

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION .....	1
II. ARGUMENT .....	1
A. THE FREEPORT AMENDMENT AND ITS COMPANION STATUTES AND REGULATIONS ARE CLEAR AND UNAMBIGUOUS .....	1
B. THE PRECISENESS WITH WHICH FEROLETO CUTS ITS STEEL COILS DOES NOT DISQUALIFY THE PROPERTY FROM THE FREEPORT EXEMPTION BECAUSE THE PROCESS BEGINS WITH STEEL COILS AND ENDS WITH STEEL COILS—A DIFFERENT PRODUCT IS NOT CREATED .....	7
1. It Is Not Settled That Feroletto Must Prove Entitlement to the Freeport Exemption by Clear and Convincing Evidence.....	7
2. Even a Strict Construction Must be a Reasonable Construction .....	9
3. Feroletto’s Cutting of Steel Coils to Custom Dimensions Specified by Its Customers Does Not Result in Products of Different Utility Within the Meaning of the Freeport Amendment .....	9
4. The Circuit Court Decisions and Taxability Rulings Cited by Respondents are Inapplicable Where Those Cases Involved Substantially More Alterations of Personal Property .....	12
5. Equal and Uniform Application of the Freeport Amendment is Central to Resolution of the Issue in This Case.....	15
C. JUDGE RECHT’S ORDER DOES NOT CONTAIN SUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW.....	17
III. CONCLUSION .....	18

## TABLE OF AUTHORITIES

### WEST VIRGINIA CASES:

<u>Davis v. Hix</u> , 140 W. Va. 398, 80 S.E.2d 404 (1954) .....	5
<u>Fayette County Nat'l Bank v. Lilly</u> , 199 W. Va. 349, 484 S.E.2d 232 (1997).....	17, 18
<u>Fielder and Turley v. Adams Express Co.</u> , 69 W. Va. 138, 71 S.E. 99 (1911) .....	5
<u>Lane v. Board of Education of Lincoln County</u> , 147 W. Va. 737, 131 S.E.2d 105 (1963).....	5
<u>Louk v. Cormier</u> , 218 W. Va. 81, 622 S.E.2d 788 (2005).....	16
<u>Miners in General Group v. Hix</u> , 123 W. Va. 637, 17 S.E.2d 810 (1941) .....	5
<u>Mountain America, LLC v. Huffman</u> , 224 W. Va. 669, 678 S.E.2d 768 (2009) .....	16
<u>State v. Kittle</u> , 87 W. Va. 526, 105 S.E. 775 (1921).....	9
<u>State ex rel. Casey v. Pauley</u> , 158 W. Va. 298, 210 S.E.2d 649 (1975) .....	4
<u>State ex rel. Miller v. Buchanan</u> , 24 W. Va. 362 (1884) .....	16
<u>State ex rel. Reeves v. Ross</u> , 62 W. Va. 7, 57 S.E. 284 (1907) .....	9
<u>State ex rel. Smith v. Gore</u> , 150 W. Va. 71, 143 S.E.2d 791 (1965) .....	4
<u>State ex rel. Trent v. Sims</u> , 138 W. Va. 244, 77 S.E.2d 122 (1953).....	4, 7
<u>State ex rel. West Virginia Citizens Action Group v. Tomblin</u> , Nos. 101494, 10-4004, 2011 WL 263735 (W. Va. January 18, 2011).....	4, 5
<u>Stone Brooke Ltd. Partnership v. Sisinni</u> , 224 W. Va. 691, 688 S.E.2d 300 (2009).....	17, 16
<u>Tax Comm'r v. Veterans of Fgn. Wars</u> , 147 W. Va. 645, 129 S.E. 2d 921 (1963).....	4, 5
<u>Wilson v. Hix</u> , 136 W. Va. 59, 65 S.E.2d 717 (1951) .....	5
<u>Wooddell v. Dailey</u> , 160 W. Va. 65, 230 S.E.2d 466 (1976) .....	4, 5

