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OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0935

MARK W. MATKOVICH, as
State Tax Commissioner of West Virginia,

Petitioner Below, Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent Below, Respondent.

BRIEF OF PETITIONER MARK W. MATKOVICH, STATE TAX COMMISSIONER OF WEST VIRGINIA

PATRICK MORRISEY
ATTORNEY GENERAL

KATHERINE A. SCHULTZ
SENIOR DEPUTY ATTORNEY GENERAL
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Telephone: (304) 558-2522
State Bar No. 3302
E-mail: Kathy.A.Schultz@wvago.gov

Counsel for Petitioner

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BRIEF OF PETITIONER MARK W. MATKOVICH, STATE TAX COMMISSIONER OF WEST VIRGINIA

I.

ASSIGNMENTS OF ERROR

A. INSTEAD OF ASSUMING, AS UNITED STATES SUPREME COURT PRECEDENT REQUIRES, THAT EVERY STATE HAD WEST VIRGINIA'S TAX STRUCTURE, THE CIRCUIT COURT ERRONEOUSLY ASSUMED THAT WEST VIRGINIA'S MOTOR FUEL TAX WAS NOT CONSTITUTIONALLY APPORTIONED BASED ON THE TAX STRUCTURES IN ALABAMA AND GEORGIA.

B. THE CIRCUIT COURT CHANGED THE SUPREME COURT'S INTERNAL CONSISTENCY TEST BY ADDING A CREDITING REQUIREMENT FOR SUSTAINING A STATE'S USE TAX.

C. THE CIRCUIT COURT MISAPPLIED THE SUPREME COURT'S *WYNNE* DECISION BY IGNORING THE FACT THAT WEST VIRGINIA'S MOTOR FUEL USE TAX, UNLIKE MARYLAND'S INCOME TAX, IF ADOPTED BY EVERY STATE, WOULD NOT RESULT IN IMPERMISSIBLE DOUBLE TAXATION.

D. THE CIRCUIT COURT'S ORDER IS CONTRARY TO SUPREME COURT PRECEDENT AND BASED UPON STATE COURT DECISIONS THAT ARE BOTH DISTINGUISHABLE AND WRONGLY DECIDED.

II.

STATEMENT OF THE CASE

CSX Transportation, Inc. (hereinafter "CSXT") pays motor fuel use tax to West Virginia to compensate for the fact that none of the motor fuel it uses in this State is purchased here. The tax is calculated based upon the wholesale price of fuel pursuant to W. Va. Code § 11-15-18b and is apportioned based upon the percentage of miles traveled in West Virginia in relation to the total miles traveled systemwide. In addition, CSXT receives a credit for motor fuel sales taxes paid to other States consistent with W. Va. Code §§ 11-15A-10a and 11-15A-13a.[1] This case presents the issue of whether it is entitled to obtain additional credit for local taxes paid in other States to further reduce its West Virginia Motor Fuel Use Tax assessment and to obtain a refund. West Virginia imposes only a State sales and use tax on motor fuel and prohibits counties and municipalities from imposing these taxes. *See* W. Va. Code §§ 7-22-12(b), 8-13C-4(c)(1)(B), 8-38-12(b) and 11-15-9f. App. vol. II, 1596-97.

CSXT is an interstate railroad carrier that uses motor fuel in West Virginia in furtherance of its business of transporting goods throughout the eastern United States. The State of West Virginia imposes a State use tax on the proportion of motor fuel that CSXT is deemed to have used when its railroad cars travel in the State. *See* W. Va. Code §§ 11-14C-5 and 11-15A-13a. As an interstate railroad carrier, CSXT loads fuel systemwide. App. vol. II, 1076. It does not segregate fuel based

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[1]CXST does not dispute the State tax credit given which apportions the taxes paid to other States based upon the mileage traveled in West Virginia.

upon where it is purchased or where it will be used. *Id.* at 1093. The fuel is commingled so that its place of purchase and use is not traceable. *Id.* at 1077, 1093-94. Further, CSXT does not calculate the amount of fuel used in each state. *Id.* at 1118. As a result, CSXT does not know how much fuel it uses in West Virginia or where it was purchased.

What is known is that CSXT purchases no fuel in West Virginia. *Id.* at 1077.[2] Furthermore, CSXT loads most of its total fuel in Ohio where there is no sales tax on motor fuel. *Id.* at 1094. In addition to Ohio, CSXT pays no sales tax on motor fuel purchased in Pennsylvania, Maryland, Virginia and Kentucky. Therefore, the fuel CSXT purchased in West Virginia's neighboring States is purchased tax free. Meanwhile, sales tax is paid on locomotive fuel purchased in Alabama, Connecticut, Georgia, Illinois, New York, and Tennessee. *Id.* at 1079. In the States where CSXT pays sales tax on the motor fuel it purchases, no credit is provided for fuel used in that State. *Id.* at 1080. Additionally, the States collecting sales tax do not provide a credit for motor fuel used outside the State where purchased. *Id.*

Because CSXT does not know how much fuel it uses in West Virginia, it does not dispute that an apportionment formula must be used to determine how much fuel it uses here. *Id.* at 1077, 1118. At the administrative hearing, the Tax Commissioner introduced two assessment calculations, one relied on the statutory apportionment formula contained in W. Va. Code § 11-15A-13a and the other relied on an alternate formula. App. vol. II, 1207-16. The alternative formula showed that the fuel purchased in Alabama and Georgia would have been used prior to travel in West Virginia. *Id.* at 1135-37, 1214-16. However, because the alternate formula was different than the apportionment

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[2]CSXT imports some fuel into Grafton, West Virginia and receives a credit for taxes paid on the imported motor fuel.

prescribed by statute, the Tax Commissioner did not appeal OTA's rejection of the alternate formula to calculate the assessment.

Motor fuel is assessed pursuant to W. Va. Code § 11-15-18b based upon a wholesale price. Entities bringing fuel into the State are taxed based upon the apportionment formula contained in W. Va. Code § 11-15A-13a. Both parties agree that the apportionment formula contained in W. Va. Code § 11-15A-13a should be used to calculate the assessments. This formula apportions to West Virginia the amount of fuel deemed to be used here based on the division of total systemwide use of fuel by the miles traveled in West Virginia. The formula assumes that fuel usage is the same for every mile traveled in the eastern United States. App. vol. II, 1101. For 2010, CSXT traveled 4.7792% of its total miles in West Virginia; in 2011, CSXT traveled 4.7514% of its total miles in West Virginia; and in 2012, CSXT traveled 4.5385% of its total miles in West Virginia. *Id.* at 1247-67. Therefore, it was required to pay use tax on the percentage of fuel which corresponded to its travel in West Virginia for each of the years at issue. The number of gallons upon which CSXT owes use tax in West Virginia is not disputed. *Id.* at 1078.

