IN THE

SUPREME COURT OF VIRGINIA

Record No. 161095

JAMES K. WOOLFORD and ELIZABETH P. WOOLFORD,
TRUSTEES OF THE WOOLFORD TRUST
U/A DTD 13 APRIL 2008,
and
WILLIAM W. WOOLFORD, IV and JANICE B. WOOLFORD,

Appellants,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Appellee.

BRIEF AMICUS CURIAE OF
TAX CREDIT BUYERS IN SUPPORT OF APPELLANTS

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I. INTRODUCTION AND INTEREST OF AMICI[1]

This appeal has enormous ramifications for the future of a tax credit program created by the General Assembly, and whether the Tax Department may contradict both the General Assembly and the Internal Revenue Service in how it administers the tax credit at issue. Amici respectfully urge this Court to reverse the judgment of the trial court.

In this appeal, the Court is asked to determine whether the trial court erred in allowing the Tax Department to rescind $4.9 million in conservation easement tax credits it previously awarded. The Amici are 147 Virginia taxpayers (the "Credit Buyers") who purchased $4,782,000 of these credits from the Woolfords. The Tax Department failed to timely challenge the valuation of the appraisal that determined the credits, or the veracity of the appraisal. Instead, almost three years after the credits were awarded, the Tax Department collaterally attacked the appraiser himself and revoked the entirety of the $4.9 million in tax credits. The Tax Department's attack on the appraiser was improper and not supported by any provision of the Code of Virginia.

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[1] Both the Woolfords and the Tax Department consented to the filing of a brief amicus curiae by the Credit Buyers at the petition stage, which was prior to the November 1, 2016, amendments to Rule 5:30. A list of the Amici is included at Attachment A. The Credit Buyers are overwhelmingly comprised of individuals, and they purchased credits in the range of $1,000 to $100,000. In light of the amendments to Rule 5:30, Amici also have filed a Motion for Leave to File a Brief Amicus Curiae this day with the Clerk of this Court.

If left uncorrected by this Court, the trial court's judgment will severely and adversely affect the Credit Buyers, as well as the Woolfords. Moreover, if left uncorrected by this Court, the Tax Department's actions will eviscerate and destroy the General Assembly's statutory framework that is intended to encourage the creation of conservation easements in the Commonwealth.

II. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW, AND STATEMENT OF FACTS

The Credit Buyers adopt the Nature of the Case and Material Proceedings Below, and Statement of Facts set forth the Woolfords.

III. ARGUMENT

This case presents an important and necessary opportunity for this Court to consider and clarify the method in which the Tax Department administers the Virginia Land Preservation Income Tax Credit (the "Credit"). This Credit is a frequently claimed Virginia income tax credit,[2] and was created by the General Assembly in the Virginia Land Conservation Incentives Act of 1999 (the "Act"), Code §§ 58.1-510 through 58.1-513. The Credits in this appeal were issued in 2011.

The Credits are issued by the Tax Department to the landowner who donated a conservation easement, and are frequently then sold by the landowner to other

[2] During the last four calendar years, the Tax Department issued $79.1 million in Credits in 2013, $45.1 million in Credits in 2014, $48.6 million in Credits in 2015, and $60.0 million in Credits in 2016.

Virginia taxpayers who may claim them on their Virginia income tax returns subject to certain limitations created by the General Assembly. The Act contains numerous requirements that must be satisfied for the Credits to be valid. The majority of these requirements concern the appraisal of the donated interest in land that determines the value and validity of the Credits. Because of the large amount of Credits that are issued by the Tax Department annually and eventually claimed on the Virginia income tax returns of Virginia taxpayers, it is important that there be certainty with regard to the requirements that every appraisal must satisfy.

Rather than certainty, the Tax Department's actions in this case will create distrust, ambiguity, and doubt in the market for the Credits, and will ultimately frustrate the General Assembly's clear intent in creating the Credit. There is no provision of the Code of Virginia that allows the Tax Department to collaterally attack the appraiser by creating requirements not expressed in, or authorized by, Virginia law. Amici respectfully request that the judgment of the trial court be reversed and vacated, and that the Court grant the relief requested by the Woolfords.

A. Overview of the Virginia Land Preservation Income Tax Credit

The Credit is a very popular Virginia income tax attribute, and was created by the General Assembly "to supplement existing land conservation programs to

further encourage the preservation and sustainability of Virginia's unique natural resources, wildlife habitats, open spaces and forested resources." Code § 58.1-510.

The Credit is equal to 40% of the fair market value of a donated interest in land. Code § 58.1-512(A). In general, Virginia taxpayers may claim the Credit on their Virginia income tax returns in the first taxable year and carry the credits forward for ten succeeding taxable years. Code § 58.1-512(D)(5). For the most of the Credit Buyers, and all other Virginia taxpayers who were affected by the 2011 annual limitation as explained below, the Credits may be carried forward for thirteen succeeding taxable years. Code § 58.1-512(D)(5)(b).

