**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**



**NO. 23-ICA-235**

**SHENANDOAH PERSONAL COMMUNICATIONS, LLC,,**

*Petitioner,*

v.

**MATTHEW R. IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA**,

*Respondent,*

**On Appeal from the Circuit Court of Kanawha County, Civil Action No. 21-AA-38**

# RESPONDENT'S BRIEF

**PATRICK MORRISEY**
**ATTORNEY GENERAL**

Sean M. Whelan (W.Va. Bar No. 12067)
*Deputy Attorney General*
William C. Ballard (W.Va. Bar No. 9557)
*Assistant Attorney General*
State Capitol Complex
1900 Kanawha Boulevard, East
Building 1, Room W-435
Charleston, WV 25305
Telephone: (304) 558-2522
Facsimile: 304-558-2525
Email: Sean.M.Whelan@wvago.gov
William.C.Ballard@wvago.gov
*Counsel for Matthew R. Irby,*
*West Virginia State Tax Commissioner*

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## I. INTRODUCTION

The basis of Shenandoah Personal Communications, LLC's ("**Shenandoah**") appeal is that it should be entitled to two exemptions from use tax for purchasing cell phones to give away to its customers. The first exemption from tax it claims is the "direct use" exemption at West Virginia Code § 11-15-2(b)(4). Yet Shenandoah never actually used the cell phones for an exempt purpose. It simply gave them to former nTelos customers to keep their business, and the statute specifically states that marketing does not qualify for direct use. Thus, the direct use exemption does not apply. Shenandoah also argues that it should be entitled to the "sale for resale" exemption at West Virginia Code § 11-15-9(a)(9). Yet it is also undisputed that Shenandoah gave the phones away, did not sell the cell phones, and charged no sales tax for the cell phones. Because no sale took place, the sale for resale exemption cannot apply. The Circuit Court's decision to uphold the Office of Tax Appeals' denial of Shenandoah's claimed tax exemptions should be affirmed.

## II. COUNTER-STATEMENT OF THE CASE

### A. WEST VIRGINIA LAW REGARDING USE TAX AND EXEMPTIONS

1. The Consumers Sales Tax applies to all purchases of tangible personal property and services in the State of West Virginia. *See* W. Va. Code §§ 11-15-1 *et seq*. West Virginia also imposes a complementary use tax, *id.* § 11-15A-1a(1), that applies when tangible personal property is purchased out-of-state and used in West Virginia, *id.* § 11-15A-3(a)(3). The exemptions available for the sales tax also apply to the use tax. *Id.* § 11-15A-3(a)(2). But in order to prevent evasion, all sales and use of property are considered taxable until the contrary is clearly established. *Id.* §§ 11-15-6(b), 11-15A-4, 11-15A-18(c).

2. The Consumers Sales Tax includes a specific statutory exemption for the purchase of tangible personal property and services that are directly used or consumed in the activity of communication.

3. The Consumers Sales Tax exemption before the Court is:

> Sales of services, machinery, supplies and materials **directly used or consumed in the activities of** manufacturing, transportation, transmission, **communication**, production of natural resources, gas storage, generation or production or selling electric power, provision of a public utility service or the operation of a utility service or the operation of a utility business, in the businesses or organizations named in this subdivision and does not apply to purchases of gasoline or special fuel;

W. Va. Code § 11-15-9(b)(2) (emphasis added).

4. Communication is defined by Section 11-15-2(b)(2) as: "all telephone, radio, light, light wave, radio telephone, telegraph and other communication or means of communication, whether used for voice communication, computer data transmission or other encoded symbolic information transfers and includes commercial broadcast radio, commercial broadcast television and cable television."

5. In addition, the Consumers Sales Tax expressly defines the operative phrase "directly used or consumed" as:

> "Directly used or consumed" **in** the activities of manufacturing, transportation, transmission, **communication** or the production of natural resources means **used or consumed in those activities or operations which constitute an integral and essential part of the activities,** as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the activities.

W. Va. Code § 11-15-2(b)(4) (emphasis added).

6. The West Virginia Code of State Rules further clarifies the meaning of "direct use." It provides that:

> Under this concept, the applicability of the sales and use tax depends on the classification of the business purchasing the property or service and the use of the property or service being purchased rather than the type of property or service purchased. The same purchase of the same item may be taxable in one instance and exempt in

> another, depending totally on its purchaser and usage. **The basic concept is that purchases directly used in activities or operations which are an integral and essential part of the specified business' activity are exempt from sales and use tax, while purchases which are instead used in activities or operations which are incidental, convenient, or remote to such activities are taxable for sales and use tax purposes**.

W. Va. Code R. § 110-15-123.1 (emphasis added).

7. That regulation further provides that certain activities do not qualify for the direct use exemption:

> 123.3.2. Uses of Property or Services Not Constituting Direct Use. - Uses of property or services which will not constitute direct use, thereby making the purchase subject to the sales and use tax shall include, but not be limited to the following.
>
> . . .
>
> 123.3.2.5. Tangible personal property or services used in marketing, general management, supervision, finance, training, accounting and administration. For example, property purchased for use in research for a new or improved product would not be directly used.

## B. UNDERLYING FACTS AND PROCEDURAL HISTORY

8. The genesis of this case was Shenandoah's application for a refund of use tax paid to the Tax Division in the amount of $913,404.58 for the tax period ending December 31, 2017. The Tax Division denied the refund application on July 16, 2019. Shenandoah appealed this refund denial to the Office of Tax Appeals ("**OTA**") on September 13, 2019.

9. An evidentiary hearing was held by OTA on October 1, 2020. During the hearing, Sunnie Barr, Senior Financial Analyst for Shenandoah, testified on behalf of Shenandoah. Ms. Barr testified that:[1]

> So nTelos was up for sale and Shentel purchased our wireless business and our spectrum to merge that into their already Sprint

[1] During the hearing, Ms. Barr referred to Shenandoah as "Shentel", which is an affiliate of Shenandoah.

> affiliate business. So Sprint got all of those customers to come over to their service since they were now part of Shentel's business.

[A.R. 324].

10. Ms. Barr, referencing an exhibit which was a form letter sent to former nTelos customers in April 2017, further testified:

> So this letter was sent out by nTelos to inform our customers of the merger, letting them know that over the next period of about a year to 18 months, they would need to transition their current cell phone plan with nTelos to a Sprint plan[.] . . . [I]f they had a phone that did not have a SIM card, then we would replace that phone with them if they continued to get -- to be one of our customers, to stay with our business and get a Sprint plan.
>
> . . . if they had any other kind of android phone or any lower level of Apple phone, we would need to replace the whole phone and we were going to give them one for free in order to continue to be our customer and have a new service plan.

[A.R. 325-26.]

11. When asked "what was the reason for giving them a free phone", Ms. Barr testified: "So they would continue to do business with us. We wanted to keep as many customers as possible during the transition." [A.R. 327.] Ms. Barr also testified that: "If [the customer] did not switch over to a Sprint plan within the timeline given, then it would automatically be switched to a Sprint plan from their nTelos line, but if they did not have a phone that worked, then they wouldn't be able to use it." [A.R. 333.]

