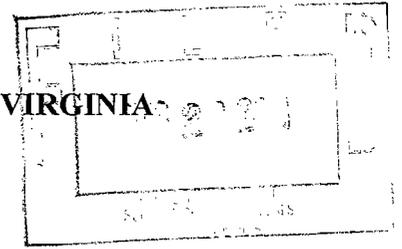


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

**BRIEF OF RESPONDENTS WEST VIRGINIA STATE TAX COMMISSIONER,
THOMAS A. OUGHTON, ASSESSOR OF BROOKE COUNTY
AND COUNTY COMMISSION OF BROOKE COUNTY**

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I.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Feroletto states that after completion of discovery the parties filed cross motions for summary judgment. Pet'r's Br. 3. In fact, Ferroletto filed its motion and supporting memorandum on July 7, 2010, *before* any discovery was conducted. App. 23, 24-28.¹ Both the Tax Commissioner and the Assessor objected to consideration of the motion because no discovery had yet been afforded to them. App. 32-33; 34-38. Thereafter, the court entered a scheduling order which established deadlines, including discovery cut-off on January 31, pretrial conference on February 11, and trial on February 15, 2011.

¹ Ferroletto's motion was just a paragraph long, and the supporting memorandum of law was 5 pages long. App. 23, 24-28. They were accompanied by a 2-page affidavit of James Hillas. App. 29-30. The argument was just a paragraph long. App. 28.

The Tax Commissioner filed his motion for summary judgment and supporting memorandum on February 7, 2011. App. 46-135. The exhibits attached to the motion constitute the key factual evidence in this case: Exhibit 1-information printed from Feroletto's website, App. 59-66; Exhibit 2-deposition of James Hillas, senior vice president of Feroletto, App. 67-90; Exhibit 3-deposition of James Shevlin, plant manager at Feroletto's Weirton plant, App. 91-111; Exhibit 4-videotaped site visit of the Feroletto Weirton plant, App. 112; Exhibit 5- Feroletto brochure provided at James Hillas's deposition, App. 113-120; and Exhibit 6-AFC Cable Systems purchase orders, App. 121-133. Feroletto filed an opposing memorandum on February 16, 2011. App. 134-194. The memorandum contained several taxability rulings issued by the Tax Commissioner, which Feroletto cited in support of its position.

The day before the pretrial conference was to be held, the circuit court held a conference call with counsel. Having reviewed the parties' briefs supporting and opposing summary judgment, the court was of the opinion that the case could be decided based on the motions and briefs. Having reviewed the taxability rulings, Judge Recht asked the parties to provide him any instances in which circuit courts had ruled on the Freeport Exemption. The Tax Commissioner provided the court and counsel the only three circuit court orders he was aware of. These three orders are attached as exhibits: *Bayer Material Science, LLC v. Helton*, Civil Action No. 05-MISC-93, Circuit Court of Kanawha County (order entered May 26, 2005) (Ex. 1); *Swisher International, Inc. v. Helton*, Civil Action No. 05-CAP-8, Circuit Court of Ohio County (order entered June 21, 2006) (Ex. 2); and *American Woodmark Corp. v. Paige*, Civil Action No. 92-P-19, Circuit Court of Hardy County (order entered December 28, 1992) (Ex. 3).

B. STATEMENT OF FACTS

Feroleto Steel Company, Inc. is a wholly owned subsidiary of Toyota Tsusho America, Inc. and is headquartered in Bridgeport, Connecticut. App. 59². It specializes in value added steel products. *Id.* Customers may order products in a variety of tempers, thicknesses, gauges, and widths to meet their needs. *Id.* Feroleto became ISO 9001:2008 certified in 2004. App. 60. Certification by the International Organization for Standardization requires Feroleto to pass regularly scheduled audits and maintain a stringent quality assurance system. *Id.* Feroleto's ISO certification is in "the manufacture of slitting, cold rolling, oscillating and edging of ferrous and non-ferrous flat rolled materials." App. 61.

Feroleto operates a "service center" in Weirton, West Virginia. App. 62, 71, p. 9³. There it maintains an extensive inventory of steel coils in various gauges (thicknesses), which it slits to customers' custom sizes. App. 62. It purchases coils of flat steel ranging in width from 36 inches to 54 inches and varying in gauge from .008 to .200 inches thick. App. 97, p. 19; App. 71, p. 11. These coils weigh several tons. App. 30. For example, a single coil being logged in by the receiver on the day of the parties' site visit weighed 27,220 pounds. App. 112, at 10:37:48⁴. Feroleto's business is slitting these large coils into smaller widths, according to the specifications of its customers, so that it can be used in the customers' manufacturing processes. App. 30; App. 100, p.

² Petitioner refers to the Appendix as Volume 1 of 1. Since there is only one volume, the Respondents will cite to the Appendix as App., followed by the page number.

³ The depositions included in the Appendix are condensed, with four pages of testimony on a single page. For this reason, the Respondents will cite to the deposition as App. ____, p. ____, with the second page being the page within the deposition.

⁴ The site visit DVD will be cited as App. 112, followed by the time on the DVD counter.

29-30. Unslit, the coils cannot be used by Feroletto's customers because they are too big to fit through their machinery or too heavy to handle. App. 100-101, pp. 28-29, 32-33; App. 30. The slit coils, or malts, still weigh about as much as a car. App. 112, at 10:19:59. Feroletto's customers use them to produce a variety of goods, including flexible conduit, corner bead for drywall, tubes, fuel cans, and mine safety equipment such as masks and breathing apparatus. App. 95-96, p. 8-13.

Feroletto claims that it sells some of the steel coils to customers uncut, in reliance on senior vice president's James Hillas's affidavit. Pet'r's Br. 2. However, this amount, if any, represents a very small portion of total sales. Mr. Hillas, when pressed about what percentage of coils were sold uncut, conceded that it was "a very small portion" of the total sales – which he could not quantify and which could be lower than 1%. App. 76, p. 28.⁵ Plant manager, James Shevlin, testified at his deposition that four of Feroletto's five customers (Eagle, Affival, U.S. Gypsum, and Jennison) never bought uncut coils from Feroletto. App. 97, pp. 18-19. He could not remember the last time that a

⁵ His deposition testimony was as follows:

By Ms. Fulton:

Q. Do you have—does Feroletto Steel have any coils that come into West Virginia to the facility here and then get sold to a customer or delivered to a customer unmodified from how they arrive?

