

SANITIZED DECS – DOCKET NOS – 04-016 RSV, 04-157 RSV, 04-159 RSV, 04-160 RSV & 04-161 RSV – R MICHAEL REED – SUBMITTED – MAY 6, 2004 AND JUNE 2, 2004 – ISSUED JUNE 4, 2004

SYNOPSIS

SEVERANCE TAXES ON COAL -- SPECIAL (EXCISE) TAX ON COAL PRODUCTION FOR SURFACE “MINING AND RECLAMATION OPERATIONS FUND” -- SPECIAL RECLAMATION TAX FOR SURFACE MINING “SPECIAL RECLAMATION FUND” -- 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), the various West Virginia statutes imposing severance taxes on coal, W. Va. Code §§ 11-13A-3(a)-(b) [1997, 2002], 11-13A-6(a) [1997], 11-12B-3(a) [2000], 22-3-32(a) [1994], and 22-3-11(h) [1994, 2001], 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*.

SEVERANCE TAXES ON COAL -- SPECIAL (EXCISE) TAX ON COAL PRODUCTION FOR SURFACE “MINING AND RECLAMATION OPERATIONS FUND” -- SPECIAL RECLAMATION TAX FOR SURFACE MINING “SPECIAL RECLAMATION FUND” -- 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judicial and quasi-judicial -- must follow precedent(s) of the Supreme Court of the United States that may appear to be no longer valid but which are not explicitly overruled by that Court, such as *Richfield Oil Corp.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 dates set forth in the respective petitions for refund,¹ the respective Petitioners in this consolidated matter filed amended tax returns claiming refunds 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.

¹ This tribunal will not unnecessarily burden this decision with the details as to the respective refund claim and refund petition filing dates, refund claim denial letter dates, respective tax amounts, tax periods, etc., pertaining to each of the several petitions for refund involved in this consolidated matter; the parties obviously are very familiar with them. This matter is just another (third) 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.

² In this matter the term “coal severance taxes” refers to the following: (a) the basic coal severance tax; (b) the “additional [severance] tax on coal”; (c) the “minimum tax” on severed coal; (d) the “special [excise] tax on coal production,” which tax is dedicated to the Surface “Mining and Reclamation Operations Fund”; and (e) the “special reclamation tax,” which tax is dedicated to the Surface Mining “Special Reclamation Fund.” 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, 2002] (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); W. Va. Code § 22-3-32(a) [1994] (imposing special excise tax on coal production, which tax is dedicated to the Surface “Mining and Reclamations Operations Fund”); and W. Va. Code § 22-3-11(h) [1994, 2001] (“special reclamation tax,” which tax is dedicated to the Surface Mining “Special Reclamation Fund”).

The Sales Tax Unit of the Internal Auditing Division of the West Virginia State Tax Commissioner's Office ("the Commissioner" or the "Respondent"), by 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 in certain of her prior administrative decisions had determined that the coal severance tax statutes in question did not violate the Import-Export Clause of the Federal Constitution as applied to 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 consolidated matter for decision on stipulations of fact. 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. Finally, the parties stipulated that the memoranda of law submitted in that prior administrative proceeding apply here, too.

FINDINGS OF FACT

Except with respect to Docket No. 04-016, the record now before this tribunal does not specify precisely the respective refund claim amounts for each of these types of taxes, or, for that matter, whether, for sure, refund claims (amended returns) have already been filed for the Code chapter 22 taxes. Accordingly, at this point, this tribunal has, for simplicity, re-designated all of these matters with the docket no. suffix, "RSV," for refund of severance taxes (here, on coal). To the extent that the Code chapter 22 coal severance (reclamation) taxes are in fact involved, this Decision applies with equal force to them. The parties will, of course, if necessary, "sort out" all of these "housekeeping details" at the appropriate time.

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 issue was transported by rail from the mine in the State of West Virginia to the seaport near Virginia. 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 Virginia, 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 Virginia. 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

This tribunal holds as follows:

1. Under the applicable statutes, *see, e.g.*, W. Va. Code § 11-13A-3(a)-(b) [1997, 2002] (excise tax imposed “upon . . . exercising the privilege of engaging or continuing within this state in the 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. 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), the various West Virginia statutes imposing severance taxes on coal, W. Va. Code §§ 11-13A-3(a)-(b) [1997, 2002], 11-13A-6(a) [1997], 11-12B-3(a) [2000], 22-3-32(a) [1994], and 22-3-11(h) [1994, 2001], 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*.

3. 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.”).³

³ This tribunal is aware of the recent ruling, issued on May 27, 2004, by Judge Kaufman of the Circuit Court of Kanawha County, West Virginia, in *U.S. Steel Mining Co. v. Craig*, Civil Action No. 03-AA-74, involving this identical issue. Judge Kaufman in essence held that *Richfield Oil* had been overruled, implicitly, by later precedents of the Supreme Court of the United States. This tribunal concludes, however, that the above-quoted teaching of *Agostini* and similar precedents require all lower tribunals to “let” the Supreme Court of the United States explicitly overrule its own precedents and, until that time, to apply existing precedents of that Court. Similarly, the dicta of the High Court in *IBM*, *supra*, is binding on all lower tribunals until the High Court explicitly overrules the same. Stated another way, it is not proper for any lower tribunal to anticipate an explicit overruling of precedent by the High Court, no matter how clear it may appear that such overruling will occur sometime.

4. 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).

5. In light of conclusions of law nos. 1, 2, and 3, 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 all of the petitions for refund in this consolidated matter are hereby **AUTHORIZED**.⁴

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.

⁴ This tribunal is not able to state precisely the total amount of taxes involved in these refund petitions, due to the present ambiguity as to whether refund claims (amended returns) for the Code chapter 22 taxes have in fact been filed. *See supra* note 2, 2nd paragraph.