### WEST VIRGINIA CONSTITUTION:

W. Va. Const. art. X, § 1 (1932).....	15, 16, 19
W. Va. Const. art. X, § 1c (1986).....	1, 2, 5, 6, 7, 10, 11, 15, 19

**WEST VIRGINIA STATUTES, RULES AND REGULATIONS:**

W. Va. Code § 11-3-25 (2010) .....8

W. Va. Code § 11-5-13 (1987) .....2, 8, 9, 10, 11, 19

W. Va. Code § 11-5-13a (1997).....3, 6, 8, 9, 11, 14, 19

W. Va. Code St. R. § 110-3-3.6 (1989) .....19

## I. INTRODUCTION

In their Brief, the West Virginia State Tax Commissioner (“Tax Commissioner”), Thomas A. Oughton, Assessor of Brooke County and the County Commission of Brooke County (hereinafter, collectively, the “Respondents”), continue to argue for an unjustifiable reading of the Freeport Amendment, West Virginia Constitution, Article X, § 1c (1986), as applied to the personal property of Feroletto Steel Company, Inc. (hereinafter “Feroletto”). Feroletto maintains that the Freeport Amendment is clear and unambiguous, must be applied according to its plain meaning and that upon application, Feroletto’s cutting of steel coils in the stream of interstate commerce are expressly exempt from the *ad valorem* tax.

Even after acknowledging that Judge Arthur M. Recht’s (“Judge Recht”) Order was “short,” Respondents attempt to provide a *post hoc* rationalization of why his order granting the Tax Commissioner’s motion for summary judgment contained sufficient findings of fact and conclusions of law. Respondents consumed more pages in their Brief attempting to justify Judge Recht’s Order than the Order itself. Simply, the Order was and remains factually and legally deficient.

## II. ARGUMENT

### A. **THE FREEPORT AMENDMENT AND ITS COMPANION STATUTES AND REGULATIONS ARE CLEAR AND UNAMBIGUOUS.**

Resolution of this case requires only the application of simple facts—that Feroletto receives steel coils from out-of-state, cuts them and ships the cut steel coils out-of-state—to the plain meaning of the West Virginia Constitution, Article X, § 1c (1986), commonly referred to as the Freeport Amendment, and West Virginia Code § 11-5-13. The Freeport Amendment reads, in pertinent part:

**§ 1c. Exemption from ad valorem taxation of certain personal property of inventory and warehouse goods, with phase in to full exemption over five-year period.**

Notwithstanding any other provisions 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 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. \* \* \*

(Emphasis added.).

The applicable statute reads, in pertinent part:

**§11-5-13. Exemption of inventory and warehouse goods.**

(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.

\* \* \*

(Emphasis added.).

In 1997, the West Virginia Legislature enacted West Virginia Code § 11-5-13a (application of exemption to finished goods in warehouse). This section accomplished three things. First, it codified, with one exception, policies adopted by state agencies and the courts for the Freeport Amendment during the preceding ten years. Second, in the single exception, the West Virginia Legislature rejected the Tax Commissioner's position that the Freeport exemption is to be strictly construed and, in West Virginia Code § 11-5-13a(a) replaced the rule with one of liberal construction of the Freeport Amendment in favor of the taxpayer seeking exemption. Third, West Virginia Code § 11-5-13a(b) uses the phraseology of "no substantial alteration" instead of the "new or different product" or "one of different utility" language used in the constitutional and statutory provisions in describing permissible activities in the warehouse that do not render the Freeport exemption unavailable. The standard, said the West Virginia Legislature, is whether the activity in the warehouse results in no substantial alteration of the original goods brought into the warehouse. West Virginia Code § 11-5-13a reads:

**§ 11-5-13a. Application of exemption to finished goods in warehouse.**

(a) 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.

(b) 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.

(c) \* \* \*

(d) This section is intended to be declarative of the law as of the enactment hereof and shall be fully retroactive.

(Emphasis added.)

The rules of application and construction that are applicable to the West Virginia Constitution and the West Virginia Code are nearly identical, with preference always given to application over construction. Respecting the West Virginia Constitution, this Court's recent opinion in State ex rel. West Virginia Citizens Action Group v. Tomblin, Nos. 101494, 10-4004, 2011 WL 263735 (W. Va. January 18, 2011), set forth the pertinent rules for application and construction. Syllabus points 2, 3, 4 and 5 of Tomblin read, respectively:

2. "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." Syllabus Point 3, State ex rel. Smith v. Gore, 150 W. Va. 71, 143 S.E.2d 791 (1965).

3. "Courts are not concerned with the wisdom or expediencies of constitutional provisions, and the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution." Syllabus Point 3, State ex rel. Casey v. Pauley, 158 W. Va. 298, 210 S.E.2d 649 (1975).