A. Yes.

Q. And what percentage of your business would you say you just sell the coils in the same condition they're in?

A. A very small portion, and mainly to AFC.

Q. And when you say "a very small portion," are you talking about less than, say, 10 percent?

A. Yes.

Q. Less than 5 percent?

A. Yes.

Q. 1 percent?

A. I don't know.

App. 76, p. 28.

coil was shipped uncut. App. 98, pp. 21-22. The fifth customer, AFC Cable, uses steel that it owns and stores at the Feroletto plant. App. 97, p. 18. Thus, it did not purchase any uncut coils either.

The steel coils are slit on Loopco slitter machines. App. 94, p. 6-7. Feroletto employs three Loopco operators at the Weirton plant – two on day shift, one from 3:30 p.m. to midnight. App. 96, p. 13. The unslit coil is loaded onto one end of the machine, unrolled, pulled through round knives (one set above, one set below), and rewound into smaller coils at the other end of the machine. App. 74, p. 20-22; App. 117, p. 4. The slitting machines are equipped with x-ray gauges to track the center gauge of each coil from end to end. App. 65.

When a coil is assigned to a job, a layout, or work order, is prepared. App. 99, p. 25-26. The layout is the work instructions for cutting the coil and includes the coil number, the readings that the operator gets, the tolerances for the job, the width and number of cuts, and what size cuts. App. 99, p. 27. Once the operator has the layout, he uses it to set up the machine. App. 99-100, pp. 27-28. The process of setting up the machine takes about two hours. App. 76, p. 30.

Feroletto's customers place blanket orders for the year, followed by weekly schedules of when the material is needed. App. 72, p. 15; App. 75, p. 24; App. 97, p. 17. The blanket order contains the specifications and tolerances for how the steel is to be cut. App. 100-101, pp. 29-32. The specifications in the purchase orders establish the gauge and the width to which the coil is to be cut in thousandths of an inch. App. 121-124, 125-133. For example, a January 14, 2009 order from AFC Cable Systems was for coil that was .0117 inch thick and 6.764 inches wide. App. 73, p. 18; App. 121. The tolerances for that job were +.005 and -.000 for width. App. 100, pp. 30-31. The +.005 means that the customer would accept material that was up to .005 (five thousandths) of an inch wider than the order specification; the -.000 means that the customer would reject material that

was narrower than the specification by any amount. App. 100, p. 30. In other words, the customer would not accept material that was even one-thousandth of an inch narrower than the order specification. *Id.* The customer also specified tolerances for the gauge, or thickness, of the material. *Id.* For this order it was +.002. Adding this to the order specification of .0117 means that the customer would accept material up to .0137 in thickness but would reject any material that was thinner than the nominal gauge specified. *Id.*

Material that is narrower than the specifications (under width) is not useable for the customer because it is too small to make the finished part the customer produces. App. 100-101, pp. 31, 33; App. 76, p. 31. Under width material is either scrapped or sent back to inventory to be cut smaller for another job. App. 98, pp. 20-21. Material that is wider than the tolerance allows is unuseable to the customer because it will not fit through the customer's machinery. App. 76, p. 31. The process of slitting the coil to customer specifications adds value to the material, and Feroletto sells the slit material for more than its acquisition cost. App. 78, p. 38.⁶

⁶ Feroletto states that from 1995 to 2008, Feroletto applied for and was granted the Freeport Exemption for its steel coils. Pet'r's Br. 2. While this is true, it is of no legal relevance. Because the issue was never litigated, principles of collateral estoppel and res judicata do not apply. The United States Supreme Court has held that each tax year is the origin of a new liability and of a separate cause of action. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948) (collateral estoppel not meant to create vested rights in decisions that have become obsolete or erroneous with time, this causing inequities among taxpayers).

[I]f a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any ** subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit.

Id., 333 U.S. at 598. Here, where there was no litigated decision on the merits, the Assessor and
(continued...)

II.

SUMMARY OF ARGUMENT

This case is an appeal of an *ad valorem* personal property taxability ruling. Feroletto Steel Company, Inc. (hereafter “Feroletto” or “the taxpayer”) applied to have its raw material, *i.e.*, its inventory of steel coils, determined exempt under the Freeport exemption found at W. Va. Const. art. X, § 1c. The amendment permits an exemption for materials that are cut or otherwise processed while in transit unless the processes result in a new product or one of different utility. The Brooke County Assessor denied the exemption and requested a taxability ruling from the West Virginia Tax Commissioner. The Tax Commissioner found, as had the Assessor, that the raw materials were not exempt because Feroletto’s cutting resulted in a new or different utility. Feroletto appealed. The Circuit Court reviewed the question of taxability *de novo* and came to the same conclusion as the Tax Commissioner.

Feroletto contends that when it cuts the large steel coils into smaller steel coils for its customers no new or different product is created. Respondents conclude that Feroletto’s activities create a new product or one of different utility: the 27,000-pound coils have a variety of potential uses when they enter the plant but have a particular and different use when they leave the plant slit into customer-specified sizes. Respondents base this conclusion on (1) the fact that the steel is custom-cut to extremely precise customer specifications—to within thousandths of an inch; (2) the fact that there are extremely low tolerances for deviations from those specifications—also within thousandths of an inch and sometimes not even that; (3) the fact that Feroletto is certified by the

⁶(...continued)

Commissioner are not bound by their determinations in any prior years.

International Organization for Standardization (ISO), which requires Feroletto to maintain strict quality control procedures; (4) the fact that Feroletto's customers cannot use the steel coil until it is cut to their specifications; and (5) the fact that the coils, once slit, have only a single use – particular to the customer and the product that it manufactures from the coil.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents believe this case is appropriate for Rule 20 oral argument because it is a case of first impression as to construction of the Freeport Amendment, and it is a case of fundamental public importance. As set forth in Argument A.3, *infra*, Respondents deny that this case involves any inconsistencies or conflicts among circuit courts.

IV.

