

No. 32695 – *Appalachian Emergency Medical Services, Inc. v. State Tax Commissioner*

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Starcher, J., concurring:

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I concur in this Court’s opinion and judgment in the instant case.

I write separately to observe that this Court too often finds itself “flying blind” (somewhat) in cases like the instant one – that involve taxation in connection with “nonprofit” entities.

There are a number of reasons that certainty and clarity in this legal area may be elusive. There is little specific statutory or regulatory language to apply. The relevant case law in this jurisdiction is sparse, and the parties usually do not cite much law from other jurisdictions (possibly because other jurisdictions’ taxation systems are different from West Virginia’s, although my guess is we could find some helpful analogies – if the parties would bring them to the attention of this Court.)

Another reason this Court can find itself without a clear basis for deciding these “nonprofit taxation” cases is the competing strong public policies that are involved, such as: (1) ensuring full and adequate and fair revenue to operate government; (2) encouraging certain positive activity conducted by “nonprofit” entities; and (3) showing fairness to straightforward “for-profit” activities. Add to this mix a seemingly endless variety of factual circumstances, and the result is a recipe for jurisprudential confusion.

From one perspective, this situation calls out for more specific legislative and

regulatory guidance. But the foregoing-noted strong competing public policies probably reflect strong competing interest groups, who may fear the outcome of seeking a more certain legislative or regulatory prescription of who has to pay what taxes and when – more than they fear the uncertain results of judicial application of an imprecise regulatory structure.

So, where there is a specific situation to be resolved, it may get dumped on the court system, and we do the best we can to make practical and principled decisions, on the basis of the sparse statutory and regulatory language and case law with which we have to work. Thus this Court's opinion in the instant case strikes a balance that I and my fellow Justices find to be roughly fair and consistent with the statutes, such as they are. This kind of *ad hoc* decision-making in this area will continue, presumably, unless the other branches of government speak with more specificity in this area.

Accordingly, I concur.