In the

Supreme Court of Virginia

At Richmond

Record No. 151956

JOSEPH A. HORBAL, Commissioner of the Revenue for Chesterfield County, Virginia,

Appellant,

– v. –

VERIZON ONLINE, LLC,

Appellee.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

1. Verizon Is Doing What This Court Prohibits: Trying to Create Ambiguity Where None Exists.

Verizon invites this Court to abandon one of its fundamental canons of statutory construction – that courts must determine the intent of the legislature in enacting a statute "from the words used, unless a literal construction could involve a manifest absurdity." Dodge v. Tr. of Randolph Macon Woman's College, 276 Va. 10, 15 (2008). "We presume the legislature says what it means and means what it says." Tvardek v. Powhatan Village Homeowners Ass'n, Inc., 291 Va. 269 (2016); In Re: Woodley, 290 Va. 482 (2015). Verizon wants this Court to do what the Tax Commissioner and trial court should not have done: look at "extrinsic evidence" and "legislative history" before determining whether the plain meaning of the language used in the tax statute at issue – VA. CODE § 58.1-1101(A)(2a) – can be understood and applied.

In this case, the words used by the General Assembly in § 58.1-1101(A)(2a) are understandable and in common usage. The plain meaning of those words makes the set top boxes which are used in a cable television business locally taxable. This result can hardly be characterized as a manifest absurdity or even as illogical. Art. X, § 4 of the Constitution of

Virginia provides that tangible personal property is segregated for, and made subject to, local taxation; § 58.1-1101(A)(2a) specifically requires that the machines used in a cable television business "shall be taxed" locally.

Verizon's strategy in this litigation is transparent. It wants this Court to skirt the plain meaning of the words used in § 58.1-1101(A)(2a) and look first at "legislative history" and other "extrinsic matters". In fact, when Verizon argues why it believes the trial court was correct, "first" on its list is the "legislative history" of the statute. Looking at the actual language used in the statute comes in "second". (Brief of Appellee at 10.) Verizon has this order reversed as a matter of law. As this Court has said repeatedly, it is improper to try to use extrinsic evidence first to create an ambiguity and then to remove it. Brown v. Lukhard, 229 Va. 316 (1985).

In Brown v. Lukhard, the question before this Court was whether the General Assembly intended to defund Aid to Dependent Children ("ADC"). The state law in question provided that "a person shall be eligible for aid to dependent children if he: (a) has not attained the age of eighteen years or, if regularly attending school, has not attained the age of twenty-one years; . . ." VA. CODE § 63.1-105 (repealed).

Even though the language of this statute (and the enacted appropriations act that funded it) was unambiguous, the State Board of

Welfare adopted a statewide ADC policy defunding the portion of the program for 18-21 year olds attending school. The Board adopted this policy based not on what the legislation unambiguously said, but rather on a legislative impact statement that was issued during the budgeting process "explaining" the intention of the legislation: "This amendment would reduce funding for Aid to Dependent Children (ADC) in the second year. Welfare payments under ADC would be terminated for 3,283 dependent children aged 18-21 who are in schools . . . " Brown, 229 Va. at 319. Several recipients of ADC benefits sued the Department of Welfare claiming that the Department's policy was contrary to the unambiguous language of the Code under which they qualified for benefits because they were persons 18-21 years of age and regularly attended school.

At trial, the court failed, just as the trial court failed in this case, to first apply the plain and unambiguous language of the legislation. Rather, the trial court turned first to the legislative impact statement and found that it created ambiguity as to the intent of the legislature. Then, after considering a variety of other extrinsic "evidence", the trial court concluded that all members of the House and Senate were aware of the legislative impact statement at the time they adopted the bill, and that the General Assembly

did not intend to appropriate any funds to the ADC program for individuals aged 18-21.

