

22 BCD-07

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANTERO RESOURCES CORPORATION,

Petitioner,

v.

**THE HONORABLE MATTHEW IRBY,
West Virginia State Tax Commissioner,**

**THE HONORABLE JOSEPH R. ROMANO,
Assessor of Harrison County, and**

**~~THE COUNTY COMMISSION OF HARRISON COUNTY,~~
Sitting as a Board of Assessment Appeals,**

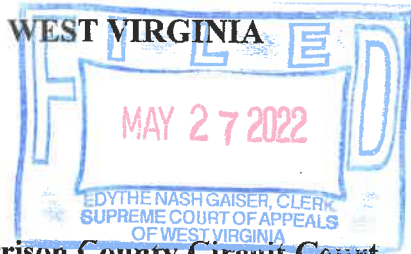
Respondents.

TO: THE HONORABLE CHIEF JUSTICE

**ANTERO RESOURCES CORPORATION'S
MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the Petitioner, Antero Resources Corporation ("Antero"), by counsel, John J. Meadows, Esq., and the law firm of Steptoe & Johnson PLLC, respectfully requests the above-styled case be referred to the Business Court Division for all further proceedings. Trial Court Rule 29.04 expressly provides that "complex tax appeals are eligible to be referred to the Business Court Division." W. Va. Tr. Ct. R. 29.04. This matter constitutes a complex tax appeal, specifically concerning tax year 2021, and it involves issues for which specialized treatment will be helpful. For these reasons, the Court should grant Antero's Motion to Refer Case to the Business Court Division.

Critically, the following related actions regarding tax years 2016, 2017, 2018, 2019, and 2021 have already been referred and transferred to the Business Court Division where they were assigned to the Honorable Christopher C. Wilkes:



**Harrison County Circuit Court
Civil Action No. 22-P-85-3
The Honorable Judge Matish**

1. *Antero Resources Corporation v. The Honorable Mark Matkovitch, et al.*, Civil Action Number 16-AA-1, Tyler County Circuit Court.
2. *Antero Resources Corporation v. The Honorable Mark Matkovitch, et al.*, Civil Action Number 17-AA-1, Doddridge County Circuit Court.
3. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 17-AA-3, Doddridge County Circuit Court.
4. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 17-C-98-2, Harrison County Circuit Court.
5. *Antero Resources Corporation v. The Honorable Mark Matkovitch, et al.*, Civil Action Number 17-AA-1, Ritchie County Circuit Court.
6. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 17-AA-2, Ritchie County Circuit Court.
7. *Antero Resources Corporation v. The Honorable Mark Matkovitch, et al.*, Civil Action Number 17-AA-1, Tyler County Circuit Court.
8. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 18-AA-1, Doddridge County Circuit Court.
9. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 18-P-235-3, Harrison County Circuit Court.
10. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 18-AA-1, Ritchie County Circuit Court.
11. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 18-AA-1, Tyler County Circuit Court.
12. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 19-AA-1, Doddridge County Circuit Court.
13. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 20-P-83-2, Harrison County Circuit Court.
14. *Antero Resources Corporation v. The Honorable Matthew Irby, et al.*, Civil Action Number 21-P-15, Ritchie County Circuit Court.
15. *Antero Resources Corporation v. The Honorable Matthew Irby, et al.*, Civil Action Number 21-P-31, Doddridge County Circuit Court.
16. *Antero Resources Corporation v. The Honorable Matthew R. Irby, et al.*, Civil Action Number 22-AA-1, Tyler County Circuit Court.

The above-styled cases regarding tax years 2016, 2017, 2018, 2019, and 2021, which have already been referred and transferred, present claims and issues of law regarding the same tax liability that is at issue in this case.

