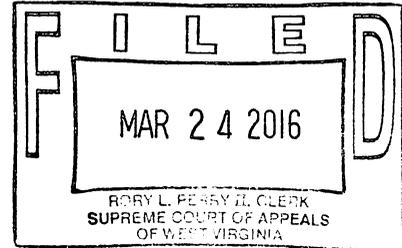


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0935



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

*Petitioner Below, Petitioner,*

v.

**CSX TRANSPORTATION, INC.,**

*Respondent Below, Respondent.*

---

**REPLY 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](mailto:Kathy.A.Schultz@wvago.gov)**

**Counsel for Petitioner**

## TABLE OF CONTENTS

	Page
I. ARGUMENT .....	1
A. THE CIRCUIT COURT ERRED WHEN IT GRANTED CSXT CREDIT FOR LOCAL TAXES PAID IN OTHER JURISDICTIONS BECAUSE ITS RULING REFLECTS A MISAPPLICATION OF THE INTERNAL CONSISTENCY TEST AND IS CONTRARY TO W. VA. CODE § 11-15A-10a .....	1
B. THE CIRCUIT COURT CHANGED THE SUPREME COURT'S INTERNAL CONSISTENCY TEST BY ADDING A CREDITING REQUIREMENT FOR SUSTAINING A STATE'S USE TAX .....	11
C. THE CIRCUIT COURT MISAPPLIED THE SUPREME COURT'S <i>WYNNE</i> 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 .....	15
D. THE CIRCUIT COURT'S RELIANCE ON FLAWED, NON-BINDING STATE COURT CASES WAS ERRONEOUS AND MISCONSTRUED THE UNITED STATES SUPREME COURT PRECEDENT .....	17
II. CONCLUSION .....	19

## TABLE OF AUTHORITIES

<b>CASES</b>	<b>Page</b>
<i>American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm’n</i> , 545 U.S. 429 (2005) .....	4, 5
<i>American Trucking Assns., Inc. v. Scheiner</i> , 483 U.S. 266 (1987) .....	5
<i>Arizona Dep’t of Revenue v. Arizona Public Service Co.</i> , 934 P.2d 796 (Ariz. Ct. App. 1997) .....	18
<i>Armco Inc. v. Hardesty</i> , 467 U.S. 638 (1984) .....	5, 10
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977) .....	18
<i>Comptroller of Treasury of Maryland v. Wynne</i> , 135 S. Ct. 1787 (2015) .....	passim
<i>Concept Mining, Inc. v. Helton</i> , 217 W. Va. 298, 617 S.E.2d 845 (2005) .....	3
<i>Container Corp. of America v. Franchise Tax Bd.</i> , 463 U.S. 159 (1983) .....	5
<i>General Motors Corp. v. City and County of Denver</i> , 990 P.2d 59 (Colo. 1999) .....	17, 18, 19
<i>Goldberg v. Sweet</i> , 488 U.S. 252 (1989) .....	5, 10
<i>Moorman Mfg. Co. v. Bair</i> , 437 U.S. 267 (1978) .....	13
<i>Oklahoma Tax Comm’n v. Jefferson Lines, Inc.</i> , 514 U.S. 175 (1995) .....	passim
<i>Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue</i> , 483 U.S. 232 (1987) .....	5
<b>STATUTES</b>	
W. Va. Code § 7-22-12(b) .....	2, 17
W. Va. Code § 8-13C-4(c)(1)(B) .....	2, 17
W. Va. Code § 8-38-12(b) .....	2, 17
W. Va. Code § 11-15-9f .....	2, 17

W. Va. Code § 11-15-18b ..... 2

W. Va. Code § 11-15A-10a ..... passim

W. Va. Code § 11-15A-13a ..... 2, 17

**OTHER**

1 Hellerstein & Hellerstein, STATE TAXATION, ¶ 18.09[2],  
 2015 WL 1646564 (3d ed. 2000-15) ..... 14

Iowa Dept. of Rev., The Wynne Decision (2015), available at  
<https://tax.iowa.gov/wynne-decision> ..... 19

Walter Hellerstein, *Is “Internal Consistency” Foolish?: Reflections  
 On An Emerging Commerce Clause Restraint On State Taxation*,  
 87 Mich. L. Rev. 138 (1988) ..... 14, 15

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.*

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

Comes now Petitioner, Mark W. Matkovich, State Tax Commissioner of West Virginia and pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure hereby submits his reply to the Brief of Respondent CSX Transportation, Inc. Petitioner incorporates his initial brief for all points not further addressed herein.