In addition to apportionment based upon miles traveled in West Virginia, the State provides a credit for sales taxes paid to other States. This credit mirrors West Virginia's use tax structure which imposes only a State use tax while prohibiting the imposition of local taxes. *See* W. Va. Code §§ 7-22-12(b), 8-13C-4(c)(1)(B), 8-38-12(b) and 11-15-9f. App. vol. II, 1596-97. Credit for the local taxes paid in Alabama and Georgia are the only credits at issue in this case. App. vol. I, 152. The scope of the statutory credit affects both the refund requested and the assessment issued.

CSXT's Director of sales tax, Ms. Victoria Friedman, oversees its compliance with the filing of sales and use tax returns and has been in that position since 2005. App. vol. II, 1072. Ms.

Friedman testified that in May of 2011, CSXT reviewed its calculations and found that in prior periods it had only taken credit for the State portion of sales tax paid. *Id.* at 1081. Therefore, CSXT filed amended West Virginia Motor Carrier Quarterly Reports[3] for sales taxes paid for locomotive fuel to cities, counties, and localities in other states. The amended returns were for the quarterly periods beginning March 1, 2008 through December 31, 2010.

The Tax Department denied CSXT's request for a refund of local taxes paid totaling $907,230.88 because W. Va. Code § 11-15A-10a only provides a credit for taxes paid to other States. Additionally, an assessment was issued for the period of January 1, 2010 through December 31, 2012, to recapture credits taken by CSXT for taxes paid to counties and municipalities in other States. *Id.* at 1086.

On January 23, 2015, OTA vacated the assessment and CSXT was granted a credit in the amount of $907,230.88. The Tax Commissioner appealed the Administrative Decision to the circuit court on March 27, 2015. The Petitioner and Respondent then briefed the matter and presented oral argument at a hearing before the circuit court held on August 6, 2015. Both parties agree that the assessment should not have been vacated and that the refund amount granted was excessive. App. vol. I, 157-58. By order entered August 24, 2015, the circuit court affirmed OTA's granting of a credit for local taxes paid. On September 24, 2015, the circuit court remanded the determination of the credit calculations and resulting assessment to OTA consistent with W. Va. Code § 11-10A-19(f).[4]

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[3]Formerly known as the West Virginia Motor Fuel Use Tax returns.

[4]The parties have submitted their calculations to OTA. Factual disputes regarding the amount of use tax paid by CSXT and the resulting credit and assessment will be the subject of an evidentiary (continued...)

The Tax Commissioner now seeks reversal of the circuit court's decision allowing local credits for tax paid to cities, counties and municipalities in other States contrary to W. Va. Code § 11-15A-10a. The circuit court's basis for expanding the statutory credit ignored the State's motor fuel structure to which it applies. This lead to the circuit court's misapplication of the internal consistency test and on this basis the Tax Commissioner requests reversal.

III.

SUMMARY OF ARGUMENT

West Virginia imposes a State use tax on motor fuel based upon the miles traveled in West Virginia. No county or municipal taxes are imposed. In fact, the State prohibits local taxation of motor fuel. Additionally, a tax credit is provided for taxes paid to other States up to the amount of motor fuel use tax paid in West Virginia. For more than 30 years the United States Supreme Court has found a challenged State's tax constitutional if the hypothetical imposition of an identical tax by every State does not cause multiple taxation. This examination is commonly referred to as the application of the internal consistency test. However, instead of using West Virginia's tax structure as the measuring stick to determine constitutionality as required by longstanding Commere Clause jurisprudence, the circuit court erroneously used the tax structure of Alabama and Georgia as a basis for erroneously extending West Virginia's crediting statute. The circuit court misapplied the test. It found West Virginia's tax structure unconstitutional because no credits were provided for local taxes not imposed by West Virginia. The circuit court granted local credits for taxes paid in other States contrary to W. Va. Code § 11-15A-10a. As a result a refund was erroneously granted and

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[4](...continued)
hearing on February 3, 2016.

CSXT's assessment was sharply reduced. Because the circuit court misapplied the constitutional test and failed to presume the constitutionality of W. Va. Code § 11-15A-10a, reversible error was committed.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Tax Commissioner requests a Rule 20 Oral Argument, pursuant to the Revised Rules of Appellate Procedure, in this case because the circuit court affirmed an OTA decision which erroneously found the credit statute at W. Va. Code § 11-15A-10a to be unconstitutional unless it was expanded. The circuit court misapplied the internal consistency test utilized by the Supreme Court because it did not assume that every State had West Virginia's tax structure. Rather than applying the statutory language contained in W. Va. Code § 11-15A-10a, read *in pari materia* with the State's entire motor fuel tax structure, the circuit court found the credit unconstitutional unless it was expanded to provide credit for local taxes imposed in other States. However, this is a misapplication of the internal consistency test because West Virginia does not impose local sales or use taxes on motor fuel.

Furthermore, a memorandum decision is not appropriate because the Tax Commissioner seeks the reversal of the circuit court's decision. *See* Rev. R.A.P. 21(d).

V.

STANDARD OF REVIEW

West Virginia Code § 11-10-9 establishes the hearing procedures applicable to petitions for reassessment and petitions for refunds. It provides, in pertinent part,

If the hearing is on a petition for reassessment the burden of proof shall be upon the

> taxpayer to show the assessment is incorrect and contrary to law, either in whole or in part. If the hearing is on a petition for refund or credit, the petitioner shall also have the burden of proof.

W. Va. Code § 11-10-9(a). In the instant case, CSXT petitioned for a refund and a reduced assessment based on its amended tax returns. Thus, it has the burden of proving that its original tax returns were incorrect and that its amended reporting is correct. In addition, it was required to prove that the assessment was incorrect. The determination of the proper assessment and whether a refund should issue depends upon whether West Virginia's use tax structure violates the Dormant Commerce Clause of the United States Constitution, which presents a question of law.

Questions of law decided by the circuit court are reviewed *de novo*. *Davis Memorial Hosp. v. West Virginia State Tax Com'r*, 222 W. Va. 677, 671 S.E.2d 682 (2008), citing *Chrystal R.M. V. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

VI.

ARGUMENT

A. INSTEAD OF ASSUMING, AS UNITED STATES SUPREME COURT PRECEDENT REQUIRES, THAT EVERY STATE HAD WEST VIRGINIA'S TAX STRUCTURE, THE CIRCUIT COURT ERRONEOUSLY ASSUMED THAT WEST VIRGINIA'S MOTOR FUEL TAX WAS NOT CONSTITUTIONALLY APPORTIONED BASED ON THE TAX STRUCTURES IN ALABAMA AND GEORGIA.

