/s/ Christopher C. Wilkes
Circuit Court Judge
Ref. Code: 21YCYFRSX

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CC-43-2018-AA-1
Ritchie County Circuit Clerk
Melanie Wilson

In the Circuit Court of Ritchie County, West Virginia

ANTERO RESOURCES CORPORATION, Plaintiff,	)	
vs.)	)	Case No. CC-43-2018-AA-1
HONORABLE DALE STEAGER, HONORABLE ARLENE MOSSOR, Ritchie County Commission, Defendants	)	

ORDER DENYING APPEAL BRIEF OF PETITIONER ANTERO RESOURCES CORPORATION

This matter came before the Court this 20th day of December 2021, upon the Appeal Brief of Petitioner Antero Resources Corporation. The Petitioner, Antero Resources Corporation, by counsel, John J. Meadows, Esq., and Respondents, The Honorable Matthew R. Irby, West Virginia Tax Commissioner and The Honorable Arlene Mossor, Assessor of Ritchie County, by counsel, Sean M. Whelan, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

I. Findings of Fact

1. Petitioner Antero Resources Corporation (hereinafter "Petitioner" or "Antero") is a producer for 75 Marcellus Shale horizontal wells in Ritchie County, West Virginia for Tax Year (TY) 2018. *See* Pet's Appeal Br., p. 1; *see also* Assessor's Resp., p. 3. This appeal brief concerns the assessment of property tax on gas wells from which Antero produces gas for the 2018 Tax Year. Specifically, this appeal brief concerns the issue of whether or not the Tax

Department should account for postproduction operating expenses, which are expenses incurred getting the product to the point of sale, including expenses for gathering, compressing, processing, and transporting gas to market for Tax Year 2018. Antero proffers its actual average operating expenses in West Virginia are $1,130,106.00 per well[1], and that this should be deducted. *See* Pet's Appeal Br., p. 2.

2. Previously, the issue of postproduction expense deductions was addressed by the West Virginia Supreme Court of Appeals in *Steager v. Consol Energy, Inc*., 242 W. Va. 209, 224, S.E.2d 135 (2019). In *Steager*, the Supreme Court found that the State Tax Commissioner's exclusion of post-production expenses from the average operating expense deduction for the 2016 and 2017 Tax Years was not arbitrary, capricious, or unreasonable. *Id*. at 224, 149.

3. On November 1, 2018, Antero protested at a hearing the Tax Department's valuation (as adopted by the Ritchie County Assessor) for its Tax Year 2018 *ad valorem* tax liability to Ritchie County because it objected to the Tax Department's application of a percentage-based deduction and $175,000.00 "cap" on monetary expense deductions. *See* Pet's Appeal Br., p. 2.

4. In 2020, in the Legislative Session, the House and Senate introduced bills which (if passed) would have allowed producers to deduct "gathering, compression, processing, and transportation" costs. *See* Assessor's Response, p. 6. This bill did not pass. *Id*. The Tax Commissioner also filed a proposed legislative rule that would have permitted deductions for post-production expenses, but it was withdrawn on November 18, 2020. *Id*.

5. Meanwhile, on June 30, 2020, the Tax Department published a document entitled "Important Notice To Producers Of Natural Gas And Oil For Tax Year 2021" (referred to by the parties as "2020 Notice). *See* Pet's Appeal Br., p. 5. This Notice was posted on the Tax Department's website but never adopted as a rule in compliance with the West Virginia Administrative Procedures Act, W. Va. Code §§29A-1-1, et. seq. ("APA"). *See* Assessor's Resp.,

p. 6. Further, on October 9, 2020, the Tax Department withdrew this Notice by issuing a withdrawal notice entitled "Notice of Withdraw [*sic*] Of Important Notice To Producers Of Natural Gas And Oil For Property Tax Year 2021" (referred to by the parties as "Withdrawal Notice"). *Id*. at 7; *see also* Pet's Appeal Br., p. 5. The Court notes that the Withdrawal stated that the appraisal formula could be subject to changes by a future Legislature, and that the very next year, in the 2021 Session, House Bill 2581 prospectively redefined the "[a]ctual annual operating costs" deduction to include the "gathering, compression, processing, separation, fractionation, and transportation charges" that were previously excluded from the appraisal formula. *See* Assessor's Response, p. 7.

