

**SYNOPSIS**

**COAL SEVERANCE TAXES -- 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 -- STATUTES CONSTITUTIONAL AS APPLIED TO FOREIGN EXPORTS --** The coal severance tax statutes, W. Va. Code §§ 11-13A-3 [1997] and 11-13A-6 [1997] 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 a certain date, the Petitioner timely filed its claim for refund of coal severance taxes for the year ended December 31, 1998. The Internal Auditing Division in writing denied the entire refund claim. The reason stated for the denial 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 mail, the Petitioner timely filed a petition for re

OFFICE OF THE  
SECRETARY OF STATE  
WEST VIRGINIA

2003 JUL 23 A 11: 02

FILED

## **FACTS**

The material facts in this matter are not controverted.

During the period in question, the Petitioner was 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 the Petitioner's initial brief; that somewhat detailed description is adopted and will be deemed to be set forth *in extenso* here as this tribunal's findings of fact with respect thereto (for purposes of any review by the courts).

This tribunal also finds that liability for the taxes in question accrues under the statutory law, at the time of sale, in these cases, which is after the coal has entered the continuous stream of export to foreign customers.

## **ISSUES AND DETERMINATIONS**

At the outset the State Tax Commissioner wishes to compliment the Petitioner's counsel for the superbly organized presentation of the factual case and for the excellently prepared memoranda of law, in this complex and vitally important matter.

### *Authority of Tax Commissioner to declare statute unconstitutional as applied*

The first issue is whether this tribunal, as part of the executive branch of state government, has the authority to declare a statute unconstitutional, not on its face, but only as applied to the particular set of circumstances involved in the litigation. The short answer is yes.

Stated more fully: It is **DETERMINED** that 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. See, e.g., *Richardson v. Board of Dentistry*, 913 S.W.2d 446 (Tenn. 1995) (“as applied” issue may also be raised for first time in courts on appeal). See generally M. Foy, *The Authority of an Administrative Agency to Decide Constitutional Issues: Richardson v. Tennessee Board of Dentistry*, 17 NAALJ 173 (Spring, 1997). Cf. syl. pt. 3, *Cleveland Gear Co. v. Limbach*, 35 Ohio St. 3d 229, 520 N.E.2d 188 (1988) (question of whether tax statute is unconstitutional as applied to a particular state of facts must be raised in notice of appeal to Board of Tax Appeals, and Board of Tax appeals must receive evidence concerning this question if presented, even though Board of Tax Appeals may not declare the statute unconstitutional as applied).

*Constitutionality of severance tax statutes as applied to coal placed immediately in export stream*

The second issue is whether the coal severance tax statutes, which admittedly are nondiscriminatory against exports, are constitutional under the more modern precedents of the Supreme Court of the United States interpreting the Federal Import-Export Clause, U.S. Const. art. I, § 10, cl. 2, insofar as these statutes are applied to the export of coal severed in this State but which coal

immediately enters the export stream to purchasers in foreign countries. The short answer is yes.

Stated more fully: It is **DETERMINED** that the coal severance tax statutes, W. Va. Code §§ 11-13A-3 [1997] and 11-13A-6 [1997], 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).

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 the Petitioner's petition for refund of coal severance taxes, for the year 1998, should be and are hereby **DENIED**.