In this case, CSXT challenges West Virginia's use tax alleging it discriminates against interstate commerce and is not properly apportioned. App. vol. I, 91. To place this case in context, there is no question that West Virginia's motor fuel use tax is constitutional. Additionally, the credit provided for State taxes in other States is not in dispute. Rather, the question is whether the circuit court's expansion of the credit provided in W. Va. Code § 11-15A-10a was constitutionally required.

Specifically, the issue on appeal is whether West Virginia must provide a credit against CSXT's use tax liability for the local sales taxes it pays in other States. There is no freestanding allegation of discrimination; rather, the discrimination alleged relates to the Taxpayer's claim of improper apportionment.

Article I, Section 8 of the United States Constitution provides that Congress has the authority to "regulate Commerce with foreign Nations, and among the several States." In addition to 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. *See Tax Com'r of State v. MBNA America Bank, N.A.*, 220 W. Va. 163, 166, 640 S.E.2d 226, 229 (2006), *cert. denied, FIA Card Services, N.A. v. Tax Commissioner of West Virginia*, 551 U.S. 1141 (2007) and reaffirmed in *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190, 728 S.E.2d 74 (2012). Dormant Commerce Clause challenges are evaluated based on whether the tax complies with the *Complete Auto* test. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

The West Virginia Supreme Court of Appeals recognized and applied the *Complete Auto* test in *Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 474 S.E.2d 599 (1996); *MBNA*, *supra*, and *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190, 728 S.E.2d 74 (2012). App. vol. I, 191. "Under the *Complete Auto* test, state taxes are upheld as nonviolative of the federal Commerce Clause provided that 'the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.'" *Hartley Marine*, 229 W. Va. at 677, 474 S.E.2d at 607. App. vol. I, 191.

In *Hartley Marine*, the Court examined the constitutionality of West Virginia's motor fuel

use tax[5] imposed upon water craft carriers engaged in interstate commerce to determine whether it violated the Dormant Commerce Clause. The Court found that the State's motor fuel use tax did not violate the Commerce Clause because it satisfied the *Complete Auto* test. In this case, West Virginia's motor fuel use tax is challenged based on discrimination[6] and improper apportionment. While the *Hartley Marine* case did not involve allegations of discrimination or improper apportionment, there is no question that the constitutionality of West Virginia's motor fuel use tax must be evaluated by applying the *Complete Auto* test.

Although discrimination is alleged, there is no independent allegation of discrimination separate from the Taxpayer's claim that the use tax is not properly apportioned. Notwithstanding the foregoing, at Conclusion of Law 14 (hereafter, "COL"), the circuit court stated, "[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.'" App. vol. I, 5. This statement is correct but it was not relevant to the circuit court's analysis. This is demonstrated by the fact that the circuit court did not weigh the equal tax treatment of motor fuel in West Virginia regardless of where it was purchased.[7] The circuit court's description of use taxes as inherently discriminatory was both wrong and inapplicable to this case.

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[5]The use tax under consideration in the *Hartley Marine* case was repealed and replaced by W. Va. Code § 11-15A-13a which is the current use tax on motor fuel.

[6]A fair reading of its tax challenge as well as the circuit court's order reflects that this case involves discrimination only to the extent that an apportionment challenge is being raised.

[7]Because OTA erred in vacating the assessment and granting a credit in excess of CSXT's witness's testimony at the administrative hearing, the calculation of the proper credit and assessment was remanded to OTA pursuant to W. Va. Code § 11-10A-19(f). The parties dispute the calculation; however, no matter which calculation is accepted by OTA, there will be no discrimination of interstate commerce.

1. The Supreme Court's Internal Consistency Standard.

In speaking of the Court's analysis of apportionment challenges, the *Jefferson Lines* Court stated, "[f]or over a decade now, we have assessed any threat of malapportionment by asking whether the tax is 'internally consistent' and, if so, whether it is 'externally consistent' as well." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). To determine whether a tax is properly apportioned, a court must first examine whether the tax passes the internal consistency test. In this case, the circuit court's apportionment determination was limited to its examination of whether West Virginia's motor fuel sales and use tax is internally consistent. COL 30. App. vol. I, 12. The internal consistency test "asks, 'What would happen if all States did the same?'" *American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 437 (2005) (citations omitted), and then assumes that all states have adopted the challenged tax structure. App. vol. I, 192-93.

At COL 17, the circuit court correctly found in part that, "[i]nternal 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.'" App. vol. I, 7 (emphasis added). App. vol. II, 1596; App. vol. I, 192-93.This conclusion of law is consistent with the unbroken line of Supreme Court precedent that has established that the challenged tax structure is the measure for determining internal consistency. *See Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983); *Jefferson Lines*, 514 U.S. at 185; *Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984); *America Trucking Assns., Inc.*, 545 U.S. at 437; *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989); *America Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 282-84 (1987); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 247 (1987); and *Wynne*,

135 S. Ct. at 1801-03. App. vol. I, 174. Importantly, the recently decided *Wynne* case did not change the internal consistency test or the assumptions that must be made. App. vol. I, 195. Rather, the *Wynne* Court reaffirmed that the subject State's *identical* tax structure is the proper measurement for determining a tax's internal consistency. The *Wynne* Court stated, "This test, which helps courts identify tax schemes that discriminate against interstate commerce, '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.'" *Wynne*, 135 S. Ct. at 1802 quoting *Jefferson Lines*, 514 U.S. at 185 (emphasis added). App. vol. I, 182.

Again at COL 16, the circuit court also correctly quotes language from *Wynne*, which states that internal consistency is determined by assuming hypothetically that every State had the same tax structure. Reading the *Wynne* decision in its entirety, the controlling assumption in the case *sub judice* is that every State has adopted West Virginia's tax structure. App. vol. I, 182. Supreme Court precedent is clear. The rationale for the Court's adoption of the internal consistency test by the Supreme Court is to respect the sovereign rights of all States while ensuring that the tax is fairly apportioned. Contrary to the circuit court's conclusion, fair apportionment pursuant to the internal consistency does not look to or depend on the taxes of other States.