STANDARD OF REVIEW

This Court reviews a circuit court's entry of summary judgment *de novo*. Syl. pt. 1, *Davis v. Foley*, 193 W. Va. 595, 457 S. E.2d 532 (1995); Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

A motion for summary judgment should be granted only when 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.

Syl. pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963). *In accord*, Syl. pt. 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995); Syl. pt. 2, *Painter, supra*; Syl. pt. 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).

Rule 56, W. Va. R. Civ. P. is “‘designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,’ if there essentially ‘is no real dispute as to salient facts’ or if it only involves a question of law.” *Williams*, 194 W. Va. at 58, 459 S.E.2d at 335, quoting *Painter*, 192 W. Va. at 192 n.5, 451 S.E.2d at 758 n.5 (quoting *Oakes v. Monongahela Power Co.*, 158 W. Va. 18, 22, 207 S.E.2d 191, 194 (1974)).

V.

ARGUMENT

A. FEROLETO’S CUSTOM CUTTING OF STEEL COILS DISQUALIFIES THE PROPERTY FROM THE FREEPORT EXEMPTION TO *AD VALOREM* PROPERTY TAX BECAUSE THE PROCESS RESULTS IN PRODUCTS OF NEW OR DIFFERENT UTILITY.

1. The Taxpayer has the Burden of Proving Entitlement to Exemption From Taxation, and the Legislative Directive for Liberal Construction Does not Relieve it of This Burden.

“It is universally recognized that taxpayers have the burden to prove the Tax Commissioner’s determination is not correct.” *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 593, 466 S.E.2d 424, 444 (1995).

There is no West Virginia Supreme Court case which discusses the burden of proof that a taxpayer must carry when appealing a taxability ruling under W. Va. Code § 11-3-25. For many years, there were two separate lines of cases as to the burden of proof in tax assessment appeals – most applying a clear and convincing evidence standard, but a few applying a preponderance of the evidence standard. In 2008, this Court directly addressed the conflicting authority by holding that a clear and convincing evidence standard applies to taxpayers challenging property tax assessments under W. Va. Code § 11-3-24 and expressly overruling the contrary line of cases. *In re Tax*

Assessment of Foster Foundation's Woodlands Retirement Community, 223 W. Va. 14, 27, 672 S.E.2d 150, 163 (2008). Not long after, the court applied the same standard to taxpayers seeking relief from erroneous assessments (exonerations) under W. Va. Code § 11-3-27 in *State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.*, 223 W. Va. 146, 155, 672 S.E.2d 282, 291 (2008). The court reasoned that it could discern no justification for applying separate burdens of proof for assessment issues raised under W. Va. Code § 11-3-24 and assessment issues raised under W. Va. Code § 11-3-27.

The instant appeal of a taxability ruling under W. Va. Code § 11-3-25 is similar to the proceedings under W. Va. Code §§ 11-3-24 and -27, in which the West Virginia Supreme Court has held that the taxpayer must provide proof by clear and convincing evidence. Accordingly, this Court should apply that same standard of proof to proceedings under W. Va. Code § 11-3-25.

Generally, “[c]onstitutional and statutory provisions exempting property from taxation are strictly construed. It is incumbent upon a person who claims his property is exempt from taxation to show that such property clearly falls within the terms of the exemption; and if any doubt arises as to the exemption, that doubt must be resolved against the one claiming it.” *Maplewood Community, Inc. v. Craig*, 216 W. Va. 273, 285, 607 S.E.2d 379, 391 (2004), quoting Syl. pt. 2, *In re Hillcrest Memorial Gardens, Inc.*, 146 W. Va. 337, 119 S.E.2d 753 (1961).

West Virginia Code § 11-5-13a, in contrast to the general rule, provides that its provisions “are to be liberally construed in favor of a person claiming exemption from tax.” However, that liberal construction has constitutional limits. *American Woodmark Corp. v. Paige*, Civil Action No. 92-P-19, Circuit Court of Hardy County (Order entered December 28, 1992), at 2. Liberal construction does not permit the Court to ignore the plain language of the statute, add statutory

language, or rewrite the statute.⁷ Where a provision of the Constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed. *State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W. Va. 276, 438 S.E.2d 308 (1993).

Feroletto Steel challenges its tax assessment based upon its position that the property in question is exempt under the Freeport Amendment. Thus, the valuation is not being challenged; rather, the propriety of the imposition of the tax is at issue. As stated herein, Ferroletto Steel's property is not exempt because the cutting of its material to unforgiving exactness makes the finished good of a different utility than the property that arrived at the plant. Liberal construction does not erase the language in W. Va. Const. art. X, § 1c, which excludes an exemption for articles or substances of different utility. Contrary to Ferroletto's repeated assertions that the mere cutting of the

⁷ While there are no cases on point from this Court, numerous other jurisdictions have considered how to reconcile legislative direction to liberally construe a statute where the statute is plain and unambiguous. Those jurisdictions have uniformly held that direction to liberally interpret a statute does not mean ignoring the plain language of a statute. Nor does it permit the court to add statutory language or rewrite the statute. *See, e.g., City of Huntington Beach v. Board of Administration*, 841 P.2d 1034 (Cal. 1992) (despite mandate to liberally construe pension legislation, court declined to treat jailers as "local safety members" under statute defining jailers' functions as custodial rather than as law enforcement); *Stewart v. State*, 33 S.W.3d 785 (Tenn. 2000) (despite mandate to liberally construe statute waiving sovereign immunity, court dismissed suit of local law enforcement officer based upon lack of statutory duty for state highway patrol officer to control local police at arrest scene); *Matter of Adoption of T.K.J.*, 931 P.2d 488 (Colo. App. 1996) (despite mandate to liberally construe adoption statutes, court could not ignore plain meaning of statute, which made step-parent adoption available only to married couples, and not lesbian domestic partners); *Butler v. City of Prairie Village, Kan.*, 172 F.3d 736 (10th Cir. 1999) (despite mandate to liberally construe ADA, court declined to find supervisor personally liable under statute defining number of employees required for employer to be subject to ADA). Ferroletto concedes that constitutional construction is governed by the same general rules applied in statutory construction. Pet'r's Br. 8, *citing* 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). Thus, the words in the amendment denying an exemption to products and substances of a different utility must be applied. Simply stated, liberal construction is not an eraser that can be employed under the taxpayer's direction.

steel coils triggers the exemption, there is no credible argument that the steel, once cut, is not of a different utility.