4. "Words used in a state constitution, as distinguished from any other written law, should be taken in their general and ordinary sense." Syllabus Point 6, State ex rel. Trent v. Sims, 138 W. Va. 244, 77 S.E.2d 122 (1953).

5. "As used in constitutional provisions, the word 'shall' is generally used in the imperative or mandatory sense." Syllabus Point 3, State ex rel. Trent v. Sims, 138 W. Va. 244, 77 S.E.2d 122 (1953).

Respecting the West Virginia Code, decisions of this Court teach that undefined terms used in a statute are to be given their common, ordinary meaning unless they are used in a technical sense. Wooddell v. Dailey, 160 W. Va. 65, 230 S.E.2d 466 (1976). Consequently, the application of the well-recognized principle that a statute which is clear and unambiguous should

be applied and not construed. See Tax Comm'r v. Veterans of Fgn. Wars, 147 W. Va. 645, 129 S.E.2d 921 (1963).

The Wooddell Court stated that “[i]n interpreting the statute involved in this case, we are guided by and apply the following principles of statutory construction: (1) Effect should be given to the spirit, purpose and intent of the lawmakers without limiting the interpretation in such a manner as to defeat the underlying purpose of the statute; See Tax Comm'r v. Veterans of Fgn. Wars, supra; (2) Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language; See Wilson v. Hix, 136 W. Va. 59, 65 S.E.2d 717 (1951), and Fielder and Turley v. Adams Express Co., 69 W. Va. 138, 71 S.E. 99 (1911); (3) Undefined words and terms used in a legislative enactment will be given their common [o]rdinary and accepted meaning; See Davis v. Hix, 140 W. Va. 398, 80 S.E.2d 404 (1954), and Miners [in General Group] v. Hix, 123 W. Va. 637, 17 S.E.2d 810 (1941) [*overruled on other grounds*]; and (4) If technical words are involved they will be presumed to have been used in a technical sense and will ordinarily be given their strict meaning; See Lane v. Board of Education of Lincoln County, 147 W. Va. 737, 131 S.E.2d 105 (1963).” Wooddell v. Dailey, 160 W. Va. at 68-69, 230 S.E.2d at 469.

The Freeport Amendment is clear and unambiguous; therefore, pursuant to the well recognized principle of constitutional application which was reaffirmed this year in Tomblin, supra, the Freeport Amendment should be applied to the facts and not construed. The clause of the Freeport Amendment, over which Feroletto and Respondents are most contentious is the meaning of: “Such property shall not be deprived of such exemption because while in the warehouse the personal property is . . .cut. . . 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. Const. art. X, § 1c (1986) (Emphasis added.). Pursuant to such clear rules of application, which mandate that words be taken in their ordinary sense, every word used in this clause is readily capable of common understanding.

Therefore, “cut” shall mean “cut.” The Freeport Amendment provides no limitation in this regard as to how personal property is cut or to what degree of specificity may be tolerated to enjoy exemption. Likewise the phrases “new or different product” or “one of different utility” are readily capable of common understanding in that so long as the personal property is not transformed into a wholly unique product while at the taxpayer’s warehouse, the taxpayer shall retain the exemption. Once the common definitions are applied to the facts here, it is clear that Feroletto cuts a steel coil and only narrower steel coils result. The coils have not been transformed into a unique product merely by cutting. On such plain application, Feroletto’s personal property is entitled to exemption.

To the extent that there is any ambiguity in the Freeport Amendment which would require construction and not application (and which Feroletto denies that any ambiguity exists), the West Virginia Legislature clarified how to construe the Freeport Amendment and its companion statutes in West Virginia Code § 11-5-13a: “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.” **This is the only instance in which legislation has been enacted to give express direction compelling liberal construction of a constitutional provision in favor of the taxpayer.** That directive cannot be ignored. It has to mean something. In this case it means just what it says. The Freeport Amendment must be construed

in favor of Feroletto and applied to the steel coils in Feroletto's facility, thereby allowing Feroletto exemption from the *ad valorem* tax.

In contrast to applying well settled principles of constitutional application, the Respondents have elected to read the Freeport Amendment creatively to the derogation of legislative and voter intent. (Resp't Br. 23.) The Freeport Amendment begins with the provision that "[s]uch property **shall not be deprived** of such exemption." "'Shall' is generally used in the imperative or mandatory sense." State ex rel. Trent v. Sims, supra. Respondents' ignore this word. To that end, the Respondents' broad and aggressive application of the phrase "**unless such activity results in a new or different product, article, substance or commodity, or one of different utility,**" negates, significantly undercuts and renders meaningless the first part of the sentence that reads "**[s]uch 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.**" Respondents do not apply the Freeport Amendment, they creatively read it so that it provides virtually no exemptions. This cannot be done.