The Court has made clear that a State tax's constitutionality should not fall prey to the action of other States. In *Armco*, the Court rejected West Virginia's suggestion that the Court should examine the tax structure of other States to evaluate its wholesale tax's constitutionality. App. vol. I, 193. In response to West Virginia's argument, the Court stated, "[i]f we were to determine the internal consistency of one State's tax by comparing it with slightly different taxes imposed by other States, the validity of state taxes would turn solely on 'the shifting complexities of the tax codes of

49 other States.'" *Goldberg*, 488 U.S. at 261 (quoting *Armco*, 467 U.S. at 645). App. vol. I, 176-77. Thus, the circuit court's examination of Alabama and Georgia's statutes for purposes of its internal consistency analysis, instead of assuming that they had a tax structure identical to West Virginia's motor fuel use tax, was an analysis rejected by the *Armco* Court. The *Armco* Court, consistent with all of the other Supreme Court internal consistency cases, does not encroach on the sovereignty of any State's imposition of an even-handed tax. The test requires only that each State through the structure of its tax ensures nondiscrimination of interstate commerce based on the assumption that every State adopts the challenged State's tax.

Additionally, the circuit court erred when it ignored the Supreme Court's holding in *Wynne*, which invalidated Maryland's tax because its identical application by every State caused multiple taxation. App. vol. I, 184. In contrast to *Wynne*, West Virginia's motor fuel use tax's adoption by every State would not cause multiple taxation. Therefore, a proper application of the internal consistency test by the circuit court would have resulted in no expansion of West Virginia's crediting statute because West Virginia does not impose county use taxes on motor fuel. Rather, West Virginia apportions its State use tax, provides an apportioned credit for the only tax imposed and prohibits the imposition of local taxes. West Virginia's apportionment of the tax and State tax credit prevents discriminatory taxation because if every State had West Virginia's tax structure, no double taxation would occur. App. vol. I, 194. In contrast, assuming *arguendo* that West Virginia imposed an unapportioned State and county use tax on motor fuel but did not provide a credit for the county tax, then West Virginia's tax would fail the internal consistency test. But that is not the case before this Court because West Virginia apportions its tax and credit, provides a credit for the only tax imposed and prohibits the imposition of local taxes. App. vol. I, 183-84.

Furthermore, the circuit court ignored the fact that the internal consistency test is not concerned with economic reality or double taxation which occurs because of a State tax's interaction with a tax from another State. Any double taxation that has occurred has occurred because of West Virginia's motor fuel tax's interaction with the tax structure of Alabama and Georgia. App. vol. I, 194. However, as discussed *infra*, in reaching its ruling, the circuit court did not assume that every State had West Virginia's tax structure. Contrary to the Supreme Court's clear directive, the circuit court expanded West Virginia's crediting statute because West Virginia does not provide a credit for local taxes that it does not impose. Thus, the circuit court's failure to assume that all States had West Virginia's tax structure consistent with Supreme Court precedent caused it to erroneously conclude that W. Va. Code § 11-15A-10a had to be expanded.

2. West Virginia's Tax Structure.

West Virginia imposes only a State motor fuel use tax. *See* W. Va. Code §11-14C-5. West Virginia does not impose local taxes on motor fuel.[8] App. vol. I, 183. West Virginia also prohibits local taxation by counties and municipalities. W. Va. Code §§ 8-38-12(b), 7-22-12(b), 11-15-9f, 8-13C-4(c)(1)(B). App. vol. II, 1596-97. A credit is provided for sales taxes paid to other States in proportion to CSXT's travel here, up to the amount of use tax liability in West Virginia. *See* W. Va. Code §§ 11-15A-10a and 11-15A-13a. CSXT does not object to the State sales tax credit provided. In addition to the provision of an apportioned sales tax credit, the tax is also apportioned based upon travel in this State. *See* W. Va. Code § 11-15A-13a. The fact that West Virginia apportions its State motor fuel use tax and provides an apportioned credit ensures no double taxation in violation of the

[8]There is no claim that West Virginia or its political subdivisions are collecting a local motor fuel tax for which no credit is provided.

internal consistency test. CSXT does not object to West Virginia's apportionment formula contained in W. Va. Code § 11-15A-13a because it does not segregate its fuel usage by State. As a result, it does not know how much fuel it uses in West Virginia. Furthermore, it doesn't know where the fuel used in West Virginia was purchased. Thus, it does not know whether the fuel used in West Virginia was purchased in Ohio or the other tax free States close to West Virginia or in Alabama or Georgia.

West Virginia Code § 11-15A-13a(c)(1) provides that a motor carrier is taxed based on the gallons of fuel apportioned to the State which corresponds to the percentage of miles traveled in the State as compared to all of the miles traveled by it. For 2010, CSXT traveled 4.7792% of its total miles in West Virginia; in 2011, CSXT traveled 4.7514% of its total miles in West Virginia; and in 2012, CSXT traveled 4.5385% of its total miles in West Virginia. App. vol. II, 1247-67. Therefore, CSXT paid use tax only on the gallons of motor fuel deemed to be used in West Virginia. The percentage of fuel apportioned to West Virginia for which State use tax is assessed is not in dispute.

For purposes of the internal consistency test, if every State had West Virginia's sales and use tax structure, there would be no double taxation because W. Va. Code § 11-15A-10a provides a credit for State taxes which is apportioned consistent with the tax imposed. Specifically, if Alabama and Georgia imposed only a State sales tax, there would be no double taxation. Likewise, if Alabama and Georgia prohibited its political subdivisions from imposing sales tax, there would be no double taxation. In addition, West Virginia's apportionment of its motor fuel use tax based on the percentage of miles CSXT travels in this State further ensures that the tax imposed is fairly related to its presence here.

No Supreme Court cases require that the rate of taxation in the States must be equal, because the internal consistency test assumes that every State adopts the challenged tax structure which

includes the assumption that the tax rates in the other states are identical to the subject State. This is confirmed by language in *Jefferson Lines* discussing the internal consistency test which states, "[t]his test asks nothing about the degree of economic reality reflected by the tax, but simply 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." *Jefferson Lines*, 514 U.S. at 185. This is consistent with the plain and unambiguous language of the test which assumes that every State has adopted West Virginia's identical tax structure which includes the rate of taxation. Identical tax structure means identical in every respect.

Furthermore, at COL 16, the circuit court correctly quoted *Wynne* as stating:

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

App. vol. I, 6 (emphasis added). App. vol. I, 182-83.

West Virginia's tax falls into the second category because if double taxation occurs it is only as a result of the interaction of West Virginia's motor fuel use tax with the sales taxes of the political subdivisions of Alabama and Georgia. App. vol. I, 183. The above-referenced quote from the *Wynne* Court makes clear that the possibility of double taxation does not invalidate a tax if the subject tax passes the internal consistency test. As discussed herein, West Virginia's motor fuel use

tax passed the internal consistency test. App. vol. I, 184. Therefore, any possibility of double taxation, is the result of the tax structures of Alabama and Georgia.

