

SANITIZED DECS. – 03-270 RSV, 03-271 RSV, 03-367 RSV, 03-363 RK, 03-536 RSV, 03-537 RSV, 03-364 RK, 03-194 RSV, 03-228 RSV, 03-229 RSV, 03-230 RSV, 03-118 RSV, 03-102 RK, 03-103 RSV, 03-088 RK, 03-089 RSV, 03-100 RK & 03-101 RSV – BY – R. MICHAEL REED – SUBMITTED FOR DECISION ON STIPULATIONS AND BRIEFS – 10/03/03 – ISSUED 12/11/03

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*, regardless of the fact that outgoing transportation costs are excluded explicitly by legislative regulation (and implicitly by statute) from the "gross value" of the coal for coal severance tax purposes.

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and quasi-judicial -- must follow precedent(s) of the Supreme Court of the United States that may appear to be no longer valid but which are not explicitly overruled by that Court, such as *Richfield Oil Corp.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

STATE OF WEST VIRGINIA
OFFICE OF TAX APPEALS

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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 dates set forth in the respective petitions for refund (or petitions for credit, as the case may be),¹ the respective Petitioners in this consolidated matter filed amended tax returns claiming refunds (or overpayment credits, as the case may be) in certain amounts for certain tax periods, for coal severance taxes.² 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 (“the Commissioner” or the “Respondent”), by

¹ This tribunal will not unnecessarily burden this decision with the details as to the respective refund claim and refund petition filing dates, respective tax amounts, tax periods, related taxpayer names, etc., pertaining to each of the numerous petitions for refund involved in this consolidated matter; the parties obviously are familiar with them. This matter is just another group of refund petitions in a continuing series of identical litigation on a vitally important federal constitutional issue that surely will be making its way through the various state and federal courts over the next several years.

It is noted, too, that this tribunal will not continue to encumber its docket by withholding the numerous decisions in these and similar matters filed with this tribunal, until the pending litigation in the courts is finally resolved. As previously communicated to the parties, they should explore legally viable ways to avoid an endless stream of “piecemeal” litigation for the ensuing time periods, without asking this tribunal to accumulate an artificial “backlog” of these cases.

² In this matter the term “coal severance taxes” refers to the basic coal severance tax, the “additional [severance] tax on coal,” the “minimum tax” on severed coal, and any other related excise taxes that the parties may ultimately agree are involved. *See, e.g.*, 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); § 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).

One other point: the parties have agreed to reserve the right to develop the record, if necessary -- after the courts’ final resolution of the federal constitutional issue -- on a relatively minor, unrelated issue

certain letters, denied all of these severance tax 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 Petitioners for coal sales to customers in foreign countries. The Petitioners received the respective refund claim denial letters on certain dates.

Thereafter, by mail, the Petitioners timely filed their respective petitions for refund, with this tribunal, the West Virginia Office of Tax Appeals. See W. Va. Code § 11-10A-8(2) [2002].

Subsequently, pursuant to the provisions of 121 C.S.R. 1, § 53.1 (Apr. 20, 2003), the parties submitted this agreed-to consolidated matter for decision on stipulations of fact and memoranda of law. The parties also stipulated that the record of the evidentiary hearing involving most of these same Petitioners that was held on May 9, 2001, before the predecessor reviewing agency, the Office of Hearings and Appeals, is incorporated into the evidentiary record in this matter.

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 mines located in one or more of the southern counties of West Virginia.

2. Immediately upon severance and any processing, all of the coal at

concerning processing of some of the coal to produce a synthetic fuel. This Final Decision does not, of course, preclude the parties from presenting that issue to this tribunal at an appropriate time later.

issue was transported by rail from the mine in the State of West Virginia to the seaport near a bordering state. The railroad has no ground storage facilities for coal at the seaport. Therefore, the railroad requires the Petitioners-taxpayers to coordinate their shipments of coal by rail to the seaport with the arrival of a ship that will transport the same coal from the port to customers overseas.

3. The coal is identified and irrevocably destined for export at the time it is loaded onto the train at the mine site. Stated alternatively, once the coal has left the train loading facility at the mine site, it will not be diverted from its destination overseas. By the time the coal is loaded onto the train at the mine site, the Petitioners-taxpayers have already informed the railroad of the identity of the foreign country to which the coal is ultimately destined and of the identity of the foreign customer. By that same time, the railroad has also coordinated the arrival of the ship near the bordering state, which will transport the coal overseas to the foreign destination. From the beginning of the loading process at the coal mine in the State of West Virginia, the train bearing the coal does not stop until it arrives at the port near the bordering state. There, the train is broken up and the coal from each car is dumped onto a conveyor belt, which loads the coal directly into the ship.

4. Accordingly, the Petitioners'-taxpayers' coal enters the continuous export stream when it is loaded onto rail cars at the mine site in the State of West Virginia.

CONCLUSIONS OF LAW

Consistent with this tribunal's Final Decision in *Concept Mining, Inc. et al.*

v. Craig, Docket No. 02-415 RSV, etc. (July 09, 2003), *on appeal to circuit court*, this tribunal holds as follows:

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*, regardless of the fact that outgoing transportation costs are excluded explicitly by legislative regulation (and implicitly by statute) from the "gross value" of the coal for coal severance tax purposes.

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 (or overpayment credit). 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 Petitioners-taxpayers in this matter have carried the burden of proof concerning entitlement to the requested tax refunds (or overpayment credits, as the case may be).

.DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that all of the petitions for refund (or credit, as the

case may be) in this consolidated matter are hereby **AUTHORIZED**. These refunds (or credits, as the case may be, plus any statutory interest).

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, or any requested credit for overpayment, is issued promptly.