**I.**

**ARGUMENT**

**A. THE CIRCUIT COURT ERRED WHEN IT GRANTED CSXT CREDIT FOR LOCAL TAXES PAID IN OTHER JURISDICTIONS BECAUSE ITS RULING REFLECTS A MISAPPLICATION OF THE INTERNAL CONSISTENCY TEST AND IS CONTRARY TO W. VA. CODE § 11-15A-10a.**

CSX Transportation, Inc. (hereinafter “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. CSXT pays motor fuel use tax because the fuel used in this State is purchased in other States.<sup>1</sup> The tax is calculated based upon the wholesale price of fuel pursuant to W. Va.

---

<sup>1</sup>CSXT also imports fuel into Grafton, West Virginia and receives a credit for taxes paid on its Importer Motor Fuel Return.

Code § 11-15-18b and is apportioned pursuant to W. Va. Code § 11-15A-13a based upon the percentage of miles traveled in West Virginia in relation to the total miles traveled systemwide.

CSXT does not challenge West Virginia's imposition of the State motor fuel use tax on the motor fuel it is deemed to have used in West Virginia. Additionally, because the Respondent does not know how much fuel it uses in West Virginia or where it was purchased, it agrees that its tax should be determined by first calculating the number of gallons of motor fuel subject to tax pursuant to W. Va. Code § 11-15A-13a. 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. The Parties agree that, consistent with W. Va. Code § 11-15A-13a, CSXT is required to pay use tax based upon 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. Furthermore, it is undisputed that West Virginia imposes only a State tax on motor fuel and that no local sales or use taxes are imposed. In addition to the fact that no local taxes are imposed in this State, local taxes on motor fuel are prohibited. App. vol. II, 1596-97. Thus, West Virginia's motor fuel sales and use tax scheme includes the imposition of an apportioned State use tax and an apportioned credit for sales tax paid to other States as well as a prohibition against the imposition of local sales and use tax. *See* W. Va. Code §§ 7-22-12(b), 8-13C-4(c)(1)(B), 8-38-12(b), 11-15-9f, 11-15-18b, 11-15A-10a and 11-15A-13a.

The apportionment of the State tax is not contested although, as discussed herein, the circuit court ignored the statutes relating to the imposition of the tax as well as West Virginia's prohibition against the imposition of local sales and use tax on motor fuel. The circuit court's error in isolating

West Virginia's credit statute will be discussed *infra*. However, an examination of the scope of the crediting statute, in relation to the local tax credits sought for taxes imposed by other States, will be discussed to place this portion of the State's tax scheme in context.

CSXT pays no motor fuel sales tax in Ohio, Pennsylvania, Maryland, Virginia and Kentucky; therefore, no crediting issue arises regarding fuel purchased in these States. West Virginia provides a credit for State taxes paid in Alabama, Connecticut, Georgia, Illinois, New York, and Tennessee. App. vol. II, 1079. CSXT does not challenge the amount of State tax credit West Virginia provides. The only issue is whether the internal consistency test requires West Virginia to provide a credit for taxes it does not impose in addition to its apportionment of the tax and the provision of credit for taxes paid to other States. The issue of whether West Virginia must provide local tax credits for sales tax imposed in other States applies only to tax payments in Alabama and Georgia. App. vol. I, 152.

The crediting provision contained at W. Va. Code § 11-15A-10a states in pertinent part:

(a) 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: *Provided, That the amount of credit allowed does not exceed the amount of use tax imposed on the use of the property in this state.*

(Emphasis added.)

The statute is plain and unambiguous. Credit is provided only on sales tax paid to another state or the District of Columbia. Therefore, the credits awarded by the circuit court for local sales tax paid in Alabama and Georgia are not provided for in the statute. When a statute is plain and unambiguous, it must be applied and not construed. Syl. Pt. 3, *Concept Mining, Inc. v. Helton*, 217 W. Va. 298, 617 S.E.2d 845 (2005). As a result, the circuit court's expansion of the credit contained

in W. Va. Code § 11-15A-10a to include local sales tax paid to political subdivisions of other States is beyond the scope of the statute and as discussed *infra* was not required to ensure the constitutionality of West Virginia's use tax.