This Court reversed. The Court first looked at the words used by the legislature and found the language to be unambiguous. The Court found that the language of the statute was "not difficult to understand," did not "lack definiteness" and did "not refer to two or more things simultaneously" so as to make the statute inconsistent. Id. at 321. The Court ruled that it was error for the trial court to have considered extrinsic evidence and to have construed the language of the law contrary to its plain meaning. When the law is unambiguous, "extrinsic legislative history may not be used to create an ambiguity, and then remove it, where none otherwise exists." Id.

In this case, the state Tax Commissioner and the trial court did exactly what the state Board of Welfare and the trial court improperly did in Brown. Without first trying to apply the plain language of the statute, the Tax Commissioner relied on extrinsic documents – a tax bulletin and a legislative impact statement – to conclude that the intent of the General Assembly was to exempt set top boxes from local taxation when it revised the Code in 1984 and created what is now VA. CODE § 58.1-1101(A)(2a). There is no factual evidence to support the bulletin or the impact statement. The trial court then committed error by relying on the Tax Commissioner's

faulty conclusion and disregarding the plain meaning of the language used in the statute. The trial court's decision should be overturned.

2. "Machines" as Used in VA. CODE § 58.1-1101(A)(2a) is Unambiguous.

The standard for determining whether or not a word is ambiguous as articulated by this Court boils down to whether a word has "no definite sense or else a double one which renders the statute internally inconsistent or otherwise incapable of operation." Ayres v. Harleysville Mut. Casualty Co., 172 Va. 383, 393 (1939) (emphasis added); Newberry Station Homeowner's Assoc., Inc. v. Bd. of Supervisors of Fairfax County, 285 Va. 604 (2013).

Under this test, the use of the word "machines" renders § 58.1-1101(A)(2a) ambiguous only if the word "machines" has (i) two or more senses which could apply and (ii) the statute cannot be read and applied using both (or all) of those senses. The latter would only occur if the two senses of the word are mutually exclusive and thereby render the statute incapable of operation or internally inconsistent. Ayres, 172 Va. at 393 (1939).

Verizon suggests that Horbal is raising this test "for the first time in this litigation". (Brief of Appellee at 14.) Hardly. Horbal argued at trial, as he does now, that the law requires more than two entries in the dictionary to

prove that a word is ambiguous. In fact, in his memorandum before the trial court supporting summary judgment, Horbal specifically asserted that two applicable definitions must refer to "two or more mutually exclusive things simultaneously" to create ambiguity, citing Blake v. Commonwealth, 288 Va. 375 (2014). (J.A. at 36.)

As Webster's reflects, the word "machine" has three senses indicated by the bold Arabic numerals **1**, **2**, and **3**:[1]

¹ma·chine \mə-ˈshēn\ *n, often attrib* [MF, fr. L *machina*, fr. Gk *mēchanē* (Dor dial. *machana*), fr. *mēchos* means, expedient — more at MAY] (1549) **1 a** *archaic* : a constructed thing whether material or immaterial **b** : CONVEYANCE, VEHICLE; *specif* : AUTOMOBILE **c** *archaic* : a military engine **d** : any of various apparatuses formerly used to produce stage effects **e** (1) : an assemblage of parts that transmit forces, motion, and energy one to another in a predetermined manner (2) : an instrument (as a lever) designed to transmit or modify the application of power, force, or motion **f** : a mechanically, electrically, or electronically operated device for performing a task ⟨a calculating ~⟩ ⟨a card-sorting ~⟩ **g** : a coin-operated device ⟨a cigarette ~⟩ **h** : MACHINERY — used with *the* or in pl. ⟨man must not become the servant of the ~⟩ **2 a** : a living organism or one of its functional systems **b** : a person or organization that resembles a machine (as in being methodical, tireless, or unemotional) **c** (1) : a combination of persons acting together for a common end along with the agencies they use (2) : a highly organized political group under the leadership of a boss or small clique **3** : a literary device or contrivance introduced for dramatic effect