Due to the popularity of the Credit among Virginia taxpayers, the General Assembly adopted two separate limitations on the amount of Credits that may be claimed or issued in a year. The first limitation applies to the maximum amount of Credits that Virginia taxpayers may claim individually during each taxable year. Code § 58.1-512(C)(1). As mentioned above, the Credits that are the subject of this appeal were issued in 2011. The annual limitation on the amount of Credits that may be claimed beginning with 2011 are as follows:

Taxable Year 2011	$50,000
Taxable Year 2012	$100,000
Taxable Year 2013	$100,000
Taxable Year 2014	$100,000
Taxable Year 2015	$20,000
Taxable Year 2016	$20,000
Taxable Year 2017	$50,000

Code § 58.1-512(C)(1).

The second limitation is on the amount of Credits that may be issued by the Tax Department in a calendar year. In general, the total amount of Credits that could be issued for the calendar years of 2011 through 2014 was $100 million. Code § 58.1-512(D)(4). This limitation was reduced to $75 million for the 2015 calendar year and thereafter. Code § 58.1-512(D)(4)(c). These limitations are important because they illustrate the popularity of the Credits to Virginia taxpayers, and thus the need for clear and certain rules for the valuation of the donated interest in land by an appraiser.

B. Substantiation of the Credit

1. Credit Requirements under the Code of Virginia

To substantiate the fair market value of the donated interest in land, those applying for the issuance of Credits must provide a "qualified appraisal" prepared by a "qualified appraiser," as those terms are defined under applicable federal law and regulations governing charitable contributions. Code § 58.1-512(B). The "qualified appraisal" must be signed by a "qualified appraiser" who is licensed in Virginia. *Id.* Each appraisal must "employ proper methodology and be appropriately supported by market evidence." Code § 58.1-512.1(A). To that end, the General Assembly directed the Tax Department to "establish and make publicly available guidelines that incorporate, as applicable (without limitation),

requirements under § 170(h) of the United States Internal Revenue Code of 1986, as amended, and the Uniform Standards of Professional Appraisal Practice (USPAP)." *Id.*

Furthermore, the Tax Department is required to update these guidelines as necessary. *Id.* The most recent version of the "Guidelines for Qualified Appraisals" (hereinafter the "Guidelines") was issued by the Tax Department on January 9, 2007. J.A. at 290. The Guidelines simply provide that: (a) the requirements of section 170(h) of the United States Internal Revenue Code, including the applicable regulations; (b) the Uniform Standards of Professional Appraisal Practice, as developed by the Appraisal Standards Board of the Appraisal Foundation; and (c) the regulations of the Virginia Real Estate Appraiser Board are incorporated into the Guidelines. The Tax Department has not updated the Guidelines since they were issued.

In addition to the Guidelines, the Tax Commissioner also may promulgate regulations relating to the interpretation of the Commonwealth's tax laws that are administered by the Tax Department. Code § 58.1-203(A). The difference in the effect of guidelines and regulations is explicitly addressed in Code § 58.1-205. Guidelines are only entitled to judicial notice whereas any regulations are to be "sustained unless unreasonable or plainly inconsistent with applicable provisions of law." Code § 58.1-205. Importantly, no regulation directly addressing the

Credits at issue in this appeal, including requirements concerning the "qualified appraisal" or "qualified appraiser," has ever been promulgated by the Tax Commissioner.

2. Credit Requirements under Federal Law

Without any promulgated regulations by the Tax Commissioner interpreting the Act, the only basis for determining whether an appraiser is a "qualified appraiser" are the requirements expressed by the General Assembly in the Code of Virginia. Code § 58.1-512(B) is unambiguous: it clearly states that a "qualified appraiser" is defined under applicable federal law and regulations governing charitable contributions.

A "qualified appraiser" is defined under Section 170 of the United States Internal Revenue Code as an individual who has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations prescribed by the secretary, regularly performs appraisals for which the individual receives compensation, and meets such other requirements as may be prescribed by the Secretary in regulations or other guidance. 26 U.S.C. § 170(f)(11)(E)(ii). Also, the Internal Revenue Code states that an appraiser is not a "qualified appraiser" unless he demonstrates verifiable education and experience in valuing the type of property subject to the appraisal, and was not prohibited from

practicing before the Internal Revenue Service for the three years preceding the appraisal. 26 U.S.C. § 170(f)(11)(E)(iii).

Importantly, no guidance is provided regarding the *type* of property being appraised. *See* 26 U.S.C. § 170(f)(11)(E)(iii)(l); *see also* Internal Revenue Bulletin: 2006-46 (Nov. 13, 2006) Notice 2006-96, *Guidance Regarding Appraisal Requirements for Noncash Charitable Contributions*. In addition, the Internal Revenue Service Commissioner has never issued any guidance that would lead to a determination that either an appraisal or an appraiser is not qualified based on the *type* of the real property being appraised.