Furthermore, liberal construction does not soften the burden of proof which, consistent with *Foster Foundation* and *Bayer*, places the burden of proof on the taxpayer challenging an assessment to prove its position by clear and convincing evidence. The *Foster* court held that a taxpayer challenging a valuation under W. Va. Code § 11-3-24 is not denied due process because it must prove its claim by clear and convincing evidence.

It is not unreasonable or unfair...to require the party claiming to have superior knowledge of the value of its own property to shoulder the burden of presenting such evidence to the decision maker. Neither is it a denial of due process to impose more stringent standards upon a complaining taxpayer in an attempt to prevent frivolous tax assessment challenges.

Foster Foundation, 223 W. Va. at 33, 672 S.E.2d at 169 (citations omitted).

Similarly, the clear and convincing standard should apply to the burden placed on Feroleto because it has superior knowledge of the changes that occur to its products to meet its customers' specification. The liberality requirement contained in W. Va. Code § 11-5-13 applies to the weight of the evidence, not the standard of proof. Plainly stated, if the legislature had wanted to establish a particular standard of proof, it would have done so in the statute.

The Freeport Amendment provides, in pertinent part:

[T]angible 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,...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.

W. Va. Const. art. X, § 1c (emphasis added). The two statutes related to the Freeport Amendment both contain language that excludes goods that become “a new or different product” or “one of different utility.” West Virginia Code § 11-5-13 provides, in pertinent part,

(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, . . . 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.) West Virginia Code § 11-5-13a provides, in pertinent part:

(a) This section is intended to clarify the intent of the Legislature and the citizens in establishing the [Freeport Exemption] as it pertains to goods held in warehouse facilities in this state awaiting shipment to a destination outside this state...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 [W. Va. Const. art. X, § 1c].

(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.)⁸

⁸ The implementing regulation provides, in pertinent part,

3.6.1. Tangible personal property which is moving in interstate commerce through
(continued...)

Because the provisions of Section 1c, the corresponding statutes, and the implementing regulation are plain and unambiguous, they need not be construed. *Mountaineer Park, supra*. Accordingly, the circuit court applied the provisions to the undisputed facts to determine whether the slitting process that occurs in Feroletto's plant results in a product "of different utility." App. 209. This Court must do the same.

2. The Circuit Court Correctly Concluded That Feroletto's Slitting of Steel to Custom Dimensions Specified by its Customers Resulted in Products "of Different Utility" When the Process Converted the Steel From Generic Utility to Specific Utility.

Feroletto argues that every word of the Freeport Amendment and statutory provisions, W. Va. Code §§ 11-5-13 and 11-5-13a, must be read and given effect according to its plain meaning. Pet'r's Br. 12. The Commissioner and the Assessor agree with this proposition but believe that application of this principle results in a different outcome than Feroletto proposes. The West Virginia Constitution provides an exemption applicable to property that is moving in interstate commerce but warehoused in West Virginia. W. Va. Const. art. X, § 1c. It also provides, in pertinent part,

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

⁸(...continued)

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, . . .

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 R. §§ 110-3-3.6.1, -3.6.2 (emphasis added).

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 (emphasis added). One corresponding statute uses the above-quoted constitutional language verbatim. W. Va. Code § 11-5-13(b). The other statute provides that the exemption applies to goods moved to a warehouse “at which no substantial alteration takes place.” W. Va. Code § 11-5-13a(b). However, this language does not change the constitutional provision which denies the exemption to products like Feroletto Steel’s where activity in its facility results in a new or different product, article, substance or commodity or one of different utility.

Feroletto states that the only activity it does is slit steel coils into smaller coils, repackage them, and ship them to customers outside West Virginia. Pet’r’s Br. 9. Because it does not chemically treat, mold into shape, modify the edges, or change the thickness of the steel, Feroletto claims to fall squarely within coverage of the exemption. Pet’r’s Br. 9-10. According to the Petitioner, “[c]utting, 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.” Pet’r’s Br. 12. In effect, Feroletto argues that, as a matter of law, cutting cannot deprive it of the exemption. This clearly cannot be true because such a reading fails to take into account the limiting phrase “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; W. Va. Code § 11-5-13(b). If cutting has such a result, then the exemption does not apply.

The circuit court below correctly determined that the sole operative fact was that “the taxpayer received a generic product (steel coil) which has a variety of non-specific general uses and which is then transformed to a product of specific utility, when the taxpayer takes that coil and cuts

it to conform to the custom dimensions dictated by the needs of the ultimate end user.” App. 208-209. The circuit court then applied the constitutional, statutory, and regulatory standard and correctly concluded as a matter of law that “the transformation of a steel coil of generic utility to a specific utility determined by the needs of the taxpayer” created a product “of different utility” that was therefore not included in the Freeport exemption. App. 209.

The steel coils that constitute the inventory of Feroletto are not merely warehoused at the Feroletto plant. They arrive as 27,000-pound coils of rolled steel that have a variety of potential uses to different customers. App. 112, at 10:37:48. While they are at the plant, Feroletto slits them into custom sizes according to the very precise specifications of their customers. App. 62. Indeed, without being cut to the specified sizes, the coils cannot be used by Feroletto’s customers. App. 100-101. The slit coils, now called malts, leave the plant as products of different utility – precision-cut steel to be used in each customer’s particular manufacturing process, and no longer suitable for a variety of other uses. Thus, they have become products “of different utility”– the custom-sized material from which Feroletto’s customers will manufacture tubes, gas cans, storage cabinets for flammable materials, flexible conduit, parts for mining breathing devices. App. 112, at 10:19:59; App. 95-96, pp. 8-13.