**B. THE PRECISENESS WITH WHICH FEROLETO CUTS ITS STEEL COILS DOES NOT DISQUALIFY THE PROPERTY FROM THE FREEPORT EXEMPTION BECAUSE THE PROCESS BEGINS WITH STEEL COILS AND ENDS WITH STEEL COILS—A DIFFERENT PRODUCT IS NOT CREATED.**

**1. It Is Not Settled That Feroletto Must Prove Entitlement to the Freeport Exemption by Clear and Convincing Evidence.**

Feroletto does not submit to the Respondents conclusion that the appropriate standard that a taxpayer must bear to prove entitlement to the Freeport exemption is by clear and convincing evidence. (Resp't Br. 10.) As admitted by the Respondents, the standard by which a taxpayer must prove entitlement to the Freeport exemption when appealing a taxability ruling pursuant to

West Virginia Code § 11-3-25 has not been decided by the West Virginia Supreme Court of Appeals. (Resp't Br. 9.) The Respondents base their argument on the erroneous comparison of proceedings pursuant to West Virginia Code § 11-3-25 to other tax proceedings and hastily conclude that since clear and convincing is the standard in other tax proceedings, then it must be here as well.

The Respondents' position respecting standard of proof fails to appreciate the unique circumstances that are presented by the Freeport Amendment and its companion statutes. The proceedings for appealing a taxability ruling under West Virginia Code § 11-3-25 cannot be read in a vacuum, otherwise the precise nature of the tax issue being appealed is trumped by slavish adherence to procedural convenience. The underlying applicable statutes, West Virginia Code §§ 11-5-13 and 11-5-13a, reinforce and, in essence, re-codify the Freeport Amendment, with a specific direction from the legislature on how to interpret the clear and unambiguous language of the Freeport Amendment—"liberally" and "in favor of the person claiming exemption." W. Va. Code § 11-5-13a. This legislative preference for liberality in favor of exemption, as previously stated, is unique to West Virginia and this exemption. Therefore, where the legislature has mandated a preference in favor of exemption, the standard in which to prove entitlement thereto should be less than clear and convincing so as to maintain fidelity to the express legislative intent regarding exemption. Feroletto maintains that insofar as taxability appeals under West Virginia Code § 11-3-25 concern entitlement to the Freeport exemption as contained in the Freeport Amendment and West Virginia Code §§ 11-5-13 and 11-5-13a, the appropriate burden of proof is by preponderance of the evidence.

Nevertheless, even assuming that this Court should hold that Feroletto must maintain its entitlement to the Freeport exemption by clear and convincing evidence, Feroletto's activities fall

within the express terms of the Freeport Amendment and it is entitled to exemption, as discussed hereinbefore and hereinafter.

**2. Even a Strict Construction Must Be a Reasonable Construction.**

Almost ninety years ago the West Virginia Supreme Court of Appeals wrote that “[a] constitutional provision authorizing legislative exemption of property from taxation is strictly construed and nothing can be exempted that does not fall within its terms; but rational construction within the terms used is required as well as permitted.” Syllabus point 3, State v. Kittle, 87 W. Va. 526, 105 S.E. 775 (1921) (emphasis added).

The Kittle Court went on to explain,

The only arbitrary requirement of the rule of strict construction, however, is that its subject-matter must be within the terms, as well as the spirit, of the provision under construction. It does not require assignment to terms actually used, of the most restricted meaning of which they are susceptible, nor any particular meaning. So long as the court stays within the terms used, it may give effect to the spirit, purpose and intent of the makers of the instrument. The rule permits, and other law requires, rational interpretation within the terms actually used. Reeves v. Ross, 62 W. Va. 7 (1907).

87 W. Va. at 529-530, 105 S.E. at 776.

When the language of the Freeport Amendment and the language of West Virginia Code §§ 11-5-13 and 11-5-13a are reasonably applied, the steel coils in the Feroletto warehouse are eligible for the Freeport exemption. Contrary to what the Respondents argue (Resp’t Br. 10-14), Feroletto is not asking the Court to rewrite the Freeport Amendment or West Virginia Code §§ 11-5-13 and 11-5-13a. Rather, Feroletto is asking the Court to apply the Freeport Amendment according to its plain and ordinary meaning.