Instead, the regulations interpreting the Internal Revenue Code provide that a "qualified appraiser" is an individual who files a declaration that he holds himself out to the public as an appraiser or performs appraisals on a regular basis, is qualified to make appraisals of the type of property being valued, is not explicitly prohibited from appraising the property, and understands that he may not intentionally overstate the value of the property. Treas. Reg. § 1.170A-13(c)(5) (2016). It is undisputed that the appraiser used by the Woolfords provided just such a declaration. J.A. at 111, 113-14, 236-38.

Additionally, the Internal Revenue Service has issued proposed regulations[3] providing that a "qualified appraiser" is "an individual with verifiable education and experience in valuing the relevant type of property for which the appraisal is performed . . ." Prop. Treas. Reg. § 1.170A-17(b)(1) (2016). The proposed requirement for verifiable education and experience is essentially satisfied if the appraiser has successfully completed professional or college-level coursework, has two or more years valuing the relevant type of property, and has earned a recognized appraisal designation. Prop. Treas. Reg. § 1.170A-17(b)(2) (2016).

What is interesting for this matter is that the "relevant type of property" is defined as "the category of property customary in the appraisal field for an appraiser to value." Prop. Treas. Reg. § 1.170A-17(b)(3) (2016). Thus, the IRS regulations do not necessarily create *categories* of *types* of property. Instead, they use examples regarding the *experience* that is necessary to value certain types of property are provided. *See, e.g.,* Prop. Treas. Reg. § 1.170A-17(b)(3)(ii) (2016). It is unclear when, or if, these proposed regulations will be adopted.

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[3] Proposed U.S. treasury regulations have no precedential value. The U.S. Tax Court gives proposed regulations "no more weight than a litigation position." *KTA-Tator, Inc. v. Commissioner*, 108 T.C. 100, 102-103 (1997). Furthermore, the Internal Revenue Service has advised taxpayers that proposed regulations "have no legal effect unless and until they are adopted." IRS Chief Counsel Notice CC-2003-014 (May 8, 2003).

C. Virginia Law Prohibits the Tax Department from Creating *Ad Hoc* Requirements for Qualified Appraisers

The Code of Virginia does not provide a definition of a "qualified appraisal" or "qualified appraiser" other than adopting federal law. The only additional requirement placed upon "qualified appraisals" is that they must be signed by a "qualified appraiser" who is licensed in the Commonwealth. Code § 58.1-512(B). *See also* Code § 54.1-2009 (stating that a "certified general real estate appraiser" is one who "meets the requirements for licensure that relate to the appraisal of *all types* of real estate and real estate property) (emphasis added). In addition, the Tax Department has never promulgated regulations regarding the meaning of a "qualified appraisal" or "qualified appraiser." Without any further requirements under Virginia law or any interpreting Virginia regulations and once it is established that an appraiser in question is licensed in Virginia, the only legal justification for determining that he is not a "qualified appraiser" must come from federal law.

This Court has provided clear guidance on how Virginia statutes must be interpreted by the trial courts when the meaning of a statute is at issue:

> While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction

> which amounts to holding the legislature did not mean what it has actually expressed.

City of Winchester v. American Woodmark Corp., 250 Va. 451, 456 (1995) (*citing City of Virginia Beach v. ESG Enterprises, Inc.*, 243 Va. 149, 152-53, (1992)). *See also Lucy v. County of Albemarle*, 258 Va. 118, 129-30 (1999) (citing *Tyson v. Scott*, 116 Va. 243, 253 (1914); *Waller v. Commonwealth*, 192 Va. 83, 89 (1951); *The Covington Virginian, Inc. v. Woods*, 182 Va. 538, 548-49 (1944)). Furthermore, "[t]he plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." *Commonwealth v. Zamani*, 256 Va. 391, 395 (1998).

In *Chesapeake Hospital Authority v. Commonwealth*, 262 Va. 551 (2001), this Court held that the Tax Department improperly added a requirement to a sales tax exemption statute where no ambiguity existed. Accordingly, the Court affirmed the trial court's invalidation of the Tax Department's assessment. *Id.* at 562. The prohibition on the addition of words or requirements to statutes is a well-settled pillar of Virginia law. *See, e.g., Southern Railway Company v. Hill*, 106 Va. 501, 505 (1907) ("In construing statutes courts cannot add to or take from them, except in cases where the duty is plain in order to give an intelligent effect to them and thereby carry out the manifest intent of the Legislature.") (citations omitted). These are the principles that should be used when interpreting any provision of the Code of Virginia.