Antero previously appealed the West Virginia Department of Revenue, State Tax Department, Property Tax Division's assessment of its wells in Doddridge, Harrison, Ritchie, and Tyler Counties for tax years 2016, 2017, 2018, 2019, and 2021. This matter involves the same tax liability for tax year 2021 in Harrison County, and the above-listed matters involve the same tax liability for tax year 2021 in Doddridge County, Ritchie County, and Tyler County. In the interest of judicial economy, these cases should be consolidated and heard together by the Business Court Division. If these cases are not consolidated, one Business Court judge and several different circuit courts, comprising multiple judges, will have to hear and decide the same issue, possibly reaching inconsistent results. Thus, not only is this precisely the type of case suited to the Business Court Division, but, here, granting the Motion to Refer will also accomplish the important goal of judicial economy and consistency.

I. INTRODUCTION AND BACKGROUND

Antero is a producer of natural gas in West Virginia, with Marcellus wells located in the relevant counties. Those wells are appraised by the West Virginia Department of Revenue, State Tax Department, Property Tax Division (the "Tax Department" or "State") based on a mass appraisal system, state-wide. Antero filed this action, as well as the above-listed actions pending in several other counties, because the Tax Department failed to properly calculate the fair market value of its Marcellus wells for tax year 2021, just as it did in tax years 2016, 2017, 2018, and 2019. The same tax liability is at issue in this matter.

Certain variables are used by the State to value producing oil and natural gas wells, including operating expenses. Specifically, the Tax Department periodically circulates a survey by which it solicits data from oil and natural gas producing taxpayers regarding operating expenses for their wells, and based on that, the Tax Department determines the operating expense variables used in its mass appraisal system. The amount of operating expenses applied to a well using the mass appraisal system is based on a percentage of the well's gross receipts not to exceed a maximum amount, and the percentage and maximum vary by the type of well (typical or conventional, Marcellus, etc.). The operating expense calculations are included in a natural resources "valuation variables" document that the Tax Department releases annually.

In addition to the valuation variables document, the Tax Department releases an annual administrative notice that lists the percentages and maximum amounts for operating expense calculations. In prior years, the Tax Department invited taxpayers to submit actual operating expenses that exceed the percentages and maximum amounts listed in the valuation variables document. The administrative notices from 2016 through 2021, unlike administrative notices from 2000 through 2015, however, did not include language that invites taxpayers to submit actual expenses, despite no changes to the West Virginia Code or the Tax Department's Legislative Rule that governs the valuation of producing natural gas wells.

Beginning in tax year 2016, the Tax Department disallowed taxpayers from deducting actual operating expenses based upon its misapplication of a legislative rule that requires the Tax Department to deduct the "average annual industry operating expenses per well" in valuing producing wells. While the legislative rule requires the Tax Department to apply a "singular monetary average" deduction for operating expenses for producing wells, the State's formula for calculating that value was based upon a flawed survey methodology which, Antero argued,

resulted in misapplications of the intended singular monetary average deduction in a way that does not reflect a “true and accurate value” of the wells by failing to give any account for certain expenses incurred by out-of-state sellers—expenses for gathering, compressing, fractionating, processing, and transporting gas to out-of-state markets.

Antero has argued *for years* that the Tax Department’s failure to account for postproduction operating expenses in the appraisal process targets out-of-state producers for different treatment and results in taxing like wells at a higher rate simply because their products are sold out of state instead of at a field line point of sale. The “singular monetary average” provision, as well as the Tax Department’s interpretation of the definition of “operating expense” in W. Va. Code St. R. § 110-1J-3.16, was the subject of this Court’s decision in *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 832 S.E.2d 135 (2019).

This appeal presents a different problem regarding the same tax liability. On June 30, 2020, the Tax Department issued new guidance clarifying that the legislative rule allowed deductions for actual expenses as an “above the line deduction” from gross receipts calculated based upon a virtual field line point of sale. *See* Exhibit A (“June 2020 Guidance”). The Tax Department explained in its guidance that the basis for the clarification was that the previous disallowance “overvalued” gas wells for tax purposes—the exact argument that Antero raises in this lawsuit and the pending matters before the Business Court.

