

FILED

SYNOPSIS

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COAL SEVERANCE TAXES -- OTA'S AUTHORITY TO DECLARE STATUTE UNCONSTITUTIONAL AS APPLIED -- The West Virginia Office of Tax Appeals ("OTA"), 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, OTA does have the limited authority to declare a state tax statute unconstitutional *as applied* to the particular set of material facts involved in a given matter.

COAL SEVERANCE TAXES -- STATUTES UNCONSTITUTIONAL AS APPLIED TO FOREIGN EXPORTS -- Governed by the holding of the Supreme Court of the United States in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 91 L. Ed. 80, 67 S. Ct. 156 (1946) (famously pro-taxpayer-oriented Douglas, J., writing for 7-1 majority), the West Virginia statutes imposing severance taxes on coal, including the additional tax on coal and the minimum severance tax on coal, W. Va. Code §§ 11-13A-3(a)-(b) [1997], 11-13A-6(a) [1997], and 11-12B-3(a) [2000], are unconstitutional, 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; these excise (business privilege) taxes, as applied in this context, constitute, "in operation and effect," "direct" "imposts" on sales of coal in foreign-export transit, which imposts are *per se* prohibited by the Federal Import-Export Clause as analyzed by *Richfield Oil*.

COAL SEVERANCE TAXES -- OTA MUST FOLLOW UNITED STATES SUPREME COURT PRECEDENT(S) NOT EXPLICITLY OVERRULED -- The West Virginia Office of Tax Appeals -- and all other tribunals, judicial and quasi-judicial -- must follow precedent(s) of the Supreme Court of the United States that may appear to be no longer valid but which are not explicitly overruled by that Court, such as *Richfield Oil Corp. v. State Board of Equalization*, 320 U.S. 69, 91 L. Ed. 80, 67 S. Ct. 156 (1946), see *United States v. International Business Machines Corp.*, 517 U.S. 843, 862, 135 L. Ed. 2d 124, 140, 116 S. Ct. 1793, 1804 (1996) (Thomas, J., writing for 6-2 majority) (dictum, that, under the Federal Import-Export Clause, "[t]he Court has never upheld a state tax assessed directly on goods in import or export transit[,] despite a different, more lenient type of analysis in more recent Import-Export Clause decisions of the highest Court; *IBM* is a Federal Export Clause case, U.S. Const. art. I, § 9, cl. 5, which imposes a broader prohibition against the Federal Congress than the Federal Import-Export Clause, U.S. Const. art. I, § 10, cl. 2, imposes against the states). *Agostini v. Felton*, 521 U.S. 203, 237, 138 L. Ed. 2d 391, 423, 117 S. Ct. 1997, 2017 (1997) ("[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of

decisions, the [lower tribunals] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

FINAL DECISION

The Petitioner filed an amended severance tax return claiming a refund, plus any statutory interest, for the calendar and tax year 1999 for coal severance taxes.* The purpose of the amendment was to delete all sales in continuous transit to the ultimate customers in foreign countries.

The Internal Auditing Division of the West Virginia State Tax Commissioner’s Office, by letter dated March 31, 2003, denied the entire refund claim. The reason stated for the total denial of this refund claim was, essentially, that the Commissioner lacked the authority to declare a state tax statute to be unconstitutional, as requested by the Petitioner for coal sales to customers in foreign countries. The Petitioner received the refund claim denial letter on a date not set forth in the record.

Thereafter, by mail postmarked April 08, 2003, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund. See W. Va. Code § 11-10A-8(2) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002]. The parties filed post-hearing memoranda of law, and the matter was submitted for decision on the evidence and those memoranda of law.

* In this matter the term “coal severance taxes” refers to the basic coal severance tax, the “additional tax on coal,” and the “minimum tax” on severed coal. See W. Va. Code §§ 11-13A-1 *et seq.*, as amended, called the “Severance and Business Privilege Tax Act of 1993,” especially §§ 11-13A-3(a)-(b) [1997] (imposing basic severance tax on coal) and § 11-13A-6(a) [1997] (imposing additional severance tax on coal), and W. Va. Code § 11-12B-1 *et seq.*, as amended, especially § 11-12B-3(a) [2000] (imposing minimum severance tax on coal).

FINDINGS OF FACT

The parties agree as to the material facts in this matter. They may be stated as follows.

1. The Petitioner is the parent company of Company 1, Company 2, and Company 3. All three of these subsidiary companies were included in the Petitioner's consolidated severance tax return for the calendar and tax year 1999. Both Company A and Company B are located in the same county in West Virginia, while Company C is located in another county in this State. Transcript ("Tr.") (of July 2002 evidentiary hearing involving the Petitioner for the immediately preceding year, adopted by reference at the hearing in this matter) at 11-12.