**3. Feroletto’s Cutting of Steel Coils to Custom Dimensions Specified by Its Customers Does Not Result in Products of Different Utility Within the Meaning of the Freeport Amendment.**

The Respondents go to great length to describe the activity in Feroletto's warehouse. (Resp't Br. 14-17.) Feroletto does not disagree with this description because it demonstrates that at all times the steel coils remain steel coils. The thickness of the metal remains the same. The molecular construct of the material remains the same. The only thing that changes is that steel coils are cut into narrower widths of steel coils. Cutting of product, as well as breaking in bulk, are expressly allowed under the Freeport Amendment and under West Virginia Code § 11-5-13.

The steel coils, as they leave the hands of the original manufacturer, can be used for a multitude of purposes or utilities. However, the coils must be bent, shaped, heated, coated, cut, molded, etc., before they can be used by any ultimate manufacturer for their products. No end manufacturer uses the coils only in the shape, form, width or length that exists when the coils leave the hands of the original manufacturer. It is a boot strap argument to state, as the circuit court did, (Pet'r's App. R. 209) and as Respondents now contend (Resp't Br. 15-16), that when the coils left the hands of the original manufacturer, the coils were fit for a multitude of purposes or utilities (they were "generic coils"), but once Feroletto cut the coils the coils were fit only for the limited purposes intended by Feroletto's five customers.

The proper characterization, one that is more logical under all of the facts and circumstances of the stream of commerce involving the steel coils at issue, is that included in the multitude of uses that the original coils are fit for are the uses intended by Feroletto's five customers. The coils need only to be cut by Feroletto, a process expressly permitted by our Constitution, statutes and regulations.

The coils do not take on a different utility when cut by Feroletto. If the original manufacturer was asked if these coils of steel were fit for use as flexible conduit, the answer would surely be yes. The same answer would be for corner beads for drywall, tubes, fuel cans

and mine safety equipment such as masks and breathing apparatus. Respondents went to great lengths to try to persuade this Court that these uses of the steel coils by Feroletto's five customers were of entirely different utilities than envisioned for the original steel coils. (Resp't Br. 6, 11, 15-16, 19-24 and 27.) That position is not true. Rather, those uses are among the many for which the original steel coils are appropriate.

Respondents also made considerable effort to contend that because the steel coils are cut to very precise specifications demanded by Feroletto's customers that somehow such preciseness "disqualifies the property from the Freeport exemption . . . because the (precise cutting employed by Feroletto) results in products of new or different utility." (Resp't Br. 9, 11 and 15-17.) Despite Respondents' self-serving argument, Respondents fail to cite any legal authority for the proposition that if precise cutting is required a product of different utility results and the exemption is lost. Feroletto has not found any such authority and contends that no such authority exists. The constitutional, statutory and regulatory provisions do not, in any way, limit the nature or the preciseness of the cutting that is permitted in order to preserve the exemption.

Under Judge Recht's Order and the Respondents' Brief, the only activity that can occur in the warehouse is one in which no physical change is made to the original product. This would occur, for example, where the warehouse operator receives at the warehouse a truckload of automobile tires of different sizes. The warehouse operator sorts the tires into piles of tires of the same size. The warehouse operator then fills orders of its customers by shipping the specific tires ordered. Provided the tires are shipped to customers outside West Virginia, tires in the warehouse would be eligible for the Freeport exemption under the Respondents and Judge Recht's construction of the exemption. The consequence of this construction is that much of the language used in the Freeport Amendment and West Virginia Code §§ 11-5-13 and 11-5-13a are

rendered meaningless and viewed as surplus verbiage. This position is contrary to the holding of this Court providing rules for construction of constitutional provisions and statutes. (Discussed hereinbefore.)

**4. The Circuit Court Decisions and Taxability Rulings Cited by Respondents Are Inapplicable Where Those Cases Involved Substantially More Alterations of Personal Property.**

The Respondents reliance on the circuit court decision of BayerMaterial Science, LLC v. Helton, Civil Action No. 05-MISC-93 (Resp't Br. 18-19) is misplaced. In that case, raw materials underwent chemical processing to produce finished goods. The process resulted in changes to the inherent characteristics and molecular structure of the raw materials, and the product had a different CAS number. The process in BayerMaterial Science, LLC consisted of far more than only assembling, binding, joining, disassembling, dividing, cutting, breaking in bulk, relabeling or repacking, all of which activities preserve the exemption, while the process at Feroleto involves only cutting, which preserves the exemption. The facts in BayerMaterial Science, LLC are materially different from the facts in this case, and that circuit court decision does not support the Respondents' position.