Feroletto’s customers specify the width to which the steel is to be cut *to the thousandth of an inch*. App. 121-124, 125-133. Likewise, they specify the tolerances for deviations from these specifications, both as to width and gauge of the material, to *within thousandths of an inch*. App. 100, pp. 30-31. Indeed, the plant manager testified at his deposition that one customer, AFC Cable Systems, had a tolerance of .000 for under width, meaning that it would not accept material that was even one-thousandth of an inch narrower than the specification on the purchase order. *Id.* AFC also

did not allow any deviation from the gauge specified on the purchase order. App. 100, p. 30. AFC would reject all such undersized material because it would not be big enough to make the particular product it was manufacturing, flexible conduit. App. 100-101, pp. 31, 33; App. 76, p.31. It would allow a small deviation for material that was too wide (.005, or five-thousandths of an inch) because its manufacturing machines could accommodate this size of material. App. 100, p. 30.

In order to assure that the gauge of the steel coil is uniform and of the nominal size, Feroletto uses slitting machines that are equipped with x-ray gauges that measure the thickness of the center of the coil from one end to the other. App. 65. In order to assure its customers that its products are cut to precise standards, Feroletto has obtained certification from the International Organization for Standardization. App. 60. This certification requires Feroletto to maintain strict quality control procedures. *Id.* Feroletto's customers cannot use the large, uncut steel coils as they arrive at the Feroletto plant. If Feroletto were not available to do the precision cutting, these customers would have to duplicate the activities that occur at Feroletto's plant in-house in order to make the steel usable. App. 98, p. 20. Plainly stated, if Feroletto did not precision cut the steel coils to products of a different utility, they would have no customers.

Taken together, these facts lead to the inevitable conclusion that Feroletto is not merely warehousing its inventory but rather is using it in a process that results in "a new or different product" or "one of different utility" within the meaning of W. Va. Const. art. X, § 1c. Therefore, it is not entitled to the Freeport exemption, and the circuit court was correct in concluding that it was not.

3. The Reasoning in the Previous Circuit Court Decisions and Taxability Rulings Regarding the Freeport Exemption Support the Circuit Court's Conclusion.

Feroletto argues that other taxability rulings in which businesses have been held not exempt involved more substantial changes than are at issue in this case. However, as discussed below, these assertions are conclusory and the activity in the cited cases is not factually similar to the facts in this case. None of these cases contain evidence regarding added value or the rejection of slightly non-conforming articles or products. Moreover, neither the amount nor type of change is at issue here: so long as the activity results in “a new or different product, article, substance or commodity, or one of different utility” the exemption does not apply. The circuit court authority that the Tax Commissioner provided to the court and the taxability rulings cited by Ferroletto all support the Tax Commissioner’s/Assessor’s position.

In *BayerMaterial Science, LLC v. Helton*, Civil Action No. 05-MISC-93, Circuit Court of Kanawha County (Order entered May 26, 2005), the Tax Commissioner issued a taxability ruling finding chemicals owned by Bayer to be taxable. Bayer sought review of the ruling under W. Va. Code § 11-3-24(a). The facts adduced in the proceeding were that Bayer received raw materials that it chemically reacted to produce finished goods. *BayerMaterial Science* Order at 2. The finished goods had changes to their inherent characteristics and molecular structure and different CAS numbers, a CAS number being a unique chemical identifier. Under these facts, the circuit court concluded that Bayer’s activities created “a new or different product, article, substance, or commodity or one of different utility. *Id.* at 8.

The circuit court based its ruling in part on a finding that Bayer’s customers could not take any of the raw materials used in the chemical process, either individually or together, and use them for the same purposes they use Bayer’s finished goods. *Id.* at 3. It is undisputed in the instant case that Ferroletto’s customers could not use the raw materials—that is the uncut large raw steel coils—for

their purposes until they are custom cut to size. In *Bayer*, the court rejected the taxpayer's theory that "inasmuch as chemicals arrive at the Bayer Plant and chemicals leave it that Bayer is entitled to the exemption requested." The court viewed that position as simplistic and not fully or fairly describing the nature of the change that occurred. *Id.* at 7. In the instant case, Feroletto contends that the only thing it does at its Weirton Plant is cut large steel coils into smaller steel coils, repackage the smaller coils, and ship them to its customers. Pet'r's Br. 9. "[T]he process begins with coils of steel and ends with coils of steel." Pet'r's Br. 19. As in *Bayer*, this is an inappropriately simplistic analysis.

The raw steel arrives at the Feroletto plant in coils weighing about 27,000 pounds; it leaves custom-cut to the specific sizes ordered by its customers—sizes specified to within thousandths of an inch. The strips shipped to AFC Cable Systems are custom-cut to specifications to be used in the manufacture of flexible conduit, which is used to house electrical wires. App. 72, p. 12. Those shipped to Eagle Manufacturing are custom-cut to specifications to be used in the manufacture of gas cans and storage cabinets for flammable materials. App. 95, p. 8. Those shipped to U.S. Gypsum are custom-cut to specifications to be used in the manufacture of corner bead, which is used in corners in the installation of drywall. App. 96, p. 12. Those shipped to Jennison Manufacturing are custom-cut to specifications to be used in the manufacture of mine safety appliances, specifically, breathing masks. App. 96, pp. 12-13. Those shipped to Affival are custom-cut to specifications to be used in the roll forming of tubes that are filled with chemicals to be injected into steel. App. 95-96, pp. 9-12. Thus, the cutting that Feroletto performs at its plant changes the steel coil from a product with many potential uses to one with a single customer-specified use.

In *Swisher International, Inc. v. Helton*, Civil Action No. 05-CAP-8, Circuit Court of Ohio County (Order entered June 21, 2006), the taxpayer challenged the Commissioner's denial of the Freeport exemption under a taxability ruling. 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. *Id.* at 1. The tobacco material used to make both chewing tobacco and snuff was subjected to several processes by which moisture, flavoring, and preservatives were added. *Id.* at 3-4. The circuit court noted that the tobacco was "divided, cut, broken in bulk, re-labeled, and repackaged" but concluded that the processes the taxpayer applied to the tobacco resulted in a product of different utility. *Id.* at 13.

The court based its decision in part on testimony and a finding that none of the taxpayer's products would be suitable for its customers and ready for shipping until the raw materials have undergone both manufacturing and numerous quality control tests. *Id.* at 11. Likewise, in the case at bar, Feroletto's products are not suitable for its customers' use and ready for shipping until they have been precision-cut to the customers' specifications. Moreover, as a measure of quality control, Feroletto's slitting machines are equipped with an x-ray to measure the gauge in the center of each coil, and the plant itself is ISO-certified as a means of quality control. In addition, as discussed above, any material that is under width by even one-thousandth of an inch is rejected by the customer as not of use in its processes.