While the circuit court acknowledges at COL 17 that application of the internal consistency test requires a court to assume that every State adopts the "structure of the tax at issue," it failed to make this assumption. App. vol. I, 7. This is demonstrated by its erroneous sustaining of OTA's final decision which expanded W. Va. Code § 11-15A-10a to require the provision of credits for local taxes in Alabama and Georgia in spite of the fact that no local taxes are imposed in West Virginia. Not only are local taxes not imposed, West Virginia prohibits their imposition.

At COL 31, the circuit court states in pertinent part, "[t]he 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." App. vol. I, 12.

The circuit court's analysis was wrong. First, it divorces the crediting statute from the statutes imposing the State tax and prohibiting the imposition of local taxes. The *Wynne* Court made clear that a State's entire tax structure must be evaluated to analysis internal consistency.[9] *Wynne*, 135 S. Ct. at 1803 n.8. However, the circuit court did not apply West Virginia's identical use tax

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[9]In further support of the fact that the entire tax structure must be examined to determine internal consistency, the Supreme Court's analysis of assertions of discrimination pursuant to prong 3 of the *Complete Auto* test is instructive. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963) and *Maryland v. Louisiana,* 451 U.S. 725 (1981). In both of these cases Louisiana asked the court to examine only the identical tax rate imposed on interstate and intrastate commerce while ignoring the difference in the way the tax was computed. The Supreme Court refused to parse the statute and found discrimination.

structure. Rather, contrary to the command of the internal consistency test, it substituted other States' tax structures in place of West Virginia's statutes to find a violation of the internal consistency test. This mistake is echoed in the remainder of COL 31, which states, "[t]he fact that West Virginia does not have a county use tax has no relevance to the analysis of internal consistency." App. vol. I, 12. Second, the circuit court's erroneous assumption caused it to find double taxation. Third, it ignored the fact that any double taxation is due to the interaction of West Virginia's constitutional tax with the presumably valid taxes of other States, which is constitutionally permissible. Because West Virginia's identical tax structure is the measure of a State's compliance with the internal consistency test; the circuit court was wrong when it failed to evaluate West Virginia's entire motor fuel use tax structure. The fact that West Virginia does not have a county tax is not only relevant, it is a part of West Virginia's tax structure that must be considered.

If the circuit court had assumed, as it was constitutionally required to, that Alabama and Georgia had West Virginia's identical tax structure, then no local credits would have been awarded. App. vol. I, 194. This is clear because if the circuit court had correctly applied the internal consistency test, it would have assumed that these States, like West Virginia, did not have local motor fuel sales taxes. The imposition of local taxes in Alabama and Georgia is irrelevant to whether West Virginia passes the internal consistency test because there are no local taxes imposed on motor fuel in West Virginia. App. vol. I, 197. If the correct constitutional assumption had been made by the circuit court, then W. Va. Code § 11-15A-10a would have been applied instead of expanded.

B. THE CIRCUIT COURT CHANGED THE SUPREME COURT'S INTERNAL CONSISTENCY TEST BY ADDING A CREDITING REQUIREMENT FOR SUSTAINING A STATE'S USE TAX.

As referenced above, the circuit court correctly stated that the "[i]nternal 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.'" COL 17. App. vol. I, 7. Although the circuit court correctly stated the internal consistency test, it did not apply it. The circuit court erred when it did not assume that every State had a tax structure identical to West Virginia's challenged sales and use tax. Rather than applying the longstanding internal consistency test, it changed the test erroneously relying on *Jefferson Lines* to add a crediting requirement for use taxes. In support of its change, the circuit court stated, "[m]oreover, for over twenty years, since the Supreme Court's decision in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 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." *Id.* (citation omitted). Contrary to the circuit court's conclusion, the *Jefferson Lines* Court did not hold that all States imposing a use tax must provide a credit for sales taxes paid in other jurisdictions. App. vol. I, 178. Instead, the Court answered only the question before it, which it articulated as, "[t]his case raises the question whether Oklahoma's sales tax on the full price of a ticket for bus travel from Oklahoma to another State is consistent with the Commerce Clause, U.S. Const. Art. 1, § 8, cl. 3." *Jefferson Lines*, 514 U.S. at 177.

In that case, the Taxpayer argued that Oklahoma's imposition of a State sales tax on the entire price of a bus ticket, which included travel outside the State, created the possibility of multiple taxation. App. vol. I, 179. Specifically, *Jefferson Lines* asserted that it might be subject to double

taxation because other States in which it traveled might impose a use tax on the travel in their States. *Jefferson Lines* rejected the hypothetical offered by the challengers that other States might impose a use tax on the bus ticket. The Supreme Court didn't care what taxes other States might impose. Rather, the Court examined only Oklahoma's tax under review. App. vol. I, 179.

The question in the case was whether the State sales tax imposed by Oklahoma needed to be apportioned to be internally consistent, not whether States imposing a use tax had to provide credits for sales taxes paid to other States or their political subdivisions. App. vol. I, 179. In order to determine whether Oklahoma's sales tax was properly apportioned, the *Jefferson Lines* Court examined whether it was internally and externally consistent. In evaluating the apportionment challenge, the *Jefferson Lines* Court first applied the internal consistency test articulating its requirements as "[i]nternal consistency is preserved when the imposition of a tax *identical* to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Jefferson Lines*, 514 U.S. at 185 (emphasis added). App. vol. I, 179. In *Jefferson Lines*, the Court found no risk of double taxation because, if every State imposed a sales tax on the bus tickets sold in their States, there will be no double taxation. App. vol. I, 179. Because the internal consistency test requires the adoption of the challenged State's identical tax structure, it is clear that no universal tax structure is mandated. If a universal tax structure was mandated for sales and use taxes then there would be no need to apply the internal consistency test. Contrary to the circuit court's ruling, because the *Jefferson Lines* case was not examining a use tax, it neither created a different internal consistency test for challenged use taxes nor imposed a sales tax crediting requirement on the imposition of use taxes. App. vol. I, 179.

The cases of *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978) and *Wynne*, *supra* provide

further support for the fact that the Supreme Court has not required States imposing use taxes to provide a credit for sales taxes imposed by States or their political subdivisions. In *Moorman*, the Court rejected the appellant's suggestion that the Commerce Clause mandates the use of a uniform formula to avoid multiple taxation when allocating the income of interstate businesses. App. vol. I, 86. The Court said, "[i]t is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions." *Moorman*, 437 U.S. at 280.

In *Wynne*, the Court reiterated that the States are permitted to use different formulas to impose income taxes. In criticizing the principal dissent in *Wynne*, the Court stated,

> [it] misunderstands the critical distinction, recognized in cases like *Armco*, between discriminatory tax schemes and double taxation that results only from the interaction of two different but nondiscriminatory tax schemes. See also *Moorman*, 437 U.S., at 277, n.12, 98 S. Ct. 2340 (distinguishing 'the potential consequences of the use of different formulas by the two States,' which is not prohibited by the Commerce Clause, from discrimination that 'inhere[s] in either State's formula,' which is prohibited.