The question *sub judice* is whether West Virginia's motor fuel use tax examined in its entirety violates the Dormant Commerce Clause. Specifically, the tax was challenged based upon CSXT's allegation that the tax was not properly apportioned.<sup>2</sup> 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. Conclusion of Law (COL) 30. App. vol. I, 12. Contrary to the implication in CSXT's response at page 23, the Tax Commissioner has never asserted that the internal consistency test need not be applied to determine whether the motor fuel use tax is constitutional. What the Tax Commissioner has contested is the improper application of the test by the Office of Tax Appeals (OTA) and the circuit court. App. vol. I, 21, 27. 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.

Relying on the recently decided case of *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015), the circuit court articulated the internal consistency test correctly, which is the same test relied on by the Tax Commissioner. In its brief to this Court, the Taxpayer alleges that the Tax Commissioner "has not cited to any cases which directly support his position." Resp't's Br. 26.

---

<sup>2</sup>There is no allegation that the State lacks nexus to impose the tax or that CSXT does not receive services from the State. Additionally, there is no free standing allegation of discrimination. Rather, the discrimination alleged is solely tied to the Taxpayer's allegation that the tax is not properly apportioned.

However, the Tax Commissioner relies upon the same precedential legal authority that was cited, yet misapplied, by the circuit court. It was the circuit court's misapplication of the internal consistency test and the Supreme Court cases interpreting it that lead to the circuit court's erroneous ruling that West Virginia must provide a credit for taxes it does not impose. As a result, the circuit court committed a legal error by expanding W. Va. Code § 11-15A-10a to provide credits for local sales taxes paid to Alabama and Georgia. This error compels reversal of the circuit court Order.

Focusing on the circuit court's application of the internal consistency test, at COL 17, the circuit court correctly articulated the internal consistency test that was reaffirmed in *Wynne* when it concluded, "[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). The internal consistency test articulated by the circuit court is consistent with the unbroken line of Supreme Court precedent that has established that the identical 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); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995); *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. Contrary to the Taxpayer's assertion, the aforesaid cases support the Tax Commissioner's position. 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, as reflected in the circuit court's Order at COL 17, the *Wynne* Court held that the subject

State's *identical* tax structure is the proper measurement for determining a tax's internal consistency.

The internal consistency test's requirement that all States are assumed to have a tax structure identical to the challenged tax is echoed in COL 19 which stated, "[i]n 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." App. vol. I, 7. Notwithstanding the circuit court's proper acknowledgment of the applicable law, it did not assume that every State had West Virginia's *identical* tax structure. This is demonstrated by the circuit court's 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 and are prohibited in West Virginia.

Contrary to the clear constitutional test repeatedly utilized by the Supreme Court to determine a tax's internal consistency, and without any precedential authority to support its disregard of West Virginia's entire use tax structure, the circuit court examined only the credit provisions contained in W. Va. Code § 11-15A-10a. The circuit court's myopic focus on W. Va. Code § 11-15A-10a, the credit statute, without examining its interplay with the statutes that impose the use tax scheme was in error. The divorcing of the crediting statute from the statutes imposing the tax ignores the terms of the internal consistency test, which requires a court to hypothetically assume that all States impose the identical tax structure being challenged.

The Tax Commissioner's position that the entire West Virginia use tax structure must be examined to determine whether the tax passes the internal consistency test is based upon the Supreme Court's continued insistence that the challenged State's entire tax structure must be

examined. Thus, contrary to CSXT's assertion, the Tax Commissioner has ample support for his position. Further support is found in *Wynne* where the Court examined the interplay of the taxing statutes with its crediting statutes. The constitutional flaw in *Wynne* occurred because Maryland did not apportion its income tax or, in the alternative, it did not provide a credit for every tax that it imposed or authorized. Those circumstances are not present in the case *sub judice*.

West Virginia imposes only a State use tax and provides a credit for taxes paid to other States up to the amount of use tax imposed by West Virginia. West Virginia's use tax structure differs from Maryland's tax structure in *Wynne* because: (1) West Virginia's motor fuel tax is apportioned; and (2) a credit is provided for every motor fuel use tax imposed in West Virginia. Thus, no double taxation results from the use tax imposed by West Virginia. If every State imposed only a State tax on motor fuel as West Virginia does, which is the appropriate assumption for the purposes of applying the internal consistency test, then the credit provided in W. Va. Code § 11-15A-10a would prevent discriminatory taxation. Likewise, if the circuit court had assumed that every State prohibited the imposition of local taxes as West Virginia does, then no impermissible double taxation would occur because of West Virginia's use tax. Furthermore, if the circuit court had assumed that every State apportioned its motor fuel tax as West Virginia apportions its use tax, then no impermissible double taxation would occur because of the tax imposed by West Virginia.

