

15-0935

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CSX TRANSPORTATION, INC.,
Petitioner below, Respondent,

v.

MATKOVICH, MARK W., as
STATE TAX COMMISSIONER of
WEST VIRGINIA,
Respondent below, Petitioner

Civil Action No. 15-AA-36
Judge Louis H. Bloom

RECEIVED

AUG 27 2015

FINAL ORDER

Attorney General Office
Tax Division

Pending before the Court is a *Petition for Appeal* filed on March 27, 2015 by the Petitioner, Mark W. Matkovich, State Tax Commissioner of West Virginia ("Tax Commissioner"), by counsel, Katherine A. Schultz, Senior Deputy Attorney General. The Tax Commissioner requests that this Court reverse the final decision of the West Virginia Office of Tax Appeals ("OTA"), specifically, OTA Docket Numbers 12-477 RMFE and 13-278 M. Upon review of the parties' legal memoranda, oral arguments, the record, and the applicable law, the Court finds and concludes as follows:

STANDARD OF REVIEW

The procedures applicable to judicial review of decisions of the Office of Tax Appeals are governed by Section 29A-5-4, *et seq.* of the West Virginia Code, otherwise known as the State Administrative Procedures Act. W. Va. Code § 11-10A-19(f). Specifically, West Virginia Code Section 29A-5-4(g) states as follows:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or

- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.¹

Conclusions of law by the Office of Tax Appeals are reviewed *de novo*.

FINDINGS OF FACT

1. Respondent is a Virginia corporation with its principal place of business in Jacksonville, Florida. The Respondent's business is interstate rail transportation.

2. In October 2010, an auditor with the West Virginia State Tax Department met with a representative of Respondent at one of its rail yards in West Virginia and characterized this meeting as a "field audit." One of the results of this field audit was to set up the Respondent as a fuel importer and to ensure that it began to pay West Virginia Motor Fuel Use Tax under Section 11-15A-13a of the West Virginia Code ("WV Use Tax") on the fuel it was using in West Virginia.

3. Thereafter, Respondent filed amended West Virginia Motor Fuel Use Tax Returns wherein the Respondent sought a credit for sales taxes paid for locomotive fuel to cities, counties, and other localities in states other than West Virginia under West Virginia Code Section 11-15A-10a. The Tax Commissioner determined that the Respondent was not entitled to a credit for these taxes and issued a Refund Denial.

4. During the process of reviewing the amended returns, the auditor and other Tax Department employees considered what they determined to be a different problem, namely, the way Respondent was calculating the credit it was seeking for fuel taxes paid to other states. This

¹ W. Va. Code § 29A-5-4(g).

led the auditor to conduct another field audit which led to a Notice of Assessment against the Respondent for WV Use Tax on June 5, 2013. For three quarters in 2012, an auditor in the West Virginia Tax Department utilized a “new” methodology to determine gallons of motor fuel deemed used in West Virginia, and how many of those gallons were purchased in other states and taxed.

5. On December 14, 2012, Respondent timely filed with the OTA a petition for refund. Additionally, as a result of the Notice of Assessment, Respondent also filed a timely petition for reassessment. The two petitions were consolidated before the OTA and an evidentiary hearing was held on April 30, 2014. At the conclusion of the hearing, the parties filed legal briefs.

6. On January 23, 2015, the OTA rendered its Final Decision which granted Respondent’s refund request and vacated the Assessment issued by the Tax Department.

7. The OTA determined that the Respondent was entitled to a credit under Section 11-15A-10a of the West Virginia Code for sales taxes paid to cities, counties, and other localities. The OTA based this determination primarily on its review and analysis of the dormant Commerce Clause jurisprudence. As a result, the OTA opined that “the Tax Commissioner has applied West Virginia’s use tax to the Petitioner here in a manner that violates the dormant Commerce Clause because its application is not fairly apportioned and discriminates against interstate commerce.”²

8. On March 27, 2015, the Tax Commissioner filed the *Petition for Appeal* before this Court, citing eight assignments of error. Respondent filed a Response to the Petition for Appeal, stating that the true issue before this Court is the strictly legal question of whether CSXT

² Final Decision, pp. 13-14.