12. When asked why no sales tax was charged for the phones given to those customers, Ms. Barr testified: "Because the customer was given them for them to stay with our service, and so they were not paying for the phone, so there was no tax to be charged on them." [A.R. 344.]

13. Following its hearing, OTA issued its June 1, 2021 *Amended Final Decision* affirming the Tax Commissioner's decision to deny Shenandoah an exemption for the use tax paid for the cell phones.

14. Shenandoah appealed the *Amended Final Decision* to the Circuit Court of Kanawha County on July 1, 2021.

15. The Circuit Court entered its *Final Order* on May 3, 2023, affirming OTA's decision. In doing so, it adopted the findings of fact from OTA's decision.

- The Petitioner, Shenandoah Personal Communications, is a Virginia limited liability company, located in Edinburg, Virginia. [OTA Decision at 2.]

- The Petitioner's primary business is providing cell phone service, and it operates in Virginia, West Virginia, Maryland, Pennsylvania, Kentucky and Ohio. These cell phone service operations are affiliated with Sprint and contain the Sprint branding. [OTA Decision at 2.]

- The Petitioner has a subsidiary business called Shentel Mobile, LLC. The business owns the towers that holds some of the Petitioner's transmission equipment. [OTA Decision at 2.]

- If a customer of the Petitioner makes a cell phone call in an area served by one of the aforementioned towers, then that call is handled by both the Petitioner and Sprint. However, the Petitioner is not its own wireless company, and as such, no calls could be completed without its contractual (and technthogical) relationship with Sprint. If a customer makes a call outside of the area where the Petitioner's subsidiary has towers, those calls are handled by the nearest tower able to accept calls of Sprint customers. [OTA Decision at 3.]

- In addition to owning cell phone towers, with the attendant equipment, the Petitioner operates retail cell phone service stores, in all the states listed above. [OTA Decision at 3.]

- Sometime prior to the tax periods in question in this matter, the Petitioner purchased approximately 30-35 retail locations operated by a competitor. These locations were affiliated with another wireless service company, called nTelos. [OTA Decision at 3.]

- Sometime during this acquisition/merger, it was discovered that certain nTelos customers had phones that were not compatible with the Sprint network. These customers were given free phones as an inducement to stay with Petitioner and Sprint. [OTA Decision at 3.]

- When these phones were provided to the former nTelos customers, no sales tax was charged, but the Petitioner did pay use tax on the purchase. Thereafter, the Petitioner determined that it was entitled to a refund of this use tax, and it filed a claim as such. [OTA Decision at 3.]

[A.R. 51-52.]

16. Shenandoah appealed to this Court, and then filed its *Petitioners Brief* (Sept. 5, 2023), asserting that the circuit court erred by (1) concluding that Shenandoah did not qualify for the direct use exemption; (2) concluding that its provision of cell phone to certain customers constituted retail sales instead of communication; (3) concluding that its purchase of the phones was not a direct use; (4) concluding that its purchase of the phones was incidental, and not integral, to its communication business; (5) concluding that purchase and give-away of the phones to certain customer was marketing; (6) finding that Shenandoah admitted that the phones were not sold to its customers; (8) relying on a persuasive, out-of-state case; (9) disregarding the legislative rule definition of sale; and (10) finding that Shenandoah gave the phones to certain customers as an inducement to stay with the company. Petr's Br. 1-2. In its Argument Section, Shenandoah then consolidates these ten assignments of error into three main issues, arguing that the circuit court erred *first* by finding the direct use exemption inapplicable, *id.* at 9-30; *second*, by finding the sale for resale exemption inapplicable, *id.* at 31-36; and *third*, by holding that Shenandoah did not use the phones but was subject to use tax anyway, *id.* at 30. This *Respondent's Brief* followed.[2]

[2] Because Shenandoah's argument "headings" do not exactly "correspond with the assignments of error," W. Va R.A.P. 10(c)(7), in its *Respondent's Brief*, the Tax Commissioner intends to "respond to each assignment or error, to the fullest extent possible," W. Va. R.A.P. 10(d), by addressing the three main issues in Shenandoah's argument and the supporting sub-arguments. This is consistent with the practice of the Supreme Court of Appeals, which often treats multiple related or "largely repetitive" assignments of error as one, "encapsulated by" the main "heading in the brief." *E.g.*, *Collett v. E. Royalty, LLC*, 232 W.Va. 126,

## III. SUMMARY OF ARGUMENT

Shenandoah seeks to reverse the Circuit Court's May 3, 2023 *Final Order* [A.R. 49], which affirmed OTA's June 1, 2021 *Amended Final Decision* [A.R. 235]. Specifically, Shenandoah argues that Circuit Court erred in rejecting its claim that it is entitled to an exemption from use tax for its purchase of cell phones under both the "direct use" and "sale for resale" exemption statutes.

When a taxpayer claims an exemption from the use tax, the West Virginia Code places the burden on the taxpayer to prove the exemption applies, and courts are required to "strictly construe" tax exemptions against the taxpayer. W. Va. Code §§ 11-10-25, 11-15-6.

In this case, the relevant facts are undisputed that following Shenandoah's purchase of another cell phone company—nTelos—Shenandoah purchased cellular phones for certain former nTelos customers for the purpose of enticing them to sign new cell phone contracts with Shenandoah in exchange for a free phone. It is undisputed that the only **actual use of the phones themselves** (*i.e.*, to make phone calls) was by the customers. OTA and the Circuit Court both properly concluded that the phones were not directly used by Shenandoah in its communication business—because the cell phones were instead given away as part of a marketing effort to retain the former nTelos customers.

Both OTA and the Circuit Court also properly concluded that the phones were not sold for resale, because Shenandoah's witness admitted at the administrative hearing that the former nTelos customers did not purchase the phones. As OTA put it: "[T]he phones at issue here were not

131, 751 S.E.2d 12, 17 (2013). The Tax Commissioner understands Assignments of Error 1, 2, 3, 4, 5, 8, and 10 to all relate to whether Shenandoah qualifies for the direct use exemption, Petr's Br. 1, 9-30; Assignments of Error 6, 7, 9, to relate to whether Shenandoah qualifies for the sale for resale exemption, *id.* at 1, 31-36; and none of the assignments of error to relate to whether Shenandoah should be subject to use tax at all, *id.* at 30. The Tax Commissioner intends to respond to each issue in turn.

purchased for resale, because they were not resold." [A.R. 31]. OTA and the Circuit Court both properly rejected Shenandoah's tax exemption arguments, and their decisions should be affirmed.

Finally, the fact that Shenandoah did not directly use the phones for communication does not mean their purchase is not subject to use tax. Shenandoah did not raise this argument below and so this Court need not address it. But even if it does, Shenandoah's argument on this point fails, too. The Circuit Court and OTA plainly found that Shenandoah used the phone for some purpose (*i.e.*, retail sales). [A.R. 29 & 38.] Shenandoah just did not directly use the phone for an exempt activity like communication. So, Shenandoah's purchase of the phones is subject to the "excise tax imposed on the use in this state of tangible personal property," W. Va. Code § 11-15A-2(a), and not exempt. That outcome makes sense, too: the use that subjects purchases to taxation must necessarily be broader than the direct use that would exempt them. Shenandoah's argument on this point should be rejected as well, and the Circuit Court's order should be affirmed.