In summary, West Virginia's State motor fuel use tax structure is an apportioned tax with a credit for the only tax imposed. The provision of the credit in W. Va. Code § 11-15A-10a, equal to the tax imposed, ensures that if every State adopted West Virginia's tax scheme no impermissible taxation would occur. Thus, there is no violation of the internal consistency test. In addition, West Virginia's use tax structure has more statutory provisions which go further than is necessary to

ensure that its motor fuel use tax passes the internal consistency test. The additional steps taken by the State are its apportionment of the State use tax imposed and the prohibition against the imposition of local use taxes.

As demonstrated above, the assumption that all States have adopted the challenged State's tax scheme is central to a proper application of the internal consistency test. Although the circuit court acknowledged the fact that the internal consistency test requires a court to assume that all States hypothetically had the challenged State's tax scheme, its analysis did not follow the test that it recognized. Contrary to the internal consistency test it articulated, the circuit court's expansion of the credit contained in W. Va. Code § 11-15A-10a to include a credit for local taxes imposed in other jurisdictions is evidence of its misapplication of the internal consistency test. Because West Virginia has only a State motor fuel tax, the circuit court was required to include only the State motor fuel tax in its assumptions when applying the internal consistency test. This assumption is a necessary part of applying the internal consistency test because that is the tax West Virginia imposed. The circuit court's inclusion of local credits into the internal consistency test is inconsistent with the test's requirement that the challenged State's identical tax structure must be hypothetically assumed to be applied by every State. If the circuit court had assumed, as it was required, that every State had West Virginia's tax structure, it would not have expanded the credits provided in W. Va. Code § 11-15A-10a to include local taxes.

In addition to misapplying the internal consistency test, the circuit court's ruling erroneously assumed that any double taxation violates the Commerce Clause. In reaching this conclusion, the circuit court ignored the *Wynne* Court's emphatic direction that not all double taxation renders the taxing State's challenged tax structure unconstitutional. Specifically at COL 16, the circuit court

held:

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).

The circuit court's *Wynne* quotation makes clear that the possibility of double taxation does not invalidate a tax if the subject tax passes the internal consistency test. Furthermore, *Wynne's* categorization is contrary to CSXT's repeated theme that simple math renders West Virginia's denial of a credit for local taxes unconstitutional. Any possibility of double taxation in this case is the result of West Virginia's use tax's interaction with the tax structures of other States and such an interaction was not rendered unconstitutional by *Wynne*.

As provided in *Wynne*, the isolation of the defendant State's tax scheme is accomplished by hypothetically assuming that all States have adopted its identical tax scheme. If after assuming that all States have adopted the defendant State's tax scheme, double taxation occurs, then the challenged tax is inherently discriminatory against interstate commerce without regard to the tax policies of other States. Such a tax is placed in category 1. If no double taxation occurs when the court assumes that all States have adopted the defendant State's tax scheme, then the tax does not discriminate against interstate commerce making it a category 2 tax. When the internal consistency test is

correctly applied, West Virginia's tax fits into category 2, which makes it constitutional without the credit expansion ordered by the circuit court. Thus, contrary to the circuit court's Order and CSXT's argument, simple math invalidates the taxes that fall in category 1 but not category 2. Assuming *arguendo* that West Virginia imposed or authorized the levying of a local use tax but chose not to provide a credit for it, then such a tax would violate the internal consistency test.

The rationale for the Court's adoption of the internal consistency test is respect for the sovereign rights of all States while ensuring that the tax is fairly apportioned. Thus, since the adoption of the internal consistency test more than 30 years ago, internal consistency analysis assumes that the challenged tax structure has been adopted by every State. Never has the Supreme Court examined the tax structures of other States, as the circuit court has done, to determine whether a tax is internally consistent.

Furthermore, 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, 176, 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, 193. 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 internal consistency 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. As demonstrated *supra*, West Virginia's use tax structure does not violate the Dormant Commerce Clause.

