

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judicial and quasi-judicial -- must follow precedent(s) of the Supreme Court of the United States that may appear to be no longer valid but which are not explicitly overruled by that Court, such as *Richfield Oil Corp.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 April 03, 2004, the Petitioner timely filed amended tax returns claiming refunds for the Petitioner's fiscal year ended March 31, 2001, for various types of coal severance taxes.¹ The purpose of the amendment in each tax refund claim 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, by a letter dated April 21, 2004, denied the entire amount of each 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 Petitioner received the respective refund claim denial letters on April 22, 2004.

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

¹ 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 Reclamation 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").

Subsequently, pursuant to the provisions of 121 C.S.R. 1, § 53.1 (Apr. 20, 2003), the parties submitted this matter for decision on stipulations of fact. The parties also stipulated that the record of the evidentiary hearing involving this Petitioner and other related taxpayers 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

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

1. During the tax refund periods in question, the Petitioner 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 an out-of-state seaport. The railroad has no ground storage facilities for coal at the seaport. Therefore, the railroad requires the Petitioner-taxpayer to coordinate its 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 Petitioner-taxpayer has 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 out-of-state seaport, 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 out-of-state seaport. 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 Petitioner's-taxpayer's 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.”).²

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 Petitioner-taxpayer in this matter has 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 entire amount of each of the petitions for refund in this matter are hereby **AUTHORIZED**.

² 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 directly on point, such as *Richfield Oil*. Similarly, the dicta of the High Court in *IBM, supra*, is, virtually, “binding” on all lower tribunals until the High Court explicitly repudiates 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.

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.