is entitled to claim a use tax credit for local taxes paid to cities, counties, and other localities in other states.³

9. The Tax Commissioner filed its Memorandum of Law, agreeing that “[t]he only issue on appeal is whether CSXT is entitled to claim a credit for local taxes paid in other states in order to reduce the assessment and obtain a refund.”⁴ The Tax Commissioner set forth three arguments in its Memorandum of Law, namely that: (1) the OTA’s decision ignored the statutory mandate of W. Va. Code § 11-15A-10a; (2) the OTA erroneously found that the Tax Commissioner’s application of the use tax credit in Section 11-15A-10a was unconstitutional; and (3) the WV Use Tax does not violate the external consistency test.

10. Respondent filed its Response, countering the Tax Commissioner’s position with three arguments in opposition, namely that: (1) dormant Commerce Clause jurisprudence clearly dictates that a failure to allow a credit for local taxes paid in other jurisdictions violated the dormant Commerce Clause; (2) the OTA correctly applied the law and found that not allowing a credit for local sales taxes paid to other jurisdictions ran afoul of the dormant Commerce Clause; and (3) the Tax Commissioner failed to show there was any error in the OTA’s final decision.

11. This Court held a hearing on August 6, 2015. At oral argument, Respondent stated that once the legal question of whether it is entitled to a credit for local sales taxes paid to other states is addressed, it would agree to jointly calculate the proper assessment for the three quarters of 2012 and the calculation of the refund request with the Tax Department. Thus, the sole issue before this Court is whether the OTA’s final decision was correct on the legal issue of

³ CSXT filed a Response to the Tax Commissioner’s Petition for Appeal, which informed the Court that there are no issues as to whether CSXT is entitled to a credit over the 6% tax rate imposed on motor fuel under West Virginia statutes, or whether CSXT is entitled to claim a credit for certain Florida taxes paid. CSXT does not claim any credits above the 6% tax rate imposed on motor fuel in this state, nor a credit for certain Florida taxes paid.

⁴ Appellant’s Memo. of Law, p. 3.

whether the failure to allow a use tax credit for sales taxes paid to cities, counties, and other localities of another state violates the dormant Commerce Clause.

DISCUSSION AND CONCLUSIONS OF LAW

Whether the Tax Commissioner's application of the use tax credit violates the dormant Commerce Clause

12. This Court will first address the issue of whether the failure to allow a use tax credit for sales taxes paid to cities, counties, and other localities of another state violates the dormant Commerce Clause.

13. Article 1, § 8 of the United States Constitution states that Congress has the authority to “regulate Commerce with foreign Nations, and among the several States.” The Supreme Court has determined that, in addition to granting express authority to regulate interstate commerce, the Commerce Clause also prevents state regulations that interfere with interstate commerce by way of the doctrine otherwise known as the “dormant” Commerce Clause.⁵

14. A fundamental principle of the dormant Commerce Clause is that “a state may not subject a transaction to a greater tax when it crosses state lines than when it occurs entirely intrastate.”⁶ West Virginia courts must utilize the same test as the United States Supreme Court when considering whether a state tax scheme runs afoul of the dormant Commerce Clause. “A state tax on interstate commerce will not be sustained unless it: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate; and (4) is fairly related to the services provided by the State.”⁷ This test is referred to as the *Complete Auto* test, as created in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

⁵ See *Tax Com'r of State v. MBNA America Bank, N.A.*, 640 S.E.2d 226, 229 (W.Va. 2006), citing *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938).

⁶ *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 646 (1994).