Respondents, likewise, erroneously rely upon Swisher International, Inc. v. Helton, Civil Action No. 05-CAP-8, Circuit Court of Ohio County (Order entered June 21, 2006). (Resp't Br. 19.) There the taxpayer challenged the Tax Commissioner's taxability ruling denying the Freeport exemption. The property at issue was tobacco that was imported from outside West Virginia, processed and packaged for use as chewing tobacco and snuff, and then shipped out of West Virginia for sale. The tobacco material was used to make both chewing tobacco and snuff and was subjected to several processes by which moisture, flavoring, and preservatives were added. The circuit court denied the Freeport exemption noting that the tobacco was "divided,

cut, broken in bulk, re-labeled, and repackaged" concluding that the processes the taxpayer applied to the tobacco resulted in a product of different utility. The adding of moisture, flavoring and preservatives by the taxpayer in Swisher International, Inc. made the substance of the end product different from the original product. This fact distinguishes Swisher International, Inc. from this case where Feroletto begins with coils of steel of one width and after cutting, ends up with steel coils albeit of different widths. The raw material is unchanged except cut into narrower widths. There is no other change. Thus Swisher International, Inc. does not support the Respondents' position taken in this appeal.

Respondents incorrectly attempt to compare extensive processing activities with cutting by reference to A.E. Inc. v. Craig, Property Tax Ruling 04-02 (January 6, 2004), where the taxpayer stretched rolled sheet aluminum coils by machine to make them thinner and then heated the thinned coils to make the aluminum less brittle. (Resp't Br. 20-22.) Feroletto does not engage in any such processing. It does not stretch its steel coils to make them thinner and does not heat the steel coils to make them more flexible or less brittle. Because all that Feroletto does is cut its steel coils into coils of narrower widths, the facts in A.E. Inc. are materially different from the facts in this case, and the result reached in Property Tax Ruling 04-02 does not support the Respondents position here.

Respondents misconstrues the case in American Woodmark Corp v. Paige, Civil Action No. 92-P-19, Circuit Court of Hardy County (court order entered December 28, 1992). (Resp't Br. 22-24.) Feroletto agrees with the Respondents that there were two types of products involved in that proceeding and that the circuit court found that one product was eligible for the Freeport exemption while the other product was not eligible for the exemption. The first product was finished cabinet front frames that were assembled, trimmed, drilled, oven-dried, inspected, stored

and shipped from the Hardy County facility. That product was not entitled to the exemption. The second product, which the circuit court found to be eligible for the Freeport exemption, consisted of parts of frames for cabinets, called dimension stock, which were delivered to the Hardy County facility where they were assembled into front frames of cabinets. The circuit court found that the dimension stock was suitable only for that purpose and that the dimension stock did not become a new of different product when assembled into the front frame of the cabinets. It is difficult to understand, if the Freeport Amendment is to be applied consistently, why the dimension stock in American Woodmark used to produce a frame is exempt under the Freeport Amendment but Feroletto's coils of steel that are cut into different widths of steel coils are taxable. As previously stated, Feroletto begins with steel coils of one width and ends with steel coils of different widths, depending upon the width desired by the customer. There is no other change. In contrast the dimension stock in American Woodmark was used to make cabinet frames. This necessarily means that the dimension stock was joined in some manner to become a frame, and obviously a frame is a different product from the dimension stock, yet the Freeport exemption was allowed. Moreover, this 1992 holding in American Woodmark was approved and codified by the Legislature in 1997 when West Virginia Code § 11-5-13a was enacted.

Respondents fail to appreciate the intricacies of the Freeport Amendment and its statutory companions when discussing Wheeling Nisshin, Inc., Property Tax Ruling 04-05 (February 13, 2004) and arguing that the degree of processing in the warehouse is not significant. (Resp't Br. 23-24.) Feroletto respectfully disagrees. In 1997, the Legislature enacted West Virginia Code § 11-5-13a. In subsection (b) thereof the Legislature specified that the degree of process does make a difference when determining whether or not the Freeport exemption applied. West Virginia Code § 11-5-13a(b) reads:

(b) 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.