**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 discussed in Argument A, the circuit court did not correctly apply the internal consistency test. Rather than applying the test, the circuit court changed it based upon its reading of *Jefferson Lines*. The fundamental problem with the circuit court's internal consistency analysis is that it ignores West Virginia's entire tax structure. Instead of cloning West Virginia's use tax structure, the circuit court found West Virginia's use tax credit deficient because it did not provide a credit for local taxes West Virginia does not impose.

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.* 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.” App. vol. I, 7. 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, the taxpayer 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 did not 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 first examined whether it was internally consistent. The *Jefferson Lines* Court held "[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. 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*, by analogy, 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.

Despite the Taxpayer's argument to this Court that the Tax Commissioner "selectively cites" to portions of the Hellerstein article, a careful reading of the article in its entirety confirms that sales tax credits are not required to ensure that a use tax is sustained. Resp't's Br. 16. 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).

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 address the provision of a credit for sales taxes paid in other States’ political subdivisions. App. vol. I, 181. Of central importance to this case, neither *Jefferson Lines* or the Hellerstein articles require the provision of a credit for a tax not imposed by the State whose tax is being challenged. Furthermore, the Hellerstein article does not discuss the possibility that States like West Virginia with 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 section of the article containing the before cited quote pertains to 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." *Id.* at 160. 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 one 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 local tax is paid in Alabama and Georgia because West Virginia does not impose local 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 factually 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 or authorized.

Notwithstanding the difference between West Virginia's tax structure and Maryland's, the *Wynne* decision supports the Tax Commissioner's position. Specifically in *Wynne*, the Court reiterated that the internal consistency test requires the Court to assume hypothetically that all States had Maryland's identical tax structure. Thus, it does not support the circuit court's expansion of West Virginia's crediting statute to include local taxes not imposed in West Virginia. Furthermore, the Court made clear that all double taxation does not render the challenged State's tax unconstitutional. Rather, the manner in which double taxation occurs is important. In order to balance the State's sovereign interest, while not allowing an impermissible burden on interstate commerce, the Court distinguished the situations where double taxation is forbidden in contrast to those situations where it is permitted.

The distinguishing factor is whether the challenged tax scheme is designed to discriminate against interstate commerce, as contrasting with double taxation that occurs because of the interaction of two valid State taxes. When as here, double taxation occurs because of West Virginia's tax's interaction with the taxes of Alabama and Georgia, West Virginia's tax is not discriminatory.

Rather, the double taxation which occurs in this case occurs because of West Virginia's

interaction with the presumably constitutional taxes of Alabama and Georgia. Thus, West Virginia's use tax falls into the second category of taxes and as a result, it is constitutional and no expansion of the crediting statute is judicially warranted. Furthermore, the case reiterates the Supreme Court's longstanding refusal to enter into the realm of the Congress by mandating a uniform formula for all States to follow when imposing taxes.

**D. THE CIRCUIT COURT'S RELIANCE ON FLAWED, NON-BINDING STATE COURT CASES WAS ERRONEOUS AND MISCONSTRUED THE UNITED STATES SUPREME COURT PRECEDENT.**

The circuit court's reliance on *General Motors Corp. v. City and County of Denver*, 990 P.2d 59 (Colo. 1999) is misplaced. The facts before this Court are different than those considered before the Colorado Supreme Court. The tax scheme challenged in *General Motors Corp.* was a municipal use tax imposed by the city of Denver. 990 P.2d at 63. In contrast, West Virginia expressly prohibits municipalities from imposing taxes on motor fuel. *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. Furthermore, the use tax considered in *General Motors Corp.* also was not apportioned like West Virginia's Motor Fuel Use Tax and instead imposed a tax upon the full value of the products brought in its jurisdiction. *General Motors Corp.*, 990 P.2d at 65. *See* W. Va. Code § 11-15A-13a.