⁷ *Griffith v. ConAgra Brands, Inc.*, 728 S.E.2d 74, 80 (W.Va. 2012), citing *Complete Auto Transit, Inc. v. Brady*, 430

15. The “apportionment” requirement ensures that each state taxes only its fair share of an interstate transaction.⁸ Accordingly, “[i]t is a commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause. In order to prevent multiple taxation of interstate commerce, the Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value.”⁹ To analyze whether a state tax is fairly apportioned, interpreting bodies look to whether “a tax is ‘internally consistent’ and, if so, whether it is ‘externally consistent’ as well.”¹⁰

16. A state’s failure to establish the internal consistency of its tax scheme is fatal because: “A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.”¹¹ The Supreme Court recently explained the internal consistency test:

By hypothetically assuming that every State has the same tax structure, the internal consistency test allows courts to isolate the effect of a defendant State’s tax scheme. This is a virtue of the test because it allows courts to distinguish between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes. . . . The first category of taxes is typically unconstitutional; the second is not. . . . Tax schemes that fail the internal consistency test will fall into the first category, not the second: Any cross-border tax disadvantage that remains after application of the test cannot be due to tax disparities but is instead attributable to the taxing State’s discriminatory policies alone.¹²

U.S. 274 (1977).

⁸ See *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989).

⁹ *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446-47 (1979).

¹⁰ *Oklahoma Tax Comm’n v. Jefferson Lines*, 514 U.S. 175, 185 (1995).

¹¹ *Id.*

¹² *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1802 (2015).

17. Internal consistency “looks to the structure of the tax at issue to see whether its identical application by every state in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.”¹³ With respect to the tax at issue, use taxes are inherently discriminatory against interstate commerce because use taxes are typically only applied to the use of goods purchased outside the taxing state and brought into it.¹⁴ Use taxes are valid, however, if the burdens of the tax imposed on intrastate and interstate commerce are equal.¹⁵ Moreover, for over twenty years, since the Supreme Court’s decision in *Oklahoma Tax Commission v. Jefferson Lines, Inc.* 514 U.S. 175 (1995), it has been clear that a state is constitutionally required to provide a credit against its own use tax for sales or use taxes paid to other jurisdictions.¹⁶

18. Thus, in the context of a use tax, state tax schemes meet this internal consistency test by providing a credit for sales or use taxes paid to other jurisdictions.¹⁷ And importantly, passing this test “requires that states impose identical taxes when viewed *in the aggregate*-- as a collection of state and sub-state taxing jurisdictions.”¹⁸ In other words, taxes imposed by a sub-state taxing jurisdiction are imputed to the state in applying the internal consistency test as being derivative of a state’s overall sovereign tax authority.

19. In order to determine whether a tax scheme is internally consistent, courts have consistently utilized a test which hypothetically assumes that every State applies its taxing scheme in the same potentially offending manner to isolate the effect of that state’s tax scheme.¹⁹

¹³ *Id.*

¹⁴ *See Ariz. Dept. of Revenue v. Ariz. Public Service Co.*, 934 P.2d 796, 799 (Ariz. Ct. App., 1997).

¹⁵ *Id.*

¹⁶ *See* 1 Hellerstein & Hellerstein, *State Taxation*, ¶ 18.09[2], 2015 WL 1646564, pp. *1-*2 (3d ed. 2000-15).

¹⁷ *General Motors Corp. v. City and Cnty. of Denver*, 990 P.2d 59, 69 (Colo. 1999), citing Walter Hellerstein, *Is “Internal Consistency” Foolish?: Reflections On an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 160 (1988).

¹⁸ 990 P.2d at 69 (emphasis added).

¹⁹ *See, e.g., Compt. of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1802 (2015); *General Motors Corp. v. City and Cnty. of Denver*, 990 P. 2d at 69; *Ariz. Dept. of Revenue v. Ariz. Public Service Co.*, 934 P. 2d at 799.

20. For example, in *Arizona Dep't of Revenue*, the Court of Appeals of Arizona first discussed the jurisprudence of fair apportionment under the internal consistency test:

State use taxes typically apply only to the use of goods purchased outside the taxing state and brought into it. A use tax thus inherently discriminates against interstate commerce. Nevertheless, such tax is valid under the Commerce Clause as a 'compensatory tax' if the state imposes an intrastate tax such that the burdens imposed on interstate and intrastate commerce are equal. The taxpayer's out-of-pocket expenses determine whether the burdens are equal. Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state.²⁰

After citing these principles of dormant Commerce Clause jurisprudence, using a simple math analysis, the Court explained its ruling that the Department of Revenue violated the internal consistency test because if an Arizona company bought coal in Arizona, it would pay 5% sales tax, and by a refusal to provide credit for all of the taxes paid on that same unit of coal, an interstate taxpayer ended up paying a total of 5.25% in taxes for the same amount of coal.²¹