6. On or about August 24, 2021, Antero filed the instant Appeal Brief of Petitioner Antero Resources Corporation, arguing Antero should be permitted to deduct postproduction expenses, and the Board's refusal to permit Antero to do so violates certain constitutional provisions. *See* Pet's Appeal Br.

7. On September 24, 2021, Respondents Matthew R. Irby, West Virginia State Tax Commissioner and Arlene Mossor, Assessor of Ritchie County filed their Brief of Respondents Matthew R. Irby, West Virginia Tax Commissioner and Arlene Mossor, Assessor of Ritchie County, arguing Antero's Petition should be denied, and arguing the Court should adopt the revaluations submitted on February 9, 2021, and set the total value of Antero's wells in Ritchie County for the 2018 tax year at $421,359,327.00. *See* Assessor's Response, p. 28.

8. On or about October 15, 2021, Antero filed its Reply in Support of Appeal Brief of Petitioner Antero Resources Corporation.

9. The Court now finds the instant Appeal Brief is ripe for adjudication.

II. Conclusions of Law

Antero has filed the instant Appeal Brief of Petitioner Antero Resources Corporation, which are expenses incurred getting the product to the point of sale, including expenses for

gathering, compressing, processing, and transporting gas to market for Tax Year 2018. *See* Pet's Appeal Br., p. 3, 4. Specifically, Antero seeks this Court grant its "Petition and order the Board to recalculate the value of Antero's Ritchie County gas wells for the 2018 tax year, this time taking into account an appropriate deduction for Antero's postproduction expenses". *See* Reply, p. 24.

In reviewing the instant valuation determination, this circuit court is performing an appellate function from the County Commission of Ritchie County. It is well-established in West Virginia "that an assessor's valuation of property for purposes of taxation is presumed to be correct". *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 25, 672 S.E.2d 150 (2008). To overcome this presumption, Antero must "demonstrate by clear and convincing evidence that the tax assessment is erroneous". Syl. Pt. 2, *W. Pocahontas Props., Ltd. V. Cnty Comm'n of Wetzel Cnty.*, 189 W. Va. 322, 431 S.E.2d 661 (1993).

Further, in reviewing the valuation determination, this circuit court is doing so as an appellate function and therefore, its judicial review is limited to the record made before the county commission. W. Va. Code § 11-3-25; W. Va. Code §§ 58-3-4 and 5; *see also In Re Tax Assessment of American Bituminous Power Partners*, 208 W. Va. 250, 539 S.E.2d 757 (2000); Syl. Pt. 1, in part, *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (2009).

This Court first looks to the direction given to it by the West Virginia Supreme Court of Appeals when it decided the case of *Dale W. Steager, WV State Tax Commissioner, et al., v. CONSOL Energy, Inc., dba, CNX Gas Company, LLC, et al.*, 242 W. Va. 209, 832, S.E.2d 135 (2019).

First, the Supreme Court of Appeals explained the valuation process well in *Steager*:

> To determine the value of gas wells for *ad valorem* taxation purposes, gas well owners provide gross receipts from their well production, to which the Tax Department applies a "production decline rate." From this figure, the "average annual industry operating expenses" are deducted to establish a "net receipts"

value. That value is then capitalized to determine the taxable value. This formula is described in West Virginia Code of State Rules § 110-1J-4.1 (2005) as follows:

> 4.1. General. -- Oil and/or natural gas producing property value shall be determined through the process of applying a yield capitalization model to the net receipts (*gross receipts* less royalties paid *less operating expenses*) for the working interest and a yield capitalization model applied to the gross royalty payments for the royalty interest.

With respect to the operating expenses referenced above, West Virginia Code of State Rules § 110-1J-4.3 provides that the Tax Commissioner shall "every five (5) years, determine the average annual industry operating expenses per well. The average annual industry operating expenses shall be deducted from working interest gross receipts to develop an income stream for application of a yield capitalization procedure." (emphasis in opinion).

Steager, at 214–15, 140–41.