Wynne, 135 S. Ct. at 1804. Thus, the Court's exercise of its judicial role has not extended to requiring the imposition of uniform tax statutes by all States to ensure proper apportionment. Furthermore, the *Wynne* Court did not order Maryland to provide a credit against its "county" tax for taxes paid in other jurisdictions which would have cured the infirmity in its income tax scheme. App. vol. I, 184. The Court explained its restraint by stating, "[o]f course, we do not decide the constitutionality of a hypothetical tax scheme that Maryland might adopt because such a scheme is not before us. That Maryland's existing tax unconstitutionally discriminates against interstate commerce is enough to decide this case." *Wynne*, 135 S. Ct. at 1806.

Additionally, a careful reading of the Hellerstein article relied on by the circuit court confirms that sales tax credits are not required to ensure that a use tax is sustained. The article references the fact that such a requirement has been advocated and adopted by some States but it concludes by stating, "[the Supreme Court] nevertheless had found it unnecessary to rule on the issue." 1 Hellerstein & Hellerstein, STATE TAXATION, ¶ 18.09[2], 2015 WL 1646564, p. *1 (3d ed. 2000-15). App. vol. I, 181. The Hellerstein article continues by stating, "[t]he Court's embrace of the 'internal consistency' doctrine as an element of its Commerce Clause jurisprudence, as well as its opinion in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, makes it clear that a state is constitutionally required to provide a credit against its own use tax for sales or use taxes paid to other states." *Id.* at p. *2 (footnotes omitted).

Because *Jefferson Lines* did not require States imposing use taxes to provide credit for other States sales taxes, West Virginia's motor fuel use tax only needs to pass the internal consistency test. Additionally, neither the *Jefferson Lines* case nor the Hellerstein article addresses the provision of a credit for sales taxes paid in other States' political subdivisions. App. vol. I, 181. Furthermore, the Hellerstein article does not discuss the possibility that States, like West Virginia, who have apportioned use taxes, can satisfy the internal consistency required without providing credits for sales taxes imposed by other States.

The earlier Hellerstein article referenced in COL 18 does not support the local credits awarded by the circuit court. The article also acknowledges that States imposing a use tax are not required to provide a credit for sales tax paid in other States. In discussing the lack of a requirement for a sales tax credit, it indicates, "[t]]he Supreme Court, at least up to now, has expressly refrained from holding that the states are constitutionally required to grant such a credit." Walter Hellerstein,

Is "Internal Consistency" Foolish?: Reflections On An Emerging Commerce Clause Restraint On State Taxation, 87 Mich. L. Rev. 138, 159-60 (1988).

The page cited as well as the one proceeding it advocating a requirement that States imposing a use tax should provide a sales tax credit is contained in a section describing unapportioned taxes. West Virginia's use tax does not fit into that category because it is apportioned. Further, the discussion of the requirement for the provision of a credit to ensure a use tax's internal consistency is limited to "sales or use taxes paid to other states." Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections On An Emerging Commerce Clause Restraint On State Taxation*, 87 Mich. L. Rev. 138, 160 (1988). West Virginia provides a credit for sales taxes paid to other States. *See* W. Va. Code § 11-15A-10a. Thus, West Virginia's tax satisfies the advocated "requirement." It is instructive that a State sales tax credit is advocated by Hellerstein to ensure that a taxpayer pays only a sales tax or a use tax. However, West Virginia's use tax does not cause the payment of two taxes. Regarding this case, only one county tax is paid to counties in Alabama and Georgia because West Virginia does not impose county taxes.

The sole focus for determining West Virginia's motor fuel use tax's internal consistency is on the taxes imposed by this State not the taxes imposed in other States or their political subdivisions. *Jefferson Lines* applied the internal consistency test to determine whether a State sales tax is properly apportioned; contrary to the circuit court order, it set no crediting requirement for sustaining use taxes. App. vol. I, 181. Thus, the *Jefferson Lines* opinion supports sustaining West Virginia's motor fuel use tax without expansion.

C. THE CIRCUIT COURT MISAPPLIED THE SUPREME COURT'S *WYNNE* DECISION BY IGNORING THE FACT THAT WEST VIRGINIA'S MOTOR FUEL USE TAX, UNLIKE MARYLAND'S INCOME TAX, IF ADOPTED BY EVERY STATE, WOULD NOT RESULT IN IMPERMISSIBLE DOUBLE TAXATION.

The United States Supreme Court's recent decision in *Wynne*, although distinguishable from this case, provides guidance to resolve the issue *sub judice*. App. vol. I, 82. Maryland imposed both a "state" income tax and a "county" income tax on its residents' income whether it was earned inside or outside the State. *Wynne*, 135 S. Ct. at 1792. App. vol. I, 82. Thus, Maryland's income tax on its residents was not apportioned based on its source. Residents who earned income out of state and paid income tax to the state where the income was earned were eligible for a credit against the Maryland "state" tax, but were not provided a credit against the "county" tax. *Id.* at 1793. App. vol. I, 82-83. Thus, unlike West Virginia's challenged tax structure, Maryland's tax was unapportioned and did not provide a credit for every tax it imposed.

Describing the income tax imposed on nonresidents, the *Wynne* Court stated, "Maryland also taxes the income of nonresidents. This tax has two parts. First, nonresidents must pay the 'state' income tax on all the income that they earn from sources within Maryland. Second, nonresidents not subject to the county tax must pay a 'special nonresident tax' in lieu of the 'county' tax." *Id.* at 1792 (citation omitted).

The question in *Wynne* was whether the State of Maryland had unrestrained power to tax the income earned by its residents. *Id.* at 1798. App. vol. I, 82. "Brian Wynne owned stock in Maxim Healthcare Services, Inc., a Subchapter S corporation. That year, Maxim earned income in States other than Maryland, and it filed state income tax returns in 39 States. The Wynnes earned income passed through to them from Maxim." *Id.* at 1793 (footnote omitted). The Wynnes sought a credit

for taxes paid to other States. *Id.* Unlike CSXT, the Wynnes were not seeking a credit for local taxes imposed by other States or their political subdivisions.[10] App. vol. I, 184-85. "[T]he Comptroller allowed the Wynnes a credit against their Maryland 'state' income tax but not against their 'county' income tax." *Wynne*, 135 S. Ct. at 1793. The denial of a credit for the "county" tax resulted in an appeal. The Circuit Court of Howard County reversed the denial of the refund sought against the "county" tax, which ruling was affirmed by the Maryland Court of Appeals. The Supreme Court affirmed the Court of Appeals' holding that Maryland's income tax scheme violated the internal consistency test.