21. The leading treatise on state and local taxation provides further guidance on the internal consistency requirements of the credit provisions in *Arizona Dep't of Revenue*:

An application of the "internal consistency" doctrine to the position of the Arizona DOR demonstrates the soundness of the Arizona court's conclusion from a constitutional standpoint. If every state had a crediting provision limited to state-level sales and use taxes imposed by other states, the interstate enterprise that purchased goods or services in a local taxing jurisdiction in State A and used the goods or services in a local taxing jurisdiction in State B would be placed at a competitive disadvantage to the enterprise that confined its activities to the local taxing jurisdiction in state A or State B. The former enterprise would pay a local sales tax in State A as well as a local tax in State B, whereas the latter enterprise would pay but a single local tax in either State A or State B. That is precisely the type of burden on interstate activity that the "internal consistency" doctrine was intended to prohibit.²²

22. Another example of the internal consistency test is *General Motors Corp.*, where the highest court in Colorado found that the Denver city and county municipal code section,

²⁰ 934 P. 2d at 799.

²¹ *Id.*

²² 1 Hellerstein & Hellerstein, STATE TAXATION, ¶ 18.09[3][a], 2015 WL 1646564, p. *6 (3d ed. 2000-15).

section 53-92(c)—which only credits sales and use taxes paid to other municipalities—was an internally inconsistent tax scheme.²³ In holding that the credit mechanism had the potential to cause multiple taxation, the Court found:

For example, if Colorado imposed a 1% sales or use tax and Denver a 2% tax, a purchaser or user would owe a 3% total tax. Similarly, if Michigan collected a 2% sales or use tax and Detroit a 1% tax, a purchaser or user in Detroit would pay a 3% total tax. However, a user who purchased the item in Detroit would be subject to an additional 1% tax upon the storage or use of the item in Denver because section 53-92(c) only credits taxes paid to other municipalities. Thus, Denver's use tax could burden interstate commerce if every other state and municipality employed the same tax structure as Colorado and Denver, but imposed different tax rates.²⁴

23. Most recently, the Supreme Court of the United States affirmed the highest court in Maryland's application of the internal consistency test.²⁵ In *Wynne*, Maryland residents complained about the fact that they received a credit against the Maryland state income tax for state income taxes paid in other states, but did not get a credit for those state taxes paid against Maryland's county taxes on the same income.²⁶ The Court of Appeals of Maryland undertook the same analysis undertaken by the Arizona Supreme Court in *Arizona Dep't of Revenue*.²⁷ Using the "simple math" of the internal consistency test, the Maryland Court of Appeals determined that a multi-state taxpayer who was unable to obtain a full credit for the taxes paid in other jurisdictions had a net higher tax bill than a comparable resident with only Maryland income.²⁸

24. The Supreme Court affirmed the Maryland Court of Appeals, holding that Maryland's failure to allow a credit for state income tax paid in other jurisdictions against Maryland's county income tax on the same income violated the dormant Commerce Clause

²³ 990 P. 2d at 69.

²⁴ *Id.* at 70.

²⁵ *See Compt. of Treasury of Maryland v. Wynne*, 135 S. Ct. at 1807.

²⁶ *Id.* at 1793.

²⁷ *Id.*

²⁸ *Id.*

because it failed the internal consistency test.” The Supreme Court stated that the “existing dormant Commerce Clause cases all but dictate the result reached in this case by Maryland’s highest court.”³⁰ Using the “simple math” of the internal consistency test and assuming that every State imposed taxes similar to Maryland’s with a credit being limited to *state* taxes paid in other jurisdictions, the Supreme Court found that the interstate taxpayer would be subject to double taxation- having to pay an “extra” income tax to his resident state as well as the state in which he earned the income.³¹

25. Now, having reviewed the well-established dormant Commerce Clause jurisprudence and the analysis of the internal consistency test by other jurisdictions, including the United States Supreme Court, this Court finds that the present case reveals a similar internal inconsistency in the application of WV Use Tax without credit for local sales taxes paid as in the above-cited cases.