In *A.E. Inc. v. Craig*, Property Tax Ruling 04-02 (January 6, 2004), cited by Feroletto, the taxpayer property at issue was rolled sheet aluminum coils. App. 169. The taxpayer stretched the aluminum lengthwise by machine so that it became thinner. App. 170. Because the aluminum became more brittle each time it was stretched, the rolls of stretched aluminum were placed in a

furnace where the application of heat reduced the brittleness. App. 170. The taxpayer argued that the defining characteristic of the aluminum was its alloy type; because it did not undergo any type of chemical change and remained flat rolled aluminum, no substantial alteration took place. App. 169, 170. The Tax Commissioner rejected this argument and concluded that the processes resulted in substantial alteration. App. 174.

In that case, the Commissioner and the Assessor noted that “taxpayer’s facility is what is normally classified as a ‘custom shop’ in that its activities are in response to and specifically determined by the order placed by the customer.” App. 170. In other words, the cutting is done according to the customer’s specifications in order to be of a particular size for use in a particular further manufacturing process. The Tax Commissioner noted that the aluminum was transformed by physical means into aluminum of different character, that is, aluminum that is considerably thinner and substantially more pliable. App. 173. The Commissioner read the phrase “different utility” to mean “tangible personal property having an application, function, or purpose that is other than that in existence during the immediately preceding incarnation of such property.” App. 173. The Commissioner then noted that it was apparent that the customer could not utilize the aluminum until after the manufacturing process performed at the A.E. plant was completed; therefore, the Commissioner concluded that the rolls of aluminum have a “different utility.” App. 173.

In the instant case, the Feroletto plant is also a custom shop: all its activities are all in response to specific orders placed by their customers. The coils Feroletto receives have an almost limitless number of uses when they arrive at the plant in their form weighing about 27,000 pounds. Although they cannot be used by Feroletto’s customers in that form, once slit to the customer’s specifications, they are of different utility because they are cut to specifications that make them appropriate for a

single specific use in further manufacturing. Accordingly, they have a “different utility” under the Freeport Exemption.

Feroletto cites *American Woodmark Corp. v. Paige*, Civil Action No. 92-P-19, Circuit Court of Hardy County (order entered December 28, 1992), for the proposition that the taxpayer was allowed the exemption for engaging in activities expressly permitted under the Freeport Amendment. Pet’r’s Br. 17. The case does not stand for such a broad proposition. In *American Woodmark*, a circuit court considered the Freeport exemption in the context of the activities of the taxpayer. It came to two different conclusions as to two types of products, both based on determination of whether the processes resulted in a new product or one of different utility.

The Randolph Circuit Court first considered finished cabinet front frames that were assembled, trimmed, drilled, oven-dried, inspected, stored, and shipped from the Hardy County facility (described in ¶ 11 of the stipulations). *American Woodmark* at 6. Despite all of these processes, the court held the item was eligible for the exemption. *Id.* The court reasoned that the parts of the frame that were delivered to the plant were “dimension stock” that could *only* be used for the purpose of being assembled into the item being made by the taxpayer – *i.e.*, the front frame of a cabinet. *Id.* Because the dimension stock was *only* suitable for that purpose, it did not become a new or different product when assembled into that item. *Id.* Accordingly, the court found that these items were covered by the exemption. *Id.* at 6.

In contrast, the items described in paragraph 12 were received as dried lumber or boards which were cut, shaped, and subject to other activity which resulted in their leaving the taxpayer’s plant as a finished cabinet door. *Id.* at 7. The court found that the assembly of this item was not covered by the Freeport Exemption because taking rough lumber and changing that lumber into a

finished cabinet door was an activity that resulted in a different product and one of different utility leaving the taxpayer's plant. *Id.* at 7.

The court's reasoning in *American Woodmark* is completely consistent with that of Judge Recht in the instant case. When raw materials, the dried boards, which could have been used for many purposes on arrival, actually left the plant as cabinet doors, the taxpayer's activities resulted in a different product and one of different utility. In the instant case, the raw materials, which previously could have been used for many purposes, actually left the plant custom-sized for the production of a single product (flexible conduit for AFC Cable Systems, corner bead for U.S. Gypsum, etc.).⁹ Therefore, Feroletto's activities resulted in a product of new utility.

Feroletto also cites *Wheeling Nisshin, Inc.*, Property Tax Ruling 04-05 (February 13, 2004), App. 177-183, as an example of a denial of the Freeport Exemption based on a more extensive manufacturing process than the slitting process that Feroletto uses. As noted above, the degree of processing is not significant. The determinative factual question is whether the processes at issue result in a new or different product or one of different utility. If they do, then the exemption does not apply. In *Wheeling Nisshin*, the Tax Commissioner ruled that the taxpayer's process of hot dipping rolls of coiled steel to add protective coatings did not fall within the Freeport Exemption. App. 182. The Commissioner reasoned that the process at issue was manufacturing, as that term is used in W. Va. Code § 11-6E-2.¹⁰ App. 181. The steel was transformed into the coating process

⁹ Feroletto asserts that the steel coil only had a single use as to each customer. This further substantiates that the custom-cutting to customer specifications transforms the raw material into a product of different utility.

¹⁰ The Freeport Exemption statute, W. Va. Code § 11-5-13, does not contain a definition of manufacturing. However, the Commissioner found that the definition at W. Va. Code § 11-6E-2(b) (continued...)

into steel of a different character. App. 181. Moreover, the customer could not use the steel until the coating process was completed. App. 182.

That same reasoning applies with equal force to the instant case. In the taxability ruling that Ferroletto appealed, the Commissioner reasoned that the slitting process was manufacturing because the steel coils were transformed into steel of a different form according to the purchaser's specifications. App. 13. And it is undisputed that Ferroletto's customers could not use the steel coils until they were cut to the sizes specified for their manufacturing processes. Moreover, Ferroletto's ISO certification is in "the manufacture of slitting . . . non-ferrous flat rolled materials." App. 61.