2. For the year 1999, the Petitioner and the aforementioned subsidiaries produced and sold a total of 986,702 net tons of coal from their mining operations. Of this total, 151,624 net tons were sold directly or indirectly to customers located in foreign countries. Petitioner's Exhibit Nos. 6 & 7.

3. The coal is sold on terms of Mine #1. That is the point at which the coal is loaded into the rail car for shipment. Title to the coal passes from the Petitioner to the purchaser at the loading point. Tr. at 18-19.

4. From the point of loading at the mines, the coal is transported by rail car to Virginia, for delivery within a few hours to export ship, and without any stops or delays along the way. There is no storage or redirection of the coal loaded for shipment. Tr. at 43.

5. All of the coal produced and sold by the Petitioner which was shipped from

the West Virginia, mines to Virginia, was loaded into ships for delivery to purchasers in foreign countries. Tr. at 21.

6. With both direct and indirect sales, the commencement of the export occurs no later than the loading of the coal into the rail car at the mines in West Virginia. Tr. at 53.

7. The Petitioner paid severance taxes on all export sales of coal. The foreign customer did not in any sale reimburse the Petitioner for the coal severance taxes paid by the Petitioner.

8. For the year 1999, the Petitioner paid coal severance taxes on all of the 151,624 tons of coal exported by the Petitioner. Tr. at 27.

CONCLUSIONS OF LAW

1. Under the applicable statutes, *see, e.g.*, W. Va. Code § 11-13A-3(a)-(b) [1997] (excise tax imposed “upon . . . privilege of . . . business of severing, extracting, reducing to possession and producing for sale, ... [5%] of the gross value of the natural resource produced . . . , as shown by the gross income derived by the sale”), liability for the coal severance taxes accrued in this matter at the time of sale, which is after the coal had entered the continuous stream of export to foreign customers.

2. The West Virginia Office of Tax Appeals (“OTA”), 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, OTA does have the limited authority to declare a state tax statute unconstitutional *as applied* to the particular set of material facts involved in a given matter. *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).

3. Governed by the holding of the Supreme Court of the United States in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 91 L. Ed. 80, 67 S. Ct. 156 (1946) (famously pro-taxpayer-oriented Douglas, J., writing for 7-1 majority), the West Virginia statutes imposing severance taxes on coal, including the additional tax on coal and the minimum severance tax on coal, W. Va. Code §§ 11-13A-3(a)-(b) [1997], 11-13A-6(a) [1997], and 11-12B-3(a) [2000], are unconstitutional, 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; these excise (business privilege) taxes, as applied in this context, constitute, “in operation and effect,” “direct” “imposts” on sales of coal in foreign-export transit, which imposts are *per se* prohibited by the Federal Import-Export Clause as analyzed by *Richfield Oil*.

4. The West Virginia Office of Tax Appeals -- and all other tribunals, judicial and quasi-judicial -- must follow precedent(s) of the Supreme Court of the United

States that may appear to be no longer valid but which are not explicitly overruled by that Court, such as *Richfield Oil Corp. v. State Board of Equalization*, 320 U.S. 69, 91 L. Ed. 80, 67 S. Ct. 156 (1946), see *United States v. International Business Machines Corp.*, 517 U.S. 843, 862, 135 L. Ed. 2d 124, 140, 116 S. Ct. 1793, 1804 (1996) (Thomas, J., writing for 6-2 majority) (dictum, that, under the Federal Import-Export Clause, “[t]he Court has never upheld a state tax assessed directly on goods in import or export transit[,]” despite a different, more lenient type of analysis in more recent Import-Export Clause decisions of the highest Court; *IBM* is a Federal Export Clause case, U.S. Const. art. I, § 9, cl. 5, which imposes a broader prohibition against the Federal Congress than the Federal Import-Export Clause, U.S. Const. art. I, § 10, cl. 2, imposes against the states). *Agostini v. Felton*, 521 U.S. 203, 237, 138 L. Ed. 2d 391, 423, 117 S. Ct. 1997, 2017 (1997) (“[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower tribunals] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

5. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon a petitioner-taxpayer to show that it is entitled to the refund. See W. Va. Code § 11-10A-10(e) [2002]; 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

6. In light of conclusions of law nos. 1, 3, and 4, the Petitioner in this matter has carried the burden of proof concerning entitlement to the requested refund of coal severance taxes, plus any statutory interest.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of coal severance taxes, plus any statutory interest, is hereby **AUTHORIZED** *in toto*.

As set forth in W. Va. Code § 11-10A-18 [2002], the West Virginia State Tax Commissioner's Office is to see that the payment of these refunds, including any statutory interest that may accrue, is issued promptly.