Before applying the internal consistency test in *Wynne*, the Court noted that the challenged "county" tax was in reality a state tax. *Id.* at 1792. App. vol. I, 83. The fact that a portion of the tax was labeled as a "state" tax and the remaining tax was labeled as a "county" tax was immaterial. App. vol. I, 83. The *Wynne* Court's internal consistency analysis assumed that every State had adopted Maryland's tax structure. *Id.* App. vol. I, 84. Specifically, the Court assumed that all States imposed an unapportioned tax on income earned in their State without a full credit for all the taxes imposed in their jurisdiction.

As a result, impermissible double taxation occurred for residents of Maryland earning income outside of the State. App. vol. I, 84. If the Wynnes had received a credit for the Maryland "county" tax imposed on their income or if their income was apportioned based upon where it was earned, then no unconstitutional multiple taxation would have occurred. App. vol. I, 184. The Supreme Court provided an example which demonstrated Maryland's income tax structure's lack of internal

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[10]"The returns did not indicate payments of income taxes to any county or local entity in other states. The Wynnes claimed their pro rata share of such income taxes paid to other states as a credit." *Maryland State Comptroller v. Wynne*, 64 A.3d 453, 460 (Md. 2013).

consistency. The example regarding Maryland's tax structure states,

> Assume that every State imposed the following taxes, which are *similar* to Maryland's "county" and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. Assume further that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate.

Wynne, 135 S. Ct. at 1803-04.

The Supreme Court's use of similar taxes reflects Maryland's tax structure. The example did not change the Court's holding that the internal consistency test assumes that all States impose the challenged State's identical tax structure. *Id.* at 1802. The example changed the rates of the taxes imposed and the lack of a credit for the county and nonresident taxes was not directly addressed. However, this is consistent with Maryland's income tax statutes because the "county" tax and the nonresident taxes were imposed without the availability of a credit.

The example demonstrates that a Maryland resident, who earns income out of State, will pay tax to both Maryland and in the State where the income is earned. The payment of additional tax in the Court's example was caused by Maryland's tax structure. Maryland's income tax statutes were found unconstitutional because if every State adopted Maryland's tax structure, double taxation would occur. Specifically, Maryland's imposition of a "county" tax with no provision of a credit or apportionment of the tax caused double taxation. *See Wynne*, 135 S. Ct. at 1806. Double taxation did not occur because of the Maryland "county" tax's interaction with taxes in other States.

Language in the Wynne decisions of the Supreme Court and the Court of Appeals further underscores the error made by the circuit court. Maryland's income tax was found unconstitutional by the Court of Appeals because it did not allow a credit for its "county" income tax. *Wynne*, 64

A.3d at 471. Maryland could cure the discrimination by properly allocating the tax, providing a credit for the "county" tax, or eliminating the "county" tax. The fact that a "county" credit would have eliminated the discrimination demonstrates that West Virginia's tax is not discriminatory, because it does not need to provide a credit for local taxes that it does not impose. App. vol. I, 184. The opinion was later clarified to remove any doubt that Maryland had flexibility in curing the constitutional infirmity. The Court of Appeals' clarification stated, in pertinent part, "[a] state may avoid discrimination against interstate commerce by providing a tax credit, *or some other method of apportionment, to avoid discriminating against interstate commerce in violation of the dormant Commerce Clause.*" *Wynne*, 64 A.3d at 478 (emphasis added). App. vol. I, 184.

In affirming the Court of Appeals, the Supreme Court stated, "[i]f Maryland residents pay income tax to another jurisdiction for income earned there, Maryland allows them a credit against the 'state' tax but not the 'county' tax. As a result, part of the income that a Maryland resident earns outside the State may be taxed twice." *Wynne*, 135 S. Ct. 1792 (citations omitted). In its affirmance of the Court of Appeals' decision, the Supreme Court also allowed Maryland to choose how to eliminate its income tax scheme's unconstitutionality. *Wynne*, 135 S. Ct. at 1806. App. vol. I, 184.

Here, unlike Maryland, West Virginia taxes only the amount of fuel apportioned to the State based upon the miles traveled. If every State taxed only the fuel apportioned in their State, based on the miles traveled in their jurisdiction, then no multiple taxation would occur. Additionally, unlike Maryland, West Virginia imposes a State tax on the use of fuel in West Virginia and provides a credit for taxes paid to another State. No political subdivision in West Virginia has, or can impose, a use tax on this fuel. This is important because it is West Virginia's tax scheme that is judged when the internal consistency test is applied. If every State adopted West Virginia's motor fuel tax

structure, then no multiple taxation would occur. App. vol. I, 183-84.

Contrary to Supreme Court precedent discussed *supra*, the circuit court changed the internal consistency test by assuming that West Virginia's tax structure was unconstitutional because it is not identical to the tax structures of Alabama and Georgia. COL 29 and 30. App. vol. I, 11, 12. The circuit court's assumption in COL 29 that West Virginia must provide a credit for county taxes in other States because it must aggregate other States local and State taxes for purposes of providing a credit, ignores the command of the internal consistency test. The fact that CSXT does not receive a credit for county taxes paid in other jurisdictions is a function of Alabama and Georgia's tax structure. What the circuit court did was contrary to the internal consistency test because West Virginia's identical tax structure has been overridden by the tax structure of other States. If West Virginia's identical tax structure had been applied, there would have been no need to provide local credit for taxes in other States because West Virginia does not impose local sales tax on motor fuel. Additional errors in the circuit court's application of the internal consistency test not previously addressed will be examined in Argument D.

D. THE CIRCUIT COURT'S ORDER IS CONTRARY TO SUPREME COURT PRECEDENT AND BASED UPON STATE COURT DECISIONS THAT ARE BOTH DISTINGUISHABLE AND WRONGLY DECIDED.

In COL 28, the circuit court concluded that West Virginia impermissibly discriminated against interstate commerce because West Virginia provides only a credit for taxes paid to other States. Thus, in its example, it assumed that a taxpayer paid a 4% State tax on diesel fuel and a 2% county sales tax. The circuit court concluded that the failure to provide a credit up to the 6% sales tax rate on goods and services in this State was discriminatory.

However, this misapplies the internal consistency test. The lack of a county tax in West

Virginia results in the assumption for the internal consistency analysis that other States have no county taxes. App. vol. I, 85-86. Thus, the circuit court's example is inconsistent with the assumption properly made when applying the test. Moreover, it ignores the fact that because West Virginia's motor fuel sales and use tax is internally consistent, any multiple taxation that occurs results from West Virginia's interaction with taxes in other States which does not support an expansion of West Virginia's crediting statute. *See Wynne*, 135 S. Ct. at 1802, 1804.