[1] Verizon also wants this Court to believe that what Webster's reflects as the plain meaning, or sense, of the word "machine" is being raised by Horbal "for the first time in this litigation". (Brief of Appellee at 14.) To the contrary, both parties relied on Webster's definitions of the word "machine" and stipulated to various senses of the word contained in Webster's. (J.A. at 24.) Horbal has consistently maintained that only one sense of the word "machine" applies to the statute, and that sense includes set top boxes. (The other two senses, 2 and 3, have nothing to do with personal property.) It is disingenuous for Verizon to claim it is somehow prejudiced by Horbal providing this Court with a copy of the definition of the word "machine" and related Explanatory Notes from Webster's. (Brief of Appellee at 14.) Verizon itself provided copies both of the definition of "machine" and of the Explanatory Notes from Webster's to the trial court. (J.A. at 204.)

Only one sense of the word (Sense 1) could apply in the context of a statute that taxes the personal property of a cable business. (Sense 2 deals with living things and people; Sense 3 with literary devices.) Sense 1 includes both mechanical machines and electronic machines. (Entries 1.e. and 1.f.)

Verizon concedes that a set top box meets the definition of Entry 1.f. which includes both electronic and mechanical machines, but contends that the word "machines" is rendered ambiguous solely because a set top box does not meet Entry 1.e., "an assemblage of parts that transmit forces . . ." (Brief of Appellee at 20.) This is not how Virginia law determines legislative ambiguity. In Virginia, the two definitions of a statutory word must render the statute incapable of being understood or applied. Blake v. Commonwealth. Reading the statute to mandate the local taxation of both the mechanical machines (backhoes, jackhammers, trenchers) and the electronic machines (set top boxes, amplifiers, tuners) used in a cable television business creates no internal inconsistencies. If Verizon owns mechanical machines used in a cable television business, they are taxed locally; if Verizon owns electronic machines used in a cable television business, those machines are taxed as well.

Verizon's "one definition only" argument ignores the fact that "machines" as used in § 58.1-1101(A)(2a) is a category of personal property comprising both mechanical and electronic machines. The Commissioner of the Revenue is not required, or permitted, by law to choose just one kind of machine to assess for taxation – backhoes or trenchers or set top boxes – any more than he must choose between different items of office furniture (desks or chairs or bookcases) or office equipment (staplers or paper cutters or fax machines). He taxes all machines used in the cable television business whether electronic or mechanical in nature.

Verizon has to contort this Court's analysis in Blake v. Commonwealth to make its argument. Verizon says the Court conducted none of this "sense analysis" which it contends Horbal "invented". (Brief of Appellee at 15.) That is not true. When the Court analyzed the "ten definitions" for "send" found in Webster's, it was analyzing the ten senses of the word headed by boldface Arabic numerals, precisely as explained in Webster's Explanatory Notes. Blake, 288 Va. at 387.

Verizon also contends that the ambiguity in Blake was created solely by the fact that two definitions of the word "send" could apply in the statute. (Brief of Appellee at 16.) Verizon is ignoring the critical fact in Blake: that

one sense of “send” would have resulted in a criminal conviction and the other sense of “send” would not. These mutually exclusive, inconsistent results are precisely what rendered the truancy statute at issue inoperable and therefore, ambiguous. Blake, 288 Va. at 382.

There is no such inherent inconsistency in the definition of “machines”. The definition defines both the mechanical machines (trenchers, tree-trimmers, jackhammers, backhoes) and electronic machines (set top boxes, amplifiers) used in a cable television business subject to local taxation under the plain meaning of § 58.1-1101(A)(2a). This makes the statute inclusive; it does not make it ambiguous.

3. Horbal Began Assessing Set Top Boxes in 2006 After Reading the Plain and Unambiguous Language of § 58.1-1101(A)(2a).

In its struggle to create ambiguity where none exists, Verizon calls the “most glaring” evidence of ambiguity to be 20-plus years of “Horbal” not assessing set top boxes for taxation prior to some “mysterious” change in position in 2006. (Brief of Appellee at 27.) This is a calculated contrivance.

