

SANTIZED DECS. – 00-409 RSV, 01-021 RSV, 03-001 RSV & 03-002 RSV –
BY – R. MICHAEL REED – ISSUED – 03/31/03 – SUBMITTED FOR DECISION
ON BRIEFS – 07/17/002

SYNOPSIS

**COAL SEVERANCE TAXES -- MINIMUM COAL SEVERANCE TAX --
TAX COMMISSIONER'S AUTHORITY TO DECLARE STATUTE
UNCONSTITUTIONAL AS APPLIED** -- The State Tax Commissioner, as a part
of the executive branch of state government, lacks the authority, under W. Va.
Const. art. V, § 1, to declare a statute unconstitutional on its face; on the other
hand, the State Tax Commissioner does have the limited authority to declare a
state tax statute unconstitutional *as applied* to the particular set of circumstances
involved.

**COAL SEVERANCE TAXES -- MINIMUM COAL SEVERANCE TAX --
STATUTES CONSTITUTIONAL AS APPLIED TO FOREIGN EXPORTS --**

The coal severance tax statutes, W. Va. Code §§ 11-13A-3 [1997] and
11-13A-6 [1997], and a related excise tax statute, W. Va. Code §§ 11-12B-1
[1990] *et seq.* (the minimum coal severance tax), are constitutional, under the
Federal Import-Export Clause, U.S. Const. art. I, § 10, cl. 2, as applied to coal
severed and processed in this State and which immediately thereafter enters the
“stream of export” to purchasers in foreign countries; the more modern
precedents of the Supreme Court of the United States actually applying that
federal constitutional provision, such as *Itel Containers International Corp. v.
Huddleston*, 507 U.S. 60, 122 L. Ed. 2d 421, 113 S. Ct. 1095 (1993), and
Limbach v. Hooven & Allison Co., 466 U.S. 353, 80 L. Ed. 2d 356, 104 S. Ct.
1837 (1984), instead of utilizing a per se rule exempting goods in transit, actually
utilize two tests for determining the validity of state taxation of foreign exports
under such provision, namely, (1) a foreign relations test and (2) a state harmony
test; neither of these is violated here, *see, e.g., Virginia Indonesia Co. v. Harris
County Appraisal District*, 910 S.W. 2d 905, 922-25 (Tex. 1995) (Hecht, J.,
dissenting), and *Department of Revenue v. Association of Washington
Stevedoring Companies*, 435 U.S. 734, 764, 55 L. Ed. 2d 682, ___, 98 S Ct.
1388, 1406 (1978) (Powell, J., concurring).

ADMINISTRATIVE DECISION

On various dates in the years 2000 through 2002, the Petitioners timely
filed their respective claims for refund of certain amounts of coal severance taxes
and minimum coal severance taxes for the respective time periods. The Internal
Auditing Division, by various letters, denied all of the refund claims. The

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stated for the denials was essentially that the Division lacked the authority to grant a tax refund based upon an allegedly unconstitutional application of certain tax statutes.

Thereafter, by various hand deliveries and mailings, the Petitioners timely filed petitions for refund.

Subsequently, notices of an agreed-to consolidated hearing on all of the petitions for refund were sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10-5e [1986] and § 11-10-9 [1978].¹

FACTS

The material facts in this matter are not controverted.

During the respective refund petition periods, the various Petitioners were engaged in the State of West Virginia in the business of severing and processing coal and immediately placing that coal in the export stream to purchasers in foreign countries.

The description of the typical salient steps in this export stream for the coal is set forth in Petitioner's initial brief; that somewhat detailed description is

¹ The two Petitioners named above in the caption to this Administrative Decision, and numerous other taxpayers who are related to Petitioner have also timely filed claims and petitions (petition filings through December 31, 2002) for refund of severance and related excise taxes for various periods subsequent to the time periods at issue at the administrative hearing in this matter, raising the same issues raised herein. At the request of all of the Petitioners, and without objection by the Division, all of these refund petitions have been consolidated herewith for purposes of administrative decision. At this beginning point in the obviously on-going litigation to-be, about the extremely important issues herein, it would be superfluous to give all the tedious details about all of these other petitions. Suffice it to say, therefore, that all of these other petitions are covered by this Administrative Decision and are, accordingly, denied, for the reasons set forth herein, as if those reasons were set forth herein *in extenso* with respect specifically to each of those other petitions. The parties obviously would agree as to which of all of these related petitions would be included in any subsequent proper and timely appeal to the courts from this Administrative Decision.

and which immediately thereafter enters the "stream of export" to purchasers in foreign countries; the more modern precedents of the Supreme Court of the United States actually applying that federal constitutional provision, such as *Itel Containers International Corp. v. Huddleston*, 507 U.S. 60, 122 L. Ed. 2d 421, 113 S. Ct. 1095 (1993), and *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 80 L. Ed. 2d 356, 104 S. Ct. 1837 (1984), instead of utilizing a per se rule exempting goods in transit, actually utilize two tests for determining the validity of state taxation of foreign exports under such provision, namely, (1) a foreign relations test and (2) a state harmony test; neither of these is violated here, see, e.g., *Virginia Indonesia Co. v. Harris County Appraisal District*, 910 S.W. 2d 905, 922-25 (Tex. 1995) (Hecht, J., dissenting), and *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 764, 55 L. Ed. 2d 682, ___, 98 S Ct. 1388, 1406 (1978) (Powell, J., concurring).

In conclusion: In a hearing on a petition for refund, the burden of proof is upon a petitioner-taxpayer to show that the petitioner-taxpayer is entitled to the refund. W. Va. Code § 11-10-9 [1978]. In this matter the Petitioner has failed to carry their burden of proof, in light of the conclusion of law (Determination) stated immediately above.

Disposition

WHEREFORE, it is the **DECISION** of the **STATE TAX COMMISSIONER OF WEST VIRGINIA** that all of the various Petitioners' petitions for refund of coal

severance taxes and the related minimum coal severance tax, for the respective tax periods, should be and are hereby **DENIED**.