Contrary to the circuit court's ruling in COL 32, the Tax Commissioner offered rebuttal to OTA's internal consistency analysis. Specifically, the Tax Commissioner argued that proper application of the internal consistency test would result in the denial of a credit for county taxes imposed in other jurisdictions because West Virginia has no county taxes which is part of its tax structure. App. vol. I, 85-86. Moreover, because the circuit court looked to the tax scheme of other States to find a violation of internal consistency, it and not the Tax Commissioner has misapplied *Armco* and every other Supreme Court case examining internal consistency. App. vol. I, 85-86.

The application of the internal consistency test reflects respect for the sovereign autonomy of all States, by ensuring that a State's tax structure's constitutionality is not dependent on the tax structures of other States. Contrary to the circuit court's ruling, the internal consistency test ignores the actual tax structures of other States. Here, if every State adopted West Virginia's use tax structure, no multiple taxation would occur. If every State was assumed to adopt West Virginia's tax structure, then local credits would not be required because the constitutional assumption is that Alabama and Georgia had no local taxes. The circuit court's failure to apply the internal consistency test, used by the Supreme Court for more than 30 years, constituted legal error compelling reversal of the circuit court's order.

An analysis of the circuit court's misplaced reliance on cases from other States having no precedential weight will now be discussed. In an attempt to bolster the decision in *Arizona Dep't of Revenue v. Arizona Public Service Co.*, 934 P.2d 796 (Ariz. Ct. App. 1997), the circuit court erroneously compared the similarity of its analysis with the Maryland Court of Appeals' decision in *Wynne*. COL 23. The Court of Appeals' decision in *Wynne* properly applied the internal consistency test while the Arizona Court did not. As discussed *supra*, the Court of Appeals found Maryland's income tax unconstitutional because it did not allow a credit for its county income tax. *Wynne*, 64 A.3d at 471.

In contrast, the Arizona Court allowed a credit for a county sales tax on coal imposed by New Mexico even though Arizona did not impose a county use tax on coal. *Arizona Dep't of Revenue*, 934 P.2d at 798 n.1. App. vol. I, 186. Because Arizona's identical tax structure should have been the standard for determining internal consistency, no credits for New Mexico's county taxes should have been awarded. App. vol. I, 186. Simply put, the Arizona Court misapplied the internal consistency test.

The Arizona Court's reliance on *Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1994) is based on a failure to recognize a key distinction with its case and *Lohman*. In *Lohman,* discrimination was found because Missouri imposed a State and county tax. Combining Missouri's combined taxes resulted in some instances of a greater tax rate on interstate commerce than was imposed on intrastate commerce. That was not the case in Arizona. More importantly, it is not the case in West Virginia. West Virginia does not have local use taxes; therefore, pursuant to the internal consistency test, it does not have to provide credits for taxes it does not impose especially in light of the fact that West Virginia's tax is apportioned. App. vol. I, 186.

Furthermore, the Arizona Court's constitutional analysis was dicta because the application of its statutory exemption would have resulted in the granting of the credit requested. App. vol. I, 185. The difference between the statutory language in W. Va. Code § 11-15A-10a and the Arizona exemption is an additional basis for giving the Arizona Court's decision no persuasive weight.[11] App. vol. I, 185.

At COL 21, the Hellerstein article justified the result in *Arizona Dep't of Revenue*, *supra* based upon the assertion that the interstate enterprise would pay taxes in both State A and B while the interstate business would only pay a local tax. This was wrong in Arizona and more importantly it is wrong in West Virginia because this State doesn't impose a county tax. The Hellerstein hypothetical is inapposite to this case because it assumes the imposition of local taxes in both jurisdictions which is not true in this case. App. vol. I, 186.

The circuit court's reliance on *General Motors Corp. v. City and County of Denver*, 990 P.2d 59 (Colo. 1999) at COL 22 is misplaced because unlike Colorado[12], West Virginia provides a credit for use tax that is imposed in our State. Moreover, the Court's conclusion that, "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*" is wrong. *Id.* at 70 (emphasis

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[11]"Arizona law provides an exemption for: Tangible personal property the sale or use of which has already been subjected to an excise tax equal to or exceeding the tax imposed by this article under the laws of another state of the United States." *Arizona Dep't of Revenue*, 934 P.2d at 799.

[12]"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." *Id.* at 70. Thus, it appears that the City of Denver and the State of Colorado do not provide a credit for every tax they impose. If they provided a credit for every tax they impose, then the case was wrongly decided.

added). App. vol. I, 187. As the *Jefferson Lines* Court stated, "[internal consistency] test asks nothing about the degree of economic reality reflected by the tax, but simply 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." Jefferson Lines, 514 U.S. at 185.

VII.

CONCLUSION

The internal consistency test applied by the Supreme Court is simple. Would double taxation occur if every State had West Virginia's tax structure? The issue raised by CSXT is whether it should receive credits for local motor fuel taxes paid in Alabama and Georgia. It is undisputed that West Virginia imposes no local motor fuel taxes and prohibits their imposition. Thus, applying the Supreme Court's test, if every State adopted West Virginia's tax structure, there would be no local motor fuel taxes.

Therefore, the circuit court's ruling must be **REVERSED**, which would **REVERSE** the OTA Decision granting the Taxpayer's refund request of Motor Fuel Use Tax and **AFFIRM** the assessment plus interest for motor fuel taxes.

Respectfully submitted,

MARK W. MATKOVICH, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Petitioner,

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL

KATHERINE A. SCHULTZ
SENIOR DEPUTY ATTORNEY GENERAL
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Telephone: (304) 558-2522
State Bar No. 3302
E-mail: Kathy.A.Schultz@wvago.gov

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0935

MARK W. MATKOVICH, as
State Tax Commissioner of West Virginia,

Petitioner Below, Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent Below, Respondent.

CERTIFICATE OF SERVICE

I, Katherine A. Schultz, Assistant Attorney General and counsel for the Petitioner, do hereby verify that I have served a true copy of the *Brief of Petitioner Mark W. Matkovich, State Tax Commissioner of West Virginia* upon Respondent's counsel by depositing said copy in the United States mail, with first-class postage prepaid, on this 19th day of January, 2016, addressed as follows:

James W. McBride, Esquire
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
920 Massachusetts Avenue, NW, Suite 900
Washington, DC 20001

Michael P. Markins, Esquire
MANNION GRAY UHL & HILL CO., L.P.A.
707 Virginia Street East, Suite 260
Charleston, West Virginia 25301

KATHERINE A. SCHULTZ