simply cuts the wider widths of flat rolled steel into narrower widths of steel and repackages those products and ships the products to out-of-state customers, that by cutting, the steel coils are not transformed into products of a different or new

utility, that liberal construction in favor of the taxpayer seeking exemption is accorded, and Feroletto's steel coils are exempt from *ad valorem* taxation under the West Virginia Constitution and statutory and regulatory provisions.

## VI. CONCLUSION

The facts and law of this appeal were extensively presented to Judge Recht. The undisputed facts are that Feroletto maintains steel coils in West Virginia in the course of interstate commerce, that Feroletto cuts the steel coils into narrower widths and lengths of steel coils, that a different or new utility is not created as a result of the cutting, that Feroletto repackages the steel coils and ships them to their out-of-state customers. The undisputed applicable law is the Freeport Amendment and West Virginia Code §§ 11-5-13 and 11-5-13a and the corresponding regulations. The Freeport Amendment and the Code and regulations expressly exempt from *ad valorem* taxation, personal property traveling in interstate commerce that is cut when warehoused in West Virginia and then shipped outside of the state. The Code also expressly requires liberal construction in favor of taxpayer exemption.

Judge Recht erroneously granted the Tax Commissioner's Motion for Summary Judgment and did not rule on Feroletto's Motion for Summary, despite these undisputed facts and law. Moreover, Judge Recht erred in issuing a deficiently brief order granting the Tax Commissioner's Motion for Summary Judgment that did not include sufficient findings of fact or conclusions of law.

As of this date, at least two circuit courts have ruled that when a taxpayer engages in activities expressly permitted under the Freeport Amendment, they shall be entitled to retain exemption from the *ad valorem* tax. Judge Recht's order is an aberration to this treatment. Because there is a complete record before the Court which demonstrates no factual issue, this

Court should rule that Feroletto's steel coils are exempt from *ad valorem* taxation under the express terms of the West Virginia Constitution and statutory and regulatory provisions, so as to ensure the equal and uniform application of the Freeport Amendment.

Respectfully submitted,

**FEROLETO STEEL COMPANY, INC.**

**By SPILMAN THOMAS & BATTLE, PLLC**

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IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

AMERICAN WOODMARK CORPORATION, PETITIONER

VS. CIVIL ACTION NO. 92-P-19

JAMES H. PAIGE, III,  
STATE TAX COMMISSIONER, RESPONDENT

COURT'S OPINION

STATEMENT OF FACTS

Petitioner is situate in Hardy County, West Virginia, and warehouses certain items moving in Interstate Commerce. While in Petitioner's facility changes are made to certain of the products, some of which changes are minor, some of which are major in nature. Because of the nature of the changes made Respondent contends the products are subject to tax in West Virginia whereas the Petitioner contends the Freeport Amendment (Article 10, Section 1C of the West Virginia Constitution, codified as Code, Chapter 11, Article 5, Section 13) exempts it from taxation. It is agreed that the determination of whether any or all of the products become taxable depends upon whether any or all of the products become taxable depends upon whether the activity or changes made by Petitioner " - - results in a new or different product, article, substance or commodity, or one of different utility - - ".

FINDING BY THE COURT

As noted below the Court finds that some of the products do not become taxable in West Virginia, while other of the products do become taxable for the reason that the latter are changed to the extent it becomes a new or different product and of different utility.

COURT'S REASONING

The Freeport Amendment has not been subject to decisions or comments that are of much help to the Court in the questions raised in this action. Nor is the history of the Amendment very helpful. The Court does believe that the Amendment is to be liberally construed in favor of the warehousemen, but that the liberal construction has Constitutional limits. The purpose of the Amendment and the Legislature apparently is to encourage the establishment of warehouses within this State and to permit the warehousemen to make extensive changes to the products received by them and yet avoid tax liability. The employment and payrolls generated thereby are preferable to the ad valorem tax that may be received by the County and State.

The Court commends and thanks counsel for your good work in having prepared and presented the law and facts and your respective views thereof. The two video tapes which are of record were helpful to the Court, but obviously were not products of professionals in the field of video taping! As each of you ably pointed out we are sailing an uncharted sea and are in need of some guidance from our Supreme Court with reference to the breadth and limitation of the Freeport Amendment. You may or may not wish to seek that guidance in this case, but I would welcome it as a helpful tool to the Courts that will be faced with this Amendment in the future.

The Court finds that the categories of personal property as stipulated and agreed by the parties is a fair and accurate representation of the different categories of properties subject to this Opinion. For convenience sake that stipulation is attached to and made part of this Opinion and reference thereto will be made to the paragraphs as numbered therein.

The Court finds that the items in Petitioner's inventory which fall within those described in paragraphs numbered 1 through 11 are exempt from taxation, and those falling within paragraph numbered 12 are subject to taxation.

The items in each paragraph are received from outside of the State of West Virginia into Petitioner's warehouse where some are changed somewhat and then are transported outside of West Virginia. The Court finds that no activity by Petitioner with reference to items received and described in paragraphs 1 through 10 are so changed that a new or different product, article, substance or commodity, or one of different utility results. The only items giving the Court any question would be those described in paragraph numbered 11. The frames which leave Petitioner's plant came into the plant as dimension stock and Petitioner assembles this stock into the frames. This requires preparation of the stock by trimming, doweling, etc., but the Court believes when the stock arrives at Petitioner's facility the only practical purpose it could be utilized for would be the frames which are prepared and assembled by Petitioner. The Freeport

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Amendment specifically provides that property shall not be deprived of the tax exemption because while in Petitioner's facility it is assembled, joined, processed, cut, etc. The stock received being suitable only for the purpose which it leaves Petitioner's plant prevents it from becoming a new or different product or one of different utility.

The items received by Petitioner and described under paragraph numbered 12 go further than permitted by the Freeport Amendment in that these items become a new or different product and of different utility. The items are received as dried lumber or boards and are cut, shaped, and subject to other activity which results in them leaving Petitioner's plant as a finished cabinet door. These doors are a useless product themselves, but are components of finished cabinets. They are placed on the cabinets in Virginia. However, the Court believes that the receipt of rough lumber and the changing of that rough lumber into a finished cabinet door by Petitioner is such an activity that results in a different product and one of different utility leaving Petitioner's warehouse. Thus, these items become subject to the ad valorem tax.

#### CONCLUSION

You may prepare and submit to the Court for signature a proper Order in conformance with the above Opinion, saving your objections.

Dated this 28th day of December, 1992.

Judge of the Circuit Court of Hardy County,  
West Virginia

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

**No. 11-0666**

FEROLETO STEEL COMPANY, INC.,

Petitioner,

v.

THOMAS A. OUGHTON, ASSESSOR OF BROOKE COUNTY,  
COUNTY COMMISSION OF BROOKE COUNTY and  
WEST VIRGINIA STATE TAX COMMISSIONER,

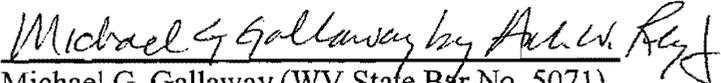
Respondents.

**CERTIFICATE OF SERVICE**

I, Michael G. Gallaway, hereby certify that on this 15<sup>th</sup> day of July, 2011, the foregoing “**BRIEF OF PETITIONER FEROLETO STEEL COMPANY, INC.**” and “**PETITIONER FEROLETO STEEL COMPANY, INC.’S APPENDIX RECORD VOLUME 1 OF 1**” was served upon counsel of record by mailing a true and correct copy thereof by United States mail, postage prepaid and properly addressed, as follows:

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