So while in prior tax years the Tax Department disallowed the deduction of postproduction operating expenses by refusing expenses for gathering, compressing, fractionating, processing, and transporting gas to market from the calculation of the “operating expense deduction,” the Tax Department finally acknowledged the resulting unfairness and clarified that such expenses should be, in effect, given account under the guise of calculated “gross receipts” as an above the line

deduction from a separate variable. “Gross receipts” are defined at W. Va. Code St. R. § 110-1J-3.8 and were not at issue in the *Steager v. Consol* decision.

Relying on the June 2020 Guidance, Antero submitted its valuations and tax year 2021 return in August 2020. But the Tax Department rejected Antero’s valuations, even though they were based on the June 2020 Guidance that was in effect at the time. The State then tried to cover its tracks by flip-flopping on October 9, 2020, purporting to withdraw the June 2020 Guidance (the “October 2020 Withdrawal”). *See* Exhibit B. This October 2020 Withdrawal is *ultra vires* and designed to make Antero’s constitutional and administrative challenges disappear.

The October 2020 Withdrawal also results in the Tax Department, once again, overvaluing Antero’s wells by failing to give account for Antero’s postproduction expenses, this time by refusing to apply its own June 2020 Guidance which allowed for such expenses to be accounted for within the calculation of “gross receipts.”

In sum, the Tax Department incorrectly and unfairly ignored Antero’s actual operating expenses and instead retroactively withdrew its own guidance after Antero submitted its valuations to ensure that Antero’s wells were, once again, overvalued and not assessed at their true and actual value.

Antero protested the Tax Department’s valuation (as adopted by the Harrison County Assessor) to the Harrison County Commission sitting as the Harrison County Board of Assessment Appeals (the “Board”). Antero presented clear and convincing evidence that the Tax Department failed to consider Antero’s actual operating expenses in determining the valuation for the wells assessed for Harrison County. Antero also explained that the Tax Department’s October 2020 Withdrawal of the June 2020 Guidance was arbitrary, capricious, and *ultra vires*, and resulted in

textbook violations of the Equal Protection Clause, Dormant Commerce Clause and Due Process clauses of the United States and West Virginia constitutions.

Despite the clear and convincing evidence produced by Antero, the Board made no adjustment to the Tax Department's valuation. Antero timely petitioned the Circuit Court for appeal of the Board's decision. For the reasons stated in the petition, Antero asked the Circuit Court to find that the Board incorrectly made no changes to the Tax Department's valuation and to order a revaluation of the wells consistent with the June 2020 Guidance.

Because the issues in this matter are complex and require specialized knowledge regarding taxation of oil and gas wells, specialized treatment will improve the expectation of a fair and reasonable resolution of this matter. Accordingly, Antero requests that this matter be transferred to the Business Court Division.

II. APPLICABLE LEGAL STANDARD

West Virginia Trial Court Rule 29.06 provides that "[a]ny party . . . may seek a referral of Business Litigation to the [Business Court] Division by filing a Motion to Refer to the Business Court Division with the Clerk of the Supreme Court of Appeals of West Virginia." W. Va. Tr. Ct. R. 29.06(a). "Business Litigation" is defined as follows:

(a) "Business Litigation" -- one or more pending actions in circuit court in which:

(1) the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and

(2) the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and

(3) the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and

consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that ***complex tax appeals are eligible to be referred to the Business Court Division.***

W. Va. Tr. Ct. R. 29.04 (emphasis added).

III. ANALYSIS

This is a complex tax appeal that should be referred to the Business Court Division. The tax assessment issues in this case are technical, and they are precisely the type of issues that should be referred to the Business Court Division. *See* W. Va. Tr. Ct. R. 29.04(a)(3) (providing that “complex tax appeals are eligible to be referred to the Business Court Division.”). Further, this case “involve[s] matters of significance to the transactions, operations, or governance between business entities,” and “presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy.” *See* W. Va. Tr. Ct. R. 29.04(a)(1)-(2).