(Emphasis added.). In Wheeling Nisshin, Inc., the Tax Commissioner ruled that taxpayer's process of hot dipping rolls of coiled steel to add protective coatings took the product outside the scope of the Freeport exemption. The Tax Commissioner's ruling in Wheeling Nisshin, Inc. does not support the Respondents' position in this case because Feroletto begins and ends with steel coils. The only difference between Feroletto's beginning product and the product shipped to out-of-state customers is that the width of the shipped product is narrower. Nothing is added, and there is no processing as there was in the Wheeling Nisshin, Inc. matter.

The ultimate flaw in the Respondents' analysis is that they use an impermissible *post hoc* test to determine entitlement to the Freeport exemption. Their test impermissibly looks at how the customer will use the product shipped from the warehouse. (Resp't Br. 23.) This is not the test, rather, the test or controlling question is whether the activity in the warehouse "results in a new or different product, article, substance or commodity, or one of different utility." This is determined by looking at what is done in the warehouse and not at how the customer will use the product shipped from the warehouse.

**5. Equal and Uniform Application of the Freeport Amendment is Central to Resolution of the Issue in This Case.**

Feroletto has properly presented and preserved the constitutional issue respecting equal and uniform application of tax law. Respondents erroneously argue that because Feroletto did not raise the equal and uniform taxation requirement in Article X, § 1 of the Constitution in the circuit court proceeding, Feroletto has waived that issue. (Resp't Br. 25.) However, Respondents

recognized that when the constitutional issue is a controlling issue in resolution of the case the court in its discretion may consider the issue, citing Mountain America LLC v. Huffman, 224 W. Va. 669, 681-682, 678 S.E.2d 768, 780-781 (2009) citing Louk v. Cormier, 218 W. Va. 81, 622 S.E.2d 788 (2005). (Resp't Br. 25 & n. 11.)

Moreover, it is submitted that substantively Feroletto did raise the equal and uniform taxation issue in citing and discussing the various tax rulings by the Tax Commissioner. In the proceedings below Feroletto's counsel did point out the distinctions and similarities with those rulings when applied to Feroletto's position taken in this case. (Pet'r's App. R. 135-40.) While arguments may not have expressly printed the term "equal and uniform taxation," the issue was sufficiently presented such that it should not be deemed to have been waived.

This Court should exercise its discretion here because unless the Freeport Amendment is equally and uniformly applied throughout the State, taxation cannot be equal and uniform. Resolution of the constitutional question is therefore central to resolution of this case.

Unless the Freeport exemption is uniformly applied throughout West Virginia, taxation cannot be equal and uniform as mandated in Article X, § 1 of the Constitution. In other words, we cannot have the 55 county assessors applying the Freeport exemption differently, and the State cannot have 31 circuit courts and 70 circuit court judges applying the Freeport exemption differently and maintain equal and uniform taxation. This point is not new but was recognized by this Court more than 125 years ago when it ruled that the equal and uniform taxation requirement also applied to exemptions from taxation. State ex rel. Miller v. Buchanan, 24 W.Va. 362, 374 (1884). The Buchanan Court wrote:

Is it possible that each of the eighty-three assessors in this State can be permitted against instructions to decide for himself what property shall be taxed and what exempted from taxation? \* \* \* There would and could be no uniformity or equality in taxation under such a system.

Id. at 383.

**C. JUDGE RECHT’S ORDER DOES NOT CONTAIN SUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

Respondents concede that Judge Recht’s order “is short,” but contend that the order contains “sufficient findings of fact, indicates which findings the court deems relevant and determinative of the issue, and provides clear notice . . . of the rationale underlying the decision.” (Resp’t Br. 27.) Not only is Judge Recht’s order “short”, but its recitation of findings of fact is obviously deficient, and its conclusions of law are practically non-existent. While the order acknowledges the existence of the Freeport Amendment, the order utterly fails to mention, discuss or reconcile the constitutional, statutory and regulatory provisions which permit cutting and accord some liberality in favor of taxpayer. A court order granting summary judgment in West Virginia on the issue in this case requires more factual and legal underpinnings than simply stating that cutting results in a product of different utility.