26. Consumers who use diesel fuel in West Virginia are subject to a 6% WV Use Tax, regardless of where purchased.³²

27. Section 11-15A-10a provides for a credit for sales taxes paid to another jurisdiction for that same service or property up to the 6% rate. Section 11-15A-10a provides:

A person is entitled to a credit against the tax imposed by this article on the use of a particular item of tangible personal property, custom software or service equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that property or service.³³

28. However, in states where the state sales tax rate is lower than 6%, but which exact a municipal and county sales tax in addition to a state sales tax, a consumer of diesel fuel who purchases the fuel outside West Virginia pays more than a similar in-state consumer of diesel

²⁹ 135 S. Ct. at 1794.

³⁰ *Id.*

³¹ *Id.* at 1803.

³² See W.Va. Code § 11-15A-13a(c)(1).

³³ W. Va. Code § 11-15A-10a.

fuel who purchases all of its fuel in West Virginia under the Department's interpretation of the credit statute. For example, in a state where there is 4% state sales tax and 2% county sales tax, a taxpayer pays a total of 6% sales tax on the purchase of diesel fuel in that state. If consumers are not given credit for local sales taxes paid, then the consumer purchasing diesel fuel out of state and paying an aggregate 6% sales tax will only get a West Virginia credit for the 4% state sales tax paid in the other jurisdiction. Thus, diesel fuel purchased outside but used inside West Virginia bears an additional 2% on diesel fuel comprised as follows: the 4% out of state sales tax plus the out of state 2% local county sales tax, plus 2% state portion of the WV Use Tax which is the 6% West Virginia rate less the credit for 4% out of state sales tax, for a total of 8%. Meanwhile, fuel purchased and consumed in West Virginia bears only the 6% WV Use Tax. In total, the consumer purchasing diesel fuel out of state and using it in West Virginia will pay more than a similar consumer purchasing in-state, when both consumers should only be paying a total 6% on fuel used in West Virginia.

29. Thus, like the tax schemes in *General Motors*, *Arizona Dep't of Revenue*, and *Wynne*, West Virginia's determination of a use tax credit without accounting for local taxes paid results in an internally inconsistent and a constitutionally suspect state tax structure. Unlike in *Wynne*, here, West Virginia does not impose a local tax. However, West Virginia's refusal to credit local taxes paid to other states results in the same outcome, *i.e.*, both states' taxing schemes favor either income derived or fuel purchased within its borders. Under Maryland's scheme in *Wynne*, Maryland residents were discouraged from gaining income from other states. Under West Virginia's scheme, using the Commissioner's method, out of state businesses who use fuel in West Virginia are discouraged from purchasing fuel from states that collect local taxes. Accordingly, this Court finds that West Virginia must allow a use tax credit against the

WV Use Tax for out of state local sales taxes paid, up to the 6% use tax credit, in order to comply with the dormant Commerce Clause.

Whether the OTA's Final Decision correctly analyzed the issue of whether Respondent is entitled to a use tax credit for sales taxes paid to cities, counties, or other localities of another state

30. Having found that failure to allow a use tax credit for sales taxes paid to other cities, counties, or localities of another state results in an internally inconsistent tax scheme, this Court finds that the OTA's Final Decision was correct in its analysis. Citing to the authority which this Court finds persuasive, this Court holds that the OTA's Final Decision did not contain any errors of law.

31. Furthermore, this Court does not agree with the Tax Commissioner that the OTA's Final Decision incorrectly analyzed the internal consistency test. As stated above, the internal consistency test is calculated by assuming that every state applies the offending tax scheme at issue to see if it results in subjecting an interstate taxpayer to double taxation while a corresponding intrastate taxpayer pays less.³⁴ The Tax Commissioner sets forth an internal consistency calculation that is premised solely on the fact that West Virginia does not have a county use tax, but this is an incorrect application of the internal consistency test. Instead, the offending tax scheme is West Virginia's failure to allow a use tax credit under Section 11-15A-10a for sales taxes paid to localities, up to the 6% use tax credit, such that an interstate taxpayer pays more for the use of motor fuel in West Virginia. The fact that West Virginia does not have a county use tax has no relevance to the analysis of internal consistency under the *Complete Auto Transit* test because the use tax provision itself is not the offending provision; rather, it is the calculation of the use tax credit without a credit for local sales taxes paid that produces the resulting discriminatory effect on interstate commerce. The Tax Commissioner's attempt to