Here, Antero is challenging the Tax Department’s valuation of its Marcellus wells in Harrison County. Before the Board, Antero submitted proof of its actual operating expenses, which should be used in determining the value of its Marcellus wells. Antero also demonstrated that the State does not consider Antero’s point-of-sale for the gas either by its calculation of “gross receipts”—through the “virtual field line point of sale” the Tax Department previously advised in its June 2020 Guidance—or by its calculation of the “operating expense” deduction as in previous tax years. Analysis of these issues requires an understanding of Antero’s business model,

particularly with regard to the point-of-sale, and an understanding of allowed operating expenses and calculation of gross receipts under Tax Department regulations.

Thus, this tax appeal presents “issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy.” *See* W. Va. Tr. Ct. R. 29.04(a)(2). To fairly and reasonably resolve these issues, the decision-maker should have familiarity with the tax code, the mechanisms used to value taxable property, the mass appraisal system used to assess oil and gas wells (including the methodology set forth in § 110-1J-4.1), as well as familiarity with allowable operating expenses and calculation of gross receipts. Antero has placed clear and convincing evidence on the record in this case demonstrating that its Marcellus wells have been overvalued. Antero asserts that specialized knowledge on the above-mentioned issues would improve the likelihood that the submitted documentation and testimony is fairly considered, and that a reasonable resolution of this controversy will result.

As discussed above, cases presenting identical issues regarding tax years 2016, 2017, 2018, 2019, and 2021 have already been transferred to and consolidated in the Business Court Division before Judge Wilkes. Additionally, pending appeals before the Business Court, some of which are now pending before this Court in Case Nos. 21-0119, 21-0121, 22-0048, 22-0049, 22-0050, 22-0051, and 22-0052 and 22-0144 regarding the retroactive application of the Tax Department’s new guidance for the 2016, 2017, 2018, and 2019 tax years present similar, complex issues for the 2021 tax years as well. This Court’s precedents thus compel referring this case to the Business Court Division. *See, e.g., Lee Trace LLC v. Berkeley Cnty. Council as Bd. of Review & Equalization, et al.*, Case Nos. 11-AA-2 and 14-AA-1, 2015 WL 7628718 (W. Va. Nov. 20, 2015) (deciding Lee Trace LLC’s appeal of the Business Court Division’s decision related to its challenge of its property tax assessments, including that it did not receive proper notice of its right to appeal its

assessment, that the assessor did not consider the requisite depreciation factors, and that the assessor failed to consider income information); *Univ. Healthcare Found., Inc. v. Larry A. Hess, et al.*, Case Number 16-AA-3, Berkeley County Circuit Court, Business Court Division (contending that a parcel of real property is exempt from *ad valorem* property tax); *John Skidmore Trucking, Inc. v. Mark W. Matkovich*, Case No. 14-C-27, Braxton County Circuit Court, Business Court Division (involving an assessment for sales and use tax related to services provided by an Enrolled Agent). The issues presented in this case similarly qualify for transfer under W. Va. Trial Court Rule 29.

Finally, because this case is in the early stages of litigation, referral to the Business Court would not prejudice the Respondents or waste judicial resources. Instead, it is in the interest of the parties and judicial economy for the above-referenced related cases to be consolidated and referred to the Business Court Division. Absent transfer and consolidation, a Business Court judge and multiple different circuit courts will have to hear and decide the same issue, possibly reaching inconsistent results. Thus, not only is this case exactly the type that should be referred to the Business Court Division, but consolidation in the Business Court Division will also promote judicial economy and consistency. For all these reasons, this case should be referred to the Business Court Division.

In further support of this Motion, please find attached hereto an accurate copy of the operative petition, answers, and docket sheet. *See* Exhibit C.

IV. CONCLUSION

WHEREFORE, Antero Resources Corporation hereby moves, pursuant to W. Va. Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted, this 27th day of May 2022.

ANTERO RESOURCES CORPORATION,

By Counsel

A handwritten signature in cursive script, appearing to read "John J. Meadows", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, John J. Meadows, do hereby certify that on this 27th day of May 2022, I served the foregoing ***“Antero Resources Corporation’s Motion to Refer Case to Business Court Division”*** by first class mail to all counsel of record at the addresses provided below:

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