SANITIZED DECS. – 02-415 RSV, 02-416 RSV, 02-416 RSV & 02-418 RSV – BY – R. MICHAEL REED – ISSUED – 07/09/03 – SUBMITTED FOR DECISION ON BRIEFS – 01/31/03

SYNOPSIS

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judicial and quasi-judicial -- must follow precedent(s) of the Supreme Court of the United States that may appear to be no longer valid but which are not explicitly overruled by that Court, such as *Richfield Oil Corp.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

On January 31, 2002, one of the Petitioners, Petitioner 1, filed two amended severance tax returns claiming refunds, respectively, for the calendar year 1998 and for the calendar year 1999, both 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 Sales Tax Unit of the Internal Auditing Division of the West Virginia State Tax Commissioner's Office, denied all of these two refund claims. The reason stated for the total denial of these claims 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. This Petitioner received the refund claim denial letter on May 06, 2002.

Thereafter, by mail postmarked June 05, 2002, Petitioner 1 timely filed petitions for refund, with the then reviewing entity, the Office of Hearings and Appeals.

Similarly, on January 29, 2002, the other Petitioner, Petitioner 2, also filed two amended severance tax returns claiming refunds, respectively, for the calendar year 1998 and for the calendar year 1999, both for coal severance taxes. The purpose of the amendment was the same as stated above for Petitioner 1.

The Respondent's Division, by letter dated April 29, 2002, denied all of these two refund claims. Again, the reason stated for the total denial of these claims 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

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* 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

foreign countries. This Petitioner received the refund claim denial letter on May 01, 2002.

Thereafter, by mail postmarked June 05, 2002, Petitioner 2 timely filed petitions for refund, with the then reviewing entity, the Office of Hearings and Appeals.

Subsequently, notice of a hearing on the petitions was sent to each of the Petitioners and an agreed-to consolidated hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002]. Post-hearing memoranda of law were filed, and the consolidated matter was submitted on January 31, 2003, for decision by this tribunal, the West Virginia Office of Tax Appeals. *See* W. Va. Code §§ 11-10-9(b) [2002], 11-10A-1 [2002], 11-10A-3 [2002], and 11-10A-8(2) [2002].

FINDINGS OF FACT

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

1. During the tax refund periods in question, the Petitioners severed, processed, and sold coal from underground and surface mines located in West Virginia. After mining and any processing, the coal was stockpiled at the mine or at a nearby central loading site.

2. Immediately upon removal from the stockpiles, all of the coal sales at issue were to customers who, in turn, immediately sold and placed the coal in continuous transit, first by railway, and subsequently by cargo ships from out-of-state loading facilities for shipment, usually within 72 hours, to the ultimate customers located in foreign countries.

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.

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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).

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 Apppeals 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].

6. In light of conclusions of law nos. 1, 3, and 4, the Petitioners-taxpayers in this matter have carried the burden of proof concerning entitlement to the requested tax refunds.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the all four of the petitions for refund (two for each Petitioner-taxpayer), described above at the outset of this Final Decision, are 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.