³⁴ See, e.g., *Compt. of Treasury of Maryland v. Wynne*, 135 S. Ct. at 1802; *General Motors Corp. v. City and Cnty. of Denver*, 990 P. 2d at 69; *Ariz. Dept. of Revenue v. Ariz. Public Service Co.*, 934 P. 2d at 799.

apply the internal consistency test by ignoring this discrepancy because West Virginia imposes no local tax misses the mark. It misses the mark because the internal consistency test requires accounting for West Virginia tax scheme's failure to provide a credit a portion of another state's tax scheme. This Court finds the Tax Commissioner's argument in this regard unavailing.

32. The Tax Commissioner, as was recognized below by the OTA, offers no clear rebuttal to the internal inconsistency argument. The Tax Commissioner cites only Supreme Court cases that essentially affirm the viability of the internal consistency test as originally enunciated in *Complete Auto Transit*. For example, the Tax Commission places great reliance on *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) to suggest that its method of analyzing internal consistency is correct because the Respondent's assessment of internal consistency depends upon taxes imposed by other jurisdictions. But the Tax Commissioner misinterprets *Armco* and misinterprets the OTA's application of the internal consistency test. The OTA's application of the test does not require a court to examine other states' taxes. Rather, a court must suppose the subject state's tax structure was adopted by other states. As explained above, said application of the internal consistency test results in double taxation and disadvantages interstate commerce.

33. In conclusion, applying the internal consistency test to the case *sub judice* and assuming all states that do not impose local taxes also deny tax credits for local taxes paid in other states, the Court is of the opinion that such a scheme inherently discriminates against interstate commerce without regard to the tax policies of other states. As such, the Respondent is entitled to a use tax credit for sales taxes paid to cities, counties, or other localities of another state.

Whether the Tax Commissioner's application of the use tax credit satisfies the external consistency test

34. Having concluded that the State Tax Department's application of the use tax credit under Section 11-15A-10a must include a credit for local sales taxes paid to localities of other states, this Court finds it unnecessary to make any determination regarding the external consistency of the application of the use tax credit in this present case.³⁵

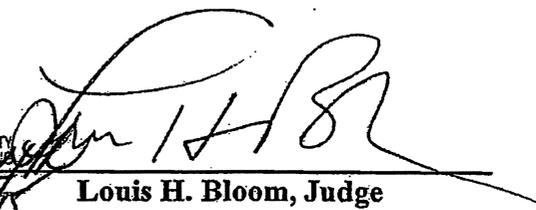
DECISION

Applying the *Complete Auto Transit* test, this Court finds that the Tax Commissioner's application of the use tax credit under Section 11-15A-10a of the West Virginia Code is an unconstitutional violation of the dormant Commerce Clause. This Court further finds that the OTA's conclusion was well-founded, well-reasoned, and well-supported by persuasive case law. This Court finds that the legal conclusion in the Final Decision of the OTA is **AFFIRMED** and does **DENY** the instant *Petition*. This Court further **ORDERS** the parties to **JOINTLY SUBMIT** a calculation of the refund requested and the proper assessment for the three quarters of 2012 based upon the determination by this Court that Respondent is entitled to a use tax credit for sales taxes paid to cities, counties, and other localities of other states **WITHIN THIRTY-DAYS** of the entry of this Order. Once the parties have submitted their joint calculations, this Court does order that the above-styled appeal be **DISMISSED** and **STRICKEN** from the docket of this Court. The Clerk is **DIRECTED** to send a certified copy of this *Final Order* to the parties and counsel of record.

4 8/24/15 ENTERED this 24 day of August 2015.

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY,
AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING
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DAY OF _____ 2015.
Cathy S. Gatson
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA


Louis H. Bloom, Judge

³⁵ *Wynne*, 135 S. Ct. at 1805 (affirming decision of Maryland Court of Appeals after finding violation of internal consistency test).