The Supreme Court considered that each year, the Tax Department issues an Administrative Notice that states what the average annual industry operating expense is for that tax year. *Id*. at 215, 141. However, in *Steager*, the Supreme Court found that the yearly Administrative Notices, which were expressed by way of a percentage of the well's gross receipts, with a "not to exceed" amount or "cap" were impermissible. *Id*. at 215, 141.

For the tax year 2016, Administrative Notice 2016-08 provided that for conventional gas wells the "[d]irect ordinary operating expenses will be estimated to be 30% of the gross receipts derived from gas production, not to exceed $ 5,000 ...." (emphasis added). For Marcellus horizontal wells, the Administrative Notice provided that "the maximum operating expenses allowed is 20% of the gross receipts derived from gas production, not to exceed $ 150,000." For the tax year 2017, the Administrative Notice provided for operating expenses of 20% not to exceed $ 175,000 for Marcellus wells. *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 215, 832 S.E.2d 135, 141 (2019). The average operating expense figures were derived from a survey of gas well producers. *Id*. at 215, 141.

Additionally, the *Steager* Court addressed that the survey which ascertained the average industry operating expense did not provide line items for expenses such as gathering,

compressing, processing, and transporting, which expenses are incurred in getting shale gas and its products to market. *Id.* at 216, 142. Consequently, the *Steager* Court mentioned, these expenses, which are significant for Marcellus wells, are not factored into the average industry operating expenses. *Id*. In *Steager*, Antero argued that this resulted in overvaluation of their gas wells and the survey and resultant calculation should have included postproduction expenses. *Id*. at 216, 218, 142, 144.

The *Steager* Court found that the Tax Department's use of a percentage deduction limited by the use of a "not to exceed" amount or "cap" is neither authorized by nor consistent with the regulation, treated like wells in a dissimilar fashion and was impermissible. *Id*. at 220, 146. Specifically, it found that "[t]his is not due to an over-valuation of the gas wells *per se*, but rather the use of two differing formulas to calculate operating expenses, which results in some wells receiving the full benefit of the deduction and others being denied it." *Id*. at 221, 147.

However, in addressing the Tax Department's methodology of not including certain postproduction costs, the very exclusion at issue in the instant Appeal Brief, the *Steager* Court concluded that the "Tax Department's exclusion of these expenses from its average expense calculation is a reasonable construction of the regulation and not facially inconsistent with the enabling statute". *Steager*, 242 W.Va. at 223.

The *Steager* Court examined the Code, which requires only that natural resources properties be assessed at their "true and actual" value, the statute's express delegation of the authority to make the determination to the Tax Commissioner, the ambiguity in the legislative rule regarding the inclusion of postproduction expenses in the definition of expenses "directly related to the maintenance and production of natural gas", and the law's direction that the Court consider whether the agency's construction of an ambiguity is permissible and reasonable. *Id*. at 222-23, 148-49. The *Steager* Court opined, and this Court agrees, that a compelling argument for including or not including such postproduction expenses in the operating expense calculation

exists. *Id*. at 223, 149.

Now, with regard to the 2018 Tax Year, Antero makes the same arguments with regard to its position as to why postproduction costs should be included in the calculated in determining its operating expenses. However, the *Steager* Court considered the Tax Commissioner's actions, and determined that the Tax Commissioner's position of choosing not to include said postproduction costs must be sustained because it falls within the range of permissible construction. *Id*.

Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit. Syl. Pt. 2, in part, *Conley v. Spillers*, 171 W. Va. 584, 586, 301 S.E.2d 216, 217 (1983).

In *Steager*, the Court expressly analyzed and provided a clear discussion regarding the specific issue of whether the Tax Commissioner properly excluded Antero's postproduction costs. The Court notes Antero, the Tax Department, and the County Commission were all parties in *Steager.* The Supreme Court of Appeals addressed the issue of whether the Tax Commissioner's position regarding the non-deductibility of those costs should be sustained, and in deciding that it could, the issue was finally decided between these parties. Accordingly, Antero's claims are precluded by collateral estoppel.

