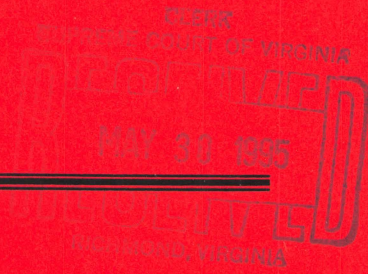


250 Va 482



IN THE

Supreme Court of Virginia

RECORD NO. 950223

WISE COUNTY BOARD OF SUPERVISORS,
Appellant,

v.

DELMER WILSON, as Commissioner of Revenue,
Appellee.

JOINT APPENDIX

Sue Ella Kobak
KOBAK & OGLEBAY
Post Office Box 428
Pennington Gap, VA 24277
(703) 546-3642

Counsel for Appellant

Henry S. Keuling-Stout
KEULING-STOUT, PC
Post Office Box 400
Big Stone Gap, VA 24219
(703) 523-1676

Counsel for Appellee

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RECEIVED AND FILED

5-9 1994

C. Gary Rakes, Clerk

By

9:05 AM Deputy Clerk
PM

VIRGINIA: IN THE CIRCUIT COURT FOR WISE COUNTY

THE WISE COUNTY BOARD OF SUPERVISORS

Plaintiff

VS.

DELMER WILSON, AS COMMISSIONER OF REVENUE

Defendant

MOTION FOR A DECLARATORY JUDGMENT

Comes the Wise County Board of Supervisors, by counsel, and respectfully request a Declaratory Judgment to the following:

1. That the Wise County Board of Supervisors, the legislative body of the Wise County Government, established a merchant's capital tax rate and assessment ratio for the fiscal year 93-94.
2. That it is then the responsibility of Delmer Wilson, in his capacity as Commissioner of Revenue, to apply the rate and assessment rate established by the Wise County Board of Supervisors to a fair market value of the inventory assessed.

Page Two - Motion for Judgment

3. That utilizing 100% of cost of the inventory to the merchants as the fair market value would be an appropriate fair market application.

4. That the rate and assessment ratio set by the Wise County Board of Supervisors is valid and must then be applied against 100% of the cost of the inventory as a fair market assessment properly reported by merchants to the Commissioner of Revenue.

To support this motion, the Plaintiff asserts the following:

1. The Wise County Board of Supervisors, as the legislative body for the County of Wise, Virginia, did duly adopt a tax levy on merchant's capital, which noted that the merchant's tax levy would be:

Merchant's Capital Tax - up to
\$300,000, 2.85 based on 45% assessment
over \$300,000 to \$400,000, 2.85 based
on 35% assessment. (See Exhibit A)

Page Three - Motion for Judgment

2. That Delmer Wilson, the Commissioner of Revenue for Wise County, responded to the Wise County Board of Supervisors by letter dated June 25, 1993, during the advertising of the proposed merchant's capital tax that he had the authority to set the assessment ratio and not the Board of Supervisors. (See Exhibit B)

3. That after the merchant's capital tax rate and assessment ratio was adopted, Delmer Wilson continued to assert that only he has the authority to set the assessment ratio and that the Wise County Board of Supervisors had only the authority to set the rate for the merchant's capital tax.

4. That subsequent to this discussion, the County Attorney, requested an informal Attorney General's opinion regarding the matter. (See Exhibit C)


5. After receiving a copy of the informal Attorney General's opinion, Mr. Wilson still continued to insist that he would apply the assessment ratio he personally established.

Page Four - Motion for Judgment


6. That a controversy exists between the Wise County Board of Supervisors and Delmer Wilson as Commissioner of Revenue regarding the establishment and collection of the appropriate merchant's capital tax rate and assessment ratio against 100% of the fair market value of the inventory assessed for the fiscal year 1993-94.

THEREFORE, the Wise County Board of Supervisors pray for a DECLARATORY JUDGMENT and such further relief as the nature of this case may require.

Respectfully submitted.



J. FRED TATE, CHAIRMAN
WISE COUNTY BOARD OF SUPERVISORS



Sue Ella Kobak, Esq.
KOBAK AND OGLEBAY
Attorneys at Law
P.O. Box 428
Pennington Gap, VA 24277
(703) 546-3642

Wise County Board of Supervisors



Office of County Administrator

COURTHOUSE

WISE, VIRGINIA 24293

TELEPHONE 703-328-2321
FAX 703-328-9780

P.O. BOX 570
206 E. MAIN STREET


The Wise County Board of Supervisors met in their Year End Meeting on June 25, 1993 at 3:00 PM in the Board of Supervisors Meeting Room located in the Courthouse, Wise, VA. The following were present:

Honorable Jack Kiser-Chairman
Honorable Virginia Meador
Honorable J. Fred Tate
Honorable Donnie Dowell
Honorable Sam Church
Honorable Edgar Mullins
Honorable Claude Collins
Honorable Douglas Baker-members of said Board and,
Scott H. Davis-County Administrator
Shannon Scott-Assistant County Administrator
Karen Mullins-County Attorney

Extract from the Year End Meeting of the Wise County Board of Supervisors held on June 25, 1993 as per attached sheets.

The undersigned County Administrator for the Board of Supervisors of Wise County, Virginia hereby certifies that the foregoing constitutes a true and correct extract from the minutes of the Year End Meeting of the Wise County Board of Supervisors held on the 25th day of June 1993 and of the whole thereof so far as applicable to the matters referred to in such extract.

WITNESS my hand and the seal of the Wise County Board of Supervisors this ___ day of _____ 199__.



County Administrator
Wise County Board of Supervisors

June 25, 1993 EA

Mr. Wilson reiterated that it is the responsibility of the Commissioner of Revenue to determine the method of assessment.

He stated that in the proposed budget he noticed the projected Revenue for Merchants Capital increased \$50,000 above last year. This is not correct according to the method of assessment that has been set forth for FY 93/94.

Nancy Davis asked that the Board take a stand on seeing that the Reclamation Laws are enforced. She also asked that there be another method of assessment made on the land that has been reclaimed.

Danny Stallard and Pledge Brooks voiced their opposition on raising Real Estate Taxes.

IN RE: GENERAL FUND BUDGET APPROVAL

The County Administrator advised that the budget has been duly advertised with a corrected advertisement in the amount \$21,328,520.00 including the Coal Road Funds.

The proposed tax levies were reviewed and discussed.

A motion was made by Sam Church, seconded by J. Fred Tate, to approve the Budget as presented by the Budget Committee.

Aye-Jack Kiser	Nay-Virginia Meador
J. Fred Tate	Douglas Baker
Donnie Dowell	
Sam Church	
Edgar Mullins	
Claude Collins	

IN RE: SCHOOL BOARD BUDGET APPROVAL

The County Administrator advised that the School budget has been duly advertised for public input and was ready for discussion and approval by the Board.

After discussing the budget, a motion was made by Donnie Dowell, seconded by Claude Collins, to approve the School Board Budget with the General Operating Fund being \$41,341,285.00 which includes the Coal Road monies in the amount of \$328,985.00 that will be available for two years. The Debt Service Fund was \$982,300.00, and the Capital Outlay Fund was \$1,080,000.00.

Mr. Mullins questioned the salary increases for the teachers and other school employees with much criticism on the method used for giving salary increases.

There being no further discussion the votes were as follows:

Aye-Jack Kiser	Nay-None
Virginia Meador	
J. Fred Tate	
Donnie Dowell	
Sam Church	
Edgar Mullins	
Claude Collins	
Douglas Baker	

IN RE: TAX RATE

A motion was made by Sam Church, seconded by Edgar Mullins, to approve the Tax Levies as follows:

Real Estate \$.48 (Increase)

Public Service Corp. R. E. \$.48 (Increase)

Personal Property-1.15 based on 100% NADA loan value

Machinery & Tools-1.15 based on 57% original cost

Mobile Homes - \$.48 (Increase)

Merchants Capital-Up to \$300,000
2.85 based on
45% assessment

-Over \$300,000
2.85 based on 35% assessment

- ELIMINATE (Collapsed into
35% category inc.)

Contractors License - \$.16 per \$100 of Gross Receipts (NEW)
exceeding \$25,000

Decal License - \$5.00 per vehicle

Utility Tax Elect.- 20% of first \$15 to \$3.00

Telephone - 20% of first \$15 to \$3.00

Coal Severance - 2% Coal

License - 3% Gas

Aye-Jack Kiser	Nay-Virginia Meador
J. Fred Tate	
Donnie Dowell	
Sam Church	
Edgar Mullins	
Claude Collins	
Douglas Baker	

IN RE: APPROPRIATION-SCHOOL BOARD

A motion was made by Claude Collins, seconded by Donnie Dowell, to approve the appropriation of \$1,000,000 to the School Operating Fund.

Aye-Jack Kiser	Nay-None
Virginia Meador	
J. Fred Tate	
Donnie Dowell	
Sam Church	
Edgar Mullins	
Claude Collins	
Douglas Baker	

IN RE: APPROPRIATION SCHEDULE FOR FY 93/94

A motion was made Donnie Dowell, seconded by Douglas Baker, to approve the Appropriations Schedule for FY 93/94 as presented.

Aye-Jack Kiser	Nay-None
Virginia Meador	
J. Fred Tate	
Donnie Dowell	
Sam Church	
Edgar Mullins	
Claude Collins	
Douglas Baker	

IN RE: ORDINANCE ON ISSUANCE OF BONDS FOR LANDFILL

The County Administrator advised that an ordinance amending the original ordinance for the issuance of the bonds for the Phase II landfill expansion was received from VRA. This would require a public hearing for public input. After discussing the amendment, a motion was made by Sam Church, seconded by Donnie Dowell, to hold a public hearing on July 8th, 1993 at 6:15 p.m. to receive citizens input on a proposed amendment to the ordinance for issuing bonds for the Phase II Landfill Expansion.

Aye-Jack Kiser	Nay-None
Virginia Meador	
J. Fred Tate	
Donnie Dowell	
Sam Church	
Edgar Mullins	
Claude Collins	
Douglas Baker	

IN RE: DISCRETIONARY FUNDS DISTRIBUTION

A motion was made by J. Fred Tate, seconded by Donnie Dowell, to approve the distribution of Discretionary Funds as presented.

There was some discussion on the ball field located in the Stevens area. The County Administrator told the Board that one bid had been submitted on making repairs and adjustments to the ball field in the amount of \$7,120.00. He further stated that other bids will be taken, hopefully, to get a better price.

Aye-Jack Kiser	Nay-None
Virginia Meador	
J. Fred Tate	
Donnie Dowell	
Sam Church	
Edgar Mullins	
Claude Collins	
Douglas Baker	

IN RE: ANNOUNCEMENT

The County Administrator reminded the Board of their Joint Meeting with the School Board on July 21st at 6:00 p.m.

IN RE: FAIRGROUND LEASE

As per letter of June 9, 1993, from the Chamber of Commerce, as an act of good faith and to further enhance the relationship and communications between the Wise

E "A"

Wise County Board of Supervisors



Office of County Administrator

COURTHOUSE

WISE, VIRGINIA 24293

TELEPHONE 703-328-2321
FAX 703-328-9780

P.O. BOX 570
206 E. MAIN STREET

TELECOPIER TRANSMISSION SHEET

TRANSMISSION DATE: 5-6-98

TIME: _____

SUBJECT: _____

FROM: Armitage

OF: _____

FAX NO.: (703) 328-9780

TO: Sue Ella

OF: _____

FAX NO.: _____

We transmitted 3 pages (including this cover sheet)

Document(s) Sent and Comments:

NEW BUSINESS

Cast members recall a little backstage humor

By IDA HOLYFIELD
NPI Media Services

Neighboring

agent; Janet Hill of Merrill Lynch and Co., and Charlottesville socialite

tion.
Young Edwin Mockaby, sensing disaster, improvised by falling dead

said she had hurried on stage and crawled in the bed first. McClanahan crawled in beside her.

said.
Marrs said she was really sweating it out by the time she heard

Store scanners

on grocery stores.
VDACS Commissioner Clinton V. Turner says that Virginia consumers are being protected at the cash register.

"In the first place, our study in 1990 showed that for high volume operations, scanners are more accurate than manual entries. Furthermore, in the past nine months, the office of weights and measures has spent 1,486 staff hours checking retail stores for accuracy at the cash register. I feel that our statistics are much more representative than recently reported statistics using much smaller samples," Turner said.

In a detailed 1990 study, 21,394 samples were taken at 461 grocery stores. Of that number, there were 805 errors, or 3.76 percent. And 52 percent of the errors were in the consumer's favor, not the store's. Most of the errors occurred on direct delivery items which the store does not price.

"Consumers can be assured that we will continue to work with retailers to keep the error rate low," Turner said.

Provided by the Virginia Department of Agriculture and Consumer Services.

FROM PAGE 10

CORRECTED SEGMENT TO WISE COUNTY BUDGET PROPOSED BUDGET FOR WISE COUNTY VIRGINIA FOR FISCAL YEAR BEGINNING JULY 1, 1993

PROPOSED TAX LEVY

The following are the proposed tax levies for fiscal year beginning July 1, 1993. The levies are based on tax per \$100 of assessed value or as otherwise indicated.