## IV. STATEMENT REGARDING ORAL ARGUMENT

The Tax Commissioner requests Rule 20 oral argument because this appeal presents issues of first impression and fundamental importance regarding the methodology for calculating use tax liability. *See* W. Va. R. App. P. 20(a)(l), (2).

## V. STANDARD OF REVIEW

Pursuant to West Virginia Code § 11-10A-19(e)[3], Shenandoah's *Petition for Appeal* must be heard in the same manner as an appeal of a contested case under the Administrative Procedures Act. W. Va. Code § 29A-5-4. Accordingly, this Court's authority to reverse, vacate, or modify

[3] At the time this appeal was initially taken, jurisdiction to hear appeals of Offices of Tax Appeals' decisions were vested in the circuit courts. Current Section 11-10A-19(e) was at Section 11-10A-19(f) and referenced the circuit courts. Pursuant to West Virginia Code § 11-3-32(b), this jurisdictional amendment was effective for assessments years beginning after July 1, 2022.

OTA's decision is predicated on Shenandoah's showing that OTA prejudiced its substantial rights due to one of the six enumerated grounds in West Virginia Code § 29A-5-4(g). *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190, 194 n.6, 728 S.E.2d 74, 78 n.6 (2012). Under this standard, questions of law are subject to *de novo* review. However, due consideration must be given to "administrative expertise and discretion." *Id.* at 195, 728 S.E.2d at 79. OTA's factual findings are presumptively valid and may not be set aside unless "clearly wrong." *Griffith*, 229 W. Va. at 195, 728 S.E.2d at 79.

With regard to Shenandoah's burden to prove an exemption from use tax, West Virginia Code § 11-10-25 states that:

> (a) The burden of proving that a tax exemption applies to any tax administered by the Tax Commissioner shall be upon the taxpayer. Tax exemptions administered by the Tax Commissioner shall be **strictly construed** against the taxpayer and for the payment of any applicable tax.
>
> (b) To prevent evasion, it is presumed that a tax exemption does not apply until the contrary is clearly established by a preponderance of the evidence.

(emphasis added).

Additionally, West Virginia Code § 11-15-6 specifically addresses the sales and use taxes, and states:

> (a) The burden of proving that a sale or service was exempt from the tax shall be upon the vendor, unless the vendor takes from the purchaser an exemption certificate signed by and bearing the address of the purchaser and setting forth the reason for the exemption and substantially in the form prescribed by the tax commissioner.
>
> (b) To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established.

It is well-settled under West Virginia law that exemptions from tax are strictly construed against the taxpayer. *See, e.g.*, Syl. Pt. 5, *CB & T Operations v. Tax Comm'r of the State of W. Va.*, 211 W. Va. 198, 564 S.E. 2d 408 (2001) (Use Tax).

## VI. ARGUMENT

### A. THE CIRCUIT COURT CORRECTLY FOUND THAT SHENANDOAH DID NOT DIRECTLY USE THE CELL PHONES IN THE COURSE OF ITS COMMUNICATIONS BUSINESS IN ORDER TO QUALIFY FOR THE SECTION 11-15-9(B)(2) EXEMPTION [SHENANDOAH'S ASSIGNMENTS OF ERROR 1, 2, 3, 4, 5, 8, AND 10].

The Circuit Court was right to find that Shenandoah did not qualify for the "direct use" exemption because it did not use the relevant cell phones for communication. Instead, it used the phones for marketing—to retain former nTelos customers—and that use is explicitly excluded from the direct use exemption and so subject to use tax. Shenandoah's Assignments of Error 1, 2, 3, 4, 5, 8, and 10 should be rejected, and the Circuit Court should be affirmed.

#### (1) The Circuit Court correctly held that Shenandoah was not in the communication business when it gave free cell phones to former nTelos customers because it did not use the cell phones for actual communication [Shenandoah's Assignments of Error 2, 3, and 4].

Shenandoah's purchase and give-away of the phones does not qualify for the direct use exemption because it used them for marketing purposes but not directly for communication.

West Virginia imposes either a consumer sales and service tax "for the privilege of selling tangible person property," W. Va. Code § 11-15A-3(a), or a tax "on the use in this state of tangible personal property," unless the property is "otherwise" exempt, W. Va. Code § 11-15A-2(a). A purchaser "pay[s]" the sale tax "to the vendor" when goods are sold in-state, W. Va. Code § 11-15-4(a), and then remits them to the Tax Commissioner, *id.* § 11-15-4(b). Whereas the "use tax is collected when a good is sold from an out-of-state supplier for use in state." *Matkovich v. CSX Transp., Inc.*, 238 W. Va. 238, 243, 793 S.E.2d 888, 893 (2016) (cleaned up). Sales and use taxes

are designed to be "complementary" and "whenever possible" "construed" together. *Preston Mem. Hosp. v. Palmer*, 213 W. Va. 189, 192, 578 S.E.2d 383, 386 (2003) (per curiam). For that reason, property that is "being used for [a] purpose" "exempt from the sales tax" under Article 15 of Chapter 11 of the Code is also exempt from the use tax. W. Va. Code § 11-15A-3(a)(2).

"Direct use" is one of these exemptions. Among other things, it exempts "[s]ales [or uses] of services, machinery, supplies, and materials directly used or consumed in the activities of . . . communication . . . in the business or organizations named in this subdivision." W. Va. Code § 11-15-9(b)(2). The statute further defines "[d]irectly used or consumed" to mean "used or consumed in" communication "activities or operations which constitute and integral and essential part of the activities" and not "simply incidental, convenient or remote to those activities." W. Va. Code § 11-15-2(b)(4). This definition "further provides a list of fourteen" examples "which constitute direct use or consumption and a list of six uses . . . which do not constitute direct use." *Antero Res. Corp. v. Steager*, 244 W. Va. 81, 86, 851 S.E.2d 527, 532 (2020). The uses explicitly excluded from direct use's definition include "marketing," W. Va. Code § 11-15-2(b)(4)(B)(v), and "[a]n activity or function incidental or convenient to . . . communication . . . rather than an integral and essential part of th[is] activit[y]," *id.* § 11-15-2(b)(4)(B)(vi). Direct use and the type of communication activities that qualify for the exemption are further outlined in legislative rule, *e.g.*, W. Va. Code R. § 110-15-123.1 (outlining direct use generally), *id.* § 110-15-123.4.5 (defining "communication" activities that qualify as direct use).

The Circuit Court and OTA both held that Shenandoah was not entitled to the direct use tax exemption for communications businesses because "when [Shenandoah] purchased the phones to be given away, [] the activity it was engaged in at that time was the retail sales of cell phones services [and] not the activity of telephone communication, as that term is used in Section 123.4.5."

[A.R. 53.] OTA and the Circuit Court distinguished between activities that are true communications activities (*i.e.*, the act of connecting parties together through electronic means to permit them to communicate) and other activities a communications company might be engaged in, such as retail sales and marketing. [A.R. 53.]

This analysis is consistent with the West Virginia Code. The definition of "communication" in Section 11-15-2(b)(2) is "all telephone, radio, light, light wave, radio telephone, telegraph and other communication or means of communication . . ." That definition is mirrored in the rule, too. W. Va. Code R. § 110-15-123.4.5 (defining "communication" the same way). OTA and the Circuit Court correctly held that, as a factual matter, when Shenandoah gave away cell phones to certain customers, it was engaged in the activity of retail sales, and not in the activity of communication as that term is defined by the West Virginia Code and legislative rules. [A.R. 52-53]

In its *Brief*, Shenandoah initially argues that it "is engaged in the communications business as it provides wireless telecommunications services in West Virginia[.]" Petr's Br. 11. It has never been contested that, in general, Shenandoah operates a communications business. But that is not sufficient: the exemption "depends on the classification of the business purchasing the property . . . **and** the use of the property." W. Va. Code R. § 110-15-123.1 (emphasis added). So, to be entitled to the direct use exemption for the purchase of the particular cell phones at issue, it is not enough for Shenandoah to be generally classified as a communication business. The cell phones must also have been **directly used by Shenandoah in its communications business** to qualify for the Section 11-15-9(b)(2) direct use exemption.

Shenandoah's use of the cell phones does not meet this criterion. It is undisputed that the only persons who made use of the cell phones for actual communications (*i.e.*, phone calls and text

messages) were Shenandoah's customers. At OTA, Shenandoah's witness admitted "[i]t was the customer using these new phones" to "send a text message" and "not an employee of [Shenandoah]." [A.R. 335.] Shenandoah argues that "both the broad statutory definition of 'communication' and logic dictate that activities dealing with physical telephones or cellphones should be considered communications activities, even if the cellphones are considered distributed via a retail store." Petr's Br. 13. However, both the statute and the legislative rules are clear and explain who is eligible to claim the direct use exemption.

The Consumers Sales and Services Tax Act defines "business" as any activity engaged in with the object of economic gain or benefit. W. Va. Code § 11-15-2(b)(1). According to statute, the direct use may only be claimed by:

> Any **person having a right or claim to any exemption** set forth in this subsection shall first pay to the vendor the tax imposed by this article and then apply to the Tax Commissioner for a refund or credit, or as provided in § 11-15-9d of this code give to the vendor his or her West Virginia direct pay permit number. The following sales of tangible personal property and services are exempt from tax as provided in this subsection: …

W. Va. Code § 11-15-9(b) (emphasis added). The Act defines "person" broadly as including both a corporation as well as an individual or person. W. Va. Code § 11-15-2(b)(11). The applicable legislative rule, however, is clear that only businesses are eligible to claim the direct use exemption—not individuals, such as Shenandoah's customers.

> 9.4. Refundable Exemptions. – The vendor liable for collection of the consumers sales and service tax or use tax shall collect such taxes when making the following sales of tangible personal property or taxable services (unless the purchaser presents his direct pay permit number issued by the Tax Commissioner under W. Va. Code § 11-15-9d and 11-15A-3d and provided that the sales are not exempt under paragraph 9.2 of these regulations); and such taxes, after payment, shall, upon proper application therefore, be refunded or credited to the purchaser as provided in W. Va. Code § 11-15-9b [typo; should read 11-15-9(b)] and 11-15A-3b:

> **9.4.1. Sales of property or services to persons engaged in this State in the business of** manufacturing, transportation, transmission, **communication** or in the production of natural resources (as such terms are defined in Section 2): Provided, That the exemption provided in this **Section shall only apply to services, machinery, supplies and materials directly used or consumed in the activities of** manufacturing, transportation, transmission, **communication** or the production of natural resources **in the businesses or organizations named above** and shall not apply to purchases of gasoline or special fuel. For further information See Section 123 of these regulations.
>
> **9.4.2.** The sale, to be exempt, **must be** of tangible personal property or taxable services **directly used or consumed** (as defined in Section 2 of these regulations) **in the business activity of** manufacturing, transportation, transmission, **communication** or in the production of natural resources.

W. Va. Code R. §§ 110-15-9.4., 9.4.1, 9.4.2 (emphasis added). The above legislative rule is clear that the cell phones must have been used "in the businesses or organizations named above." *Id.* § 110-15-9.4.1. Accordingly, to qualify for the direct use exemption, the cell phones must be directly used or consumed in the business activity of communication by a business or organization engaged in business activity of communication.

Having established that only businesses engaged in certain business activities are eligible for the direct use exemption, the rule then further refines and restricts the direct use exemption. It says that the exemption "depends on the classification of the business purchasing the property or service **and the use of the property or service being purchased rather than the type of property or service purchased**." W. Va. Code R. § 110-15-123.1 (emphasis added). Rather than exempting purchases based on the nature of the property, it applies based on the classification of the business and the use. Those "purchases directly used in activities or operations which are an integral and essential part of the specified business' activity" are exempt. *Id.* But "purchases . . . used in activities or operations which are incidental, convenient, or remote to such activities are

taxable for sales and use tax purposes." *Id.* The rule also clarifies that "[t]he same purchase of the same item may be taxable in one instance and exempt in another, **depending totally on its purchaser and usage**." *Id.* (emphasis added).

Read together, for Shenandoah to claim a direct use exemption (1) it must be engaged in the business of communication and (2) the property must be directly used in the business activity of communication. While Shenandoah is clearly engaged in the business of communication, Shenandoah clearly did not (itself) directly use the cellphones for communications. Shenandoah's customers, of course, used the cellphones to make phone calls; however, their customers are **not** persons engaged in the business activity of communication. Thus, the Circuit Court was correct in finding that:

> [I]t is clear that the cell phones were not directly used by Shenandoah because the phones were given to customers for their use. Sunnie Barr, Senior Financial Analyst for Shenandoah, testified at the hearing before OTA that the cell phones were never used by Shenandoah itself to make phone calls or send text messages, but rather only used by the customers for those purposes. [Tr. at 23-24.]

[A.R. 56.] While Shenandoah has the right to claim the direct use exemption when it **directly** uses goods in its business (*e.g.*, cell phones purchased for its employees who use those phones for work purposes), they cannot claim the exemption based on their customers' use of the phones. And their customers cannot claim it either since they are not engaged in the business activity of communication.

This indirect usage of the cell phones is what Shenandoah relies on for the direct use exemption. [Pet Br. at 14 ("both testimony and logic conclude that a wireless telecommunications network like the Sprint/Shentel network would sit—ready and waiting but unused—unless and until someone uses a compatible cellphone to send a text, make or receive a voice call, or use

cellular data).] Quite clearly, Shenandoah does not qualify for the direct use exemption for those cellphones because **simply replacing a customer's cell phone is not direct use of the actual phone**. At best, by purchasing cell phones to give away to its customers, Shenandoah used the cell phones in an "incidental, convenient, or remote" way, which does not qualify it for the exemption. W. Va. Code R. § 110-15-123.1.

The Supreme Court of Appeals' *Antero* decision does not help Shenandoah, either. *See* Petr's Br. 21-23. That case centered on whether certain products and services were "integral and essential" or "incidental" to the business production of natural resources. Syl. Pt. 3, *Antero*, 244 W. Va. at 82, 851 S.E.2d at 528. Antero claimed that its (1) crew quarters and related equipment; (2) portable toilets, sewage systems, related water systems, and septic cleaning charges; and (3) trash trailers and waste receptacles were all directly used in its oil and gas drilling operations. *Id.* at 84, 851 S.E.2d at 530. Antero argued that those products and services were essential because the crew was required to remain at the drill site around the clock. *Id.* at 86, 851 S.E.2d at 532. The Supreme Court of Appeals held that the definition of "direct use" was clear and unambiguous and should be applied in that case according to its plain meaning. *Id.* at 88, 851 S.E.2d at 534. Then, with regard to crew living amenities, it found that Antero's purchases of those products and services were integral and essential to the activities of gas production because "[t]hey were necessary to allow directional drillers and company men to remain on-site to perform ongoing work related to the operation and monitoring of the drilling operations." *Id.* at 87, 851 S.E.2d at 533. It reached the same conclusion with respect to the toilets, sewage systems, related water systems, and septic cleaning charges because "it would be impractical if not impossible for Antero to operate its well sites without making bathroom facilities available." *Id.* at 89, 851 S.E.2d at 535. The Supreme Court further noted that "[i]t is difficult to imagine how the drilling operations

could proceed without such facilities." *Id.* But if found that trash trailers and waste receptacles were not exempt because "the evidence" did not show "that the primary use of the receptables was directly related to the waste resulting from the production of natural resources." *Id.* at 90, 851 S.E.2d at 536. The Court found that evidence of this property's use "somewhat confusing" and could not confirm whether these receptacles were simply used for "regular waste" or "packaging" "from the trailers." *Id.* at 89-90, 851 S.E.2d at 535-36.

In contrast to *Antero,* the cell phones purchased by Shenandoah were not directly used for communication activities by any Shenandoah employee. Nor were the phones integral to its communication business because it was clearly able to continue its operations without providing free cell phones to some of the former nTelos customers. On this point, OTA held (and the Circuit Court affirmed) that "it is impossible to rule that [Shenandoah] had to have these free phones in order to engage in the activity of telephone communications." [A.R. 55.] In fact, even if Shenandoah had not provided the cell phones, Ms. Barr testified that if the former nTelos customers with incompatible equipment that failed to "switch over" their equipment would be "automatically" switched to a new plan. [A.R. 333 (Tr. at 22).] Thus, the Circuit Court correctly found that the giveaway of free phones was "incidental, convenient, and remote to the activity of communications." [A.R. 55.]

In its *Brief*, Shenandoah argues that if "a bed and portable toilet can be 'integral' and 'essential' to producing natural gas, then logically a compatible cellphone is 'integral' and 'essential' to wireless telecommunications." Petr's Br. 23. This comment forgets that the exemption "depend[s] totally on its purchaser and usage" and not on the nature of the item: "the same purchase of the same item may be taxable in one instance and exempt in another." W. Va. Code R. § 110-15-123.1. And it simply misses the point. There was no question that Antero

**actually used** the crew living amenities. Here, there is no question that Shenandoah did not actually use the phones. Because Shenandoah did not itself use the cell phones for communications, any use of the phones by customers was incidental—rather than direct. Finally, to the extent there is any doubt about how this Court should construe the direct use exemption, Section § 11-10-25(c) requires the Court to "strictly construe[]" tax exemptions against the taxpayer.

**(2) The Circuit Court Correctly held that Shenandoah was engaged in marketing when it gave free cell phones to former nTelos customers [Shenandoah's Assignments of Error 5, 8, and 10].**

OTA and the Circuit Court also correctly held that Shenandoah was not entitled to the direct use exemption because it purchased the cell phones for marketing. [A.R. 56.] As noted above, when Shenandoah's witness (Sunnie Barr, Senior Financial Analyst) was asked at the OTA hearing why Shenandoah gave former nTelos customers (with incompatible cell phones) free phones, she said "[s]o they would continue to do business with us. We wanted to keep as many customers as possible during the transition." [Tr. at 327.] Shenandoah's Assignments of Error 5, 8, and 10 which address this point should be rejected as well.

Legislative Rule § 110-15-123.3.2.5 specifically provides that the use of property or services by a company for marketing "will not constitute direct use, thereby making the purchase subject to the sales and use tax[.]" Shenandoah is correct that the term marketing is not defined by the West Virginia Code or Code of State Rules. But in such circumstances, courts give "[u]ndefined words and terms . . . their common, ordinary and accepted meaning," Syl. Pt. 6, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 527, 336 S.E.2d 171, 173 (1984), and they often turn to the dictionary to supply such common meanings, *e.g.*, *Kings Daughters Housing, Inc. v. Paige*, 203 W. Va. 74, 76, 506 S.E.2d 329, 331 (1998) (relying on BLACK'S LAW DICTIONARY (5th ed. 1979); *W. Va. Consol. Pub. Ret. Bd. v. Weaver*, 222 W. Va. 668, 675 nn.8-10, 671 S.E.2d 673, 680

nn.8-10 (2008) (finding the common definition of "related" in RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed.1998) and the XIII THE OXFORD ENGLISH DICTIONARY (2d ed.1991 reprint)).

This Court should do the same here. Merriam-Webster defines "marketing" to mean: "the process or technique of promoting, selling, and distributing a product or service". *Marketing*, MERRIAM-WEBSTER, DICTIONARY, https://www.merriam-webster.com/dictionary/marketing (last accessed October 13, 2023). According to Black's Law Dictionary, "marketing" is similarly defined as "[t]he act or process of promoting and selling, leasing, or licensing products or services" and as "[t]he part of a business concerned with meeting customers' needs." BLACK'S LAW DICTIONARY, "Marketing" (11th ed. 2019). Shenandoah's witness specifically testified that the purpose of giving away free cell phones to former nTelos customers was to convince them to sign a new cell phone contract. Thus, the cell phone giveaway was clearly a process and technique to convince the former nTelos customers to sign cell phone contracts with Shenandoah. It was also part of Shenandoah's business concerned with customer needs. The Circuit Court and OTA correctly found that Shenandoah's cell phone giveaway to former nTelos customers was done for the express purpose of enticing them to sign new service agreements, which is marketing. [A.R. 56.]

The Circuit Court likewise properly considered analogous case law from the State of Washington—*Sprint Spectrum, LP v. Dep't of Revenue*, 174 Wash. App. 645, 302 P.3d 1280 (2013). Under the law of the State of Washington, taxpayers are not entitled to a "resale" exemption if the taxpayer used the property before resale. In that case, "the undisputed material facts reflect that Sprint provided fully-discounted phones only to customers who were willing to sign long-term service agreements." *Id.* at 174 Wash. App. at 664, 302 P.3d at 1289. The *Sprint Spectrum* court held that:

> . . . Sprint made intervening use of the phones it ultimately "sold" for no money (but valuable consideration) because the phones served the marketing purpose of convincing customers to purchase wireless service contracts. Accordingly, *Activate* is indistinguishable on this point and Sprint is liable for user tax pursuant to RCW 82.04.190(1)(a).

*Id.* While Shenandoah is correct that the language of the State of Washington tax code differs from West Virginia and the facts of that case differed from the instant case, the Circuit Court did not err in relying on that case in support of its findings. As in *Sprint Spectrum*, Shenandoah's cell phone giveaway to former nTelos customers was done for the express purpose of enticing them to sign new service agreements, which is marketing. Because the term marketing is not defined, the Circuit Court properly relied on *Sprint Spectrum* to conclude that cell phone giveaways are marketing.

**(3) The Circuit Court correctly held that Shenandoah's use of the cell phones did not constitute direct use as defined by West Virginia Code § 11-15-2(b)(4), which includes its statutory examples of direct use.**

Shenandoah further argues, *see* Petr's Br. 16-19, that its use of the cell phone qualifies for the direct use exemption based on the definition of "directly used or consumed" in Section 11-15-2(b)(4). This definition contains various examples of uses that qualify as direct use of personal property. Specifically, Shenandoah argues that its use of the cell phones falls within one or more of the "uses of property or consumption of services which constitute direct use or consumption" in Section 11-15-2(b)(4)(A), and that the Circuit Court erred in failing to address those "examples."

This argument is another red herring. Again, Section 11-15-2(b)(4) defines "directly used or consumed" to mean activities which are "integral and essential" to communications—"as contrasted with and distinguished from those activities or operations which are **simply incidental**, convenient or remote to [communication]." (emphasis added). Under Section 11-15-2(b)(4)(A),

communication "[u]ses of property or consumption of services which constitute direct use or consumption . . . **include only**" certain activities listed in its subsections. (emphasis added). Shenandoah believes that its use of the cell phones falls within one of the following categories of required uses:

- "Transporting or storing property undergoing . . . communication" [W. Va. Code § 11-15-2(b)(4)(iii)];
- "Physically controlling or directing the physical movement or operation of property directly used in . . . communication" [W. Va. Code § 11-15-2(b)(4)(v)];
- "Directly and physically recording the flow of property undergoing . . . communication" [W. Va. Code § 11-15-2(b)(4)(vi)];
- Maintaining or repairing of property, including maintenance equipment, directly used in . . . communication [W. Va. Code § 11-15-2(b)(4)(xi)];
- Otherwise using as an integral and essential part of . . . communication[.] [W. Va. Code § 11-15-2(b)(4)(xiv).].

In its *Final Order*, the Circuit Court affirmed OTA's finding that Shenandoah's use of the cell phones was incidental, as opposed to integral, under Section 11-15-2(b)(4). [A.R. 54.] Because the Section 11-15-2(b)(4) definition of "directly used and consumed" must first include an "integral and essential" activity, Shenandoah's attempt to apply the statutory examples of such activities is fruitless. For example, Shenandoah argues that it replaced the nTelos customers' old cell phones with new cell phones, which is akin to "maintenance or repair of a cellphone" used in communications. Petr's Br. 18. Obviously, the old cell phones were not repaired by Shenandoah—they were replaced. But more importantly, the new phones were not **directly** maintained or repaired by Shenandoah at any stage—they were simply purchased and given away to new customers. Likewise, Shenandoah did not directly use the phones to "transport[] or stor[e]" [p]hysically control[] or direct[]" or "record[] the flow" of "property undergoing . . .

communication," W. Va. Code § 11-15-2(b)(4)(iii), (v), (vi), because it did not use the phones for communication at all. Its customers may have. But that use cannot qualify as a direct use by Shenandoah. The phones must be directly used by "persons engaged in this State in the business of . . . communication." W. Va. Code R. § 110-15-9.4.1. And the exemption "only appl[ies] to" property "directly used or consumed . . . in the" those "businesses or organizations." *Id.* § 110-15-9.4.1. Because Shenandoah made no **direct use** of the cell phones for communications, none of the statutory examples can apply.

Additionally, the Circuit Court specifically upheld OTA's finding that Shenandoah used the cell phones for marketing. [A.R. 56.] Under Section 11-15-2(b)(4)(B)(v) (*i.e.*, the definition of directly used or consumed), "[u]ses of property or services which do not constitute direct use or consumption in the activities of . . . communication . . . include, but are not limited to . . . marketing[.]" In other words, the West Virginia Code states that if personal property is used for marketing, it is *per se* not directly used or consumed by the business. Because the Circuit Court found that the cell phones were used for marketing, they simply could not have been directly used or consumed by Shenandoah, even under the statutory examples in Section 11-15-2(b)(4)(A).

* * * * *

For these reasons, OTA and the Circuit Court both properly held that Shenandoah's purchased the phones for marketing purposes, and Shenandoah is therefore not entitled to the direct use exemption. This Court should reject Shenandoah's seven assignments of error on this issue and affirm.

## B. THE CIRCUIT COURT CORRECTLY FOUND THAT THE SALE FOR RESALE EXEMPTION, W. VA. CODE § 11-15-9(A)(9), DOES NOT APPLY TO SHENANDOAH'S CELL PHONE GIVEAWAY [ASSIGNMENTS OF ERROR 6, 7, AND 9].[4]

The Circuit Court was also right to find that Shenandoah did not qualify for the "sale for resale" exemption. Shenandoah alternatively seeks to rely on this exemption under Section 11-15-9(a)(9). OTA and the Circuit Court rejected that claim because "[t]he phones at issue here were not purchased for resale, because they were not resold." [A.R. 57.] This holding should be affirmed, and Shenandoah's Assignments of Error 6, 7, and 9 should be rejected.

The Code states that "sales of tangible personal property and services are exempt" if they were "for the purpose of resale in the form of tangible personal property[.]" W. Va. Code § 11-15-9(a)(9). It then defines "sale" to "include[] any transfer of the possession of tangible personal property . . . for a consideration." W. Va. Code § 11-15-2(b)(17). The legislative rule largely mirrors this definition. It says that "sale" "for purposes of the use tax" means "any transaction resulting in the **purchase of tangible personal property** or taxable services from a retailer or vendor." W. Va. Code R. § 110-15-2.79 (emphasis added).

During the OTA hearing, Ms. Barr testified that the former nTelos customers did not pay sales tax for their new phones "[b]ecause the customer was given them for them to stay with our service, and so they were not paying for the phone, so there was no tax to be charged on them." [A.R. 344.] In other words, because the phones were **given** to the former nTelos customers, they were not **purchased** by those customers. There was no sale of the cell phones as that term is

[4] It is unclear to the Tax Division where in its *Brief* Shenandoah specifically argues Assignment of Error 7 (that the Circuit Court erred when it claimed that Petitioner "admits that there was no sale of the phones to the former nTelos customers."). To the extent that Assignment of Error 7 is related to Shenandoah's broader argument that the sale for resale exemption should apply, the Tax Division addresses Shenandoah's arguments below. Otherwise, Assignment of Error 7 should be deemed waived. Syl. pt. 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.").

defined by Legislative Rule § 110-15-2.79 because the customers did not purchase the cell phones. And because there was no sale of the cell phones, the sale for resale exemption cannot apply according to the plain language of that statute.

Shenandoah attempts to avoid this result by arguing that the cell phones were presumed sold at the time its customers took possession of the cell phones. In support of this argument, Shenandoah cites Legislative Rule § 110-15-9.3.4.3, which states that:

> For providers of taxable services and sellers of tangible personal property subject to the consumers sales and service tax or use tax, property **purchased** is **presumed** to be purchased for resale if the final consumer or end user of the property sold will obtain possession of the property upon consummation of the final sale of the property or service sold.

(emphasis added.)

Shenandoah argues that a sale is presumed under Legislative Rule § 110-15-9.3.4.3—even if the customer paid nothing—based on transfer of possession. That analysis is incorrect and turns the sale for resale exemption on its head. The word "possession" in the Rule cannot be read in isolation. The Rule states that the sale for resale exemption may be presumed if the customer "obtain[s] possession of the property upon consummation of the **final sale of the property** or service sold." *Id*. (emphasis added). Since Shenandoah admits that there was no sale of the phones to the former nTelos customers, the Rule does not apply according to its plain language. And as correctly noted by OTA, Shenandoah's citations to other types of sales involving a change of possession is of no moment—because no **sale** of the cell phones occurred in this case. [A.R. 58.] In other words, because the phones were **given** to the former nTelos customers, they were not **purchased** by those customers. There was no sale of the cell phones as that term is defined by Legislative Rule § 110-15-2.79 because the customers did not purchase the cell phones. And because there was no sale of the cell phones, the sale for resale exemption cannot apply.

What's more, just because the rule creates a presumption does not mean it is conclusive. "The word 'presume' does not, in common usage, connote conclusive or mandatory rule" but instead, "has long been held in this jurisdiction to create a rebuttable presumption of law." *State v. O'Connell*, 163 W. Va. 366, 368-69, 256 S.E.2d 429, 431 (1979). That is why most presumptions are rebuttable and "may be overcome by competent evidence." *E.g. Simmons v. Simmons*, 171 W. Va. 170, 174, 298 S.E.2d 144, 147 (1982) (related to rebuttable presumption of joint ownership of certain funds); *see also* Syl. *First Nat'l Bank v. Tri-State Equip. & Repair Co.*, 108 W. Va. 686, --, 152 S.E. 635, 635 (1930) ("A presumption of fact raised by law falls when substantial evidence is introduced rebutting that presumption."); BLACK'S LAW DICTIONARY, "presumption" (11th ed. 2019) ("Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence."). Shenandoah offers this Court nothing to suggest that the presumption in the sale for resale exemption operates differently.

Applied here, whatever presumption is created by the transfer of the phones has clearly been rebutted because Shenandoah's own witness admitted that the phones were "give[n]" to their customers "for free." [A.R. 326.] Likewise, she testified that their customers "were not paying for the phone." [A.R. 344.] That is why OTA concluded that the phones "were not resold," [A.R. 31], and the Circuit Court held that "no sale occurred in this case." [A.R. 43.]

Shenandoah's reliance on two Office of Hearings and Appeals ("OHA") decision from the 1990s is misplaced for similar reasons. It says that both cases show that the sale for resale exemption turns on whether possession of the property changed hands. Petr's Br. 33. But prior "administrative decisions" of OHA "are not binding on other administrative law judges" like those at OTA. *Putnam Cnty Bd. of Ed. v. Andrews*, 198 W. Va. 403, 407 n.6, 481 S.E.2d 498, 502 n.6

(1996). Nor, logically, can they bind the circuit courts or this Court. Also, neither case addressed this relevant issue: whether property could qualify for "purchases for resale" when given away for free like the phones here. In the 1996 case, OHA found "engine sealer, armorall and wax . . . which remain on the car, are considered to be purchases for resale" and so "exempt from the tax." Admin. Dec., W. Va. Tax Dec. 92-298, 1996 WL 287026, *1 (Off. Hrg. App. 1996). Whereas in the 2000 case, OHA found that "purchases of soap and chemicals for use in" a "car wash business are not exempt from use tax because" they "are used up or otherwise disappear in the washing process." Admin. Dec., W. Va. Tax Dec. 98-045, 2000 WL 33300378, *1 (Off. Hrg. App. 2000). But neither case questioned whether the customers would pay for the waxing and washing services and materials they received. And neither case addressed whether the tax results would be the same if these materials were admittedly given away for free like the phones here. So, these decisions are not helpful. After all, a "sale" requires more than just the "transfer of possession or ownership." W. Va. Code § 11-15-2(b)(17). It also must be "for a consideration." *Id.*

To be sure, Shenandoah takes a stab at proving that the phones were sold "for consideration," too. It says that the Circuit Court finding that Shenandoah was engaged in marketing when it gave away the cell phones proves that there was consideration for the phones. Petr's Br. 34-34. It points out that "consideration" under contract law can be any "right, interest or benefit accruing to one party or some forbearance, detriment or responsibility given, suffered or undertaken by the other." *Id.* (quoting *Hardwood Grp. v. Larocco*, 219 W. Va. 56, 64, 631 S.E.2d 614, 622 (2006)). And it claims that the "consideration for the cellphones was the service contract" between Shenandoah and the former nTelos customers. Petr's Br. 35.

But contract law does not help Shenandoah here because "a contract with multiple clauses only requires consideration for the entire contract." Syl. Pt. 6, *Dan Ryan Builders, Inc. v. Nelson*,

230 W. Va. 281, 282, 737 S.E.2d 550, 552 (2012). "There is no requirement for consideration for each promise within the contract." *Id.* Whereas the definition of "sale" for purposes of the sale and resale exemption requires separate consideration for the exempt property: the sale must be a "transfer of the possession or ownership of . . . property . . . for consideration." W. Va. Code § 11-15-2(b)(17).

Likewise, the record does not show that Shenandoah transferred the phones to its customers in exchange for the service contract. As Ms. Barr testified at OTA, the nTelos customers "would automatically be switched to" their plan even if they did not accept the free phone. [A.R. 333.] And Shenandoah did not receive anything more from these customers than it would have from any other customers. After all, Ms. Barr admits that the "contract" was "just for the service piece," [A.R. 328], that the phones were "giv[en] away" for "free," [A.R. 344], and that these customers future bills would not be higher than other customers: "[t]here was no charge for the new phone." [A.R. 335]. She said that these customers "could absolutely cancel and go to a different service," [A.R. 334], but nothing in the record indicates that they lost that right after receiving the new phones. *Cf.* [A.R. 333] (agreeing that their customers "can cancel the contract"); [A.R. 328] (agreeing that they did not "have any obligation to return [the free phone] at some point").

Simply put, Shenandoah has already admitted that it did not sell the cell phones to its customers, as a factual matter. During the OTA hearing, Judge Pollack and Ms. Barr had the following exchange:

> JUDGE POLLACK: During that time, how ---? I sort of interrupted you, and I apologize. If I came in for service as a new customer, got a phone, how would I pay for it?
>
> MS. BARR: So at that time, you --- that was when cell phone companies were leaning heavily towards leasing phones again. And so you could still buy your phone outright, so if you wanted to completely pay for your phone, you could, and you would have to pay your phone and tax at that moment. Or you could choose to

lease your phone where you made monthly installments over a certain amount of time. And in that case, you would have to make a down payment on a phone and pay your tax up front.

JUDGE POLLACK: Would I pay the tax up front on the entire amount?

MS. BARR: Yes.

JUDGE POLLACK: Okay. All right. Then, as you testified, during the merger, there were certain customers whose phones were not compatible. They were given the opportunity to have a phone, given a –

MS. BARR: Correct.

JUDGE POLLACK: --- be given a free phone? And to be clear, no sales tax was charged on those free phones?

MS. BARR: No.

JUDGE POLLACK: Why not?

MS. BARR: Because the customer was given them for them to stay with our service, and so they were not paying for the phone, so there was no tax to be charged on them.

JUDGE POLLACK: Okay. So was Shentel's opinion at that time that what, they were purchased for resale?

MS. BARR: No. It was our opinion at the time that we accrued and paid the tax, which is what the refund claim is for. **We were giving away these free phones** -

JUDGE POLLACK: So tax was paid by Shentel?

MS. BARR: Correct. That's the refund claim is that we paid that amount for these phones?

[A.R. 343-44 (emphasis added).]

Again, in order to qualify for the sale for resale exemption, it is axiomatic that a sale occur. Because Shenandoah's witness testified that (1) the cell phones were "giv[en] away" and not sold and (2) no sales tax was charged to the customers for those phones, the sale for resale exemption simply cannot apply.

Shenandoah was correctly denied the sale for resale exemption. Its Assignments of Error 6, 7, and 9, which relate to this issue, should be denied, and the Circuit Court should be affirmed.

### C. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT SHENANDOAH IS LIABLE FOR USE TAX [PET'R BR. 30: NO RELATED ASSIGNMENT OF ERROR].

Shenandoah's final argument is that because the Circuit Court found that it did not directly use the cell phones, it should not be liable for the use tax at all. Petr's Br. 30.

But Shenandoah has clearly waived this argument, as it was not presented to OTA or the Circuit Court. "One of the most familiar procedural rubrics" is that "the failure to timely raise [an] issue below" will "result[] in waiver of the matter" on "appeal." *Deras v. Prime Capitol Props*., No. 20-0946, 2021 WL 4936971, *3 (Oct. 13, 2021) (mem. decision). Only last month, this Court reaffirmed that rule: "the failure to timely raise the issue below [will] result in waive of the matter in this appeal." *In re R.T.*, 23-ICA-115, 2023 WL 6290594, *3 (ICA Sept. 26, 2023) (mem. decision) (applying the same rule). That is because appellate jurisdiction does not extend to "nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syl. Pt. 7, *In re Michael Ray T*., 206 W. Va. 434, 436, 525 S.E.2d 315, 317 (1999). This rule is "rooted in the concept of judicial economy, fairness, expediency, respect, and practical wisdom." *State v. Greene*, 196 W. Va. 500, 505, 473 S.E.2d 921, 926 (1996) (Cleckley, J., concurring). If Shenandoah did not believe it should be liable for use tax because it did not use the phones in any respect, it should have presented that argument, in the first instance, to OTA. This Court should not consider this argument first raised here.

But even if this Court does entertain this issue, Shenandoah is wrong. This argument fails to acknowledge that the Circuit Court did find that Shenandoah used the cell phones—for marketing. [A.R. 56.]

With regard to liability for use tax, West Virginia Code § 11-15A-2(a) states that:

> An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article.

The concept of "use" is defined by Legislative Rule § 110-15-2.013, which states that:

> **"Use" means and includes the exercise by any person of any right or power over tangible personal property or taxable services which is incident to the ownership, possession or enjoyment of such property or services**, or by any transaction in which possession of or the exercise of any right or power over tangible personal property or taxable services is acquired for a consideration, including any lease, rental or conditional sale of tangible personal property. As used in this definition, "enjoyment" includes a purchaser's right to direct the disposition of the property or services, whether or not the purchaser has possession of the property. The term "use" does not include the keeping, retaining or exercising of any right or power over tangible personal property solely for the purpose of subsequently transporting it outside the State for use thereafter solely outside this State.

W. Va. Code R. § 110-15-2.103 (emphasis added). This same regulation also states that "directly used or consumed" means:

> in manufacturing, transportation, transmission, communication or the production of natural resources shall mean used or consumed in those activities or operations which constitute an integral and essential part of such activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to such activities.

W. Va. Code R. §§ 110-15-2.27. Thus, the Legislative Rules clearly distinguish between when a company "uses" personal property and when a company "directly uses" personal property—which of course corresponds to liability for use tax and the ability to claim the direct use exemption.

The Circuit Court specifically held that that Shenandoah used the cell phones for marketing. [A.R. 56.] Marketing would certainly be considered "use" of the cell phones, as it exhibits the exercise of power of the cell phones incident to ownership. W. Va. Code R. § 110-

15-2.103. In other words, the act of ordering cell phones to give away to customers is use. Whereas direct use (an exemption from use tax) does not include marketing or other incidental uses. The Circuit Court's holding was therefore consistent with the West Virginia Code and the Legislative Rules. Shenandoah arguments on this issue should be rejected as well.

## VII. CONCLUSION

Based on the forgoing, the Tax Commissioner respectfully requests that Shenandoah's ten assignments of error be rejected, and the Circuit Court's *Final Order* be affirmed.

**Respectfully submitted,**

**MATTHEW R. IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA**

**By counsel**

**PATRICK MORRISEY**
**ATTORNEY GENERAL**

Sean M. Whelan (W.Va. Bar No. 12067)
*Deputy Attorney General*
William C. Ballard (W.Va. Bar No. 9557)
*Assistant Attorney General*
State Capitol Complex
1900 Kanawha Boulevard, East
Building 1, Room W-435
Charleston, WV 25305
Telephone: (304) 558-2522
Facsimile: 304-558-2525
Email: Sean.M.Whelan@wvago.gov
William.C.Ballard@wvago.gov

**IN THE INTERMEDIATE COURT OF APPEALS**

**OF WEST VIRGINIA**

**NO. 23-ICA-235**

**SHENANDOAH PERSONAL COMMUNICATIONS, LLC,,**

*Petitioner,*

v.

**MATTHEW R. IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA**,

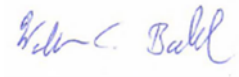
*Respondent,*

**On Appeal from the Circuit Court of Kanawha County, Civil Action No. 21-AA-38**

## CERTIFICATE OF SERVICE

I, William C. Ballard, do hereby certify that on this 19th day of October 2023, the foregoing Respondent's Brief was electronically filed with the Clerk of the Court using the File & Serve Xpress system, which constitutes service on the following:

Alexander Macia, Esq.
Paul G. Papadopoulos, Esq.
Chelsea E. Thompson, Esq.
Spilman Thomas & Battle PLLC
300 Kanawha Boulevard, East
Charleston, West Virginia 25301
304-340-3800
amacia@spilmanlaw.com
ppapadopoulos@spilmanlaw.com
sthompson@spilmanlaw.com



William C. Ballard, Esq.
*Counsel for Respondent*