In *Mongold Lumber Enterprises v. Paige*, Civil Action No. 95-C-51, Circuit Court of Randolph County (order entered Sept. 27, 1995), the taxpayer's inventory consisted of logs, green lumber, dried lumber, and milled woodwork, which it claimed was exempt under the Freeport Amendment. App. 143. Ferroletto claims that the circuit court ruled that the taxpayer's inventory did not lose the exemption based upon the taxpayer's activities in relation to the inventory. Pet'r's Br. 16. Reliance on that order is misplaced for several reasons. First, the facts at issue are not apparent on the face of the order. Although facts may have been included in the taxability ruling being appealed, those facts are typically the taxpayer's recitation of facts and are therefore not subject to cross examination. Because the circuit court reviews a taxability ruling *de novo* and takes evidence, it is unclear what facts the court actually considered. Second, the order was not a substantive ruling

¹⁰(...continued)
was useful:

(6) "Manufacturing" means a systematic operation or integrated series of systematic operations engaged in as a business or segment of a business which transforms or converts tangible personal property by physical, chemical, or other means into a different form, composition or character from that in which it originally existed.

by the court but rather an approval of a settlement reached by the parties. App. 143. Third, because it was a settlement, the order does not address the issue of whether the taxpayer's activities resulted in a new product or one of different utility. Thus, the order does not address the issue in this case.

Feroletto asserts that the circuit court's order violates the state constitutional guarantee of equal and uniform taxation, W. Va. Const. art. X, § 1, because the Circuit Courts of Randolph and Hardy Counties allowed taxpayers (Mongold Lumber and American Woodmark) an exemption for engaging in activities expressly permitted by the Freeport Amendment, while Judge Recht's order disallowed the exemption. Pet'r's Br. 17. Ferroletto did not raise this issue below; thus it was waived.¹¹ Moreover, there is no evidence to demonstrate that Ferroletto is similarly situated with Mongold Lumber or that it is being treated differently. As to American Woodmark, to the extent that the facts are similar, the court in that case denied the exemption. When this Court has examined the Equal and Uniform Clause, it has required the taxpayer to prove not only that it was similarly situated to the taxpayer that received different treatment but also that the difference in treatment was intentional and systematic. *Mountain America*, 224 W. Va. at 688-689, 687 S.E.2d at 787-788. Even if there were such evidence, this Court has recognized, in accordance with the United States Supreme Court, that,

“[t]he system of taxation unfortunately will always have some inequality and nonuniformity attendant with such governmental function. It seems that perfect equality in taxation would be utopian, but yet, as a practicality, unattainable. We must satisfy ourselves with a principle of reason that practical equality is the standard

¹¹ A constitutional issue that was not properly preserved at the trial court level may, in the discretion of the court, be considered on appeal when the constitutional issue is the controlling issue in the resolution of the case. *Mountain America, LLC v. Huffman*, 224 W. Va. 669, 681-682, 687 S.E.2d 768, 780-781 (2009), citing *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005). This constitutional issue, however, is not the controlling issue in the resolution of this case. Thus, this Court need not, and should not, consider it.

to be applied in these matters, and this standard is satisfied when the tax system is free of systematic and intentional departures from this principle.”

Mountain America, 224 W. Va. at 689, 687 S.E.2d at 788, quoting *Kline v. McCloud*, 174 W. Va. 369, 374, 326 S.E.2d 715, 720 (1984) (quoting *Meyer v. Cuyahoga County Bd. of Revision*, 390 N.E.2d 796 (Ohio 1979)).

B. THE CIRCUIT COURT’S ORDER CONTAINS SUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW TO PERMIT MEANINGFUL REVIEW BY THIS COURT.

Although the West Virginia Rules of Civil Procedure do not require findings of fact and conclusions of law in motions for summary judgment, this Court has qualified this by case law.¹² In *Gentry v. Mangum*, 195 W. Va. 512, 521, 466 S.E.2d 171, 180 (1995), the Court stated, “[O]n summary judgment, a circuit court must make factual findings sufficient to permit meaningful appellate review.” This is because the Court’s function as a reviewing court is to determine whether the stated reasons for the granting of summary judgment by the lower court are supported by the record. *Fayette County National Bank v. Lilly*, 199 W. Va. 349, 353, 484 S. E.2d 232, 236 (1997). In that case, the Court stated the standard as follows:

[A]lthough our standard of review for summary judgment remains de novo, a circuit court’s order granting summary judgment must set out factual findings sufficient to permit . . . appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed. 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.

Fayette County National Bank, 199 W. Va. at 354, 484 S.E.2d at 237. Although Judge Recht’s order is short, it meets this standard.

¹² Rule 52(a) provides, in pertinent part, “Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56.”

The circuit court begins with the observation that the matter is “a factually simple case that has legal consequences of vital importance.” App. 208. The court’s statement of the issue includes the following findings of fact, although they are not denominated as such: (1) Feroletto’s tangible personal property consists of steel coils which have a variety of non-specific potential uses; (2) the coils are consigned from a point of origin outside West Virginia to Feroletto’s warehouse; and (3) while there, it “is cut in dimensions consistent with the request of a customer.” App. 208. The discussion section of the order clearly indicates the facts that the court considers relevant, determinative of the issues and undisputed, as required by *Fayette County National Bank*: (1) “the taxpayer receives a generic product (steel coil) which has a variety of non-specific potential uses,” and (2) “the taxpayer takes that coil and cuts it to conform to the custom dimensions by the needs of the ultimate user.” App. 208-209. The court then applies the applicable test – that is, whether the taxpayer’s action of cutting the steel coil to custom dimensions result in a product of “different utility.” App. 209. The court concludes as a matter of law that it does because “the steel coil is converted from a generic utility to a specific utility.” App. 209. Accordingly, the taxpayer is not entitled to the Freeport Exemption. App. 209.

Although the order is short, it contains sufficient findings of fact, indicates which findings the court deems relevant and determinative of the issue, and provides clear notice to the parties of the rationale underlying the decision. Nothing more is required.