The case of Stone Brooke Ltd. Partnership v. Sisinni, 224 W. Va. 691, 688 SE2d 300 (2009) provides additional authority in support of Feroletto’s position that Judge Recht’s order is deficient. In Sisinni, which involved appeals from Brooke, Hancock and Cabell Counties (consolidated for appeal) addressing the issue of the appropriateness of tax assessments of commercial real property made for purposes of *ad valorem* taxation, this Court reversed all three circuit court orders because each circuit court order failed to adequately reflect appropriate consideration of the factors required to be considered under W. Va. C.S.R. §§110-1P-2.1.1 to 2.1.4. The Court pointed out that the requirement of the circuit court to set forth sufficient

findings of fact and conclusions of law in Sisinni was consistent with other decisions “imposing similar requirement in other contexts,” citing the case of Fayette County Nat’l Bank v. Lilly, 199 W. Va. 349, 484 SE2d 232 (1997), which was previously cited by Feroletto in its initial Brief. Sisinni, supra, at 706 & 315 & n. 14. (Pet’r’s Br. 18 & 21.) Sisinni in the context of this appeal stands for the proposition that more meaningful findings of fact and conclusions of law must be supplied than exists in Judge Recht’s order now under review.

Judge Recht’s Order and the Respondents’ argument regarding the sufficiency of the legal conclusion is based upon a brief, impermissibly conceived *post hoc* test to conclude that a product of different utility results. (Resp’t Br. 27.) However, as illustrated hereinbefore, Respondents (and Judge Recht) improperly look at how the customer will use the product after it is shipped from Feroletto’s warehouse. That test is not appropriate. As a matter of law, Judge Recht concluded that cutting results in a product of different utility because “the steel coil is converted (by the cutting) from a generic utility to a specific utility.” (Pet’r’s App. R. 209.) The conclusion by Judge Recht flies in the face of the constitutional provision that permits Feroletto to cut the steel coils without losing the exemption. The circuitous analysis and logic used by Judge Recht would never permit only cutting to be done under any circumstance without losing the benefit of the Freeport exemption and renders meaningless the constitutional provision when applied to Feroletto’s activities. In fact and law, the opposite is true. Cutting is permitted. Judge Recht’s Order is wrong.

### **III. CONCLUSION**

There are no disputed issues of fact in this case, but Respondents’ characterization of those facts is misplaced. Feroletto receives coils of steel and cuts them into narrower widths of steel coils. No other changes are made to the steel. The preciseness of the cutting done by

Feroletto and the fact that Ferroletto has the capability to make such precise cuts is irrelevant. What is relevant is that Ferroletto's only activity consists of cutting which is expressly permitted by the Freeport Amendment.

Respondents contention that the narrower cut steel coils become a product of different utility is the result of an improper construction of the Freeport Amendment. Respondents improperly look at how Ferroletto's five customers will use the products which they receive from Ferroletto, rather than give due acknowledgment to the fact that the uses to which Ferroletto's customers will put the steel coils are among the utilities for which the original coils of steel are appropriate. Respondents' interpretation ignores the preservation of the Freeport Amendment when it provides that "[s]uch property shall not be deprived of such exemption" when the property is only cut, and gives undue emphasis to the language "unless such [cutting] results in a . . . [product] of different utility," such that the former provision is rendered meaningless.

Respondents' position ignores the implication of West Virginia Code §§11-5-13 and 11-5-13a, as well as Legislative Rule § 110-3-3.6 which, taken together, require liberal construction of the Freeport Amendment "in favor of a person claiming exemption." Not only is the Freeport Amendment clear and unambiguous and applies to Ferroletto's products, but West Virginia Code § 11-5-13a provides greater emphasis on the need to apply the exemption in favor of Ferroletto because cutting is the only activity carried out by Ferroletto. An equal and uniform application of the Freeport Amendment requires exemption for Ferroletto's inventory. Judge Recht's Order fails to properly consider and memorialize sufficient factual and legal bases for his ruling and his conclusions are clearly wrong. Ferroletto's activity of cutting the steel coils into narrower steel coils is permitted under the Freeport Amendment. Ferroletto is entitled to the exemption, and Ferroletto is entitled to judgment in its favor as a matter of law.

Respectfully submitted,

**FEROLETO STEEL COMPANY, INC.**

**By SPILMAN THOMAS & BATTLE, PLLC**



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**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 16<sup>th</sup> day of September, 2011, the foregoing “**REPLY BRIEF OF PETITIONER FEROLETO STEEL COMPANY, INC.**” 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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