The Colorado Supreme Court's application of the internal consistency test also deviates from the formulation set out by the United States Supreme Court in *Jefferson Lines* and *Wynne*. In testing the challenged tax scheme's internal consistency, the Colorado Supreme Court placed considerable emphasis on the potential of multiple taxation that would occur if another jurisdiction imposed a different tax rate. *General Motors Corp.*, 990 P.2d at 70. The focus of the court on the effect of different rates, however, ignores the hypothetical nature of the internal consistency test. *See Wynne*,

135 S. Ct. at 1802. It is also contrary to the purpose of the test which is to determine “as a matter of law” whether the scheme places interstate commerce at a disadvantage. *Jefferson Lines*, 514 U.S. at 185. *General Motors Corp.* erroneously places weight on “the degree of economic reality reflected by the tax” instead of the “structure of the tax,” and therefore, is contrary to *Jefferson Lines*. 514 U.S. at 185. The emphasis in *General Motors Corp.* on the effects of different tax rates imposed by other jurisdictions also muddles the “critical distinction” made by the United State Supreme Court in *Wynne* between an inherently discriminatory tax scheme and the disparate results from “the interaction of two different but nondiscriminatory” taxes of separate jurisdictions. *Wynne*, 135 S. Ct. at 1802, 1804.

The circuit court’s reliance on the dicta in *Arizona Dept. of Revenue v. Arizona Public Service Co.*, 934 P.2d 796 (Ariz. Ct. App. 1997) further misconstrues the internal consistency test set out by the United States Supreme Court. *Arizona Dept. of Revenue* is not relevant to this Court’s decision because the internal consistency test is not applied in the Arizona Appeals Court’s opinion. Although the United States Supreme Court had decided *Jefferson Lines* two years earlier, the Arizona Court of Appeals made no mention of the *Complete Auto* four part test or *Jefferson Lines*. See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Instead, the court assumed that the test for whether a use tax was constitutionally valid depended on the equality of interstate and intrastate taxpayers’ out-of-pocket expenses. *Arizona Dept. of Revenue*, 934 P.2d at 799.

The court in *Arizona Dept. of Revenue* never asks whether the imposition of an identical tax by every other State would burden interstate commerce. Instead, the court analyzed the interplay between the Arizona tax scheme and taxes in New Mexico for which the taxpayer was requesting an exemption. *Id.* This analysis conflicts with the internal consistency test. Similar to the flaws

within *General Motors Corp.*, the Arizona Appeals Court’s test for constitutionality of the tax incorrectly considers economic realities instead of considering whether the tax is inherently discriminatory. See *Wynne*, 135 S. Ct. at 1802; *Jefferson Lines*, 514 U.S. at 185.

Undoubtedly, the circuit court relied so heavily on authority in Arizona and Colorado because there are no cases decided by this Court or the United States Supreme Court which would require West Virginia to provide a credit for sales taxes imposed by the political subdivisions of other States when such taxes are prohibited within its borders.<sup>3</sup>

## II.

### CONCLUSION

The narrow issue before this Court is whether CSXT should receive credit for local motor fuel taxes paid in Alabama and Georgia. Despite CSXT’s effort to portray the Tax Commissioner’s position as lacking legal support, the Circuit Court, CSXT, and the Tax Commissioner have all cited to the same Supreme Court cases finding a challenged State’s tax to be constitutional if it passes the internal consistency test. This test when properly applied supports the Tax Commissioner’s denial of a tax credit for local taxes paid in other States. The Circuit Court committed reversible error when it misapplied the law and found that the internal consistency test can be applied to isolated portions of a tax scheme as opposed to the entire structure. This misapplication resulted in the Circuit Court erroneously using the tax structures of Alabama and Georgia as its measuring stick as

---

<sup>3</sup>The Respondent also relies on Iowa Dept. of Rev., *The Wynne Decision* (2015), available at <https://tax.iowa.gov/wynne-decision>. The Respondent’s reading of the Iowa Department of Revenue’s decision is over broad. The source is substantively distinguishable from the case before this Court because the announcement acknowledges that the State imposes local taxes for which the State previously did not offer a credit. To the extent that the Respondent’s argument relies on this source, it is misplaced.

opposed to West Virginia's as required by controlling and persuasive case law.

Therefore, based on the evidence in the record and the points and authorities in the Tax Commissioner's briefs, it is respectfully submitted that the Circuit Court's Final Order 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](mailto: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 *Reply 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 24th day of March, 2016, addressed as follows:

James W. McBride, Esquire  
BAKER, DONELSON, BEARMAN,  
CALDWELL & BERKOWITZ, PC  
901 K St. NW, Suite 900  
Washington, DC 20001

Michael P. Markins, Esquire  
CIPRIANI & WERNER PC  
400 Tracy Way, Suite 110  
Charleston, West Virginia 25311

  
KATHERINE A. SCHULTZ