Horbal’s predecessor, Everett Carmichael, relied on the erroneous position of the Tax Commissioner that set top boxes are not locally taxable.

(J.A. at 161.) Horbal, himself, did not take office until 2004.[2] As Horbal testified in his deposition, after he became the Commissioner of the Revenue, he reexamined the issue of whether or not set top boxes were subject to local taxation. He "read the tax code, and the plain language in the Code was clear . . ." to him. (J.A. at 133.) Horbal began taxing set top boxes in 2006 because they met the plain meaning of "machines". Horbal was correct to assess set top boxes for taxation, based on the plain meaning of the language in § 58.1-1101(A)(2a), rather than follow his predecessor's reliance on erroneous guidance from the Tax Commissioner.[3]

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[2] Verizon wants this Court to believe that Horbal changed his mind after 20 years of exempting set top boxes from taxation. Verizon knows this is not true. After taking office in 2004, Horbal made his own analysis of § 58.1-1101(A)(2a) and concluded that his predecessor, Carmichael, was wrong in exempting set top boxes. Verizon tries to obscure this "inconvenient truth" by defining "Horbal" in its Brief of Appellee as including both Horbal and Carmichael. Verizon does this in a footnote. (Brief of Appellee at fn. 3). Ironically, Verizon says it is not possible for an electronic machine and a mechanical machine to both be taxed as "machines", yet it has no problem treating two human beings as a single person called "Horbal."

[3] Verizon asserts that ambiguity is established by the mere fact that Horbal interpreted the statute differently than the trial court (and the trial courts of Arlington and Henrico). (Brief of Appellee at 25.) These so-called "divergent" interpretations do not establish ambiguity. The trial courts were merely wrong. Each court fell in lockstep with the Tax Commissioner's opinion rather than apply the plain language of the Code. This is precisely what the Welfare Board and trial court did in Brown and what this Court rejected in Brown. Brown, 229 Va. at 321.

4. The Legislative History Supports Horbal's Reading of the Code, Not Verizon's.

The legislative evolution of what is now § 58.1-1101(A)(2a) reflects the General Assembly's intent to tax the set top boxes used in a cable television business beginning in 1983 and continuing through the 1984 revision of this section to the present.

Prior to 1983, property of manufacturers and several other industries was segregated for state taxation, except that the General Assembly made the broad categories of "machinery and tools," "motor vehicles", and "delivery equipment" subject to local taxation. VA. CODE § 58.1-105(A)(2) (predecessor to § 58.1-1101(A)(2)). This Court has held that the term "machinery and tools" as used in § 58.1-1101(A)(2) is an unambiguous term and applies to personal property which is "actually and directly used in the manufacturing process." City of Winchester v. American Woodmark Corp., 250 Va. 451, 459 (1995); The Daily Press, Inc. v. City of Newport News, 265 Va. 304 (2003).

In 1983, cable television businesses were added to the list of manufacturers and other businesses in § 58.1-105(A)(2) whose property was segregated for state taxation, except that the General Assembly also added "trunk and feeder cables, studio equipment, tuners, converters, antennae, and office furniture and equipment" used by cable television

businesses to the existing list of property subject to local taxation. (J.A. at 763.) These new items (all of which are used exclusively by cable television businesses, including "converters") were not already included in the preexisting taxable category "machinery and tools" because, as this Court has held, "machinery and tools" referred to machines used directly by the manufacturing industry during the manufacturing process, (American Woodmark), and cable television businesses are not manufacturing or industrial businesses in any sense.

In 1984, however, the General Assembly created an entirely new subsection, § 58-405(A)(2a) applicable only to cable businesses. (J.A. at 773.) In subsection (A)(2a), the General Assembly replaced "converters" and "tuners" with a new category of personal property, "machines and tools", which the Tax Commissioner himself described as "the actual machines and tools of cable television businesses." (J.A. at 774, 776, 778.)