In addition, the Tax Commissioner's interpretation of an unambiguous statute is not entitled to due deference or great weight. This Court recently discussed how Virginia courts must treat agency interpretations of Virginia statutes:

> We have consistently held that courts do not defer to an agency's construction of a statute because the interpretation of statutory language always falls within a court's judicial expertise.

Nielsen v. Arlington County, 289 Va. 79, 88 (2015) (*citing Virginia Marine Res. Comm'n v. Chincoteague Inn*, 287 Va. 371, 380 (2014)). This Court, however, did recognize the limited circumstances when a trial court may defer to an agency interpretation:

> When 'the statute is obscure or its meaning doubtful, [a court] will give great weight to and *sometimes* follow the interpretation which those whose duty it has been to administer it have placed upon it.'

Id. (emphasis added) (quoting *Superior Steel Corp. v. Commonwealth*, 147 Va. 202, 206 (1927)). The Court then concluded that the Tax Department's interpretation of a tax statute is entitled to great weight — if, of course, the statute is ambiguous. *Id.* at 88-89 (quoting *LZM, Inc. v. Virginia Dep't of Taxation*, 269 Va. 105, 109 (2005)).

The tax statute in question in this case, Code § 58.1-512, is not ambiguous. Nor has the Tax Department issued any formal interpretation consistent with its

position in this litigation, much less a timely one. It has simply taken an *ad hoc* position within the confines of this particular case, doing so *years* after the appraisal of the Woolford's property had been completed. For all of these reasons, no deference should be given to the Tax Department's interpretations. And no deference should be given to the Tax Department's collateral attack on the appraiser in this appeal – which was done almost *three years* after the Credits issued. Furthermore, as stated by the General Assembly, only federal law should be looked to for guidance. Any attempt by the Tax Department to add requirements to the Credit beyond what has been articulated by the General Assembly must be invalidated.

D. Only Federal Law Controls the Determination of a "Qualified Appraiser"

In the absence of a properly promulgated regulation, the Tax Department cannot simply create its own interpretation of whether an appraiser is a "qualified appraiser." The Code of Virginia specifically defers to federal law regarding this aspect of the Credit. In the proceedings below, the Tax Department essentially crafted its own interpretation regarding the type of property that an appraiser must have experience with to be considered a "qualified appraiser." Neither the Internal Revenue Service Commissioner nor the applicable federal regulations make distinctions within types of property as the Tax Department now has done in this case. As such, because the appraiser, Michael Simerlein, was a qualified real

estate appraiser, the Tax Department's attack on his qualifications was improper and without any legal basis.

As described above, the Credit is a very popular Virginia income tax credit. The number of Virginia taxpayers who earn and/or claim the Credit annually substantially outnumber the Credit Buyers directly affected by this case. When Virginia taxpayers consider the purchase of a Credit, they typically evaluate the appraisal that substantiates the fair market value of the donated interest. Part of this evaluation requires a determination of whether the appraiser is a "qualified appraiser."

If the Tax Department is permitted to make its own determinations of what constitutes a "qualified appraiser" without promulgating any regulation, Virginia taxpayers who are interested in the Credits will be unable to properly evaluate Credits. And worse, the Tax Department appears to have chosen to create standards for the meaning of a "qualified appraiser" on a case-by-case basis. This creates uncertainty and volatility, as evidenced by the Tax Department's revocation of the Credits in this appeal almost three years after the same Tax Department issued such Credits. With such uncertainty, prudent Virginia taxpayers would not choose to purchase the Credits. This ultimately will frustrate the intent of the General Assembly in passing the Virginia Land Conservation Incentives Act of 1999.

The Credit Buyers could not have predicted that the Tax Department would create a novel interpretation and definition of what constitutes a "qualified appraiser." To make the Credit Buyers responsible for almost $5 million in Virginia income taxes because of an improper interpretation of federal law by the Tax Department is an unjust result. The trial court's rulings below were error and must be corrected by this Court.

IV. CONCLUSION

For the foregoing reasons, the Credit Buyers respectfully urge this Court to reverse and vacate the judgment of the trial court, and that the Court grant the relief requested by the Woolfords.

Dated: 3 May 2017

Respectfully submitted,

/s/ *Robert W. Loftin*

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CERTIFICATE

Pursuant to Rule 5:26, Rule 5:27, and Rule 5:30, I hereby certify the following:

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   Listed on Attachment A to this Brief Amicus Curiae.

2. Counsel for Amicus Curiae Tax Credit Purchasers are:

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7. I caused the foregoing to be filed electronically with the Clerk of the Supreme Court of Virginia and served on all counsel of record this 3rd day of May, 2017, pursuant to this Court's VACES Guidelines. I further certify that I caused three copies of the foregoing to be hand-filed with the Clerk of the Supreme Court of Virginia.

/s/ *Robert W. Loftin*

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Attachment A

Attachment A

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