	ACTUAL LEVIES 1992-93	PROPOSED LEVIES 1993-94	INCREASE OR DECREASE
AS ADVERTISED Merchant's Capital			
	Up to \$300,000 2.85 based on 45% assessment	Up to \$300,000 2.85 based on 45% assessment	0
	\$300,000 to \$400,000 2.85 based on 35% assessment	\$300,000 to \$400,000 2.85 based on 35% assessment	0
	Over \$400,000 2.85 based on 25% assessment	ELIMINATE	Collapsed Into 35% Category inc.
CORRECTED TO READ Merchant's Capital			
	Up to \$300,000 2.85 based on 45% assessment	Up to \$300,000 2.85 based on 45% assessment	0
	\$300,000 to \$400,000 2.85 based on 35% assessment	Over \$300,000 2.85 based on 35% assessment	Increase
	Over \$400,000 2.85 based on 25% assessment	ELIMINATE	Collapsed Into 35% Category inc.

BUYING EYE GLASSES -

It's Just This Simple!

HAVE AN
EYE EXAM.
Wherever You Choose

2 BRING YOUR
PRESCRIPTION TO
NEW VISION OPTICAL.

3 RECEIVE AN ADDITIONAL
10% DISCOUNT OVER
AND ABOVE OUR
2 FOR 1 SPECIAL!

NEW VISION OPTICAL

Rick Norton, Optician
Wise County Plaza - Wise, VA
679-5610

Delmer Wilson, Jr.

Telephone: 703/328-3556 or 703/523-1925
P.O. Box 1278
WISE, VIRGINIA 24293



**Wise County
Commissioner of the Revenue**

Exhibit "B"

June 25, 1993

Jack Kiser, Chairman
Wise County Board of Supervisors
Wise, VA 24293

Dear Mr Kiser:

The June 24th edition of the Coalfield Progress advertised a "corrected segment" to the Wise County proposed budget for the fiscal year beginning July 1, 1993.

For the record, this corrected advertisement also contains erroneous information. The correct assessment ratio for the merchant's capital in Wise County for the fiscal year 93-94 will be as follows:

<u>REPORTED INVENTORY</u>	<u>ASSESSMENT RATIO</u>
Up to \$300,000	45%
\$300,000 to \$400,000	35%
Over \$400,000	25%

We have covered this ground before but once again, it is the responsibility of the Commissioner of Revenue to determine the method of assessment. The method of assessment I have determined is as stated above. This is the method I will be using to determine assessed value for fiscal year 93-94.

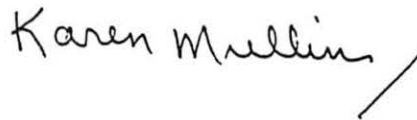
I notice the projected revenue from merchants capital in the proposed budget increased \$50,000 above last year. If you are relying on the assessment ratio as advertised in the newspaper to cause the increase in revenue, then you have overstated the revenue in that category by \$50,000.

I have had numerous discussions with the county administrator, various board members, and the county attorney about this issue, but evidently my efforts to resolve this matter have been in vain. Be assured that advertising incorrect assessment ratios or even adopting a budget with those ratios gives absolutely no legitimacy to that ratio. The Board of Supervisors have no authority to determine the method of assessment used by the Commissioner of Revenue.

Sincerely,



Delmer Wilson, Jr.
Commissioner of Revenue



Enc.

cc: Scott Davis, Com
cc: Karen Mullins, '



COMMONWEALTH of VIRGINIA

Stephen D. Rosenthal
Attorney General

Office of the Attorney General
Richmond 23219

August 27, 1993

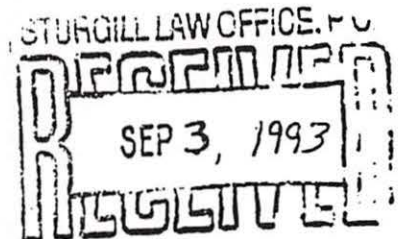


Exhibit "C"
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
804 - 786 - 2071

Ms. Karen T. Mullins
County Attorney for Wise County
P.O. Box 3458
Wise, Virginia 24293

Dear Karen:

This responds to your letter requesting an informal opinion from this Office about whether your county board of supervisors or the commissioner of the revenue has the authority to determine the assessment ratio applicable to merchants' capital.

Merchants capital is taxable under Article 3, Chapter 35 of Title 58.1, §§ 58.1-3509 through 58.2-3510.3, of the *Code of Virginia*. Section 58.1-3509 provides:

The capital of merchants is segregated for local taxation only. However, no rate or assessment ratio in any county, city or town for merchants' capital shall be greater than such rate and ratio as was in effect in such county, city or town on January 1, 1978.

The language of this section clearly contemplates that while both the rate and ratio applicable to assessment and taxation of merchants' capital are capped at the rate in effect in the locality in 1977, each may be adjusted from year to year as long as the 1977 levels are not exceeded. While it is clear that the local governing body sets the tax rate for all local taxes, including those on merchants' capital, no provision in Title 58.1 specifies how the assessment ratio for merchants' capital taxes shall be established.

The concept of an assessment ratio is a somewhat outmoded one with respect to other types of taxes. In recent years, the General Assembly has required real estate to be assessed at 100 percent of fair market value in all localities, thereby eliminating the local practice of applying a fixed ratio or percentage reduction to real estate assessments. See § 58.1-3201. Likewise, personal property and machinery and tools are assessed on the basis of recognized pricing guides, or declining percentages of original cost, and those assessments are generally not reduced by applying a uniform ratio or percentage. See §§ 58.1-3503, 58.1-3507. Merchants' capital taxes thus are the only *ad valorem* taxes to which such a locally determined ratio now is applied routinely,¹ and relatively few localities tax merchants' capital, because most have elected instead to impose business and professional license taxes. See § 58.1-3704 (license tax on merchants shall be in lieu of tax on capital).

¹Under §§ 58.1-2604 to 58.1-2608, the Department of Taxation determines an assessment ratio for each locality, based on a comparison of actual sales to assessments, that is applied in the taxation of property of public service corporations. That ratio has no effect, however, on the taxation of merchants' capital.

Ms. Karen T. Mullins
August 27, 1993
Page 2

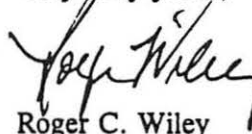
We have found no prior cases or opinions addressing whether the assessment ratio for merchants' capital must be established by the local governing body or by the commissioner of the revenue or comparable local assessing officer. Because that ratio is analogous to the ratio many localities used to apply to real estate assessments, however, I have consulted with a couple of senior constitutional officers to determine their recollection of how real estate assessment ratios formerly were determined. They recall that the assessment ratio was established by the local governing body, rather than the assessing officer.

That conclusion is consistent with the view the Supreme Court of Virginia has taken about the constitutional authority of local governing bodies to impose local taxes. The Court has interpreted Article VII, §§ 2 and 7 of the Constitution as making an exclusive grant of taxing authority to such local governing bodies. *Wright v. Norfolk Elec. Bd.*, 223 Va. 149, 286 S.E.2d 227 (1982). Accordingly, the Court concluded in *Wright* that a referendum provision in a city charter adopted by the General Assembly could not be used to permit voters to establish the city's tax rate, because that would infringe on the constitutional authority of the city council to impose local taxes. *Id.* at 152-53, 286 S.E.2d at 228-29.

If the board of supervisors were authorized to set the tax rate on merchants' capital, but the commissioner of the revenue established the assessment ratio independently from the board, the board ultimately would be unable to control the level of taxation being imposed on merchants' capital in the county, because the commissioner could nullify any increase or decrease in the tax rate by a corresponding adjustment in the ratio. In view of the Supreme Court's conclusion that the General Assembly could not authorize even the voters in a referendum to infringe on the taxing powers of the local governing body, it is not logical to conclude that the General Assembly could authorize the commissioner of the revenue to make a similar infringement on the governing body's taxing powers. Accordingly, in my view, the ability to establish the assessment ratio, which is equally essential to the tax rate in determining the level of taxes being imposed, rests with the board of supervisors or municipal council, and may not be transferred or delegated to the commissioner of the revenue, either by local ordinance or by state statute.

With kindest regards,

Very truly yours,



Roger C. Wiley
Senior Assistant Attorney General
Chief, Opinions Section

5:67/54-140i

VIRGINIA:
IN THE CIRCUIT COURT
OF WISE COUNTY

WISE COUNTY BOARD)
OF SUPERVISORS) PLAINTIFF
V.) CA No.
) C94-280
)
DELMER WILSON) DEFENDANT

DEMURRER

COMES NOW the Commissioner of Revenue of
Wise County, Delmer Wilson, by counsel, and
Moves to Dismiss the Motion for Declaratory
Judgment against him on the following
grounds.

1. The Virginia Constitution, Article
X §1 grants the General Assembly the right to
segregate taxable subjects between state and
local taxation.

2. Virginia Code §58.1-3000 makes

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May 31 1994

E. G. Rakes, Clerk

B. Denney

10:30 AM Deputy Clerk

merchants capital, otherwise intangible personal property a subject of local taxation only.

3. Virginia Code §58.1-3001 directs the governing body to fix the amount of county taxes for the current year.

4. Virginia Code §58.1-3008 provides that the Wise County Board of Supervisors can set the rates of the taxes and can impose different rates on different subjects so long as the rates conform to Chapter 35 of the Code of Virginia.

5. Chapter 35 of the Code of Virginia includes Virginia Code §§58.1-3509-3510.3.

6. Virginia Code §58.1-3509 provides that no rate or assessment ratio for merchants capital can exceed that set effective January 1, 1978.

7. Virginia Code Title §58.1-3510 defines the various elements making up merchants capital.

8. No Virginia Statute gives the Wise County Board

of Supervisors power to ascertain or assess the value of Merchants Capital.

9. The express power and direction to ascertain and assess at fair market value all subjects of taxation which include merchants capital is granted to the Commissioner of Revenue by Virginia Code Title 58.1-3103. This concept of Fair Market Value fits into the Virginia Constitution requirement of fair market value assessment of real and tangible personal property. See the Constitution of Virginia at Article X §2.

10. The fair market value can be a percent or percentages of original cost. See Virginia Code §58.1-3103 and the end note which cites the Virginia Supreme Court case of Cross v. City of NewPort News, 217 Va.202, 206 & n.5, 228 S.E. 2d 113 (1976). And see Virginia Code §58.1-3503(A)(17) and B. This case in addition to standing for the proposition that the fair market value can be a percentage of original cost also sets forth the procedure by which the assessment of fair market value is to be made. That procedure is the statutory mandate of the Commissioner of

Revenue and not the Board of Supervisors.

The Wise County Board of Supervisors has set forth no constitutional nor statutory provision giving it the right either to set an assessment at "100% of the cost of the inventory as a fair market assessment" or the right or power to state that the tax rate would be applied to a percentage (45% or 35%) of the fair market value assessment.

11. The Board of Supervisors can set the rate, but ascertaining what merchants capital is out there to be taxed and determining the fair market value of that merchants capital are powers and duties granted by the legislature expressly to the Commissioner of Revenue. See Virginia Code §§58.1-3103;3110.

12. The Board of Supervisors in its Motion for Declaratory Judgment is asking this Court to declare it has the right to ascertain and assess merchants capital and assess a tax on merchants capital at its fair market value. But the Board of Supervisors has not pointed to one statute which grants it that authority and there is a statute on the books which expressly grants that power and authority to the

Commissioner of Revenue.

13. The Wise County Board of Supervisors is attempting to usurp unto itself the ascertainment and assessment of merchants capital. This the Board cannot do. What if a taxpayer disagrees with the fair market value of his or her or its merchants capital. Where does the Wise County Board of Supervisors have authority to hear such disputes? It does not. The Commissioner of Revenue on the other hand is provided just this duty and authority under Virginia Code §58.1-3503(B). (58.1-3984)

For which reasons Delmer Wilson the duly elected Commissioner of Revenue of Wise County, asks that this Motion for Declaratory Judgment be dismissed.

DELMER WILSON

BY COUNSEL

KEULING-STOUT, P. C.
123 WOOD AVENUE, EAST
P. O. BOX 400
BIG STONE GAP, VA 24219

BY:


HENRY S. KEULING-STOUT
COUNSEL FOR DELMER WILSON

CERTIFICATE

The undersigned certifies a true copy of the foregoing pleading has been served by mailing the same first-class mail, postage prepaid, to Sue Ella Kobak, Esquire, P. O. Box 367, Jonesville, VA 24263, counsel for plaintiff, on this the 27th day of May, 1994.


Henry S. Keuling-Stout

1:\1032\79-001

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7-18 1994

By *Velma Sheel* C. Gary Baker, Clerk

3:30 AM Deputy Clerk
PM

VIRGINIA:

IN THE CIRCUIT COURT OF WISE COUNTY

THE WISE COUNTY BOARD OF SUPERVISORS

PLAINTIFF

DELMER WILSON, COMMISSIONER OF REVENUE

DEFENDANT

Case Number C94-280

POINTS OF AUTHORITY IN SUPPORT OF PLAINTIFF'S MOTION FOR
DECLARATORY JUDGEMENT

Comes the Plaintiff, the Wise County Board of
Supervisors, and respectfully submits this Brief in support
of its Motion for Declaratory Judgement.

QUESTION PRESENTED

Whether the Wise County Board of Supervisors has the
exclusive authority to impose the rate and assessment ratio
for merchants' capital tax?

Page Two

BRIEF ANSWER

The exclusive authority for imposing local taxes rest with the local governing body as per Article VII, section 2 and 7 of the Virginia Constitution. Also, there is a clear legal presumption that the rate and assessment ratio established by the Wise County Board of Supervisors is valid.

The Commissioner of Revenue has the authority to assess the merchants' capital against which the local tax will be imposed. Once the assessment is made by the Commissioner of Revenue, he then has an obligation to apply the tax rate and assessment ratio established by the local governing body to the assessment of merchants' capital.

FACTS

For the fiscal year beginning July 1, 1993, the Wise County Board of Supervisors advertised a proposed budget and tax levy in the local newspaper. (See advertisement attachment A.) On June 25, 1993, the Hon. Delmer Wilson

Page Three

wrote a letter to the then Chairman of the Wise County Board of Supervisors asserting that he, as Commissioner of Revenue, has the authority to set the assessment ratio and not the Board of Supervisors. (See letter, attachment B.)

Thereafter, on June 25, 1993, the Board of Supervisors adopted a budget for the fiscal year 1993, which included a merchants' capital rate and assessment ratio as:

up to \$300,000

2.85 based on

45% assessment

- over \$300,000

2.85 based on

35% assessment

(See minutes attachment C.)

Subsequent to the adoption of the merchants' capital rate and assessment ratio, Mr. Wilson in his capacity as Commissioner of Revenue, refused to apply fully the rate and assessment ratio as adopted. The Wise County Board of Supervisors, on May 9, 1994, filed the herein Motion For Declaratory Judgement alleging that the Commissioner of Revenue has a duty to determine the merchants' capital tax applying the rate and assessment ratio established by the Board of Supervisors.

Page Four

In his Demurrer to the Motion for Declaratory Judgement, Mr. Wilson asserts that he has the exclusive authority to establish the assessment of the merchants' capital for application of the rate established by the Board of Supervisors.

ARGUMENT

THE WISE COUNTY BOARD OF SUPERVISORS HAS THE EXCLUSIVE AUTHORITY TO IMPOSE THE MERCHANTS' CAPITAL TAX RATE AND ASSESSMENT RATIO.

The Wise County Board of Supervisors has set the merchants' tax rate and assessment ratio. The rate is the tax rate and the assessment ratio is the ratio to be applied against the assessment established by the Commissioner of Revenue.

Merchants' capital is taxable under Article 3, Chapter 35 of Title 58.1, sections 58.1-3509 through 58.1-3510.3 of the Code of Virginia as amended. Section 58.1-3509 provides:

Page Five

"The Capital of merchants is separated for local taxation only. However, no rate or assessment ratio in any county, city or town for merchants' capital shall be greater than such rate and ratio as was in effect in such county, city or town on January 1, 1978."

A. Case Law Supports The Authority To Impose Local Taxes Granted By The Virginia Constitution To The Local Governing Body.

Article VII, Sections 2 and 7 of the Virginia Constitution vests with the local governing body the authority to impose taxes. See also Wright v. Norfolk Elec. Bd., 223 Va. 149, 286 S.E. 2d 227 (1982), wherein the Supreme Court ruled that the General Assembly's grant of a city charter giving the voters permission to establish the city's tax rate was an improper infringement of the constitutional authority of the city council, as the local governing body, to impose taxes.

Page Six

B. Virginia Code Section 58.1-3509 Clearly Contemplates The Local Governing Body Imposing Both The Rate And Assessment Ratio Of Merchants' Capital Tax.

While it is clear pursuant to Article VII, Section 2 and 7 of the Virginia Constitution that the local governing body sets the rate for all local taxes, including those on merchants' capital, it is equally clear that the language of Section 58.1-3509 contemplates that the assessment ratio for merchants' capital is also to be established by the local governing body. Section 58.1-3509 specifically uses the statement "rate and assessment ratio" in the context of the local government's power to tax merchants' capital. Additionally, since the local government body has the exclusive authority to impose taxes, by necessary implication, they have the exclusive authority to set the assessment ratio. If the Commissioner of Revenue were authorized to establish the assessment ratio independently from the Board of Supervisors, the Board ultimately could not be able to control the level of taxation being imposed on merchants' capital, since the Commissioner of Revenue could adjust the ratio to void any increase or decrease in the tax rate.

Page Seven

C. Presuming Arguendo That Statutes And Case Law Are Not Definitive, The Presumption Of Legislative Validity Requires A Determination In Favor Of The County.

The merchants' capital rate and assessment ratio has been established by ordinance by the local governing body of Wise County. The Virginia Supreme Court has held that "every statute carries a strong presumption of validity and unless it clearly violates a provision of the United States or Virginia Constitution", the Court will not invalidate it. Heublein, Inc. v. Alcoholic Beverage Control, 237 Va. 192, 376 S.E. 2d 77, (1989). Therefore, the action of the Wise County Board of Supervisors is presumed valid and must be applied by the Commissioner of Revenue to the assessment of merchants' capital unless and until such time as the courts have ruled the ordinance to be unconstitutional. Cox Cable v. City of Norfolk, 439 S.E. 2d 366 (Jan. 7, 1994); Town of Ashland v. Board of Supervisors, 202 Va. 409, 117 S.E. 2d 679, (1961).

Page Eight

The conclusion that the local governing body establishes the rate and assessment ratio is consistent with Wright, supra, wherein the Commissioner of Revenue cannot refuse to apply the rate and assessment rate as adopted, because that would infringe on the constitutional authority of the local governing body to impose local taxes.

Furthermore, the Wise County Board of Supervisors has acquired an informal Attorney General's opinion which is persuasive in this court and courts throughout Virginia. The Senior Assistant Attorney General has opined that the ability to establish the assessment rest with the Board of Supervisors and may not be transferred or delegated to the Commissioner of Revenue. (See Opinion Attachment D.)

CONCLUSION

The Virginia Constitution and case law support the position that a local governing body has the authority to establish a tax rate and assessment ratio on merchants' capital. There is a strong presumption of the validity of the action of the Wise County Board of Supervisors, and Mr. Wilson, as Commissioner of Revenue has no authority to


Page Nine

nullify the action of the Board of Supervisors by not applying the rate and assessment ratio as adopted.

Thus, the Wise County Board of Supervisors respectfully request a declaratory judgement that the Commissioner of Revenue must apply the "rate" and "assessment ratio" established by the Wise County Board of Supervisors.

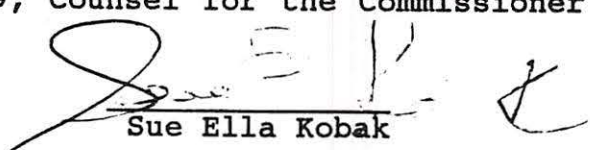
THE WISE COUNTY BOARD OF SUPERVISORS

- By Counsel -


Sue Ella Kobak, Esq.
KOBAK AND OGLEBAY
P.O. Box 428
Pennington Gap, VA 24277
(703) 546-3642

CERTIFICATE OF SERVICE

I hereby certify that I have this the 15th day of July, 1994, placed with the U.S. Postal Service a true copy of the herein POINTS OF AUTHORITY IN SUPPORT OF PLAINTIFF'S MOTION FOR DECLARATORY JUDGEMENT addressed to Henry S. Keuling-Stout, Esq., 123 Wood Avenue, East, P.O. Box 400, Big Stone Gap, VA 24219, Counsel for the Commissioner of Revenue, Delmer Wilson.


Sue Ella Kobak

KEULING - STOUT

A PROFESSIONAL CORPORATION

Phone: 703/523-1676

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Attorney At Law
Licensed in VA and NY

123 Wood Avenue, East
P.O. Box 400
Big Stone Gap, Virginia 24219

July 26, 1994

The Honorable William C. Fugate
Judge, Thirteenth Judicial
Circuit Court of VA
P. O. Box 326
Jonesville, VA 24263

RE: Wise Co. Board of Supervisors v. Delmer Wilson
File No. 1032-79

Dear Judge Fugate:

I wish to supplement my Demurrer dated May 27, 1994, and respond to Wise County's Brief dated July 15, 1994, as follows:

The Wise County Board of Supervisors is attempting without express statutory authority to usurp the statutory mandate of Virginia Code Title 58.1-3103 which states that the Commissioner of Revenue "shall ascertain and assess, at fair market value, all subjects of taxation..."

The Wise County Board of Supervisors in its Brief admits on page 5 and page 6 that both Article VII §2 and §7 of the Virginia Constitution and the case of Wright v. Norfolk go only so far as to give the Wise County Board of Supervisors the right to set the tax rate.

The argument of the Board of Supervisors of Wise County is that Virginia Code §58.1-3509 "contemplates" that the Wise County Board of Supervisors has the right to set both the rate and an assessment ratio. §58.1-3509 contemplates no such thing. It is simply a direction to the local Boards of Supervisors that they shall not set a rate and to the local Commissioners of Revenue that they shall not set an assessment ratio greater than what was in effect on January 1, 1978. This is the reading of §58.1-3509 which is consistent with the duties held respectfully by the Board of Supervisors (setting the rate) and the Commissioner of Revenue, (doing the assessment, a part of which is selecting a ratio).

Realizing that its argument is weak, the Wise County Board of Supervisors then suggests to the Court that its "comptemplative" argument is propped up by a presumption of legislative validity. It is not. Both the Heublein case and the more relevant Town of Ashland cases cited on page 7 of the Board of Supervisors Brief do stand for the proposition that there is a strong presumption that

a statute or an ordinance is presumed to be constitutional. The Commissioner of Revenue in this case is not stating that an ordinance is unconstitutional. The commissioner of Revenue is stating that a resolution of the Wise County Board of Supervisors is in direct violation of Virginia Code Title 58.1-3103.

In this regard, the most recent case of Cox Cable v. City of Norfolk, cited also on page 7 of the Brief of the Board of Supervisors is of no assistance to the position of the Wise County Board of Supervisors. Cox again reiterates the presumption only applies in a case where the constitutionality of a statute is being questioned. Moreover the Cox case says the presumption does not apply where the person challenging the ordinance claims an infringement of a fundamental right. And that is exactly the situation in this case. The Wise County Board of Supervisors is attempting to take from the Commissioner of Revenue his fundamental right to assess the taxes as given him by the Code of Virginia.

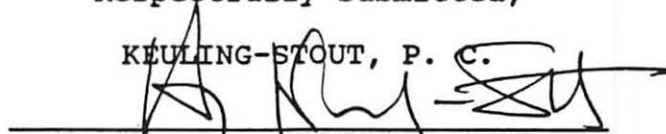
Stated a little bit differently, the Wise County Board of Supervisors is attempting to take a house keeping statutory measure (namely §58.1-3509) which applies to the houses of both of the Wise County Board of Supervisors and the Wise County Commissioner of Revenue and turn that into an express empowerment and authorization to take the statutory duty of assessment under Title 58.1-3103 away from Delmer Wilson, the Commissioner of Revenue.

The express law of Virginia and the Dillon rule do not permit the Wise County Board of Supervisors to convert a "contemplation" into law.

ONE FINAL AND VERY IMPORTANT POINT. Contrary to the artful assertion on page 7 of the Wise County Board of Supervisors Brief, the merchants capitol rate and assessment ratio was not established "by ordinance." The extract of the June 25, 1993, Board of Supervisors meeting minutes attached as exhibit C to the Board of Supervisors Brief documents a Motion made and seconded and passed "to approve the Tax levies as follows..." No ordinance was passed. And in fact the only thing that was approved was a tax levy. So what we have is a Board of Supervisors passing a resolution to violate the law and to usurp the statutory function of a Commissioner of Revenue of the Commonwealth of Virginia. This act cannot be permitted.

Respectfully Submitted,

KEULING-STOUT, P. C.

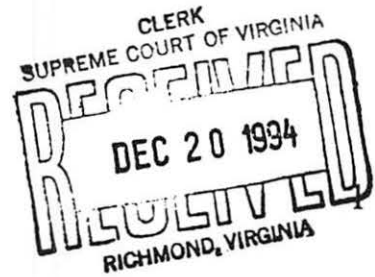


Henry S. Keuling-Stout
Counsel for The Honorable Delmer Wilson
Wise County Commissioner of Revenue

HK-S:scp

cc: Sue Ella Kobak, ESJ 30

ORIGINAL



VIRGINIA

IN THE CIRCUIT COURT OF WISE COUNTY

WISE COUNTY BOARD OF SUPERVISORS,

Plaintiff,

vs.

DELMER WILSON,

Defendant.

094-280

Thursday, July 28, 1994

Wise, Virginia

The above-entitled action came on to be heard before the Honorable William C. Fugate, Judge of the Circuit Court of Wise County, at the Wise County Courthouse, Wise, Virginia, beginning at 10:00 a.m., when there were present on behalf of the respective parties:

APPEARANCES:

For the Plaintiff:

MS. SUE ELLA KOBAK, ESQUIRE

For the Defendant:

HENRY S. KEULING-STOUT, ESQUIRE

RECEIVED AND FILED
8-1 1994
C. Gary Rakes, Clerk
By *H. S. Keuling-Stout*
9:05 AM Deputy Clerk

LINDA C. MILLER COURT REPORTING

(703) 328-3700

31,

(703) 679-1000

PROCEEDINGS

THE COURT: Let the record reflect that the matter before the Court at this time is the case styled Wise County Board of Supervisors versus Delmer Wilson. There was an action filed for a Declaratory Judgment by the Board of Supervisors, through their attorney, Ms. Kobak, and Mr. Wilson has filed a Demurrer by his attorney, Mr. Keuling-Stout.

I think probably at this point in time that the issue of the Demurrer should be argued. For that purpose, Mr. Keuling-Stout, the Court would recognize you.

MR. KEULING-STOUT: Thank you, Your Honor.

Your Honor, first of all let me present to the Court the original of my response that I think was faxed to you, by way of Beverly of your office, and I think Sue Ella would have gotten a copy of that, too.

MS. KOBAK: I have a faxed copy.

THE COURT: I have a faxed copy and Ms. Kobak, I believe, received a copy of that, also.

MR. KEULING-STOUT: I would just like to file with the Court the original.

Your Honor, a few general comments first. As I understand the context of this suit, what we have is the Wise County Board of Supervisors is suggesting that it, rather than the Wise County Commissioner of Revenue, has statutory

1
2 authority to set the assessment ratio that is applied to
3 merchants capital in Wise County.

4 Now my understanding of merchants capital, I
5 mean there are several parts of it, but let's just take for an
6 example we have inventory of one hundred dollars. I'll get to
7 the statute in a minute on the Demurrer but just sort of a
8 broad brush here, what the Commissioner of Revenue does,
9 there is no requirement in the statute that he or she choose
10 any specific method.

11 But in Wise County now and for as many
12 years as we know about, what has been done as to merchants
13 capital, and one example of that is inventory, is that if the
14 inventory, the original cost of the inventory was one hundred
15 dollars, then the Commissioner of Revenue had to decide,
16 according not only to the statute but the Constitution, what is
17 the fair market value because the assessments always have to
18 be made on fair market value. That is a constitutional
19 requirement.

20 Well, the Commissioner of Revenue could, of
21 course, just accept the original cost of the inventory, in my
22 example one hundred dollars, and say that is the fair market
23 value but it is up to the Commissioner of Revenue to make
24 that assessment and to determine the fair market value.

25 Now what the Commissioner of Revenue in

1
2 Wise County has done in the past and the present
3 Commissioner does is to say I'm going to take a percentage of
4 that, a ratio of that, to get to the fair market value. In my
5 opinion, says the Commissioner of Revenue, 100 percent of
6 fair market of the original cost is not the fair market value,
7 it is something else.

8 The reason it is something else is because if
9 you have inventory that has been there that just came in the
10 back door, that might be worth one hundred dollars; but what
11 if you have had inventory sitting on the shelf for two years,
12 three years?

13 These are various factors that go into the
14 determination by the Commissioner of Revenue as to, well,
15 what is the fair market value of this merchant's capital, an
16 example of which is inventory.

17 So, the Commissioner of Revenue selects a
18 percentage. Now because of a statute in 1978 he cannot
19 select any percentages, he cannot select any percentages,
20 which is the assessment ratio, and the Board of Supervisors
21 cannot set any rate above what the rate and ratio was in 1978.

22 Now my broad brush statement is this. The
23 ratio is a percentage and it is not until he applies the
24 percentage to the original cost that he has a fair market
25 value. So, the 43 percent, let's just take an example, 43

1
2 percent of one hundred dollars is forty-three dollars.

3 Well, the forty-three dollars is the fair
4 market value and that is what the Commissioner of Revenue
5 determines. Then the Board of Supervisors says, okay, based
6 on this forty-three dollar value, fair market value, which the
7 Commissioner has gotten to by way of 43 percent of the
8 original hundred dollar cost, we then are going to do what we
9 are statutorily authorized to do and apply a rate to it, two
10 eighty-five per hundred or whatever it is.

11 Now what we have going on in this case is the
12 Board of Supervisors say, no, and it is saying two things in its
13 Motion for Judgment. It is saying we have determined that the
14 fair market value of merchants capital is 100 percent of the
15 original cost and we are going to apply our own percentage to
16 it.

17 Now they have done two things that we will
18 get to, but the purpose of the Demurrer is to say where in the
19 statute is there any express authority to do either, but I'm
20 giving you the broad brush to show what is, in effect, being
21 asked by the Board of Supervisors is that they had don two
22 things.

23 They had said we are going to say, we have
24 said that the fair market value of that inventory or the
25 merchants capital, for the purpose of merchants capital, is

1
2 100 percent. That is the duty of the Commissioner of Revenue
3 to say what the fair market value is.

4 Number two, they are saying we are going to
5 apply a percentage to it. It is in the application of the
6 percentage to the original cost that the Commissioner of
7 Revenue comes up with the fair market value which is the
8 percentage times the original cost. That is the method that he
9 uses.

10 He doesn't have to use that method but that is
11 the method that in Wise County and I think in most counties in
12 the Commonwealth of Virginia that is used. So, that is the
13 broad brush. Now the more specific is this. In order for Wise
14 County to come into Court and say now we want the law to be
15 declared either this or that, they have to show that they have
16 some express authority by statute or the Constitution to set
17 fair market value and do any assessing.

18 Now they have suggested in a reply brief that,
19 oh, we have an ordinance and anything we do has to be
20 presumed to be correct. Well, first of all, this resolution that
21 they talk about is not an ordinance. Number one, we are not
22 saying that what they have done is unconstitutional, it is
23 against the Constitution. At this point we are saying it is
24 against the statute.

25 What we are saying is why they have come

1
2 into Court is they are looking at one statute. To help the
3 Court and the parties, I have made some copies of some of the
4 statutory stuff, a copy for Sue Ella and a copy for the Court.

5 Looking at page, and I have roughly numbered
6 these, looking at page seven, now this is the statute upon
7 which the Wise County Board of Supervisors, in this
8 Declaratory Action, bases its Declaratory Action. It says
9 merchants capital subject to local taxation and rate limit.

10 The capital of merchants is segregated for
11 local taxation only, however, no rate or assessment ratio, no
12 rate or assessment ratio, in any county, city or town, for
13 merchants capital shall be greater than the rate and ratio was
14 in effect in such county on January 1, 1978.

15 Now this is it. This is the total statutory
16 basis upon which the Wise County Board of Supervisors comes
17 into Court and says now we need a declaration of our rights,
18 that this gives us the right to set the rate and the ratio. It
19 doesn't say anything about whose duty it is to do it. It simply
20 says whatever the rate and ratio was in effect in '78, you
21 can't go above and you is whoever does the doing.

22 As I said in my reply memorandum, this is a
23 housekeeping measure. It is saying to a house of a Board of
24 Supervisors, you can't, in your rate setting, go higher than
25 your rate in 1978, January, as of July '78 and it is saying that

1
2 you, Mr. Commissioner or Ms. Commissioner or Revenue, you
3 can't go any higher than the ratio that you were using at that
4 time.

5 Now contrary to that, you have a section of
6 the Code, which is shown on page nine of my material, which
7 is 58.1-3103, which says when the Commissioners begin to
8 work, Commissioners to make assessments. Each
9 Commissioner shall begin annually on the 1st day of January
10 to discharge the duties prescribed by law.

11 As part of his duties, each Commissioner of
12 Revenue shall ascertain and assess at fair market value all
13 subjects of taxation in his county or city on the 1st day of
14 January of each year except as otherwise provided by law.

15 Now here is an express grant empowerment
16 charge that the Commissioner of Revenue is going to be the
17 one to make the assessments. It is the Commissioner of
18 Revenue. At fair market value. Fair market value goes back to
19 I think Article Two or Article Ten, probably, I want to say
20 Section Two but let me check.

21 Yes, Article Ten, page ten of my handout.
22 Article Ten, Section Two of the Constitution of Virginia says
23 all assessments of real estate and tangible personal property
24 shall be at their fair market value that is ascertained as
25 prescribed by law.

1
2 Now let me turn to -- so at this point, what
3 I'm saying is this. The Wise County Board of Supervisors has
4 come to Court and said what appears on page seven of my
5 handout, 58.1-3509, gives us the power to set the fair market
6 value, which is an assessment really to assess merchants
7 capital. That is what they are saying.

8 Now there is a correction that I need to make
9 in my Demurrer as to a cite to a Code Section but that cite is
10 very illustrative to the reason why I don't think Wise County
11 can get its foot in the door. It is paragraph thirteen of my
12 Demurrer, the fifth page, where it talks about, it is above my
13 signature block, the statutory Code Section which I cited was
14 58.1-3503 B and that was an incorrect cite. It should have
15 been 58.1-3980.

16 You will see that statutory Code Section
17 beginning and the section following, beginning on page twenty
18 of my handout. Now the significance of this is that there is a
19 whole scheme in the statute for correction of assessments,
20 remedies and refunds.

21 Particularly in 58.1-3980 and 58.1-3981,
22 there are specific provisions where if there is any question,
23 and it mentions in both of those merchants capital, any
24 questions about the assessment of merchants capital, there is
25 a mechanism whereby the taxpayer or, for that matter, the

1
2 county, if they are concerned about a correction that was
3 made in someone's assessment, to take up those issues.

4 There is no such section that the Board of
5 Supervisors -- in other words, say the Board of Supervisors
6 comes in and says, okay, we are saying that the merchants
7 capital fair market value is now 100 percent of cost and we
8 are going to apply X percentage to it.

9 Okay, say that Wal-Mart decides they don't
10 agree with that. Well, they will go to the Commissioner of
11 Revenue. The Commissioner of Revenue will say I didn't have
12 anything to do with it, that power was taken over. The Board
13 of Supervisors did that. Then there is no place in the statute
14 for the merchant to go..

15 The Board of Supervisors certainly cannot,
16 under the Dillon Rule, the Board of Supervisors can't do
17 anything it doesn't have the power to do and I certainly don't
18 think that they are ready, that the Board of Supervisors is
19 going to have hearings from all the merchants, just as a
20 practical matter, to come in and question the determination of
21 fair market value for merchants capital.

22 Even if they were, as a practical matter, said
23 yes, we will do that, there is nothing in the statute that
24 permits it. But again there is something express in the
25 statute and clear at 58.1-3980 and following, clear that gives

1
2 the authority and tells who is going to correct any
3 assessments made, including those of merchants capital, and
4 that is the Commissioner of Revenue.

5 So, I used that example, as well as the first
6 one of 58.1-3509, to show that what the Wise County Board of
7 Supervisors is saying is, look, we have a statute here that
8 says the rates have to be the same as '78. The statute has
9 two words in it, rate and ratio, therefore, we, the Board of
10 Supervisors, can set the assessment ratios and the fair
11 market value for merchants capital.

12 Where does it say that? Where does it even
13 imply it? Compare that to the statute that says assessments
14 that the Commissioner of Revenue will make, his duty is, that
15 is page nine, each Commissioner shall annually, on the 1st day
16 of January, to discharge his duties, each Commissioner shall
17 begin on the 1st day of January to discharge the duties
18 prescribed by law. As part of his duties, each Commissioner
19 of Revenue shall ascertain and assess at fair market value all
20 subjects of taxation.

21 If the Commissioner of Revenue cannot apply
22 a percentage to the original cost of inventory, which is an
23 example, a big example, of merchants capital, he cannot or she
24 cannot set a fair market value.

25 That task, a statutory task, has been taken

1
2 from the Commissioner or Revenue. Then the Commissioner of
3 Revenue is subject himself, in this case, to lawsuits that he
4 did not fulfill his duty and permitted some other entity to
5 take it over.

6 So, I go back to my original broad brush
7 stroke statement, to put it all in perspective, the percentage
8 of the original cost is the way, is the method used by the
9 Commissioner of Revenue to arrive at fair market value.

10 What the Board of Supervisors has done has
11 said, no, we are saying that 100 percent of cost is the fair
12 market value and we are the ones that are going to set a rate.
13 What they are doing is calling a rate a ratio.

14 Now why is this subject at this point for a
15 Demurrer? The reason is that, yes, it is a Declaratory
16 Judgment but we have to declare that is generally for a case
17 where you have to declare now this statute clearly says this
18 and this statute clearly says this, now what are our rights
19 between those two statutes.

20 Well, in this case the Wise County Board of
21 Supervisors says this is the statute and it contemplates, that
22 was the used word, word used, it contemplates that the Board
23 of Supervisors can do this. But with all due respect, there
24 isn't anything in Virginia, when you come to law, that
25 contemplates anything.

1
2 It is either there, particularly under the
3 Dillon Rule, as to what localities can do. Certain powers are
4 granted to the localities and certain are reserved to the state
5 and certain are reserved to people. If it is not granted, you
6 don't got it.

7 Now another thing that the Court will find in
8 looking at pages twenty through twenty-three, which is the
9 statutory sections on correcting assessment, that is 58.1-
10 3989 and following, is that when an assessment has been
11 determined, set by the Commissioner of Revenue, that
12 assessment and, in turn, that method has a strong presumption
13 of validity.

14 So, if anybody has a strong presumption and if
15 we are going to apply presumptions here, it is not the
16 presumption of the constitutionality of a statute or an
17 ordinance. We are not questioning the constitutionality of a
18 statute or an ordinance, even if what they did is an ordinance,
19 which I argue it wasn't.

20 It was a resolution, part of a budget package
21 and a budget package is not an ordinance. It doesn't go in the
22 ordinance book. But the person who has the presumption that
23 the assessment is correct is Mr. Wilson, the Commissioner of
24 Revenue, and if you have a problem with the assessment you
25 first go to him, through the procedures outlined in 58.1-3180,

1
2 and if you don't like that, then you apply to the Court as a
3 taxpayer.

4 That is how you correct assessments. You
5 don't decide, as the Board of Supervisors, that, well, we are
6 going to do your job for you. My point, my narrow point here
7 today is, unless the Wise County Board of Supervisors can
8 show the Court express statutory language that it, the Wise
9 County Board of Supervisors, is authorized and empowered by
10 the Constitution and particularly the Statutes of Virginia, to
11 assess and, as a means of assessment, using an assessment
12 ratio, merchants capital, it can't have anything declared.

13 There is nothing from which -- you can't
14 imply it. The reason for that is there is an express statute on
15 the books that says the Commissioner of Revenue is to do the
16 assessing. Now if there was nothing on the books of who was
17 supposed to do the assessment and fair market value, and if
18 there was nothing on the books about how it is corrected or
19 anything like that, who would correct it, then you could say,
20 well, it has really never been determined. But you don't have
21 that here.

22 Now in order to get into Court the Wise
23 County Board of Supervisors will probably say, well, we have
24 an informal Attorney General's opinion that says, well, I
25 talked, this is informal by the way, I talked around to some

1
2 old assessors and they say that real estate once was assessed
3 by Boards of Supervisors.

4 First of all, it is informal. Second of all,
5 there is no statute that supports it. Third, for purposes of
6 argument today and so that the Court can be fully apprised,
7 there is, on page twenty-five, a report of the Attorney
8 General, from May 3, 1974, which talks about assessment
9 ratios.

10 Now one of the people in the Attorney
11 General's office, in the informal letter, made an assumption
12 but this is from the report of the Attorney General. It says
13 your letter of April 23 requested an opinion whether the Board
14 of Supervisors could raise or lower the ratio of assessment on
15 real property.

16 There is no provision of law which
17 authorizes the use of an assessment ratio. To the contrary,
18 Article Ten, Section Two of the Constitution, requires that all
19 assessments of real estate be at their fair market value to be
20 ascertained as provided by law.

21 As a practical matter, however, the
22 assessment ratio is used in a great number of localities,
23 although it is not mentioned in any provision of law, it is built
24 into the assessment process. Except in localities which have
25 adopted the annual assessment under 58-769.2 or other

1
2 enabling legislation, real estate assessments and the
3 certification of value, pursuant to such assessments, are
4 made periodically by the Board of Assessors appointed by the
5 Circuit Court under the statute there.

6 The assessors are directed to determine the
7 fair market value of the real estate and certify the value to
8 the Circuit Court and the Land Book must reflect the value so
9 certified. Any assessment ratio to be used for tax purposes is
10 therefore determined by the Board of Assessors and reflected
11 in the value certified to the Court.

12 Because the assessors are an independent
13 body supervised by the Court, the Board of Supervisors has no
14 authority to direct them in the ascertainment of value, the
15 Supervisors have no authority over the ascertainment of
16 assessment ratio.

17 We argue that this is an Attorney General's
18 statement that when it comes to, just like the Board of
19 Assessors is a separate body, so is the Commissioner of
20 Revenue. The Commissioner of Revenue is charged with doing
21 the assessment.

22 Now the question might come up, well, where
23 does it say he can use any such method that he wants to. The
24 method of assessment is up to him and that is the crux of the
25 Cross case, I believe it is Cross, which I have placed in the

1
2 documents at page -- Cross v. City of New Port News. It is
3 starting at page thirteen of my handout material. I believe it
4 is on page 207 of my handout.

5 Okay, on page 206, footnote 5, it says in our
6 consideration of this question, we again reject the argument
7 that the fair market value forbids an assessment at a
8 percentage of fair market value. That goes into the same
9 argument that at one time people would say you couldn't use
10 percentages.

11 In line with the Cross case, we also have the
12 case from the Corporation Court of the City of Newport News,
13 dated June 9, 1951, and I have a certified copy to give to the
14 Court. It is really just a provision of law.

15 It states basically this cause came on this
16 day to be heard on a Petition, the Answer of the defendant, the
17 testimony heard ore tenus. Upon consideration whereof the
18 Court or the Judge order, decree and declare, I'm looking
19 particularly at number three, that the City Council has the
20 right to suggest but not to direct the Board of Assessors, in
21 this case, what percentage of the fair market value the Board
22 shall use on real estate assessment in the city.

23 So, we use this case and we use the Cross
24 case, the Cross case is a Virginia Supreme Court opinion, this
25 Newport News case, for the proposition that of course

1
2 percentages can be used.

3 I really don't think that that is what is being
4 argued but it also goes to show that the person who is doing
5 the percentage setting is not the Board of Supervisors and, in
6 fact, in that case, which the Court is now looking at, it said
7 they can suggest but they cannot set the rates or the
8 percentages.

9 Now the case that has been cited, the Virginia
10 Supreme Court case that I think has been cited by the Wise
11 County Board of Supervisors, which I think is the Newport
12 News Wright case, is also a case that -- I'll just leave it at
13 that. That case talks about -- what happened in that case, I
14 think the City of Newport News or Norfolk said or some
15 citizens and taxpayers said we want to have a referendum and
16 we want to set our own rate for taxation.

17 The Court said, no, no, no, no. The Board of
18 Supervisors is given the right under statute to set the rate
19 and they are the only ones that can set the rate, you can't do it
20 by referendum. Now the Wise County Board of Supervisors
21 certainly can't get out of that case, that it has the right to set
22 the assessment ratio.

23 We admit, the Commissioner of Revenue
24 certainly admits that the right to set the rate is the Board of
25 Supervisors but the rate has to be applied to a valuation of

1
2 property at its fair market value and the way that that is
3 gotten at is an assessment ratio applied against an original
4 cost.

5 Now for these reasons it is the opinion of the
6 Commissioner of Revenue that the Wise County Board of
7 Supervisors can't get its foot in the door on a Declaratory
8 Judgment action because it has no express statutory authority
9 to be doing the assessing.

10 That is what it is saying, we want to assess
11 merchants capital in Wise County, we want to raise some
12 revenue, we don't like, we don't like your fair market
13 valuation, whatever the percentage is, 43 percent of one
14 hundred dollars original value, we don't like that, we are going
15 to do it ourselves because we want some revenue.

16 Well, the Commissioner of Revenue's job is
17 not to raise revenue. The Commissioner of Revenue's job is to
18 assess property at its fair market value and not to get into
19 the raising of revenue and say, well, we will do this so we can
20 get revenue.

21 So, the Board of Supervisors is saying, well,
22 if you are not going to do anything, we are going to take over
23 your job and we are going to raise revenue, we are going to
24 say 100 percent, we are going to say the fair market value is
25 100 percent and we can't get over 50 percent of that, because

1
2 the statute in '78 says we can't do that, but we will just
3 change the fair market value and that is what they are doing.

4 They can't do that. That is an assessment.
5 Until they can come into Court and say this statute says that
6 we, the Wise County Board of Supervisors, can assess the
7 value of property, merchants capital in Wise County, I don't
8 think there is any question for the Court, any issue of law, any
9 determination. It is not in conflict with anything.

10 If they can show a statute, then the Court has
11 to go the next step. The Court can say, well, then we have to
12 have evidence on, on what I'm not sure because I don't know
13 how they would put on evidence to show that they comply
14 with, that under 3509 they have a right to assess taxes in
15 Wise County.

16 Thank you very much.

17 THE COURT: Ms. Kobak.

18 I guess we are still addressing the issue of
19 the Demurrer. I think the Demurrer would have to be ruled
20 upon first.

21 MS. KOBAC: I just have some documents I
22 would like to share. I will just do that first and refer to them
23 as we go along.

24 Your Honor, the Motion for Judgment filed by
25 the Board of Supervisors very simply asks that, asserts that

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2 the Board of Supervisors has the exclusive authority to set
3 the assessment ratio for merchants capital and they ask for
4 Declaratory Judgment that Mr. Wilson, as Commissioner of
5 Revenue, apply that rate and assessment ratio in his
6 assessment of merchants capital.

7 They set the rate and assessment ratio
8 pursuant to 58.1-3509. They did this action on June 25, 1993,
9 and then again on May 26, 1994, which is represented by the
10 document of the Minutes from the Board of Supervisors.

11 There is a substantial -- the Board did this by
12 legislative action. There is a substantial amount of case law
13 to support the presumption that any action that the Board of
14 Supervisors did was legal and valid.

15 I would like to refer to the case that I gave
16 you in the back of Ferguson which stands for the premise that
17 any action on the part of the Board of Supervisors or any
18 action on the part of a legislative body is presumed valid.

19 Whether you are talking about ordinance or
20 whether you are talking about a statute or whether you are
21 talking about any action on the part of the Board of
22 Supervisors, that action, as a legislative action, is presumed
23 valid.

24 Ferguson is a very strong case which fully
25 supports that. That case is an old case. It is a 1922 case. It

1
2 has been cited many times and has never been limited in any
3 of the subsequent citations and, in fact, I gave a copy of the
4 Code Section, 15.1-510, which gives the general powers to the
5 county for their legislative powers and that case, Ferguson, is
6 cited in the annotations.

7 It is very widely, very -- it is prevalent law
8 that has not been overturned, that the actions of the Board of
9 Supervisors is valid. The other reasons why that the Board's
10 action is valid is that because they, the local governing body,
11 have the power to do taxation and 58.1-3509 delegates to the
12 local governing body the authority to tax for merchants
13 capital.

14 In that very specific delegation of power, it
15 states rate and assessment ratio.

16 THE COURT: Which Code Section?

17 MS. KOBAK: That is 58.1-3509. That is the
18 power, that is the authority for the governing body to
19 establish the tax. I think we are talking about two different
20 things here. It is inherent that taxation is a legislative
21 function.

22 The General Assembly could not have
23 delegated to Mr. Wilson the power to set taxation. He is a
24 member of the executive side of the government and his
25 authority is pursuant through the Constitution and subsequent

1
2 statutes as an executive member, not a legislative body.

3 I think the problem that we are dealing with
4 here is that we are having difficulty over the definition of the
5 assessment ratio and assessment. What assessment ratio is
6 is the ratio that -- what the Board of Supervisors does is that
7 they set a rate and they set a ratio, an assessment ratio,
8 which is the ratio that the Commissioner is to apply in his
9 assessment.

10 In fact, the Board of Supervisors do not
11 disagree with anything that Mr. Wilson asserts in terms of his
12 right to set assessment. We agree fully that he has complete
13 right to set assessment but we are saying that assessment
14 ratio has nothing to do with assessment.

15 All he has been doing by giving assessment
16 ratio is he has been told the rate, the ratio to apply against
17 his assessment. He goes ahead and sets his assessment and he
18 sets his assessment according to the dictates of the statute
19 and directions given to it. We did not interfere with that and
20 we don't think that there is any problem with that.

21 But we think that he is misinterpreting the
22 definition of the word assessment ratio. We, you know,
23 continue to restate that the legislative power for taxation is
24 derivative from the Constitution, that it is very clear, it is
25 very clear that the Commissioner or Revenue does not have the

1
2 power to impose taxes, his role is to assess and it was very
3 clearly laid out what that role is and we don't have any
4 problem with that.

5 He pointed to an AG's opinion that was trying
6 to define the assessment ratio but we point out that that is a
7 twenty year old AG's opinion. That is talking about
8 assessment ratio as to real estate property, which is a whole
9 different concept and a whole different idea, and does not
10 contemplate the issue of assessment ratio as utilized in
11 merchants capital.

12 What this really is boiling down to is a
13 dispute over the use of the word assessment ratio but Mr.
14 Wilson does not have the power, as Commissioner of Revenue,
15 to unilaterally decide that he is not going to apply the rate
16 and assessment ratio as established by the Board of
17 Supervisors.

18 Ferguson and all the cases that we have cited
19 are very clear that there is a very strong presumption in favor
20 of the Board of Supervisors. Mr. Wilson is to apply that
21 unless, you know, unless he or some citizens or someone else
22 challenges that.

23 You know, otherwise he has no authority just
24 to say, oh, they are wrong, I'm going to not do that, the Board
25 of Supervisors, you know, I'm not going to apply this

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2 assessment ratio because, you know, they are wrong in doing
3 that when, in fact, 58.1-3509 specifically grants to the
4 county, the legislative body, the authority to set an
5 assessment ratio and rate.

6 You know, therefore, we think that we very
7 clearly are entitled to a Declaratory Judgment that Mr. Wilson
8 comply with the requirements to do the assessment and apply
9 the rate and assessment ratio as established by the Board of
10 Supervisors.

11 We see very clearly that he does not have any
12 authority to just say I'm not going to apply it which is what
13 he has done.

14 Thank you.

15 MR. KEULING-STOUT: Your Honor, I will first
16 address the Ferguson case. On page -- I have not read this one
17 cover to cover but I have on page 568 of the Ferguson case,
18 Section 8 at the bottom left of the page, it says applying a
19 principle to the facts of this case, it is to us apparent that
20 the establishment of such toll roads is, by the Virginia
21 Constitution and statute, committed to the legislative
22 discretion of Boards of Supervisors and Courts of Equity in the
23 absence of some fraud, abuse of power, so on and so forth.

24 Looking back on page 566, down to number 6
25 at the bottom left-hand of the page, it says it is also true as

1
2 a general proposition and subject only to constitutional
3 limitation, the Legislature had supreme control over streets
4 and highways.

5 Now I suspect, if I read this case more
6 carefully, I am going to see that this case had what this
7 present case before the Wise County Circuit Court does not
8 have. The Court said it is clear from the statutes that the
9 power to, I think, regulate streets in this thing or fix the
10 streets, is with the Board of Supervisors and the equity
11 courts, apparent that the establishment of toll roads is given
12 to the Board of Supervisors.

13 This case, Ferguson, begs the question. It
14 doesn't answer it. The question is is there anything that has
15 been presented by the Wise County Board of Supervisors,
16 really, let me narrow it down, the question is does 58.1-3509,
17 which is on page seven of my handout, grant, empower, the
18 Wise County Board of Supervisors to assess taxes or to do
19 anything about -- and ratio is part of that assessment.

20 Now their whole case relies on the language
21 the capital of merchants is segregated for local taxation only.
22 Now that doesn't give the power -- that gives the power to the
23 localities as opposed to the state and that goes back to
24 Article Ten, Section One of the Constitution, which is on page
25 one and two of my handout, and it says the General Assembly,

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2 on page two of my handout, the General Assembly may define
3 and classify taxable subjects except as to classes of property
4 herein expressly segregated for either state or local taxation,
5 the General Assembly may segregate several classes of
6 property so as to specific so on and so forth.

7 So, right there is the power under the
8 Constitution that it may segregate to the localities certain
9 things for local taxation only. Now their 58.1-3509, which is
10 on page 7, simply is the statutory, it does what the
11 Constitution says the Legislature can do, we, the Legislature,
12 the Commonwealth of Virginia, hereby segregate for local
13 taxation only the capital of merchants.

14 It doesn't say who is to assess it. It doesn't
15 say who is to collect it. It doesn't say who is to give a rate to
16 it or anything. It simply says merchants capital. Without this
17 statute, merchants capital would be a matter that can only be
18 taxed by the Commonwealth of Virginia.

19 So, the only thing that first sentence does is
20 to say merchants capital is a subject for local taxation. Now
21 who assesses the property upon which the tax will be placed?
22 The Commissioner of Revenue. How does the Commissioner of
23 Revenue do it? By making up, having a ratio or a percentage of
24 original cost.

25 Who collects the taxes? I think that is the

1
2 Treasurer. It doesn't say who is going to collect it. I think
3 that is the Treasurer. Who is going to set the rate? Well, you
4 have got to go to another statute to find out who is going to
5 set the rate and the other statute, as shown in my Demurrer,
6 well, let's see, my handout, the Board of Supervisors is given
7 express authority to set the rate, 58.1-3008, on page 6 of my
8 handout, the governing body of the county may impose
9 different rates. It has the power to do the rates even.

10 The Statute of Virginia, 58.1-3008, page 6 of
11 my handout, says the Board of Supervisors sets the rates.
12 Okay, page nine of my handout says who does the assessment.
13 The Commissioner of Revenue. It is not relevant -- it is
14 relevant at the point I speak but it is not necessarily relevant
15 to the case but I suppose it is now.

16 The person who collects the taxes is the
17 Treasurer and I'm sure there is a portion of the Code that
18 gives the Treasurer express authority to collect the taxes.
19 So, 3509 which is on page 7, simply says merchants capital is
20 segregated for local taxation. It does not say who collects it,
21 assesses it or puts a rate on it. Fixes the tax, that is what
22 the -- when you fix the tax you put a rate on it.

23 Now what does it -- it has a however,
24 however, no rate or assessment ratio in any county, city or
25 state or city or town for merchants capital shall be greater

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2 than the rate was in effect on January 1, 1978. What does
3 that say? That says the Board of Supervisors, you have been
4 setting rates, you can't make that rate now any more than it
5 was on January 1, '78.

6 Commissioner of Revenue over here, you have
7 been setting these ratios, now you can't do any, you can't have
8 any percentages higher than what you had in 1978. You can
9 make them lower but you can't make them higher. That is the
10 way that he sets his fair market value is by those
11 percentages. Without the percentages he has no way to set a
12 fair market value, he can't do his job.

13 They have a rate. If they can't do rates, there
14 is no way they can do their job of setting the rate that is
15 applied against the fair market value. Using our example, one
16 hundred dollars cost, original cost, the Commissioner of
17 Revenue decides the fair thing, the fair market value for this
18 bulk of inventory, for this classification of inventory is 43
19 percent. So, that is forty-three dollars.

20 The Board of Supervisors says what rate are
21 we going to place against that forty-three dollars. They apply
22 a rate of two eighty-five per hundred or whatever. So, they
23 apply the rate against the fair market value which is the
24 forty-three dollars.

25 So, 3509 is the crux of the Wise County Board

1
2 of Supervisors' case and it rises or files on their proposition
3 that that one sentence or two sentences is a statutory
4 mandate that the Wise County Board of Supervisors both set
5 the rate and the ratio of assessment which means do the
6 assessment.

7 It is our position that that only says what the
8 two houses can't do and it tells -- it empowers nobody. It
9 just says this type of value, this type of merchants capital,
10 this type of property is the correct word, this type of
11 property can be taxed by you folks down there in Wise County.

12 Who is going to do it? The Commissioner of
13 Revenue is going to set a value. He does that by ratios. The
14 Wise County Board of Supervisors is going to apply a rate to
15 that and the Treasurer is going to try to collect it.

16 Those, you go express statutory Code
17 Sections and there is one for each of them, 58.1-3008, the
18 Board of Supervisors to set rates, 58.1-3103 for the
19 Commissioner of Revenue to do the assessing at a fair market
20 value and a Code Section, I'm sure there are other Code
21 Sections for the Treasurer to do his or her job.

22 This is not an enabling statute for the Board
23 of Supervisors to take over the express authority and function
24 of the Commissioner of Revenue as set forth in 58.1-3103.

25 THE COURT: First of all, let me say this. I

1
2 appreciate very much the work that has gone into this. Ms.
3 Kobak has prepared an excellent brief in regard to the matter
4 and so has Mr. Keuling-Stout. I spent many hours going over
5 the material that has been furnished to me and the Code
6 Sections that I believe apply in this case.

7 Of course, it does come down I think to the
8 question of whether, the section is 58.1-3509, the Board of
9 Supervisors can set both the rate and the assessment ratio.

10 It is the opinion of this Court that that Code
11 Section is not broad enough to give that authority. The Code
12 Section set forth the authority of the Boards of Supervisors
13 and the Code Section set forth the authority of the
14 Commissioner of Revenue and his duties.

15 As such, it is the opinion of the Court that
16 his duties is to set the assessment ratio and it is the duty of
17 the Board of Supervisors to set the tax rate.

18 To do otherwise, I think would be in violation
19 of all the case law that we have, quite frankly, and it
20 certainly would go beyond what we consider under the Dillon
21 Rule in Virginia, which I think is supported by the 1896 case
22 of City of Winchester versus Redford.

23 Basically, the Dillon Rule just says that you
24 have no authority unless that authority has been expressly
25 delegated to you by the Legislature of Virginia and the

1
2 Legislature of Virginia has expressly stated what the duties
3 and responsibilities of the Commissioner of Revenue are and
4 one of the duties that they have expressly stated for him to
5 carry forth is set forth in 3103.

6 Am I correct on that code section?

7 MR. KEULING-STOUT: Yes, Your Honor.

8 THE COURT: 3103 states as follows: Each
9 Commissioner shall begin annually on the 1st day of January
10 to discharge the duties prescribed by law, as part of his
11 duties each Commissioner of the Revenue shall ascertain and
12 assess at fair market value all subject of taxation in his
13 county or city on the 1st day of January of each year except as
14 otherwise provided by law.

15 Quite frankly, I can find nothing otherwise
16 provided by law with the exception of the language that is
17 being relied upon in the brief by the Board of Supervisors and I
18 just do not think it stands for that at all.

19 I think the Dillon Rule is still the law in the
20 Commonwealth of Virginia and until such time as the
21 Legislature sees fit to change the responsibilities and duties
22 of the Commissioner of Revenue, then I think it is the duty of
23 the Commissioner of Revenue to make the assessment.

24 I understand the arguments that have been put
25 forth in the briefs. This may not solve the problem. I'm not

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2 sure that it will. I would trust that it would but the problem,
3 if there is a problem, needs to be clarified. I think that the
4 General Assembly of Virginia is the person and proper body to
5 clarify that.

6 Until such time as the Legislature of this
7 state changes the law, then I think that duty stays with the
8 Commissioner of Revenue. I think the Demurrer was the
9 proper manner in which to proceed on this matter.

10 The Demurrer does, what it is it just
11 challenges the legal sufficiency of the pleading and, in this
12 particular case, Virginia practice is that Virginia has the
13 common law general Demurrer and which reached this matter,
14 the subject matter here.

15 If the Court feels that the party, as a matter
16 of law, has no authority, that the authority rests with the
17 Commissioner of Revenue, a decision on the issue of law on
18 the Demurrer, I think resolves the issue. I am going to sustain
19 the Demurrer.

20 If you will draw up a proper Order for the
21 Court, Mr. Keuling-Stout, I would appreciate it and circulate it
22 to Ms. Kobak.


23 -----

24 [The proceedings were concluded at 11:00
25 a.m.]

1
2 CERTIFICATE OF REPORTER

3 I, Judy C. Ryder, Court Reporter, do hereby certify
4 that the proceedings were taken by me by Stenomask and
5 thereafter reduced to typewriting; said transcript is a true
6 record of the proceedings; that I am neither counsel for,
7 related to, nor employed by any of the parties to the action,
8 nor financially or otherwise interested in the outcome of the
9 action.

10 Given under my hand this 29 day of July, 1994.

11
12 
13 JUDY RYDER
14 COURT REPORTER

15 My commission expires:
16 January 31, 1998.
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25

VIRGINIA: IN THE CIRCUIT COURT OF WISE COUNTY

THE WISE COUNTY BOARD OF SUPERVISORS

PLAINTIFF

V.

DELMER WILSON, COMMISSIONER OF REVENUE

DEFENDANT

MOTION FOR RECONSIDERATION AND REHEARING

Comes the Plaintiff, the Wise County Board of Supervisors, and respectfully request a reconsideration and rehearing from the decision of this Honorable Court indicated on July 28, 1994, wherein no final order has been entered.

FACTS

On May 06, 1994, the Plaintiff, the Wise County Board of Supervisors, filed a Petition for Declaratory Judgement in the Circuit Court for Wise, VA. On May 27, 1994, the Defendant, Delmer Wilson as Commissioner Revenue, filed a Demurrer. Both parties filed briefs in support of their

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positions. A hearing was held on July 28, 1994, in the Wise County Circuit Court. Both parties were represented by counsel, and after oral arguments, the Court indicated that he found in favor of the Defendant and requested an Order be prepared.

The reason for reconsideration and rehearing is for the following:

1. If the Final Order is entered as prepared, the interpretation of the the applicable Virginia Code will arise to a level of unconstitutional result; and
2. Other reasons to be stated at bar; and

Your Plaintiff will ever pray.

THE WISE COUNTY BOARD OF SUPERVISORS
- By Counsel -

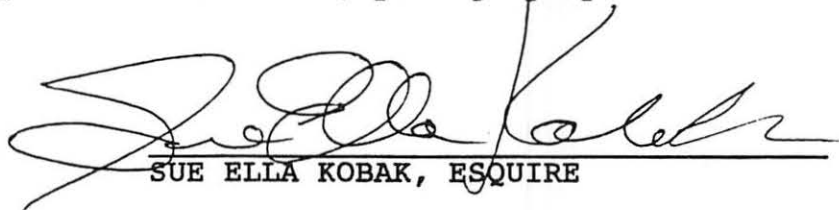


SUE ELLA KOBAK, ESQUIRE
KOBAK & OGLEBAY
P. O. BOX 428
PENNINGTON GAP, VA. 24277-0428
(703) 546-3642

Page Three

CERTIFICATE OF SERVICE

I, Sue Ella Kobak, Esquire, counsel of record for Plaintiff, do hereby certify that I have on this the 29th day of August, 1994, mailed a true and accurate copy of the foregoing Motion for Reconsideration and Rehearing to Henry S. Keuling-Stout, Esquire, 123 Wood Avenue, East, P. O. Box 400, Big Stone Gap, Virginia 24219-0400, Counsel for Defendant, by first-class mail, postage prepaid.


SUE ELLA KOBAK, ESQUIRE

VIRGINIA: IN THE CIRCUIT COURT OF WISE COUNTY

THE WISE COUNTY BOARD OF SUPERVISORS

PLAINTIFF

VS.

DELMER WILSON, COMMISSIONER OF REVENUE

DEFENDANT

MOTION TO AMEND PETITION FOR DECLARATORY JUDGMENT

Comes now the Plaintiff, the Wise County Board of Supervisors, and respectfully request the abovenamed Honorable Court to hear a Motion allowing Plaintiff to amend their Petition for Declaratory Judgment on the following grounds:

1. Should the proposed Final Order be entered as currently prepared, the interpretation of the applicable Virginia Code will arise to a lever of unconstitutional result; and

2. Other reasons to be stated at bar; and

Your Plaintiff will ever pray this Honorable Court will grant the relief requested.

Page Two

THE WISE COUNTY BOARD OF SUPERVISORS
- By Counsel -



SUE ELLA KOBAK, ESQUIRE
KOBAK & OGLEBAY
P. O. BOX 428
PENNINGTON GAP, VA. 24277-0428
(703) 546-3642

CERTIFICATE OF SERVICE

I, Sue Ella Kobak, Esquire, Counsel of record for Plaintiff, do hereby certify that I have on this the 29th day of August, 1994, mailed a true and accurate copy of the foregoing Motion to Amend Petition for Declaratory Judgment to Henry S. Keuling-Stout, Esquire, 123 Wood Avenue, East, P. O. Box 400, Big Stone Gap, Virginia 24219-0400, Counsel for Defendant, by first-class mail, postage prepaid.



SUE ELLA KOBAK, ESQUIRE

VIRGINIA:
IN THE CIRCUIT COURT
OF WISE COUNTY

WISE COUNTY BOARD)
OF SUPERVISORS) PLAINTIFF
V.) CA No.
C94-280
DELMER WILSON) DEFENDANT

Motion to Dismiss


COMES NOW the Defendant Delmer Wilson, Commissioner of Revenue of Wise County, by counsel, and Moves to Quash or otherwise Dismiss the two Motions filed by the Plaintiff dated August 29, 1994 on the ground that the two Motions are "Motions for reconsideration" and those Motions must be filed in accordance with the local rules of this court effective September 1, 1993. According to those rules any Motion For Reconsideration "should include all authorities and argument which the moving party wishes the court to consider." The Plaintiff's Motions include no authorities or arguments. The Plaintiff simply states "other

reasons to be stated at bar." And though the Plaintiff does state that "the interpretation of the applicable Virginia Code will arise to a level (sic) of unconstitutional result," this is not a new argument. It is simply the argument which the Plaintiff has already set forth its earlier brief filed with the court. There is no legal authority in support of the contention.

WHEREFORE, the Defendant respectfully requests this Court to Dismiss the Motions filed by the Plaintiff dated August 29, 1994, unless a Motion for Reconsideration is forthcoming which complies with the local rules of court, and that the Court enter the Final Order, a copy of which has been delivered to Plaintiff's attorney and a duplicate original of which is attached to this Motion.

THE HONORABLE DELMER WILSON,
WISE COUNTY COMMISSIONER OF
REVENUE, BY COUNSEL


KEULING-STOUT, P. C.
123 WOOD AVENUE, EAST
P. O. BOX 400
BIG STONE GAP, VA 24219

BY: 
HENRY S. KEULING-STOUT
COUNSEL FOR DELMER WILSON

L:\1032\79-017

CERTIFICATE

The undersigned certifies a true copy of the foregoing pleading has been served by mailing the same first-class mail, postage prepaid, to Sue Ella Kobak, Esquire, P. O. Box 367, Jonesville, VA 24263, counsel for plaintiff, on this the ¹³~~12~~th day of September, 1994.


Henry S. Keuling-Stout

L\1032\79-001

V I R G I N I A :

IN THE CIRCUIT COURT OF WISE COUNTY

THE WISE COUNTY BOARD OF SUPERVISORS

PLAINTIFF

VS.

DELMER WILSON, AS COMMISSIONER OF REVENUE

DEFENDANT

**AUTHORITY AND SUPPORT FOR MOTION TO AMEND
PETITION FOR DECLARATORY JUDGMENT**

Pursuant to Rule 1:8 of the Rules of the Supreme Court of Virginia, the Court is to allow liberal amendment of Plaintiffs' prior Pleadings in that Plaintiffs' **LEAVE TO AMEND** shall be liberally granted in the furtherance of the ends of justice.

Therefore, Plaintiffs request this Honorable Court to allow said Motion for **LEAVE TO AMEND PETITION FOR DECLARATORY JUDGMENT** be granted; and

Your Plaintiffs will ever pray.

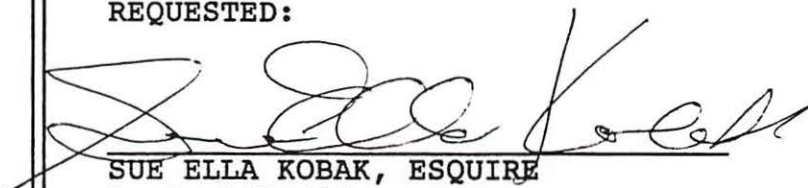
RECEIVED AND FILED

9-26-1994
C. GARY RANKIN, CLERK
By *B. Hensley*
9:00 AM Deputy Clerk

Page Two - Leave to Amend Complaint -

THE WISE COUNTY BOARD OF SUPERVISORS
-By Counsel-

REQUESTED:

A handwritten signature in cursive script, appearing to read 'Sue Ella Kobak', is written over a horizontal line.

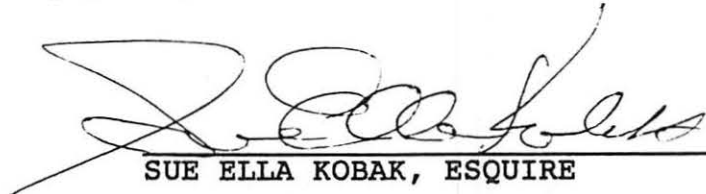
SUE ELLA KOBAK, ESQUIRE
P. O. BOX 428
PENNINGTON GAP, VA 24277-0428
(703) 546-3642

CERTIFICATE OF SERVICE

I, Sue Ella Kobak, Esquire, do hereby certify that I have on this the 22 day of September, 1994, mailed or hand delivered a true and accurate copy of the foregoing **AUTHORITY AND SUPPORT FOR MOTION TO AMEND PETITION FOR DECLARATORY JUDGMENT** to Henry S. Keuling-Stout, Esquire, 123 Wood Avenue, East, P. O. Box 400, Big Stone Gap, VA 24219, Counsel for Defendant; Scott H. Davis, County Administrator for Wise County, P. O. Box

Page Three - Motion for Leave to Amend -

570, Wise, VA 24293-0570; and to the Honorable William C. Fugate, Judge, Thirtieth Judicial Circuit, P. O. Box 306, Jonesville, VA 24263-0306, by first class mail, postage prepaid or by personal service.



SUE ELLA KOBAK, ESQUIRE

VIRGINIA: IN THE CIRCUIT COURT FOR WISE COUNTY

THE WISE COUNTY BOARD OF SUPERVISORS

Plaintiff

VS.

DELMER WILSON, AS COMMISSIONER OF REVENUE

Defendant

Points of Authority for Motion for Reconsideration and
Rehearing

The facts in Plaintiff's Points of Authority in
Support of Plaintiff's Motion for Declaratory Judgement are
adopted by reference.

I. Question Presented

Whether the ruling of this Court on July 28, 1994,
would create an interpretation of Virginia Code Section
58.1-3509 inconsistent with the Virginia Constitution?

Argument

Article X, Section 1 of the Virginia Constitution
specifically grants powers of taxation to the sovereign.

RECEIVED AND FILED

9-26-94

CLERK OF COURT

By *B. Hensley*

9:00 AM

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Page Two

This power of taxation is an inherent attribute of sovereignty. Wright v. Norfolk Elec. Bd., 223 Va. 149 (1982); Greenough V. Tax Assessors, 331 U.S. 486 (1947).

Pursuant to Article VII, Section 2, of the Virginia Constitution, the power of the Commonwealth to create and control local governments is limited by the state constitution. Thus, while Article VII, Section 2 provides that the General Assembly may grant to local government the "power of . . . taxation and assessment, the taxing power is constrained by the provisions of Article X. Section 1." (emphasis added.) Wright, at 149.

The power of taxation noted in Article VII, Section 2, mandates how certain powers are to be exercised. Imposing taxes is specifically noted as part of the mandate. The procedure for imposing taxes is further mandated as a responsibility of the "governing body" pursuant to Article VII, Section 7 of the Virginia Constitution. Wright, at 149. Reading Article VII, Section 2 and section 7 together with the constraints of the provisions of Article X of the Virginia Constitution gives this Court clear direction as to the specific meaning of Virginia Code Section 58.1-3509.

Page Three

As in Wright, it is presumed that the General Assembly is familiar with these constitutional limitations and did not intend for Virginia Code Section 58.1-3509 to have an unconstitutional result. Allowing the Commissioner of Revenue to set the assessment ratio allows him to control the merchants' capital tax rate, which would be an unconstitutional result.

Under Virginia Code Section 58.1-3509, the process is supposed to function as follows:

1. The Board of Supervisors set the tax rate (herein set at \$2.85.) and an Assessment Ratio (herein defined as the ratio the rate is to be applied against the assessment as set by the Commissioner of Revenue pursuant to the fair market value.) Depending on the assessment set by the Commissioner of Revenue, the Commissioner of Revenue is supposed to apply, "tax rate X % as established by the assessment ratio X assessment = tax liability".
2. Under the present ruling the tax rate is set at no more than \$2.85, or the Board of Supervisors could set the tax

Page Four

rate at less than \$2.85, as mandated by Virginia Code 58.1-3509. Then the Commissioner sets the assessment ratio as against some assessment he says he determines is the fair market value.

The result is that the Wise County Board of Supervisors, the local governing body, has no control over the merchant's capital tax. If the ruling is allowed to stand, the Commissioner of Revenue can control the tax rate by adjustment of the assessment ratio. This result is unconstitutional.

The Virginia Constitution mandates no other reading of Virginia Code Section 58.1-3509 than that the Board of Supervisors sets the tax rate and assessment ratio because the power to tax rest with the local governing body, not a constitutional officer.

II. Question Presented

Does Dillon's Rule allow for any other interpretation of Virginia Code Section 58.1-3509 than that the Wise County Board of Supervisors have the exclusive authority to set the merchant's tax rate and assessment ratio?

Page Five

ARGUMENT

Dillon's Rule, as applied in Virginia, stands for the premise that a local governing body can exercise the specific powers delegated and no others. The local governing body has those powers that are: "first, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes. . .". Blacks Law Dictionary, Fifth Edition, West Publishing Co., St. Paul, Minn. 1979.

Reading Article VII, Section 2 and section 7 together with the constraints of the provisions of Article X of the Virginia Constitution give this Court clear direction as to the specific meaning of Virginia Code Section 58.1-3509 to state that the local governing body is to set the tax rate and assessment ratio. Wright, at 149. This application of the Virginia Constitution to interpret Virginia Code Section 58.1-3509 is consistent with the Dillon Rule.

III. Question Presented

Is there a clear presumption that the actions of the local governing body is correct?

Page Six

Argument

The Merchant's Capital tax and assessment ratio has been established by action of the Wise County Board of Supervisors, the local governing body. Consistently, case law supports the position that the actions of the Board of Supervisors to which they are invested with discretion is conducted in good faith and presumed legal. Ferguson V. Board of Supervisors, 133 Va 561 (1922) at p. 569. The Virginia Constitution specifically vests the power of taxation as a governmental function. Thus, the action of the Wise County Board of Supervisors setting a merchants' capital tax rate and assessment ratio is within their discretion and presumed valid.

The Commissioner of Revenue does not have the authority to decide that the Board of Supervisors' action is incorrect and not apply the decision as duly adopted.

CONCLUSION

For the foregoing reasons, the Wise County Board of Supervisors is entitled to a Reconsideration and Rehearing and a Declaratory Judgement that the action of the Wise

Page Seven

County Board of Supervisors was valid and that the Commissioner of Revenue is Ordered to comply with the requirements and duties of his office.

THE WISE COUNTY BOARD OF SUPERVISORS
- By Counsel -



SUE ELLA KOBAK, ESQUIRE
P. O. BOX 428
PENNINGTON GAP, VA 24277-0428
(703) 546-3642

CERTIFICATE OF SERVICE

I, Sue Ella Kobak, Esquire, do hereby certify that I have on this the 22 day of September, 1994, mailed or hand delivered a true and accurate copy of the foregoing POINTS OF AUTHORITY FOR MOTION FOR RECONSIDERATION AND REHEARING to Henry S. Keuling-Stout, Esquire, 123 Wood Avenue, East, P. O. Box 400, Big Stone Gap, VA 24219-0400, Counsel for Defendant; Scott H. Davis, County Administrator for Wise County, P. O. Box 570, Wise, VA 24293-0570; and to the Honorable William C. Fugate, Judge, Thirtieth

Page Eight

Judicial Circuit, P. O. Box 306, Jonesville, VA 24263-0306, by first class mail, postage prepaid or by personal service.



SUE ELLA KOBAK, ESQUIRE

KEULING - STOUT

A PROFESSIONAL CORPORATION

Phone: 703/523-1676

FAX: 703/523-1608

HENRY S. KEULING-STOUT
Attorney At Law
Licensed in VA and NY

October 26, 1994

123 Wood Avenue, East
P.O. Box 400
Big Stone Gap, Virginia 24219

The Honorable William C. Fugate, Judge
Thirtieth Judicial Circuit
P.O.Box 306
Jonesville, VA 24263-0306

RECEIVED
10-28 94
B. Henry
3:00 AM
FBI

RE: Wise County Board of Supervisors
v.
Delmer Wilson, Commissioner of Revenue
File No. F1032-79

Dear Judge Fugate:

By a letter dated September 12, 1994 I advised attorney Kobak that I would move to quash or otherwise dismiss two motions filed by attorney Kobak dated August 29, 1994 as they did not comply with the local Rules of Court on "Motions for Reconsideration." Now that attorney Kobak has filed a formal Motion for Reconsideration there is no further need for me to move to dismiss attorney Kobak's motions dated August 29, 1994 as being procedurally defective.

Now I am in receipt of attorney Sue Ella Kobak's letter to you regarding this case dated September 22, 1994. Attorney Kobak is again asking for a reconsideration of your ruling of July 28, 1994. Attorney Kobak is asking also for a hearing.

My reading of the local Rules of Court under the section entitled "Motions for Reconsideration" does not provide for a Court hearing or a response from my client unless and until your Honor requests a response from me and sets the hearing. Accordingly I shall not file a formal response to attorney Kobak's Motions.

I will simply conclude at this point by stating that the Wright case on which attorney Kobak relies, stands squarely against the proposition for which she uses it. The Wright case stands for the proposition that the Constitution has granted the power to tax to the elected officials of the municipalities and not to the voters themselves. In Wright the voters wanted to set the tax rate. No, said the Supreme Court, the power of taxation and the power of assessment are powers granted to the elected officials of the municipal corporations.

I respectfully request that the Court enter the Final Order a draft of which I enclose for the Court's review. For the

convenience of the Court I enclose a copy of the transcript of the hearing and the Court's ruling in this case dated July 28, 1994.

Very truly yours,

KEULING-STOUT, P. C.



Henry S. Keuling-Stout

HK-S:lj

Enclosure

cc: The Honorable Delmer Wilson, Commissioner of Revenue,
w/out trial transcript.
Gary Rakes, Clerk Wise County Circuit Court, w/out trial
transcript.
Sue Ella Kobak, Esquire, w/out trial transcript.

L:\1032\79\020

VIRGINIA: IN THE CIRCUIT COURT OF WISE COUNTY
WISE COUNTY BOARD OF SUPERVISORS

PLAINTIFF

V.

CA NO. C94-280

DELMER WILSON

DEFENDANT

FINAL ORDER

On July 28, 1994 this matter came before the Court on the plaintiff's motion for declaratory judgement and on the defendant's Demurrer. The plaintiff was present by counsel and by its agent Scott Davis, The County Administrator for Wise County and the Defendant was present by counsel and in person. The defendant by counsel argued his Demurrer and the plaintiff by counsel argued in opposition to the Demurrer. The Court heard and considered the arguments made by counsel for both parties in open court and considered the briefs and legal authorities that had been supplied to the court prior to the hearing and at the hearing and the Court having reviewed the pleadings, briefs, the memoranda and having conducted its own legal search was of the opinion that the Demurrer filed by the Defendant Delmer Wilson should be granted. Accordingly, it is hereby ADJUDGED, ORDERED and DECREED, for the reasons set forth fully in the record from the bench on July 28, 1994, that the defendant's Demurrer be and is hereby sustained and that the Motion for Declaratory Judgement for the plaintiff is hereby dismissed. The plaintiff by counsel filed two motions dated August 29, 1994 and two similar motions dated September 22, 1994 in which the plaintiff has requested that this Court grant a Motion for Reconsideration, and/or a Motion to Amend the original Motion

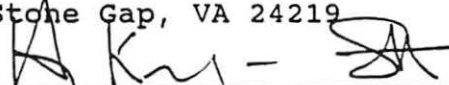
for a Declaratory Judgement. The Court has reviewed the plaintiff's Motion for Reconsideration and the Motion to Amend and finds nothing in either Motion which leads this Court to change its opinion as set forth in its ruling in this Court on July 28, 1994. Accordingly the Motion to Amend and the Motion for Reconsideration are hereby denied. There being nothing further to come before the Court on this matter, this case is stricken from the docket. The Clerk is directed to file this case among the ended causes and is directed to send an attested copy of this Final Order to counsel of record.

Enter this _____ day
of November 1994

JUDGE

Requested:

Keuling-Stout, PC.
123 Wood Avenue, East
P. O. Box 400
Big Stone Gap, VA 24219

By: 
Henry S. Keuling-Stout, Esquire
Counsel for defendant

Seen:

Kobak & Oglebay
P. O. Box 428
Pennington Gap, VA 24277

By: _____
Sue Ella Kobak, Esquire
Counsel for plaintiff

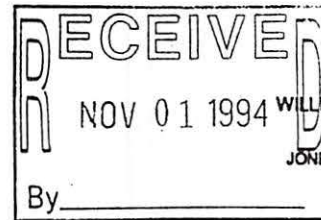
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Thirtieth Judicial Circuit of Virginia

J. ROBERT STUMP, JUDGE
JAMES C. ROBERSON, JUDGE
P.O. BOX 1980
WISE, VIRGINIA 24293
1-703-328-8653



COMMONWEALTH OF VIRGINIA
COUNTIES OF LEE, SCOTT AND WISE
CITY OF NORTON



WILLIAM C. FUGATE, JUDGE
BOX 326
JONESVILLE, VIRGINIA 24263
1-703-346-7763

October 31, 1994

Mr. Henry Keuling-Stout
Attorney at Law
P.O.Box 400
Big Stone Gap, Va. 24219

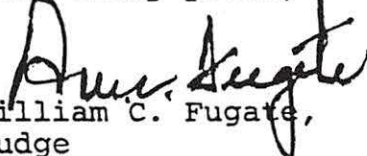
✓ Ms. Sue Ella Kobak
Attorney at Law
P.O.Box 428
Pennington Gap, Va. 24277

IN RE: Wise County Board of Supervisors vs. Delmer Wilson,
Commissioner of Revenue

Dear Mr. Keuling-Stout and Ms. Kobak,

I am in receipt of Mr. Keuling-Stout's letter of October 26, 1994 which is the first response to previous motions filed by Ms. Kobak after the July 28 hearing. I have reviewed a transcript of the proceedings of July 28, 1994 and the argument of counsel in regard to the demurrer and I am of the opinion that the order sustaining the demurrer should be entered. I would like for Ms. Kobak to endorse the final order which has been forwarded by Mr. Keuling-Stout and, at this point in time, I do not anticipate a reconsideration. This however would not prevent Ms. Kobak, on behalf of the Wise County Board of Supervisors, to seek an appeal of this ruling. With best regards to both of you, I am

very truly yours,


William C. Fugate,
Judge

WCF/ba

VIRGINIA: IN THE CIRCUIT COURT OF WISE COUNTY
WISE COUNTY BOARD OF SUPERVISORS

PLAINTIFF

V.

CA NO. C94-280

DELMER WILSON

DEFENDANT

FINAL ORDER

On July 28, 1994 this matter came before the Court on the plaintiff's motion for declaratory judgement and on the defendant's Demurrer. The plaintiff was present by counsel and by its agent Scott Davis, The County Administrator for Wise County and the Defendant was present by counsel and in person. The defendant by counsel argued his Demurrer and the plaintiff by counsel argued in opposition to the Demurrer. The Court heard and considered the arguments made by counsel for both parties in open court and considered the briefs and legal authorities that had been supplied to the court prior to the hearing and at the hearing and the Court having reviewed the pleadings, briefs, the memoranda and having conducted its own legal search was of the opinion that the Demurrer filed by the Defendant Delmer Wilson should be granted. Accordingly, it is hereby Adjusted, Ordered and Decreed, for the reasons set forth fully in the record from the bench on July 28, 1994, that the defendant's Demurrer be and is hereby sustained and that the motion for declaratory judgement for the plaintiff is hereby dismissed. There being nothing further to come before the Court on this matter, this case is stricken from the docket. The Clerk is directed to file this case among the ended causes and is directed to send an attested copy of this Final Order to counsel of

record.

Enter this 15th day
of ~~August~~ ^{Nov} 1994

Amc. Langate
JUDGE

Requested:

Keuling-Stout, PC.

123 Wood Avenue, East

P. O. Box 400

Big Stone Gap, VA 24219

By: HSK

Henry S. Keuling-Stout, Esquire
Counsel for defendant

Seen and objected to SEK
Kobak & Oglebay

P. O. Box 428

Pennington Gap, VA 24277

By: SEK

Sue Ella Kobak, Esquire
Counsel for plaintiff

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NOTICE OF APPEAL FROM TRIAL COURT

VIRGINIA: IN THE CIRCUIT COURT OF WISE COUNTY

WISE COUNTY BOARD OF SUPERVISORS

APPELLANT

V.

DELMER WILSON, AS COMMISSIONER OF REVENUE

APPELLEE

CA NO. C94-280

NOTICE OF APPEAL

THE WISE COUNTY BOARD OF SUPERVISORS, PLAINTIFF, hereby
appeals to the Supreme Court of Virginia from the Final
Order of this Court entered on November 15, 1994.

A transcript of testimony and other incidents of the
case will be filed.

CERTIFICATE

The undersigned certifies as follows:

- (1) The name and address of the appellant is:

The Wise County Board of Supervisors
P.O. Box 570
Wise, VA 24293-0570

Page Two - Notice of Appeal

(2) The name, address and telephone number of counsel for appellant are:

Sue Ella Kobak, Esq.
KOBAK & OGLEBAY
P.O. Box 428
Pennington Gap, VA 24277
(703) 546-3642

(3) The name and address of appellee are:

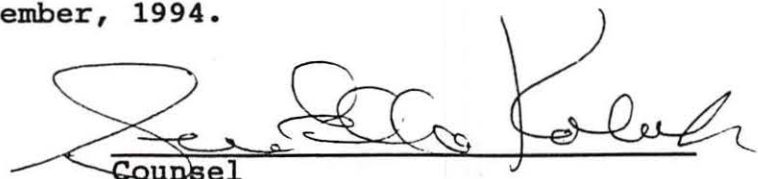
Delmer Wilson, Commissioner of Revenue
P.O. Box 1278
Wise, VA 24293

(4) The name, address and telephone number of counsel for the appellee are:

Henry S. Keuling-Stout, Esq.
KEULING-STOUT, P.C.
123 Wood Avenue, East
P.O. Box 400
Big Stone Gap, VA 24219
(703) 523-1676

(5) A transcript has already been prepared by the Court Reporter. A certified copy will be ordered as required by Virginia Code Section 5A:8(a).

(6) A copy of this Notice of Appeal has been mailed or delivered to all opposing counsel, to the Clerk of the Supreme Court and to the Clerk of the trial court on this the 9th day of December, 1994.


Counsel

ASSIGNMENTS OF ERROR

The trial court erred in granting Defendant's Demurrer by holding that it is the duty of the Commissioner of Revenue to set the "assessment ratio" pursuant to Article 3, Chapter 35, Title 58.1, Section 3509 of the Virginia Code, (1950, as amended), because:

1. Assessment ratio cannot be equated with the assessment within the general authority of the Commissioner of Revenue since neither the tax rate nor assessment ratio can be greater than the rate and ratio as was in effect in Wise County in 1978.
2. The Wise County Circuit Court on November 15, 1994, created an interpretation of Section 58.1 of the Code of Virginia, (1950, as amended), inconsistent with the Virginia Constitution.
3. Holding that it is the duty of the Commissioner of Revenue to set the assessment ratio, violates Dillon's Rule.
4. The presumption that the actions of the Wise County Board of Supervisors in setting the assessment ratio is legal has not been rebutted.