As the Supreme Court in *Steager* explicitly found that the non-deductibility of those postproduction expenses was permissible, this Court must reject Antero's instant argument that the County Commission's revalued assessment of Tax Year 2018 of Antero's wells are impermissible because they do not include the deduction of postproduction expenses, which Antero argues violates statutory provisions, is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion and violates constitutional provisions, including the federal and state Due Process Clauses, federal Equal Protection Clause, state Equal

and Uniform Taxation Clause, and dormant Commerce Clause.

Further, this Court's review is limited to the record made before the county commission. W. Va. Code § 11-3-25; W. Va. Code §§ 58-3-4 and 5; *see also In Re Tax Assessment of American Bituminous Power Partners*, 208 W. Va. 250, 539 S.E.2d 757 (2000); Syl. Pt. 1, in part, *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (2009).

Accordingly, the June 2020 Notice and the October 2020 Withdrawal Notice, which were attached as Exhibits A and B to Antero's Appeal Brief, cannot be considered. They were not before the County Commission and are not part of the record.

However, the Court notes and finds that even if it could properly consider the June 2020 Notice and the October 2020 Withdrawal Notice, the Court rejects any argument that a communication posted on a state agency website, which has been written as a letter that personally addresses taxpayers[2], that is not an administrative rule can somehow overturn a Supreme Court decision. There has been no evidence that the 2020 Notice, which has been withdrawn, was promulgated in keeping with the requirements of the APA, let alone applicable retroactively.

Finally, the Court notes the 2020 Notice applied to the 2021 TY. Thus, the posting of the 2020 Notice letter to taxpayers and its subsequent withdrawal had no impact on Antero as to its 2018 taxes (which presumably had already been paid as they would have been due years prior) except for dashing a fourteen week hope of a return of some taxes paid nearly three years earlier.

For all of these reasons, the Court finds that even if it was appropriate to consider the June 2020 Notice and the October 2020 Withdrawal Notice, the contents of both would not change the clear holding by *Steager* that the Tax Commissioner's decision not to find postproduction expenses can be deducted to be a permissible and reasonable one.

After the *Steager* decision, the Tax Commissioner revalued Antero's Ritchie County wells for the 2018 Tax Year[3]. *See* Assessor's Response, p. 5-6. He revalued each gas

producing well using an operating expense deduction of $175,000.00 and each oil producing well using a $5,570.00 deduction. *Id*. at 5-6. For each well, he disregarded the 20% and 35% deductions that *Steager* found impermissible. *Id*. at 6. For each of these, he declined to include deductions for postproduction expenses which *Steager* found permissible. Accordingly, this Court finds the revaluation appropriate for Tax Year 2018 and consistent with the relevant law.

Accordingly, the Court finds the instant Appeal Brief of Petitioner Antero Resources Corporation must be denied. Additionally, the Court finds the true and actual value of Antero's Marcellus Shale horizontal wells in Ritchie County shall be set at $421,359,327.00 for TY 2018.

III. Conclusion

WHEREFORE, based on the forgoing, it is hereby ADJUDGED and ORDERED that the Court hereby DENIES the Appeal Brief of Petitioner Antero Resources Corporation.

Also, based on the forgoing, it is hereby ADJUDGED and ORDERED that the true and actual value of Antero's Marcellus Shale horizontal wells in Ritchie County shall be set at $421,359,327.00 for TY 2018.

There being no further issues to be decided, this matter is **DISMISSED**, with prejudice, and forever stricken from the Court's docket. The Clerk is directed to enter this Order as of the date first hereinabove appearing, and send attested copies to all counsel of record, as well as to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

Enter this 20th day of December, 2021.

[1] Antero avers it presented this figure in "charts" to the County Commission of Ritchie County, sitting as a Board of Assessment Appeals. *See* Pet's Appeal Br., p. 2.
[2] The Notice is written in letter format, containing the following: "your natural gas and oil property tax return for the 2021 property tax year is due Monday" and "The form and content of the return is like the returns you filed in prior years…". It is signed "Sincerely yours, Dale W. Steager, West Virginia Tax Commissioner."
[3] The Court notes it has been proffered to the Court that these revaluations were forwarded to Antero on April 24, 2020 and notice of them was filed with this Court in

February 2021. *Id*. at 6.

/s/ Christopher C. Wilkes
Circuit Court Judge
3rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.