When the category "machines and tools" was added to subsection (A)(2a), there was no need to list converters and tuners any longer because "converters" and "tuners" were not "machinery and tools" used in manufacturing under (A)(2), but they quite obviously were "machines" used by a cable business. As argued above, the word "machines" had the same plain meaning in 1984 as it does today, and includes electronic devices

such as "converters" and "tuners."[4] In fact, this Court recognized in The Daily Press that computers and other electronic devices are machines, but are not "machinery and tools" if not also used actually and directly in the manufacturing process as § 58.1-1101(A)(2) requires.[5] The Daily Press at 310.

If the legislature had intended to make "converters" exempt from local taxation, it would not have added the new category "machines" which includes converters. Verizon argues that if the word "converters" was deleted because converters were considered to be "machines", then the legislature would have also removed all the other items of property from the list that arguably qualify as "machines". Verizon then suggests that "studio equipment" might include machines. (Brief of Appellee at 32.) There is, however, no evidence in the record that "studio equipment" does include

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[4] Strangely, Verizon contends that there is no reason to conclude that the legislature intended for the "most modern definition" of the word "machine" to apply. (Brief of Appellee at 21.) There is a reason. The words in a statute are always to be given their ordinary meaning at the time they are used. Sansom v. Bd. of Sup'rs of Madison County, 257 Va. 589 (1999).

[5] Verizon alleges that Horbal "misrepresents" the holding of The Daily Press. (Brief of Appellee at 25.) But, Verizon and Horbal are saying the same thing: electronic devices are not taxable as "machinery and tools" unless used directly in manufacturing. In The Daily Press, the Court found that the electronic devices were not used in manufacturing, but the Court did not hold that these electronic devices were not machines. In fact, the Court expressly called them "machines" in its opinion. Id. at 307, 308, 310.

machines and, in fact, “studio equipment” certainly includes studio stage equipment such as sets, curtains and risers, none of which are machines. Likewise, trunk and feeder cables and antennae, also on the list of locally taxable property, are not machines. Cable and antennae are essentially lengths of wire, or in the case of fiber optic cable, glass. They are not machines and, in fact, need to be connected to electronic machines in order to serve any function.

When looking at the words of a statute to determine its meaning, a court must consider the entire statute and interpret the several parts of a statute as a consistent and harmonious whole. City of Richmond v. Virginia Electric and Power Company, 787 S.E.2d 161 (2016); REVI, LLC v. Chicago Title Ins. Co., 290 Va. 203 (2015). Section 58.1-1101 includes both subsection (A)(2) and (A)(2a). This Court found in American Woodmark that the term “machinery and tools” as used in § 58.1-1101(A)(2) is unambiguous and would apply to electronic machines if they were used directly in a manufacturing process. Given the fact that “machines” and “machinery” are virtually identical words, there is no logical reason to conclude that the term “machinery and tools” is unambiguous, but “machines and tools” is somehow incapable of being understood.

CONCLUSION

The word "machines" as used in VA. CODE § 58.1-1101(A)(2a) is a plain word with an ordinary sense, or meaning, as stipulated by the parties. It is unambiguous and applies to set top boxes used in a cable business. The plain meaning of § 58.1-1101(A)(2) defines the intent of the legislature. If the meaning of the statute is to be changed, that is the job of the legislature, not the courts. Virginia Transit Co. v. Tidd, 194 Va. 418 (1952). Verizon is a sophisticated business that knows how to talk to state legislators. That is the proper venue for Verizon to obtain the result it seeks. The trial court's interpretation of the statute violates all of this Court's standards for reading and applying unambiguous statutes and should be overturned.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 26, 2016, the foregoing Reply Brief was filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the same were hand delivered to the clerk's office. This same date, a copy of the Reply Brief was sent via email to all counsel of record, at the email addresses below:

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