Feroletto cites several cases for the proposition that a summary judgment order cannot be affirmed if it is vague about the evidence on which the court relied. Pet’r’s Br. 18. Although the order in the instant case is short, it is not vague. It is clear from the order that the circuit court relied

on the Tax Commissioner's detailed description of the facts as to how the coil was cut to very precise customer specifications.

Feroletto also claims that the court failed to address the fact that the steel was *cut*, which is one of the processes explicitly mentioned as permissible in the Freeport Amendment. Pet'r's Br. 19. The court did not ignore this fact. Rather, it considered it as part of the applicable legal standard:

The question raised in these competing Motions for Summary Judgment is the applicability of the "Freeport Exemption" to the taxation of tangible person property (coils of steel) . . . when the steel coil is *cut* in dimensions consistent with the request of a customer. Does the activity of *cutting* the steel coil result in a product of different utility thus losing the exemption to the taxpayer from *ad valorem* taxes which is bestowed pursuant to West Virginia Constitution Article 10, Section 1c.

App. 208 (emphasis added).¹³ Ferroletto further claims that under the circuit court's reasoning there could never be a product in interstate commerce that is "only cut in any way, manner, or degree, shape or form that could be exempt from *ad valorem* taxation." Pet'r's Br. 20. This is clearly untrue. As is apparent from the cases discussed in Argument A.3, *supra*, the cases contain a wide range of facts, and the decisions as to the exemption are case-specific. That is, the Commissioner and the circuit courts apply a single legal standard to a variety of different factual situations to

¹³ Ferroletto claims that the circuit court failed to mention its motion for summary judgment other than to note that there were competing motions for summary judgment. Pet'r's Br. 3. Excluding the portions of Ferroletto's brief related to statements of fact and applicable legal standards, its legal argument in both briefs consisted of a single paragraph:

Feroletto merely takes possession of steel coils, cuts them into manageable sizes and ships them off to out of state customers. Therefore, as a matter of law, said steel coils are exempt from West Virginia *ad valorem* property tax per the West Virginia Constitution, statutes and regulations.

App. 28. The supplemental memorandum of law contained the same language except for the addition of an introductory phrase, "[I]t is undisputed that." App. 39. Given the conclusory nature of the argument, the court could hardly have devoted much discussion to it.

determine whether the activity in question – in this case, cutting – results in a new product or one of different utility. Judge Recht clearly concluded that the activity of cutting *to custom specifications*, resulting in the creation of a single-use product, resulted in a product of new utility. This is a much narrower holding than Feroletto claims and does not bar application of the exemption to other instances of cutting that do not have such a result.

Even if this Court were to deem the circuit court's findings of fact to be insufficient, it should not remand the case because remand would not change the outcome of the case. As discussed above, the order reflects that the circuit court relied on the detailed facts contained in the Commissioner's statement of facts, rather than Feroletto's conclusory claim that it merely cuts and repackages the steel. Pet'r's Br. 9; App. 28, 39. The court relied on the undisputed fact that the steel was not merely cut but was, instead, custom-cut to specifications that made it suitable for a single specific purpose for each customer. Thus, while remand might change the specificity of the findings, it would not change the outcome. *De novo* review on appeal is review of the result, not the language or reasoning of the lower court's decision; therefore, this Court may affirm the circuit court's decision on any grounds. *U.S. Steel Mining Co. v. Helton*, 219 W. Va. 1, 3 n.3, 631 S.E.2d 559, 561 n.3 (2005), citing *GTE South, Inc. v. Morrison*, 199 F.3d 733, 742 (4th Cir. 1999).

There is no need for remand because this Court has before it all the facts it needs to decide the case without a remand, *i.e.*, the facts on which the court below relied: the depositions of James Hillas and James Shevlin, the DVD of the plant visit, and the Feroletto Steel website pages. Because there was no trial below, the circuit court made no findings of credibility. Thus, this Court is as favorably positioned as the circuit court is to decide the legal issue.

The circuit court's decision in this case was correct and should be affirmed because substantial justice was done.

“When the court, on a thorough examination of the whole case, finds that substantial justice has been done, the judgment will not be reversed for any error committed by the circuit court, unless such error, if it had not been committed, would have tended in some measure to produce a different result.”

Syl. pt. 2, *State ex rel. McGraw v. National Fuels Corp.*, 215 W. Va. 532, 600 S.E.2d 244 (2004), quoting Syl. pt. 4, *Barnes v. City of Grafton*, 61 W. Va. 408, 56 S.E. 608 (1907).

VI.

CONCLUSION

There are no disputed issues of material fact in this case. The parties agree that (1) Feroletto engages in the business of slitting rolled coils of steel to customer specifications so that it can be used in these customers' manufacturing processes; (2) once slit to these specifications, each coil has a single use for a single customer, *e.g.*, to make flexible conduit for AFC Cable Systems, to make corner bead for U.S. Gypsum, etc.; (3) Feroletto's customers specify size to within thousandths of an inch; and (4) in the absence of such slitting the steel is not usable to the customers. Thus, Feroletto's activity of slitting the steel coils to customer specifications results in a product of different utility. Under the Freeport exemption, tangible personal property that is “consigned from a point of origin outside the State to a warehouse . . . within the State for storage in transit to a final destination outside the State” is not deemed to acquire a tax situs in West Virginia for purposes of ad valorem property tax. The exemption applies to such property that 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. Const. art. X, § 1c (emphasis added). Feroletto’s inventory of steel coils does not meet the standard for the Freeport exemption because the processes that occur at the Feroletto plant transform the material into a product of different utility. Therefore, it is not entitled to the Freeport exemption, and the Commissioner and Assessor are entitled to judgment as a matter of law under W. Va. R. Civ. P. 56.

Respectfully submitted,

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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,**

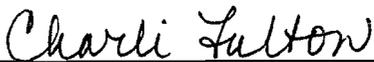
Respondents.

CERTIFICATE OF SERVICE

I, Charli Fulton, Senior Assistant Attorney General and counsel for Craig A. Griffith, West Virginia State Tax Commissioner, do hereby certify that the foregoing *Brief of Respondents West Virginia State Tax Commissioner, Thomas A. Oughton, Assessor of Brooke County and County Commission of Brooke County* was served by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail this 29th day of August 2011, addressed as follows:

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE