

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

**DOCKET NO. 12-0638**

**LEE TRACE LLC,  
Petitioner,**

**v.**

**Respondent Brief In Support of The  
Final Order of The Circuit Court of  
Berkeley County  
(11-AA-2)**

**GEARL RAYNES, AS ASSESSOR FOR  
BERKELEY COUNTY, WEST VIRGINIA,**

**BERKELEY COUNTY COUNCIL SITTING AS  
BOARD OF REVIEW AND EQUALIZATION,  
and**

**BERKELEY COUNTY COUNCIL,  
Respondents.**

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**RESPONDENT ASSESSOR'S  
BRIEF**

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## STATEMENT OF THE CASE

Petitioner Lee Trace LLC (“Petitioner”) owns an apartment complex consisting of 156 apartment units located on 17.02 acres at 15000 Hood Circle, Delmar Orchard Road, within the corporate limits of the City of Martinsburg, Berkeley County, West Virginia (the “Property”). (A.R. 130, 131, 142). Construction on Petitioner’s Property was completed in 2008. (A.R. 74). Petitioner listed the “(f)ace amount of fire insurance carried” on the Property, as of the February 11, 2011 “Application For Review of Property Assessment” as \$17,000,000.00 (A.R. 130). On the same document Petitioner declared the cost of construction of the apartment complex to be \$12,927,378.00 and the cost of the land to be \$1,122,504.00 (A.R. 130). The assessed value of the Property for the 2009 tax year was \$677,040.00 (A.R. 22), which reflected an assessed valuation of the land only as of the July 1, 2008 assessment date, as the apartment buildings were still under construction (A.R. 22). For the 2010 tax year, utilizing the July 1, 2009 assessment date, the Respondent Assessor (“Respondent Assessor”) assessed the Property at \$7,895,530.00 (the “2010 Assessment”), which reflected the assessed value of both land and buildings, as the buildings were then completed. (A.R. 22).

Petitioner asserts in its STATEMENT OF THE CASE in Petitioner’s Brief at page 2, that the West Virginia Code of State Rules requires “...that the income approach to valuation be used as part of the assessment of commercial properties, such as the Property.” However, West Virginia Code of State Rules §110-1P-2.2.1. provides: “...the Tax Commissioner will consider and use where applicable, three (3) generally accepted approaches to value: (A) cost, (B) income, and (C) market data.” See West Virginia Code of State Rules §110-1P-2.2.1. This Courts has

held that the Tax Commissioner may exercise discretion in choosing and applying the most accurate method of appraising commercial and industrial properties, and this exercise of discretion will not be disturbed upon judicial review absent a showing that this discretion was abused. Certainly the same standard of discretion is applicable to assessors. Contrary to Petitioner's assertion that the Respondent Assessor must use the income approach in valuing Petitioner's Property, the West Virginia Code of State Rules §110-1P-2.2.1. and the case law permits the Respondent Assessor to exercise discretion in utilizing any or all three appraisal methods.

However, the issue before the Court herein is not the appraisal method utilized by the Respondent Assessor to value and assess Petitioner's Property for the 2010 tax year, but rather the failure of Petitioner to appear before the Berkeley County Council sitting as the Board of Review and Equalization in February, 2010 and seek relief in accordance with West Virginia Code §11-3-24. Petitioner did appear before the Berkeley County Council in February, 2011, approximately one year later, and sought relief pursuant to West Virginia Code §11-3-27 claiming inter alia that the 2010 tax assessment on Petitioner's Property resulted from a clerical error made by the Respondent Assessor, and asserting that the "Notice of Increase In Assessment" dated January 5, 2010 was inadequate and deprived Petitioner of due process of law in that it failed to inform Petitioner of its right to appear at the Berkeley County Council sitting as a Board of Review And Equalization by the "...February 25, deadline..." and "appeal" the 2010 tax assessment. (A.R. 8, Petitioner's Brief, p. 3). The Berkeley County Council denied Petitioner's "Application For Relief Based On Improper Notice Pursuant To West Virginia Code §11-3-2a And For Relief From Clerical Errors Pursuant To West Virginia Code §11-3-27" (A.R. 6-9), by a decision letter dated February 24, 2011 (A.R. 32), finding from the argument at a

hearing before the Berkeley County Council on February 3, 2011 (A.R. 11-33) that adequate notice was given to Petitioner for "...the filing of a 2010 Review and Equalization application; that Mr. Crocker failed to timely file for a request or application for review during the 2010 Review and Equalization session..." and that it was "...without jurisdiction to hear this request from 2010, since the Board adjourned sine die, in February, 2010." (A.R. 32). Petitioner appealed this denial to the Circuit Court of Berkeley County. By order dated March 23, 2012, the Circuit Court of Berkeley County found that "...the notice sent by the assessor was clearly adequate." (A.R. 472); that West Virginia Code §11-3-2a only "...requires that notice 'advise the person assessed ... of his or her right to appear and seek an adjustment in the assessment.'" (A.R. 472); that West Virginia Code §11-3-2a "...provides nothing further regarding the contents of the notice..." and that the notice given to Petitioner "...shows that the wording required by the statute was included in it." (A.R. 472, 5). The Judge of the Circuit Court of Berkeley County in its order of March 23, 2012 further found that Petitioner's contention that the notice was inadequate because it "...did not state the deadline by when the Petitioner must appear..." (A.R. 472), fails because West Virginia Code §11-3-2a "...does not require the date be given." (A.R. 472). Indeed as noted by the Judge of the Circuit Court of Berkeley County in its order, West Virginia Code §11-3-24 "...states a range in which (the) board may adjourn sine die (,) (s)o the exact date would change from year to year and may not be known in January..." when the notice is sent. (A.R. 472). The Judge of the Circuit Court of Berkeley County further found in its order that "'(a)ll persons are presumed to know the law..." and that, "Petitioner is not entitled to legal instruction beyond what is required by §2..." and that "(t)he 'Notice' sent met the requirements of §2a, and Petitioner did not challenge the assessment in a timely manner." (A.R. 472). Insofar as Petitioner's claim that the appraisal method employed by the Respondent Assessor constituted

a “clerical error or a mistake” which under West Virginia Code §11-3-27(a) would permit Petitioner to extend the “...time frame to challenge the assessment..,” the Judge of the Circuit Court of Berkeley County found in its order of March 23, 2012 that the alleged error complained of by Petitioner “...was clearly an intentional decision and not inadvertent...” and therefore the “...time frame for challenging the assessment is not extended by §27 because it does not apply.” (A.R. 473). The Judge of the Circuit Court of Berkeley County in its order concluded that “(s)ection 24 states that a person failing to apply for relief at the meeting of the Board for that tax year ‘shall have waived his right to ask for correction in his assessment list for the current year, and shall not thereafter be permitted to question the correctness...” West Virginia Code §11-3-24 (A.R. 473). The Circuit Court of Berkeley County in its order further concluded, “(t)he Petitioner clearly did not challenge the 2010 tax assessment at the proper time and his arguments are insufficient to alleviate this requirement...” and “...the Board’s conclusion that it could not consider the 2010 Assessment because it had not been timely challenged was correct and should be affirmed.” (A.R. 473). Respondent Assessor requests that this Court uphold the order of the Circuit Court of Berkeley County.

## SUMMARY OF ARGUMENT

The Respondent Assessor asserts that the Circuit Court of Berkeley County did not err when it concluded in its order of March 23, 2012 (A.R. 467-475) that the Respondent Berkeley County Council was correct in its decision letter of February 24, 2011 (A.R. 32) declining to hear Petitioner's "Application For Relief Based On Improper Notice Pursuant To West Virginia Code §11-3-2a And For Relief From Clerical Errors Pursuant To West Virginia Code §11-3-27" (A.R. 6-9), in that as found and concluded by the Circuit Court in that order, the "Notice of Increase In Assessment" dated January 5, 2010 (A.R. 5), was sufficient under West Virginia Code §11-3-2a; that West Virginia Code §11-3-2a does not require a date be given to the Petitioner of a deadline to appear and challenge a tax assessment; that Petitioner was informed by West Virginia Code §11-3-24 of the time range that the Respondent Berkeley County Council shall sit in session as a Board of Review and Equalization to hear tax appeals before it may adjourn sine die, and that Petitioner is charged with knowledge of the law; that the use by the Respondent Assessor of a particular method to appraise Petitioner's Property did not constitute a "clerical error or a mistake" as envisioned by West Virginia Code §11-3-27, and therefore did not justify extending the time frame for challenging the 2010 tax assessment of Petitioner's Property; and therefore that Petitioner did not challenge the 2010 tax assessment of its Property within the time frame provided by West Virginia Code §11-3-24.

**STATEMENT REGARDING ORAL ARGUMENT  
AND DECISION**

Respondent Assessor hereby waives oral argument.

## ARGUMENT

### I. STANDARD OF REVIEW

This Court reviews challenges to a circuit court's findings of fact under a "clearly erroneous" standard, but conclusions of law are reviewed de novo. In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, 223 W.V. 14, 672 S.E. 2d 150 (2008).

"As a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct; the burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous." Syl. Pt. 8, Bayer Material Science, LLC v. State Tax Com'r, 223 W.Va. 38, 672 S.E. 2d 174 (2008).

II. THE CIRCUIT COURT DID NOT ERR IN FINDING PETITIONER WAIVED ITS RIGHT TO CHALLENGE THE 2010 TAX ASSESSMENT PURSUANT TO W.VA. CODE §11-3-24; THAT THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE "NOTICE OF INCREASE IN ASSESSMENT" SENT BY THE ASSESSOR WITH RESPECT TO THE 2010 TAX ASSESSMENT WAS ADEQUATE AND IN CONFORMANCE WITH STATE LAW; THAT THE CIRCUIT COURT DID NOT ERR IN DENYING THE PETITIONER'S PETITION FOR APPEAL AS TO THE 2010 TAX ASSESSMENT CONCLUDING THAT THE "NOTICE OF INCREASE IN ASSESSMENT" WAS SUFFICIENT AND IN COMPLIANCE WITH LAW AFFORDING PETITIONER DUE PROCESS; AND THE CIRCUIT COURT DID NOT

ERR IN DENYING THE PETITIONER'S PETITION FOR APPEAL AS TO THE 2010 TAX ASSESSMENT.

Petitioner contends that "Notice of Increase In Assessment" dated January 5, 2010 failed to meet the requirements of West Virginia Code §11-3-2a or the requirements of procedural due process. Petitioner contends that the "Notice of Increase In Assessment", dated January 5, 2010 (A.R. 5) does not conform to the statute, West Virginia Code §11-3-2a. The Circuit Court of Berkeley County in its order of March 23, 2012 concluded that:

First, the notice sent by the assessor was clearly adequate. Section 2a controls this notice. It requires that notice 'advise the person assessed ...of his or her right to appear and seek an adjustment in the assessment.' It provides nothing further regarding the contents of the notice. An initial review of the Notice shows that the wording required by the statute was included in it. See Findings of Fact #9, infra. (A.R. 472).

Furthermore the Court in Mountain America LLC v. Huffman, 224 W.Va. 669, 683, 687 S.E. 2d 768, 782 (2009) noted the distinction between statutes imposing a tax, and statutes governing the procedures for collection and assessment of taxes:

(g)enerally, we have also recognized with respect to legislative enactments pertaining to taxation that '(s)tatutes governing the imposition of taxes are generally construed against the government and in favor of the taxpayer. However, statutes establishing administrative procedures for collection and assessment of taxes will be construed in favor of the government.' Syl. Pt. 1, Calhoun County Assessor v. Consolidated Gas Supply Corp., 178 W.Va.

230, 358 S.E. 2d 791 (1987) (emphasis added).

Id.

Our Court in Mountain America LLC. V. Huffman concluded that West Virginia Code §11-3-24 was facially constitutional and constitutional as applied in that case, and that West Virginia Code §11-3-24 was a procedural statute that should be construed in favor of the government. Likewise this Court should conclude that West Virginia Code §11-3-2a is not a statute imposing taxes, but rather a procedural statute that should be construed in favor of the government. Applying such a liberal construction to West Virginia Code §11-3-2a , in favor of the government, the Court should conclude that the Circuit Court of Berkeley County did not err in its March 23, 2012 order (A.R. 472) concluding that the “Notice of Increase In Assessment,” dated January 5, 2010 (A.R. 5), was “clearly adequate” under the statute informing Petitioner of its right to appear and seek an adjustment in its assessment before the Board of Review and Equalization.

Petitioner further asserts that the “Notice of Increase In Assessment,” dated January 5, 2010, was deficient and deprived Petitioner of procedural due process in that it failed to advise Petitioner of its right to appear on or before the February 25, 2010 deadline. The Circuit Court of Berkeley County concluded in its order of March 23, 2012 (A.R. 472) that Petitioner was on notice of the deadline for appearing before the Berkeley County Council sitting as a Board of Review and Equalization by virtue of the statutory language of W.Va. Code § 11-3-24, that provides a range of time that the Board of Review and Equalization may be in session before it may adjourn sine die. The Circuit Court of Berkeley County also concluded in its order of March 23, 2012 (A.R. 472) that the Notice of Increase in Assessment actually referred to W.Va. Code § 11-3-2a “which gave the Petitioner the place to look to find out about the process,” (A.R.

472). Then the trial court concluded that “(a)ll persons are presumed to know the law,” citing State v. McCoy, 107 W.Va. 163, 172 (1972).

Petitioner’s counsel argues in Petitioner’s Brief that State v. McCoy is a criminal case that provides no basis for dispensing with notice. However, Respondent Assessor argued below in its brief, that the legal axiom, that persons are presumed to have knowledge of the law, is accepted both nationally and in West Virginia. In Baker v. Gaskins, 128 W.Va. 427, 433-434, 36 S.E. 2d 893, 896 (1946), our Court held that litigants were by law charged with knowledge of the dates of the holding of term of court and all subsequent terms of court. In Commercial Banking & Trust Co. v. Doddridge County Bank, 119 W.Va. 449, 194 S.E. 619-623-625 (1937), our Court held bank directors are presumed to know that banking law does not permit the pledge of bank assets to secure deposits other than certain government deposits. The United States Supreme Court in Anderson v. Lockett, 321 U.S. 233, 243, 64 S. Ct. 599, 605, 88 L. Ed. 692 (1944) observed that “(a)ll person having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes. In United States v. Yazell, 382 U.S. 341, 86 S. Ct. 500, 15 L. Ed. 2d 404 (1966), the United States Supreme Court concluded that the SBA was chargeable with knowledge of the Texas law of coverture. The United States Court of Appeals, Fourth Circuit, in Knott Corporation v. Furman, 163 F. 2d 199, 203 (4<sup>th</sup> Cir. 1947), held that a corporation is presumed to have knowledge of a Virginia statute. In Dimenski v.I.N.S., 275 F. 3d 574 (7<sup>th</sup> Cir. 2001), the United States Court of Appeals, Seventh Circuit held that an alien is presumed to have knowledge of immigration law. Most importantly the United States Supreme Court in Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 710, 4 S. Ct. 663, 668, 28 L. Ed. 569 (1884) held in a tax assessment case, that “(t)he law in prescribing the time when

such complaints will be heard (by board of revision or equalization) gives all the notice required, and the proceeding by which the valuation, though it may be followed if the tax be not paid, by sale of the delinquent's property, is due process of law." See also Turner v. Wade, 254 U.S. 64, 68, 41 S. Ct. 27, 28, 65 L. Ed. 134 (1920); Lander v. Merchantile Bank of Cleveland, 186 U.S. 458, 22 S. Ct. 908 (1902).

Therefore the notice of when the Berkeley County Council sitting as a Board of Review and Equalization will meet is set by statute, W.Va. Code § 11-3- 24, and Petitioner is presumed to have knowledge of the notice set forth in W.Va. Code § 11-3-24 of the time range when the Board of Review and Equalization will meet. Furthermore as held by the United States Supreme Court in Hagar v. Reclamation Dist. No. 108, supra, this statutory notice of the time when the tax review board is to meet to hear taxpayer complaints as to the valuation of taxed property is due process. Therefore Petitioner's contention that the Circuit Court of Berkeley County erred in its March 23, 2012 order (A.R. 472) by relying on presumed knowledge of the law and the notice set forth in W. Va. Code § 11-3-24 is misplaced.

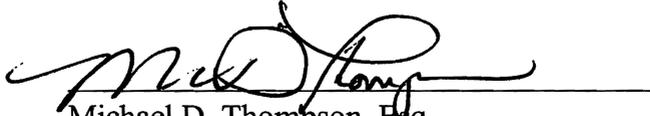
Beginning at page 8 of Petitioner's Brief, petitioner cites a number of cases for the proposition that there is a due process right to be advised of appeal rights and deadlines for appeal. These cases are easily distinguished as either involving very specific statutes that require very specific notice to the party of his right to appeal, deadlines for appeal and or notice of consequences of a determination. Most of these cases involve entitlements to benefits or other such rights, and only a few of these cases deal with valuation and assessment of property and are not on point.

## CONCLUSION

The Circuit Court of Berkeley County did not err in its finding that Petitioner waived its right to challenge the 2010 tax assessment; that the Circuit Court of Berkeley County did not err in finding that the “Notice of Increase in Assessment” sent by the Respondent Assessor with respect to the 2010 tax assessment was adequate and in conformance with State law; that the Circuit Court of Berkeley County did not err in denying the Petitioner’s Petition For Appeal as to the 2010 tax assessment concluding that the “Notice of Increase in Assessment” was sufficient and in compliance with law affording Petitioner due process of law; and the Circuit Court of Berkeley County did not err in denying Petitioner’s Petition For Appeal as to the 2010 tax assessment.

WHEREFORE Respondent Assessor would respectfully request that this Court deny  
Petitioner's Petition For Appeal.

Respondent Gearl Raynes  
Assessor of Berkeley County, West Virginia  
By Counsel

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

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**CERTIFICATE OF SERVICE**

I, Michael D. Thompson, Esq., do hereby certify that I served a true copy of the attached Respondent Assessor's Brief upon the following counsel at their addresses shown by United States Mail postage prepaid this 27<sup>th</sup> day of September, 2012.

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